Missouri Law Review

Volume 83 | Issue 2 Article 12

Spring 2018

Disregarding Statutory Safeguards: The Supreme Court of Missouri's Failure to Recognize Manifest Injustice in Predatory Sexual Offender Determinations

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NOTE

Disregarding Statutory Safeguards: The Supreme Court of Missouri's Failure to Recognize Manifest Injustice in Predatory Sexual Offender Determinations

State v. Johnson, 524 S.W.3d 505 (Mo. 2017) (en banc)

Lauren Vincent[*]

I. INTRODUCTION

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."[1] This right, in conjunction with the Due Process Clause,[2] requires that each element of a crime be proved to a jury beyond a reasonable doubt.[3] Over the course of the twentieth century, however, legislatures across the country have adopted schemes that allow certain factors that impact sentencing to be found by the trial judge, independent of the jury.[4] The way these legislative sentencing schemes intersect with the jury-trial guarantee provided by the Sixth Amendment has been a subject of confusion and controversy for decades.[5]

The United States Supreme Court has interpreted the Sixth Amendment in this context in a series of decisions, beginning with *McMillan v. Pennsylvania*[6] in 1986, followed by *Apprendi v. New Jersey*[7] in 2000, *Harris v. United*

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1. U.S. CONST. amend. VI.; *see also* U.S. CONST. amend. XIV, § 1 (extending the Sixth Amendment federal jury trial guarantee to the States).

2. *Id.* amend. V ("No person shall . . . be deprived of . . . liberty . . . without due process of law . . . .").

3. United States v. Gaudin, 515 U.S. 506, 509–10 (1995) (citing Sullivan v. Louisiana, 508 U.S. 275, 277–78 (1993)).

4. Frank O. Bowman III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 368 (2010).

5. *Id.*

6. McMillan v. Pennsylvania, 477 U.S. 79 (1986).

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

States[8] in 2002, *Blakely v. Washington*[9] in 2004, *United States v. Booker*[10] in 2005, and most recently *Alleyne v. United States*[11] in 2013 and *Hurst v. Florida*[12] in 2016. In each of these opinions, the Court attempted to clarify the messy topic of constitutionality in criminal sentencing and grappled with providing answers to two questions. First, what facts constitute elements of a crime such that a jury must prove them beyond a reasonable doubt? Second, what facts that can impact sentencing are not elements but, rather, mere "sentencing factors," such that a judge may determine them by a lower standard of persuasion?

However, with each decision, a "thicket of knotty issues" emerged, many of which involved determining the proper relationship between the judiciary and legislature in criminal sentencing.[13] In June 2013, the United States Supreme Court sought to put these constitutional sentencing questions to rest with its decision in *Alleyne*. Many legal scholars have written about the clarity they hoped *Alleyne* would bring to the national stage.[14] The general thrust of their scholarship voiced optimism that *Alleyne* would once and for all silence the ongoing sentencing debate regarding the proper relationship between the judiciary and the legislature in sentence enhancement.[15] The Supreme Court of Missouri's August 2017 decision in *State v. Johnson*, however, proves that the clarity many legal scholars believed *Alleyne* would bring is more of a dream than a reality – at least in Missouri.[16]

The predatory sexual offender sentence enhancement scheme, as written in the 2017 version of Missouri's Criminal Code, provides a perfect illustration of the Sixth Amendment violations that can occur when the legislature allows a judge to make findings of fact that the Constitution requires to be proven to

8. Harris v. United States, 536 U.S. 545 (2002), *overruled by* Alleyne v. United States, 570 U.S. 99 (2013).

9. Blakely v. Washington, 542 U.S. 296 (2004).

10. United States v. Booker, 543 U.S. 220 (2005).

11. *Alleyne*, 570 U.S. 99.

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

13. Bowman, *supra* note 4, at 368.

14. *See generally* James Barta, Note, *Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment*, 51 AM. CRIM. L. REV. 463 (2014); The Supreme Court, 2012 Term – Leading Cases, *Sixth Amendment – Right to a Jury Trial – Mandatory Minimum Sentences* – Alleyne v. United States, 127 HARV. L. REV. 248 (2013) [hereinafter Leading Cases]; Ben Ashworth, Note, *Between a Rock and a Hard 50: The Effect of the* Alleyne *Decision on Kansas' Sentencing Procedures*, 24 KAN. J.L. & PUB. POL'Y 273 (2015); Nila Bala, *Judicial Fact-Finding in the Wake of* Alleyne, 39 N.Y.U. REV. L. & SOC. CHANGE 1 (2015); Nancy J. King & Brynn E. Applebaum, Alleyne *on the Ground: Factfinding that Limits Eligibility for Probation or Parole Release*, 26 FED. SENT'G REP. 287 (2014).

15. *See supra* note 14.

16. *See* State v. Johnson, 524 S.W.3d 505 (Mo. 2017) (en banc).

a jury beyond a reasonable doubt.[17] In August 2017, this sentencing scheme was brought to the attention of the Supreme Court of Missouri, for the first time since *Alleyne* was decided.[18] In *Johnson*, the Supreme Court of Missouri determined whether the fact that a defendant committed a sexual offense against multiple victims – a fact that, if found, triggers the enhanced sentencing mechanisms provided by the predatory sexual offender laws in Missouri's Criminal Code – was an element of the crime, and thus "must be submitted to a jury and found beyond a reasonable doubt," or a mere sentencing factor, and thus may be found independently by a judge by a preponderance of the evidence.[19]

This Note scrutinizes the way in which the Supreme Court of Missouri resolved the issue of whether the predatory sexual offender statute, section 566.125.5(3), is constitutional when applied to currently charged acts in light of the procedural mandates for sentence enhancement provided in section 558.021.2. This Note argues the Supreme Court of Missouri erred in its interpretation of the statutory language provided in section 566.125.5(3) and in its application of *Alleyne* precedent. This Note further argues the Supreme Court of Missouri failed to recognize the manifest injustice that resulted when the trial court disregarded the statutory timing requirements that should have been followed in order to extend Johnson's sentence pursuant to the predatory sexual offender provisions.

II. FACTS AND HOLDING

Angelo Johnson was charged with thirteen felony counts related to the sexual abuse of his two step-daughters, D.P. and R.J., and his biological daughter, L.J.[20] Johnson allegedly committed ongoing sexual abuse against the three girls, beginning when D.P. was five or six years old, R.J. was eleven years old, and L.J. was fifteen or sixteen years old.[21] Specifically, the government charged Johnson with three counts of first-degree statutory rape,[22] six counts

17. MO. REV. STAT. § 566.125 (Cum. Supp. 2017). Between the time Johnson was charged and the publication of this Note, the Missouri General Assembly renumbered the statutes in the criminal code, specifically section 558.018, now codified at section 566.125. The *Johnson* court refers to the statute by its previous numbering. However, for ease of use, the section numbers used in this Note reflect the current Missouri code, except as where indicated when expressly discussing the legislative history in Part III.C. In places where quoted material from a case refers to a past version of a statute, the current section number appears in brackets.

18. *See Johnson*, 524 S.W.3d at 508.

19. *Id.* at 509, 510–12.

20. *Id.* at 508. Because the victims are minors, the court refers to them by their initials to protect their identities. MO. REV. STAT. § 595.226.1 (Cum. Supp. 2017).

21. State v. Johnson, No. ED 101823, 2015 WL 7455477, at *1 (Mo. Ct. App. Nov. 24, 2015), *transferred en banc to* 524 S.W.3d 505 (Mo. 2017).

22. MO. REV. STAT. § 566.032 (Cum. Supp. 2017). Johnson's three counts of first-degree statutory rape were Counts 1, 4, and 6. Appellant's Brief at 6, *Johnson*, 2015

of first-degree statutory sodomy,[23] three counts of incest,[24] and one count of second-degree statutory rape.[25] Although he had no prior convictions, Johnson was additionally charged as a predatory sexual offender under Missouri Revised Statutes section 566.125.5 because he allegedly committed an act against more than one victim.[26] This charge subjected Johnson to the possibility of a life sentence with an eligibility of parole after twenty-five years.[27] Without the

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WL 7455477 (No. ED 101823). "A person commits the offense of [first-degree statutory rape] if he or she has sexual intercourse with another person who is less than fourteen years of age." § 566.032.1. "The offense of statutory rape in the first degree . . . is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years" unless otherwise indicated by statute. *Id.* § 566.032.2.

23. MO. REV. STAT. § 566.062 (Cum. Supp. 2017). Johnson's six counts of first-degree statutory sodomy were Counts 2, 3, 8, 9, 10, and 11. Appellant's Brief, *supra* note 22, at *6. Section 566.062.1 provides that a person commits the offense of first-degree statutory sodomy if "he or she has deviate sexual intercourse with another person who is less than fourteen years of age." § 566.062.1 "The offense of statutory sodomy in the first degree . . . is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years" unless otherwise indicated by statute. *Id.* § 566.062.2.

24. MO. REV. STAT. § 568.020 (Cum. Supp. 2017). Johnson's three counts of incest were Counts 5, 7, and 13. Appellant's Brief, *supra* note 22, at *6. Section 568.020.1 provides that

> [a] person commits the offense of incest if he or she marries or purports to marry or engages in sexual intercourse or deviate sexual intercourse with a person he or she knows to be . . . his or her: (1) Ancestor or descendant by blood or adoption; or (2) Stepchild, while the marriage creating that relationship exists; or (3) Brother or sister of the whole or half-blood; or (4) Uncle, aunt, nephew or niece of the whole blood.

§ 568.020.1. Incest is a class E felony violation. *Id.* § 568.020.2. If a defendant has previously been found guilty of incest, the court shall not grant him probation. *Id.*

25. *Johnson*, 524 S.W.3d at 508.

26. *Johnson*, 2015 WL 7455477, at *1; *see also* MO. REV. STAT. § 566.125.5(3) (Cum. Supp. 2017) ("Has committed an act or acts against more than one victim which would constitute an offense or offenses listed in subsection 4 of this section, whether or not the defendant was charged with an additional offense or offenses as a result of such act or acts.").

27. *Johnson*, 2015 WL 7455477, at *1. Johnson was not charged as a "predatory sexual offender as to L.J., given that the offenses against L.J. – incest and second-degree statutory rape – are not predicate offenses for charging a defendant as a predatory sexual offender." *Id.* at *1 n.1. Section 566.125.5 defines "predatory sexual offender" as a person who:

> (1) Has previously been found guilty of committing or attempting to commit any of the offenses listed in subsection 1 [of section 566.125] . . . ; or
>
> (2) Has previously committed an act which would constitute an offense listed in subsection 4 [of section 566.125], whether or not the act resulted in a conviction; or

predatory sexual offender charge, Johnson "would have been entitled to unconditional release after serving twenty-five years even if he received the maximum sentence."[28]

Johnson waived his statutory right to jury sentencing before trial.[29] After the close of evidence and before submission of the case to the jury, the trial court considered the government's request that it find Johnson to be a predatory sexual offender.[30] The trial court made this consideration outside of the jury's presence.[31] The government's argument that Johnson was a predatory sexual offender because he "[h]as committed an act or acts against more than one victim" rested on the allegations that formed the bases for the current charges against him.[32] Johnson argued section 566.125.5(3) did not apply to him because the statute referred to prior acts only.[33]

The trial court found that section 566.125.5(3) "d[id] not apply to the facts of [Johnson's] situation," reasoning that the statute is designed to contemplate a defendant's prior conduct.[34] As such, the trial court did not find Johnson to be a predatory sexual offender prior to submitting the case to the jury.[35] Subsequently, the jury found Johnson guilty on twelve of the thirteen counts.[36] At sentencing, the government again requested that the trial court find Johnson to be a predatory sexual offender and subject him to a mandatory life sentence with a specified minimum term of twenty-five years.[37] Johnson reiterated that section 566.125.5(3) did not apply to him.[38] The trial court, however, found Johnson to be a predatory sexual offender upon the government's request for

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> (3) Has committed an act or acts against more than one victim which would constitute an offense or offenses listed in subsection 4 [of section 566.125], whether or not the defendant was charged with an additional offense or offenses as a result of such act or acts.

§ 566.125.5

28. *Johnson*, 524 S.W.3d at 519 (Stith, J., dissenting); *see generally* MO. REV. STAT. § 558.011 (Cum. Supp. 2017).

29. *Johnson*, 524 S.W.3d at 508.

30. *Id.* at 509.

31. *Id.*

32. *Id.*

33. *Id.*

34. State v. Johnson, No. ED 101823, 2015 WL 7455477, at *1 (Mo. Ct. App. Nov. 24, 2015), *transferred en banc to* 524 S.W.3d 505 (Mo. 2017).

35. *Id.*

36. *Johnson*, 524 S.W.3d at 509. The jury acquitted Johnson on Count 10: one count of first-degree statutory sodomy. *Id.*; *see also* Appellant's Brief, *supra* note 22, at *6.

37. *Johnson*, 524 S.W.3d at 509; *see also* MO. REV. STAT. § 566.125.6–566.125.7 (Cum. Supp. 2017).

38. *Johnson*, 524 S.W.3d at 509.

reconsideration.[39] The trial court stated its findings were "based on the evidence that was presented at trial, the testimony that was presented by the three victims and, of course, by the verdicts that were returned by the jury in this number of counts."[40] Consequently, the trial court sentenced Johnson as a predatory sexual offender to eight concurrent terms of life imprisonment for his first-degree statutory sodomy and first-degree statutory rape convictions with eligibility for parole after twenty-five years.[41]

On appeal, Johnson argued that, when applied to currently charged acts, section 566.125.5(3) is unconstitutional in light of the timing requirements set forth in section 558.021.2.[42] Johnson argued that if a judge is permitted to deem a defendant a predatory sexual offender on the basis of currently charged acts, then the judge is required to find, *before the case is submitted to the jury*, that the defendant did, in fact, commit the acts alleged.[43] According to Johnson, such an occurrence "force[s] the trial court to find facts which increase the mandatory minimum punishment in violation of *Alleyne*" and violates his right to a jury trial, as guaranteed by the Sixth Amendment.[44] Further, Johnson claimed the trial court violated section 558.021.2 in finding him to be a predatory sexual offender because the trial judge made this finding after the case had already been submitted to the jury and after the jury returned its verdicts.[45]

In a 5–2 ruling, the Supreme Court of Missouri affirmed Johnson's convictions, holding: (1) section 566.125.5(3), which states that a defendant can be found to be a predatory sexual offender if he "[h]as committed an act or acts against more than one victim," applies to currently charged acts and is constitutional on its face; (2) no manifest injustice resulted from the trial court's failure to adhere to the procedural requirements of section 558.021.2; and (3) the trial court appropriately sentenced Johnson as a predatory sexual offender.[46]

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39. *Id.*

40. *Johnson*, 2015 WL 7455477, at *2.

41. *Johnson*, 524 S.W.3d at 509. Johnson still could have been sentenced to life imprisonment for each of the eight convictions without a predatory sexual offender finding, "but [he] would have been subject to a lesser mandatory minimum sentence of either [five] or [ten] years, depending on the conviction." *Id.* at 510.

42. *Id.* at 511, 513.

43. *Id.* at 512.

44. *Id.* (alteration in original). Johnson also argued interpreting section 558.018.5(3) to apply to charged acts violates his right to a jury trial guaranteed by article I, section 18(a) of the Missouri Constitution; however, Johnson made no separate due process argument. *Id.* at 510 n.6.

45. *Id.* at 513.

46. *Id.* at 509–15 (quoting MO. REV. STAT. § 566.125.5 (Cum. Supp. 2017)).

III. LEGAL BACKGROUND

In *Johnson*, the Supreme Court of Missouri relied primarily on its interpretation of *Alleyne* in holding that section 566.125.5(3) of Missouri's Criminal Code is facially constitutional when applied to currently charged acts.[47] First, this Part addresses the history and current structure of the nationwide criminal justice sentencing system. Next, this Part discusses the United States Supreme Court's trend toward reining in the expansive sentencing authority asserted by legislatures over the past several decades and analyzes how *Alleyne* and the Court's subsequent decisions fit within that trend. Lastly, this Part examines Missouri's predatory sexual offender sentencing scheme, as described in sections 566.125 and 558.021.2, and scrutinizes how the Supreme Court of Missouri has confronted the issue of determining whether manifest injustice results from violations of the timing requirements prescribed by section 558.021.2.

A. The Criminal Justice System

Legislatures for each state define crimes by statute.[48] When a legislature defines a crime, it establishes a set of criteria, commonly known as "elements."[49] If the elements are proven by the government, a defendant will be subject to criminal liability and a corresponding range of punishments.[50] It is a fundamental principle of law that before a defendant can be subjected to punishment, his criminal conviction must "rest upon a jury determination that [he] is guilty of every element of the crime" in question "beyond a reasonable doubt."[51] Proof beyond a reasonable doubt is proof that leaves a person "firmly convinced of the truth of a proposition."[52]

In response to various changes to American society, such as the civil rights movement, the anti-war movement, and the development of a permeating drug subculture, a national trend "toward tougher, more definite, less discretionary criminal sentences" emerged in American criminal law toward the end of the twentieth century.[53] The result of this tough-on-crime trend was the development of "structured sentencing" regimes that permitted sentencing commissions to "guide judicial sentencing discretion" by identifying certain

47. *Id.* at 510–13.

48. Bowman, *supra* note 4, at 370.

49. *Id.*

50. *Id.*

51. United States v. Gaudin, 515 U.S. 506, 510 (1995).

52. Robert H. Dierker, *Missouri Criminal Law*, 32 MO. PRAC., Appendix – Penalty Phase Jury Instructions § 57:13 (3d ed. 2017). "The law does not require proof that overcomes every possible doubt." *Id.*; *see also* MO. APPROVED JURY INSTR. (CRIMINAL) 302.04. (3d ed.).

53. Bowman, *supra* note 4, at 374. In conjunction with these social changes, the 1960s and 1970s were characterized by rising violent crime and property crime rates. *Id.*

non-element criteria that could "influence the type and severity of punishment imposed on convicted defendants."[54] The government usually must only prove the existence of these non-element criteria by a preponderance of the evidence.[55] Unlike the beyond a reasonable doubt standard, sustaining a burden of proof by a "preponderance of the evidence" means that the government must show that the proposition in question is more likely to be correct than not.[56]

Alongside this trend toward structured sentencing, legislatures began enforcing other sentence-enhancing mechanisms in the 1970s and 1980s, such as (1) separate mandatory minimum statutes, which enhanced the minimum penalty for a crime beyond the penalty prescribed for the crime itself, and (2) legislative "factual add-ons," which attached penalty enhancements to proof of non-element criteria.[57] Common factual add-ons include sentence enhancements related to the commission of certain offenses on or within a specified distance of particular kinds of facilities, gun possession, and recidivism.[58]

For several decades, there has been a "tug-of-war between the judiciary and the legislature over control of the sentencing process."[59] While the legislature tries to increase sentences by forcing judges to increase minimums and maximums, judges fight back by holding that the facts needed to increase the minimums and maximums are elements of crimes that need to be proven beyond a reasonable doubt.[60] Accompanying this tug-of-war has been widespread criticism that judicially found facts, which may be proved by a preponderance of the evidence, may impact a defendant's actual sentence the same amount as the actual elements of the crime itself, which must be proved beyond a reasonable doubt.[61] This conflict is well illustrated by the predatory sexual offender statute and its accompanying procedural mandates, as discussed below.[62]

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54. *Id.* at 375–76.

55. *Id.* at 375–76, 379.

56. Kathleen A. Forsyth, *Missouri Evidence*, 22 MO. PRAC., Burdens of Proof, Production, and Persuasion – Generally § 300:6 (4th ed. 2017); *see also* Horning v. White, 314 S.W.3d 381, 385 (Mo. Ct. App. 2010). The preponderance of the evidence standard is more frequently employed in civil cases. *Id.*

57. Bowman, *supra* note 4, at 376–77; *see also* Ewing v California, 538 U.S. 11, 15 (2003) (discussing a "three strikes" recidivism statute that imposed minimum sentences on defendants convicted of a specified number of prior offenses). Many "factual add on" statutes increased maximum sentences, increased minimum sentences, or did both. Bowman, *supra* note 4, at 377–78.

58. *Id.* at 377 & n.40; *see e.g.*, 21 U.S.C. § 860(a) (2012) (providing that any person who "distribut[es], possess[es] with intent to distribute, or manufactur[es] a controlled substance in or on, or within one thousand feet of" all public and private schools, colleges, public housing authority playgrounds, public swimming pools, or video arcade facilities is subject to double the maximum penalty provided by federal law).

59. Leading Cases, *supra* note 14, at 257.

60. *Id.* at 248.

61. Bowman, *supra* note 4, at 378–79.

62. *See infra* Part III.C & D.

B. The United States Supreme Court's Interpretation of the Jury-Trial Guarantee

Until the twenty-first century, legislatures were given significant leeway when drafting criminal codes to determine whether a particular fact would be deemed an element to be decided beyond a reasonable doubt by a jury or a sentencing factor to be decided by a preponderance of the evidence by a judge.[63] Because of this authority, legislatures could freely remove certain issues from the province of the jury and allow their resolution by a judge operating under a lesser burden of proof.[64]

This broad legislative leeway was first discussed by the United States Supreme Court in *McMillan*.[65] In *McMillan*, the defendant was convicted of aggravated assault, which carried a maximum ten-year sentence.[66] The government asked the judge to apply the Pennsylvania Mandatory Minimum Sentencing Act ("PMMSA") in crafting the defendant's sentence.[67] The PMMSA required the imposition of a five-year mandatory-minimum term of imprisonment upon a sentencing judge's finding that the defendant "visibly possessed a firearm."[68] Because proof of the visible possession raised the minimum sentence on his aggravated assault conviction, the defendant contended that "visible possession" should be treated as an element of a more serious crime, which had to be proven beyond a reasonable doubt to the jury.[69] The Court rejected the defendant's argument and held "that a fact triggering a mandatory-minimum sentence was not an element but a mere 'sentencing factor'" – at least with respect to the imposition of sentences no more severe than the statutory maximum prescribed for the offense itself.[70] Because the finding that the defendant was in visible possession of a firearm was not deemed an element of the offense, the Court maintained that the defendant's Sixth Amendment right to a jury trial was not violated.[71]

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63. Leading Cases, *supra* note 14, at 254; *see also* Benjamin E. Rosenberg, *Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing*, 23 SETON HALL L. REV. 459, 477 (1993).

64. Leading Cases, *supra* note 14, at 254; *see also* Rosenberg, *supra* note 63, at 477.

65. McMillan v. Pennsylvania, 477 U.S. 79 (1986); *see also* Bowman, *supra* note 4, at 382.

66. *McMillan*, 477 U.S. at 82, 87. McMillan's case was consolidated with three other similarly situated criminal defendants on appeal. Bowman, *supra* note 4, at 382 n.72.

67. 42 PA. CONST. STAT. § 9712 (1982), *invalidated by* Commonwealth v. Valentine, 101 A.3d 801 (Pa. Super. Ct. 2014) (as cited in *McMillan*, 477 U.S. at 80).

68. Bowman, *supra* note 4, at 382 (citing *McMillan*, 477 U.S. at 81–82).

69. *Id.* at 382–83 (citing *McMillan*, 477 U.S. at 88).

70. *Id.* (citing *McMillan*, 477 U.S. at 88–90).

71. *McMillan*, 477 U.S. at 93.

This "high degree of authority over criminal sentencing," as illustrated by *McMillan*, was curtailed by the United States Supreme Court's momentous decision, *Apprendi*.[72] In *Apprendi*, the white defendant was charged with multiple felony firearms charges after shooting at his African American neighbor's house.[73] He pled guilty to three of the charges, and the government dismissed the rest; however, pursuant to a plea agreement, the government reserved the right to seek an enhanced sentence based on the New Jersey hate crime statute.[74] To apply the hate crime sentence enhancement, the judge was required to find by a preponderance of the evidence that the defendant's actions were taken with a "purpose to intimidate."[75] The defendant challenged the sentence enhancement and argued that the finding of a "purpose to intimidate" is an "element" of the crime that must be found by a jury beyond a reasonable doubt because it is a fact that increased his sentence beyond the statutory maximum prescribed for the offense itself.[76]

In *Apprendi*, the Court held in a split 5–4 decision that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" is an element of a crime that "must be submitted to the jury and proved beyond a reasonable doubt," regardless of the legislature's designation.[77] The Court rejected the idea that a fact triggering sentence enhancement could be a mere sentencing factor and instead placed emphasis on the purpose and effect of the provision at issue.[78] Curiously, the majority in *Apprendi* declined to overrule *McMillan*'s holding and instead chose to limit *McMillan*'s holding to cases that "do not involve the imposition of a sentence more severe than the statutory maximum for the offense."[79]

In a separate concurrence, Justice Clarence Thomas wrote that a "crime" should include "every fact that is by law a basis for imposing or increasing punishment."[80] In Justice Thomas's view, a jury should be required to find any

72. Leading Cases, *supra* note 14, at 253 (citing Apprendi v. New Jersey, 530 U.S. 466 (2000)).

73. *Apprendi*, 530 U.S. at 469.

74. *Id.* at 468–70; *see also* N.J. STAT. ANN. § 2C:39–4(a) (West 1995) (as cited in *Apprendi*, 530 U.S. at 468) (classifying the possession of a firearm for an unlawful purpose as a "second-degree" offense); N.J. STAT. ANN. § 2C:44–3(e) (West Supp. 1999–2000) (as cited in *Apprendi*, 530 U.S. at 469) (providing for an "extended term" of imprisonment if the trial judge finds, by a preponderance of the evidence, that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color").

75. *Apprendi*, 530 U.S. at 471.

76. *Id.*

77. *Id.* at 490.

78. *Id.*

79. *Id.* at 487 n.13.

80. *Id.* at 501 (Thomas, J., concurring).

fact affecting the "kind, degree, or range of punishment" to which the prosecution is entitled.[81] In many ways, Justice Thomas's concurring view paved the way for the *Alleyne* result, as further discussed below.[82]

While the *Apprendi* decision seemed expansive, the Court's choice to uphold *McMillan* while simultaneously holding that it was "unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed"[83] spurred confusion with respect to facts that increase the statutory *minimum*.[84] In the years following the *Apprendi* decision, the Court released a number of Sixth Amendment sentencing decisions that prolonged confusion with respect to constitutional sentencing.[85]

The lack of clarity with regard to facts increasing statutory minimums was showcased in *Harris*.[86] In *Harris*, the Court held that a fact increasing the defendant's minimum sentence by two years was a sentencing factor that may be determined upon a preponderance of the evidence by the judge, as opposed to an element of the offense to be found by the jury.[87] In so holding, the Court backtracked and reaffirmed its conclusion in *McMillan*, where the Court originally concluded that a fact that increases a mandatory *minimum* sentence may be treated as a mere sentencing factor.[88]

The Court's decisions in *Blakely*[89] and *Booker*[90] further transformed criminal sentencing. Both *Blakely* and *Booker* reaffirmed the holding of *Apprendi* and expanded its reach.[91] In *Blakely*, the defendant was convicted of second-degree kidnapping, a "class B felony" that carried a maximum sentence of ten years.[92] Washington's Sentencing Guidelines statute, however, created a "standard [sentencing] range" for the offense and permitted the judge to deviate

81. *Id.*

82. *See infra* notes 96–101.

83. *Apprendi*, 530 U.S. at 490 (quoting Jones v. United States, 526 U.S. 252, 252 (1999) (Stevens, J., concurring)).

84. Leading Cases, *supra* note 14, at 257.

85. *Id.* at 248.

86. Harris v. United States, 536 U.S. 545 (2002), *overruled by* Alleyne v. United States, 570 U.S. 99 (2013).

87. *Id.* at 568.

88. Leading Cases, *supra* note 14, at 248.

89. Blakely v. Washington, 542 U.S. 296 (2004).

90. United States v. Booker, 543 U.S. 220 (2005).

91. Leading Cases, *supra* note 14, at 256; *Blakely*, 542 U.S. at 303–04; *Booker*, 543 U.S. at 233.

92. *Blakely*, 542 U.S. at 299; *see also* WASH. REV. CODE ANN. § 9A.40.030 (West 2003) (defining the crime of second-degree kidnapping and classifying it as a Class B felony); *see also* WASH. REV. CODE ANN. § 9A.20.021(1)(b) (West 1998) (specifying the maximum punishment for a Class B felony as imprisonment for a term of ten years, a fine of $20,000, or both).

from that "standard range" if additional factual findings were made at sentencing.[93] The Court held that, in light of *Apprendi,* allowing upward departures from the standard range based on judicial fact-finding alone violated a defendant's Sixth Amendment guarantee "that a prosecutor prove to a jury all facts legally essential to the punishment."[94] One year after the *Blakely* decision, the Court extended its reasoning to cover the Federal Guidelines as well.[95]

With *Alleyne*,[96] the Court began what has been referred to as "the next major chapter in the rollback of structured sentencing regimes and legislative designation of sentencing factors"[97] first initiated by *Apprendi*. In *Alleyne*, the Court overruled *Harris*, holding that its "distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum . . . is inconsistent with our decision in *Apprendi* . . . and with the original meaning of the Sixth Amendment.[98] The Court noted that *Apprendi*'s holding requires that any fact that necessarily raises the defendant's "penalty" is an element for the jury.[99]

Adopting the reasoning of Justice Thomas's dissenting opinion in *Apprendi*, the Court in *Alleyne* determined that facts that increase the mandatory minimum sentence "alter the prescribed range of sentences to which a defendant is exposed to" and aggravate his punishment accordingly; therefore, any fact that leads to such an increase is an element that the jury must find beyond a reasonable doubt.[100] *Alleyne* brought consistency and clarification to many years of confusing sentencing practices involving distinctions between facts that increase a defendant's mandatory minimum or maximum and continued "the judiciary's recent trend of reining in the expansive sentencing authority asserted by legislatures" in the years following *Apprendi*.[101]

In 2016, the United States Supreme Court determined in *Hurst*[102] that a state statute requiring the trial court to find an aggravating circumstance, independent and in addition to the jury's own fact-finding, was unconstitutional

93. *Blakely*, 542 U.S. at 299; *see* WASH. REV. CODE ANN. § 9.94A.120(2) (West 2000), *invalidated by Blakely*, 542 U.S. 296 (providing that "a judge may impose a sentence above the standard range if he finds 'substantial and compelling reasons justifying an exceptional sentence'").

94. *Blakely*, 542 U.S. at 313–14.

95. *See generally* United States v. Booker, 543 U.S. 220 (2005); *see also* Leading Cases, *supra* note 14, at 256.

96. Alleyne v. United States, 570 U.S. 99 (2013).

97. Leading Cases, *supra* note 14, at 248.

98. *Alleyne*, 570 U.S at 103.

99. *Id.*; *see also* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

100. *Alleyne*, 570 U.S. at 107–08.

101. Leading Cases, *supra* note 14, at 248.

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

under *Alleyne*.[103] In *Hurst*, a jury convicted the defendant of first-degree murder – which is a capital felony in Florida.[104] Under Florida law, life imprisonment is the maximum sentence a capital felon may receive upon conviction.[105] Florida employed a "hybrid" approach to sentencing, which allowed a "jury [to] render[] an advisory verdict" but required "the judge [to] make[] the ultimate sentencing determination[]."[106] Therefore, Florida law provided that "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death."[107] Although the judge must give the jury recommendation "great weight," the sentencing order must "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors."[108]

The jury in *Hurst* recommended an advisory verdict that the defendant be subjected to a death sentence.[109] The judge in *Hurst* independently agreed, finding the presence of aggravating factors.[110] The defendant appealed, arguing his sentence violated the Sixth Amendment in light of *Ring v. Arizona*,[111] a United States Supreme Court case holding that capital defendants have the right to have any fact that could trigger an increase in punishment submitted to a jury.[112] The Court held that even though the jury also made the requisite findings that allowed the trial judge to sentence the defendant to death, the Florida statute at issue in *Hurst* ran afoul of *Alleyne* because it required the trial judge to make a factual finding necessary for enhanced sentencing to take effect.[113] According to the Court, such a statute did not "provide[] the defendant additional protection" and violated a defendant's Sixth Amendment right to a trial by jury.[114]

Despite the long line of Sixth Amendment United States Supreme Court jurisprudence that clarified the rule that the finding of any fact that leads to an increase in a defendant's sentencing penalty must be considered an element for the jury – and the jury alone – to find beyond a reasonable doubt, in *Johnson*

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103. *Id.* at 624.

104. *Id.* at 619–20; *see also* FLA. STAT. § 782.04(1)(a) (2010).

105. *Hurst*, 136 S. Ct. at 620.; *see also* FLA. STAT. § 775.082(1) (2010).

106. *Hurst*, 136 S. Ct. at 620 (quoting Ring v. Arizona, 536 U.S. 584, 608 n.6 (2002)).

107. *Id.* at 620; *see also* FLA. STAT. § 921.141(3) (2010), *invalidated by* Perry v. State, 210 So. 3d 630 (Fla. 2016).

108. *Hurst*, 136 S. Ct. 620 (first quoting Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (per curiam), then quoting Blackwelder v. State, 851 So. 2d 650, 653 (Fla. 2003) (per curiam)).

109. *Id.*

110. *Id.*

111. *Id.*; *see also Ring*, 536 U.S. at 609.

112. *Ring*, 536 U.S. at 609.

113. *Hurst*, 136 S. Ct. at 622.

114. *Id.*

the Supreme Court of Missouri was confronted with a statutory challenge similar to those raised by the defendants in *Alleyne* and *Hurst* and came to the opposite conclusion.[115]

C. Missouri Criminal Code Sections 558.018.5 and 558.021.2

In 1995, the Missouri General Assembly comprehensively revised the sexual offenses chapter of Missouri's Criminal Code.[116] The 1995 revision expanded the number of sexual offenses, especially with respect to offenses against children, and provided for harsher punishments on convicted defendants than the previous 1979 code.[117] In 1996, the Missouri House of Representatives introduced House Bill No. 974, which proposed the addition of a "predatory sexual offender" category to Missouri's Criminal Code.[118] Lawmakers chose the word "predatory" to describe the defendants subject to the newly proposed law to "instill[] a certain image of a sex offender lurking in every dark area."[119] The "predatory" descriptor facilitated the public's perception in the mid-1990s that sex offenders employed "animalistic type[s] of behavior" and would "resume their hunt for victims" upon their release from incarceration.[120]

The Missouri legislature ultimately amended Missouri's Criminal Code to include a predatory sexual offender category defined in section 558.018.[121] Section 558.018.5(3) provided that — in addition to persons who have previously been found or pleaded guilty to specific sexual felonies or have previously committed a specified sexual felony, whether or not a conviction resulted – a predatory sexual offender included a person who "[h]as committed an act or acts against more than one victim . . . whether or not the defendant was charged with an additional offense or offenses as a result of such act or acts."[122]

With the enactment of the 1996 legislation, defendants who were deemed predatory sexual offenders were subject to mandatory life sentences in all cases, and to certain specified minimum terms of not less than thirty years with the possibility of probation or fifteen years without probation or parole when

115. *See* State v. Johnson, 524 S.W.3d 505 (Mo. 2017) (en banc).

116. Robert H. Dierker, *Evolution of Missouri Law*, 32 MO. PRAC., Mo. Crim. Law § 23:2 (3d ed. 2017).

117. *Id.*

118. H.B. 974, 88th Gen. Assemb., 2d Reg. Sess. (Mo. 1996); *see also* Robert MacKenzie, New Developments or More of the Same? A Historical, Sociological, and Political Look at Missouri's Sex Offender Laws from 1995 to 2013 at 19 (Apr. 16, 2014) (M.A. thesis, University of Missouri, St. Louis) (available at http://irl.umsl.edu/thesis/69).

119. MacKenzie, *supra* note 118, at 21.

120. *Id.*

121. MO. REV. STAT. § 558.018 (1996) (current version at MO. REV. STAT. § 566.125 (Cum. Supp. 2017)).

122. § 558.018.5(3).

they had prior convictions for specified sexual offenses.[123] Under section 558.018.4, a defendant could only be deemed a predatory sexual offender if the trial judge found him to be a predatory sexual offender *and* the defendant was also found guilty of committing or attempting to commit one of the several predicate crimes listed by a jury.[124]

Section 558.018 underwent several subsequent revisions, most significantly in 2006[125] and 2013.[126] The predatory sexual offender category, as defined in subsection 5 of the statute, however, has retained its original 1996 language.[127] Therefore, under the current predatory sexual offender scheme, both the jury and the trial judge must find a defendant to be a predatory sexual offender before imposing an extended sentencing term.[128] Section 558.021.2, which defines the procedures that must be followed by the trial court in subjecting a defendant to enhanced sentencing as a predatory sexual offender, further provides that in a jury trial, the trial court must make its finding that a defendant is a predatory sexual offender "prior to [the case's] submission to the jury outside of its hearing."[129]

D. "Manifest Injustice" Determinations in Missouri

Missouri appellate courts are frequently tasked with determining whether an alleged trial court error has resulted in "manifest injustice." It is well established that, to be preserved for review, all objections made at trial "must be specific and made contemporaneously with the purported error."[130] When a defendant fails to timely object to a finding made by the trial court, but nonetheless argues on appeal that the finding he contests was error, his claim is entitled only to plain error review at the discretion of the appellate court.[131] Under this heightened standard of review, an appellate court must determine

123. *Id*. §§ 558.018.6–558.018.7.

124. *Id.* § 558.018.4. Relevant here, the predicate crimes listed in section 558.018.1 include first-degree statutory sodomy and first-degree statutory rape. *Id.* § 558.018.1.

125. *See* H.B. 1290, 93d Gen. Assemb., 2d Reg. Sess. (Mo. 2006).

126. *See* H.B. 215, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013).

127. The definition of "predatory sexual offender" and the mandatory minimum and maximum sentences associated with such a finding can be found in section 566.125 of the 2017 Missouri Code, rather than section 558.018. MO. REV. STAT. § 566.125 (Cum. Supp. 2017). The 2017 Code maintains that a court sentencing a predatory sexual offender can fix the minimum term of imprisonment before parole anywhere within the range of punishment, up to and including the entirety of a person's natural life. *See generally id.*

128. *See id.*

129. MO. REV. STAT. § 558.021.2 (2016). Section 558.021.2 provides an exception to the procedural mandates of this section for facts required by subsection 4 of section 558.016, which relates to persistent misdemeanor offenders. *Id.*

130. State v. Driskill, 459 S.W.3d 412, 426 (Mo. 2015) (en banc).

131. *Id.*

whether the claimed error is a "plain error affecting substantial rights."[132] "An error is plain if it is 'evident, obvious, and clear,'"[133] and "'substantial rights' are involved if . . . there are significant grounds for believing that the error is of the type from which manifest injustice . . . could result if left uncorrected."[134]

Missouri courts have long held that determining what constitutes "manifest injustice" is based primarily on the facts and circumstances of each individual case.[135] Unfortunately, Missouri courts have not provided much insight into the meaning behind the phrase "manifest injustice."[136] Indeed, most court opinions offer a vague and circular explanation of the concept.[137] In Missouri, application of the "manifest injustice" standard has been criticized for its conclusory, and highly subjective, nature.[138] However, Missouri appellate courts seem to be in agreeance that "[b]eing sentenced to a punishment greater than the maximum sentence for an offense constitutes plain error resulting in manifest injustice."[139]

The Supreme Court of Missouri has decided multiple cases that provide insight into what constitutes a procedural timing violation of section 558.021.2, which requires a trial court to make the predicate findings prior to submission of the case to the jury.[140] In each of these cases, the court has provided clues about how and why "manifest injustice" determinations are made.

In *State v. Emery*, the court held that permitting the government to present new evidence of the defendant's prior offenses in support of his alleged prior and persistent offender status while the case was on remand for re-sentencing would violate the timing requirement of section 558.021.2.[141] The court reasoned that because section 558.021.2 requires presentation of such evidence prior to the case's submission to the jury, any presentation of the defendant's

132. State v. Hunt, 451 S.W.3d 251, 260 (Mo. 2014) (en banc).

133. *Id.* (quoting State v. Baumruk, 280 S.W.3d 600, 607 (Mo. 2009) (en banc)).

134. *Id.*

135. State v. Baxter, 204 S.W.3d 650, 652 (Mo. 2006) (en banc); *see also* State v. Winfield, 5 S.W.3d 505, 516 (Mo. 1999) (en banc).

136. Kenneth D. Dean, *Equitable Estoppel Against the Government – The Missouri Experience: Time to Rethink the Concept*, 37 ST. LOUIS U. L.J. 63, 106 (1992).

137. *Id.* at 104.

138. "Injustice may, like beauty, be found only in the eye of the beholder." *Id.* at 106.

139. State v. Davis, 533 S.W.3d 853, 864–65 (Mo. Ct. App. 2017) (quoting State v. Taborn, 412 S.W.3d 466, 474 (Mo. Ct. App. 2013)); *accord* State v. Hardin, 429 S.W.3d 417, 419 (Mo. 2014) (en banc); State v. Lemons, 351 S.W.3d 27, 32 (Mo. Ct. App. 2011); State v. Severe, 307 S.W.3d 640, 642 (Mo. 2010) (en banc); State v. Kimes, 234 S.W.3d 584, 590 (Mo. Ct. App. 2007).

140. *See* State v. Emery, 95 S.W.3d 98, 101 (Mo. 2003) (en banc); *Severe*, 307 S.W.3d at 644–45; State v. Teer, 275 S.W.3d 258, 260–62 (Mo. 2009) (en banc); *see also* MO. REV. STAT. § 558.021.2 (2016).

141. *Emery*, 95 S.W.3d at 101–02.

prior convictions on remand would run afoul of the aforementioned procedural timing mandates.[142]

In *State v. Teer*, the court held that manifest injustice resulted when the trial court found the defendant to be a status offender *after* the jury had already recommended a sentence.[143] Because the defendant's status as a prior offender was not pleaded and proven prior to the case's submission to the jury, the court held that the plain language of section 558.021.2 was violated.[144] Because the defendant in *Teer* was subjected to a sentence of twenty years rather than a sentence of four years, as recommended by a jury of his peers, the court found that the trial court's untimely findings deprived the defendant of the benefit of a more lenient jury-recommended sentence and thus resulted in manifest injustice.[145]

One year later, in *State v. Severe*, the court held that a defendant suffered manifest injustice after he was sentenced as a status offender because the government failed to plead and prove his prior convictions, as required to be deemed a status offender, prior to submission of his case to the jury.[146] The court decided that allowing the government to present new evidence of his prior convictions would give the government "two bites at the apple" and that, pursuant to the timing requirements of section 558.021.2, no additional evidence could be presented against the defendant at re-sentencing.[147] Most recently, in *State v. Collins*,[148] the court found that a defendant suffered manifest injustice after he was sentenced as a chronic DWI offender despite the government's failure to adduce, prior to sentencing, the evidence necessary to subject him to such a determination.[149]

Two common themes can be deduced from Supreme Court of Missouri cases interpreting whether and how "manifest injustice" has resulted after trial court violations of section 558.021.2 timing requirements. First, *Emery*, *Severe*, and *Collins* established that manifest injustice will result if a defendant is sentenced as a status offender, yet the government has failed to establish its burden of proof prior to submission of the case to the jury. Second, *Teer* established that manifest injustice will result if the trial court fails to make its predicate findings before the jury has made its requisite verdicts and recommended a sentence. In *Johnson*, discussed further below, the court clarified and reaffirmed the theme endorsed by its decisions in *Emery*, *Severe*, and *Collins* by noting that the government did not fail to meet its burden of proof in finding Johnson to be a predatory sexual offender. The court, however, seemed to carve out the following exception to the theme it announced in *Teer* in its

142. *Id.*
143. *Teer*, 275 S.W.3d at 260.
144. *Id.* at 261–62.
145. *Id.* at 262.
146. State v. Severe, 307 S.W.3d 640, 645 (Mo. 2010) (en banc).
147. *Id.*
148. State v. Collins, 328 S.W.3d 705 (Mo. 2011) (en banc) (per curiam).
149. *Id.* at 710.

more recent *Johnson* opinion: a trial court's failure to make its predicate findings before submission of a case to the jury *only* results in manifest injustice if the defendant has not waived his statutory right to jury sentencing before trial.

IV. INSTANT DECISION

This Part examines the several facets of the Supreme Court of Missouri's *Johnson* decision in three sections. First, this Part dissects the majority opinion's holding and reasoning, as authored by Judge Zel M. Fischer. Second, this Part distinguishes the reasoning presented by Judge Patricia Breckenridge in her concurrence. Third, this Part analyzes the reasoning behind Judge Laura Denvir Stith's dissent.

A. The Majority Opinion

In *Johnson*, the Supreme Court of Missouri held that: (1) section 566.125(3)[150] applies to charged acts and is constitutional on its face; (2) no manifest injustice resulted from the trial court's failure to adhere to the procedural requirements of section 558.021; and (3) the trial court appropriately sentenced Johnson as a predatory sexual offender.[151]

In so holding, the court first determined that section 566.125.5(3) unambiguously applies to prior acts as well as acts that form the bases for current charges.[152] The court noted that section 566.125.5(3) refers only to "an act or acts against more than one victim," without reference to "prior" or "previous acts."[153] The court explained that to hold, as Johnson argued, that section 558.018.5(3) applies only to prior acts, the Supreme Court of Missouri would have to impermissibly add language to an unambiguous statute and find section 558.018.5(3) to be superfluous in light of section 558.018.5(2), which allows a predatory sexual offender determination to be made if a person "[h]as previously committed an act which would constitute an offense listed in subsection 4 of this section, whether or not the act resulted in a conviction."[154]

Next, the Supreme Court of Missouri determined that section 566.125.5(3) is constitutional on its face and does not "run afoul" of the United States Supreme Court's decision in *Alleyne*.[155] In *Alleyne*, the United States Supreme Court held that "[a]ny fact that, by law, increases the [mandatory minimum sentence] is an 'element' that must be submitted to the jury and found

150. Section 566.125.5(3) states that a defendant can be found to be a predatory sexual offender if he "[h]as committed an act or acts against more than one victim." MO. REV. STAT. § 566.125.5(3) (Cum. Supp. 2017).

151. *See* State v. Johnson, 524 S.W.3d 505 (2017) (en banc).

152. *Id.* at 510–11.

153. *Id.*; *see also* § 566.125.5(3).

154. *Johnson*, 524 S.W.3d at 509.

155. *Id.* at 511–13; *see also* Alleyne v. United States, 570 U.S. 99 (2013).

beyond a reasonable doubt."[156] Applying this holding to Johnson's case, the Supreme Court of Missouri found that the "fact that increase[d] the mandatory minimum sentence [was] that [Johnson] committed acts against more than one victim."[157] According to the court, *Alleyne* required only that, pursuant to section 566.125.5(3), the fact Johnson committed acts against multiple victims be submitted to and found by the jury.[158] The court contended that *Alleyne*'s holding did not prohibit a statute from requiring that a trial court additionally find this fact.[159] Indeed, the Supreme Court of Missouri asserted that "[r]equiring a trial court to also find the necessary facts [was] a layer of protection above and beyond that required by *Alleyne*."[160]

The court held the trial court's violation of the timing requirement in section 558.021.2 was "immaterial to the constitutional analysis" of section 566.125.5(3).[161] The court reasoned that even if the procedural mandates of section 558.021.2 would have been properly followed in Johnson's case, "the [trial court's] pre-submission determination, *by itself*, would not have violated Johnson's constitutional right" because such pre-submission findings of fact would not have removed Johnson's right to have the jury subsequently find the same facts thereafter.[162]

Lastly, the court determined that although the trial court's failure to comply with the procedural mandates of section 558.021.2 was "evident, obvious, and clear" in Johnson's case, such error did not result in manifest injustice.[163] The court distinguished Johnson's case from a number of others in which it previously held manifest injustice resulted where the defendant was sentenced as a status offender after the trial court violated similar statutory requirements.[164] In previous cases, the court found manifest injustice only when the necessary preconditions to sentencing a defendant as a status offender were altogether absent; that is, "the respective defendants were sentenced based on

156. *Johnson*, 524 S.W.3d at 511–12 (quoting *Alleyne*, 570 U.S. at 103).

157. *Id.* at 512.

158. *Id.*

159. *Id.* at 512 & n.8.

160. *Id.*

161. *Id.* at 512.

162. *Id.*

163. *Id.* at 513. Johnson failed to object to any violation of section 558.021.2 at his sentencing hearing; therefore, his claim of error with regard to section 558.021.2 was not preserved on appeal. Despite the lack of preservation at the trial court level, the Supreme Court of Missouri reviewed his claim under plain error review. "[P]lain errors affecting substantial rights may be considered in the discretion of the court when the error has resulted in manifest injustice or miscarriage of justice." *Id.* (alteration in original) (quoting State v. Hunt, 451 S.W.3d 251, 260 (Mo. 2014) (en banc)).

164. *Id.* at 514–15; *see also* State v. Collins, 328 S.W.3d 705, 708–10 (Mo. 2011) (en banc) (per curiam); State v. Severe, 307 S.W.3d 640, 642–45 (Mo. 2010) (en banc); State v. Emery, 95 S.W.3d 98, 101–02 (Mo. 2003) (en banc); State v. Wilson, 343 S.W.3d 747, 750–51 (Mo. Ct. App. 2011); State v. Starnes, 318 S.W.3d 208, 210–18 (Mo. Ct. App. 2010).

an offender status never proved by the State or never expressly found by the [trial] court . . . or the State was unfairly given 'two bites at the apple' when the statute allows only one bite."[165] Because Johnson did not complain of the aforementioned preconditions, the court concluded that no manifest injustice resulted from the trial court's violation of section 558.021.2.[166]

Ultimately, the court in *Johnson* maintained that even if Johnson had not been deemed a predatory sexual offender, his statutory rape and statutory sodomy convictions still carried possible sentences of life in prison, and the fact that Johnson had waived his statutory right to be sentenced by a jury of his peers remained unchanged.[167] As such, the court held that the trial court subjected Johnson to the same sentence he would have received had the trial judge not initially made a mistaken reading of the statute.[168] Thus, the Supreme Court of Missouri held that the trial court properly sentenced Johnson as a predatory sexual offender pursuant to section 566.125.5(3), and no manifest injustice resulted.[169]

B. The Concurring Opinion

In her concurrence, Judge Breckenridge agreed with the majority's conclusion that section 558.018.5(3), as written, applies to currently charged acts and is facially constitutional.[170] She disagreed, however, with the majority opinion's analyses of these issues.[171]

First, Judge Breckenridge wrote that because the statutory language of section 566.125.5(3) encompasses acts that form the bases for the current charges, and section 558.021.2 procedurally requires a trial court to make factual findings regarding offenses addressed by section 558.018.5(3), any finding by the trial court that a defendant is a predatory sexual offender violates the defendant's Sixth Amendment right to a jury trial in light of *Alleyne*.[172]

Second, according to Judge Breckenridge, section 566.125.5(3)'s statutory scheme may *only* be constitutionally applied when prior convictions involving multiple victims are used to establish the defendant's status as a predatory sexual offender.[173] She reasoned that because "[p]rior convictions are

165. *Johnson*, 524 S.W.3d at 514 (quoting *Severe*, 307 S.W.3d at 645).
166. *Id.*
167. *Id.* at 515.
168. *Id.*
169. *Id.*
170. *Id.* (Breckenridge, J., concurring).
171. *Id.*
172. *Id.* at 516.
173. *Id.*

not facts that must be submitted to the jury for purposes of sentencing enhancement,"[174] the *Alleyne* rule is not violated when prior convictions involving multiple victims are used to establish the defendant's status as a predatory sexual offender.[175]

Third, Judge Breckenridge contended that the submission to and finding by the jury of the necessary fact that increases the mandatory minimum sentence – in Johnson's case, that he committed an act or acts against more than one victim – may only be relevant to whether the defendant was prejudiced by the constitutional violation.[176] Judge Breckenridge noted another difficulty with the predatory sexual offender sentencing scheme provided by sections 566.125(3) and 558.021.2: a trial judge can find a defendant to be a predatory sexual offender if he finds the defendant committed offenses against multiple victims, regardless of whether the government charged the defendant with those additional acts.[177] Put another way, under the statute, a trial judge is authorized to find a defendant to be a predatory sexual offender on the basis of offenses that the jury does not subsequently find the defendant guilty of committing.

Judge Breckenridge concluded that section 566.125.5(3) should be found unconstitutional as applied when used to classify a defendant, like Johnson, as a predatory sexual offender based on acts committed against multiple victims without the presence of prior convictions.[178] Nevertheless, she concluded that under the facts and circumstances of Johnson's case, the *Alleyne* violation did not require reversal of his convictions because "the facts that increased Mr. Johnson's mandatory minimum sentence . . . were submitted to and found by the jury" beyond a reasonable doubt, and therefore no prejudice resulted.[179]

C. The Dissenting Opinion

In her dissent, Judge Stith, joined by Judge George W. Draper III, wrote that the trial judge's failure to follow section 558.021.2 was determinative of whether Johnson was deemed a predatory sexual offender and resulted in manifest injustice.[180] According to Judge Stith, a strict adherence to the procedural requirements set forth by section 558.021.2 would have precluded the trial judge from finding section 566.125(3) applicable to Johnson and thus would have prevented the trial judge's ability to enhance Johnson's sentence.[181] Judge Stith argued that the majority opinion "unequivocally . . . permit[s] what

174. *Id.* (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).
175. *Id.* (citing Alleyne v. United States, 570 U.S. 99 (2013)).
176. *Id.* at 517.
177. *Id.*
178. *Id.*
179. *Id.* at 518.
180. *Id.* (Stith, J., dissenting).
181. *Id.*

Alleyne prohibits – using a trial judge's findings to increase the mandatory minimum."[182]

Judge Stith provided three deficiencies in the majority's argument that no manifest injustice resulted from the trial judge's failure to comply with the procedural requirements of section 558.021.2.[183] First, she asserted that the trial judge committed plain error when he failed to require the state to present any evidence outside the jury's hearing to separately establish that Johnson was a predatory sexual offender, as required by section 558.021.2.[184] Second, she noted that the trial judge made his evidentiary findings *after* rather than before submission to the jury, violating the procedural requirements of section 558.021.2.[185] Finally, she argued the trial judge impermissibly based his finding that Johnson was a predatory sexual offender on the evidence presented to the jury, violating the requirement of section 558.021.2 that a trial judge's predatory sexual offender determination be based on evidence presented outside the jury's presence.[186]

Further, Judge Stith wrote that section 566.125.5(3) should not have been found to permit current charges to provide the basis of Johnson's predatory sexual offender designation.[187] Judge Stith disagreed with the majority's reasoning that because section 566.125.5(3) does not use the term "previously" in providing what charges can form the basis of a predatory sexual offender finding, the court can permissibly base a predatory sexual offender determination on the very charges being submitted to the jury.[188]

Instead, Judge Stith noted that section 566.125.5(3) provides a predatory sexual offender determination is to be based on "whether or not the defendant was charged with an additional offense or offenses as a result of such act or acts."[189] According to Judge Stith, the purpose of section 566.125.5(3) is to allow the trial judge to consider conduct *in addition* to that charged in the current case, regardless of whether that additional conduct itself resulted in other charges.[190] Because "the actual offenses charged cannot be 'additional' to

182. *Id.* at 522.

183. *Id.* at 518–19.

184. *Id.* at 519.

185. *Id.* Judge Stith noted that section 558.021.2 sets out a single exception in which the trial judge is permitted to make a determination of whether a defendant is a "dangerous offender" under subdivision 558.016.4(1) after submission to the jury based on evidence presented at trial. *Id.* at 520. She asserted that that exception clearly did not apply in Johnson's case, and therefore the trial court erred in allowing the trial judge to make a finding that Johnson was a predatory sexual offender after submission of his case to the jury. *Id.*

186. *Id.* at 519.

187. *Id.* at 523–24.

188. *Id.* at 523.

189. *Id.* (quoting MO. REV. STAT.§ 566.125.5(3) (Cum. Supp. 2017)).

190. *Id.*

themselves," Judge Stith maintained the charged offenses cannot form the basis of a predatory sexual offender determination.[191]

Judge Stith concluded that to hold, as the majority held, that current charges may provide the basis for a predatory sexual offender determination would mean that "the enhanced mandatory minimum applies in every case with more than one victim, as it requires the trial judge to determine prior to submission whether the evidence shows beyond a reasonable doubt the defendant committed a listed act against more than one victim."[192] She concluded that such a scheme could not have been what the legislature intended and held that she would vacate the trial judge's determination that Johnson was a predatory sexual offender and remand for resentencing.[193]

V. COMMENT

With its decision in *Johnson*, the Supreme Court of Missouri sent a clear message to predatory sexual offenders – that it is possible to be labeled as a "predator" and subjected to enhanced sentencing despite: (1) the absence of a prior sexual felony conviction; (2) the absence of the admission of prior sexual felonious acts into evidence, regardless of whether those acts resulted in conviction; and (3) the trial court's failure to comply with legislatively mandated procedural sentencing requirements.[194]

First, this Part addresses the drawbacks and inconsistencies in the Supreme Court of Missouri's statutory interpretation of section 566.125.5(3). Specifically, this Part asserts that Section 566.125.5(3) cannot be reconciled with the holding in *Alleyne* when it is interpreted as applying the predatory sexual offender determination to presently charged acts. Second, this Part notes the Supreme Court of Missouri's evident failure to recognize manifest injustice as a result of the trial judge's failure to follow section 558.021.2 in Johnson's case. Ultimately, this Part concludes that the Supreme Court of Missouri defied *Alleyne* precedent when it failed to uphold the statutory safeguards regarding predatory sexual offender sentencing and therefore failed to recognize manifest injustice in Johnson's case.

A. The Supreme Court of Missouri's Statutory Interpretation of Section 566.125.5(3)

When interpreting a statute, the Supreme Court of Missouri adheres to the principle that it must construe statutory language in a way that best furthers

191. *Id.*
192. *Id.*
193. *Id.* at 524.
194. *See generally Johnson*, 524 S.W.3d 505.

legislative intent.[195] To determine legislative intent from statutory language, the court applies the "plain meaning rule."[196] The plain meaning rules states that if the intent of the legislature is clear and unambiguous when the language used in the statute is given its plain and ordinary meaning, then the court must refrain from consulting other rules of statutory interpretation.[197] "A text is unambiguous if a person of ordinary intelligence would find its meaning plain and clear."[198] To the contrary, a text is ambiguous if its language "is subject to more than one reasonable interpretation."[199] In Missouri, if there are two ways to read a statute, and one way implies a constitutional violation while the other does not, the statute should be interpreted in a way that does not entail a constitutional violation. [200] Other rules of statutory interpretation should only be consulted if a text is ambiguous.[201]

While the court determined that section 566.125.5(3) unambiguously applies to acts that are the bases for the current charges on the ground that the statute fails to refer to "prior" or "previous" acts,[202] its analysis fails to convincingly demonstrate that the language in the statute is only subject to one reasonable interpretation. The court reached its conclusion that section 566.125.5(3) applies to acts serving as the bases for the current charges by focusing solely on the first clause in the statute: "[h]as committed an act or acts against more than one victim which would constitute an offense or offenses listed in subsection 4 of this section."[203] The court emphasized the lack of reference to "prior" or "previous" acts in the statute in determining that the legislature intended section 566.125.5(3) to apply to acts that form the bases for the current charges and concluded that to hold otherwise would force the court to "impermissibly add language to an unambiguous statute."[204]

However, as Judge Stith indicated in her dissent, the second clause present in section 566.125.5(3) further provides that a predatory sexual offender determination is to be based on the defendant's commission of an act or acts against multiple victims, "whether or not the defendant was charged with an

195. Matthew Davis, Note, *Statutory Interpretation in Missouri*, 81 MO. L. REV. 1127, 1129 (2016); *see, e.g.*, Stiers v. Dir. of Revenue, 477 S.W.3d 611, 615 (Mo. 2016) (en banc); Greer v. Sysco Food Servs., 475 S.W.3d 655, 666 (Mo. 2015) (en banc).

196. Davis, *supra* note 195, at 1129.

197. *Id.*; *Johnson*, 524 S.W.3d at 510–11; *see also* Howard v. City of Kan. City, 332 S.W.3d 772, 787 (Mo. 2011) (en banc).

198. Davis, *supra* note 195 at 1129; *see also* Wolff Shoe Co. v. Dir. of Revenue, 762 S.W.2d 29, 31 (Mo. 1988) (en banc).

199. Davis, *supra* note 195, at 1129 (quoting State v. Liberty, 370 S.W.3d 537, 548 (Mo. 2012) (en banc)).

200. *Id.* at 1141.

201. *See id.* at 1129; Parktown Imps., Inc. v. Audi of Am., Inc., 278 S.W.3d 670, 672 (Mo. 2009) (en banc).

202. *Johnson*, 524 S.W.3d at 511.

203. *Id.* at 509 (quoting MO. REV. STAT. § 566.125.5(3) (Cum. Supp. 2017)).

204. *Id.* at 511.

additional offense or offenses as a result of such act or acts."[205] Judge Stith emphasized the presence of the word "additional" in the statute in her argument that the legislature did not intend section 566.125.5(3) to apply to acts that form the bases for the current charges.[206]

The language in section 566.125.5(3) regarding an "additional" offense might be directed towards some prior act for which a defendant was not charged, as noted by Judge Breckenridge in her concurrence.[207] But the fact that this language might be read to suggest it applies to such prior acts does not preclude the majority's plain reading of the first clause present in section 566.125.5(3), which just refers to an act or acts against multiple victims, nor does it imply that Judge Stith's interpretation is wholly unreasonable.

Given the conflicting, yet reasonable, views of the majority and the dissent of the "plain meaning" behind the language of section 566.125.5(3), the court should have deemed the language of the section ambiguous in *Johnson*. If the court had deemed section 566.125.5(3) ambiguous, it could have looked to other rules of statutory construction to assist in discerning the intent of the legislature, notably the broader legislative purpose for the predatory sexual offender statute and how section 558.021.2 influences the determination of that legislative purpose.

As noted by Judge Stith in her dissenting opinion, interpreting section 566.125.5(3) to apply to acts that form the bases for the current charges means the enhanced mandatory minimum applies in every case with more than one victim, as it requires the trial judge to determine prior to submission of the case to the jury whether the evidence shows beyond a reasonable doubt the defendant committed a listed act against more than one victim.[208] It is difficult to imagine that the legislature wanted every offender who commits charged crimes against multiple victims and against whom a submissible case was made to automatically receive an enhanced mandatory minimum. If this were the desired result, the legislature "would have so provided," as Judge Stith wrote in her dissent.[209]

Next, the court should have noted the constitutional consequences of considering section 566.125.5(3), as interpreted to apply to acts that form the bases for the current charges, in light of section 558.021.2, a separate statute that provides the procedural mandates that must be followed before a trial court may subject a defendant to predatory sexual offender sentence enhancement in a trial by jury.[210] When section 566.125.5(3) is read to include acts that form the bases for the current charges, the precedent of *Alleyne* is violated because

205. *Id.* at 523 (Stith, J., dissenting) (emphasis added) (quoting § 566.125.5(3)).

206. *See id.*

207. *Id.* at 517 (Breckenridge, J., concurring).

208. *Id.* at 523 (Stith, J., dissenting).

209. *Id.* at 524.

210. Davis, *supra* note 195, at 1139; *see also* Williams v. State, 386 S.W.3d 750, 754 (Mo. 2012) (en banc). These statutes are commonly referred to as "statutes *in pari materia*." Davis, *supra* note 195, at 1139.

the trial judge is forced to determine a fact beyond a reasonable doubt that increases a defendant's mandatory minimum sentence prior to submission of the case to the jury under section 558.021.2. When section 566.125.5(3) is read to include only prior acts, this erroneous result is avoided. As such, the court should have interpreted section 566.125.5(3) in a way that is most harmonious with *Alleyne* precedent, finding that section 566.125.5(3) should not be read to include acts that form the bases for the currently charged offenses.

B. Section 566.125.5(3) Cannot Be Reconciled with Alleyne *Precedent When Read to Include Acts that Are the Bases for the Current Charges*

The Supreme Court of Missouri insisted that, just because the jury ultimately found the fact necessary to subject Johnson to enhanced sentencing, it is of no consequence whether the trial judge is also required to make such a factual finding, nor whether the trial judge makes such a factual finding before or after the case is submitted to the jury.[211] The court's holding, however, cannot be reconciled with *Alleyne* precedent.

Alleyne expressly requires that any factual findings that increase the mandatory minimum be found by a jury, rather than a judge.[212] According to the court, the factual finding that increases the mandatory minimum pursuant to section 566.125.5(3) is that a defendant committed an act or acts against multiple victims, even if those act or acts comprise the bases for the current charges.[213] Section 558.021.2 plainly authorizes that in a jury trial the judge must find this fact prior to submission of the case to the jury.[214] This procedural requirement violates the holding in *Alleyne* because it plainly authorizes a *judge* to make a determination that must be reserved for the jury.

The court suggested that requiring a trial court to additionally find the necessary facts – in this case, that Johnson committed acts against more than one victim – adds a "layer of protection above and beyond that required by *Alleyne*";[215] however, this conclusion misinterprets *Alleyne*'s holding and defies the United States Supreme Court's subsequent interpretation of *Alleyne*. Instead of endorsing a scheme that adds a "layer of protection" to the sentencing of predatory sexual offenders, the Supreme Court of Missouri validated a method of sentence enhancement that robs the defendant of his Sixth Amendment jury-trial guarantee and instead places his sentencing fate in the hands of the trial judge.

In 2016, the United States Supreme Court in *Hurst*, while applying the principles set forth in *Alleyne*, refused the precise line of reasoning adopted by

211. *See Johnson*, 524 S.W.3d at 512.
212. Alleyne v. United States, 570 U.S. 99, 116 (2013).
213. *Johnson*, 524 S.W.3d at 512.
214. MO. REV. STAT. § 558.021.2 (2016).
215. *Johnson*, 524 S.W.3d at 512 n.8.

the majority in *Johnson*.[216] In *Hurst*, the Court held that a Florida statute, which required a judge to make a determination that a defendant should be punished by death in addition to the jury's recommendation, did not provide a defendant with "additional protection" in sentencing.[217] Because the statute at issue in *Hurst* permitted the judge to find an aggravating circumstance *independent* of the jury's fact-finding, the Court determined Florida's statute was unconstitutional.[218]

Under the *Alleyne* and *Hurst* framework, the Supreme Court of Missouri incorrectly found section 566.125.5(3) constitutional with respect to acts that form the bases for the current charges. Because section 558.021.2 allows a sentencing judge to find the necessary fact that the defendant committed an act or acts against multiple victims pursuant to section 566.125.5(3) independent of the jury's fact-finding and prior to submission of the case to the jury, the Supreme Court of Missouri should have found the predatory sexual offender sentencing scheme unconstitutional when applied to acts that form the bases for the current charges. As noted by Judge Stith in her dissent, this statutory scheme violates the Sixth Amendment as it stands because it permits what *Alleyne* expressly prohibits – using a trial judge's findings to increase the mandatory minimum.[219]

C. The Supreme Court of Missouri's Failure to Recognize Manifest Injustice Resulting from the Trial Court's Failure to Comply with Section 558.021.2 Is Inconsistent with Prior Decisions

In *Johnson*, the Supreme Court of Missouri found that the trial judge's failure to comply with the procedural requirements of section 558.021.2 was "evident, obvious, and clear" and conceded that the error "facially involve[d] substantial rights."[220] Despite these findings, the court failed to recognize the miscarriage of justice that resulted from the trial court's error.[221] The Supreme Court of Missouri further acknowledged that "if either the [trial] court or the jury would fail to find the required predicate facts, the defendant could not be sentenced as a predatory sexual offender."[222] But despite the trial court's failure to find the required predicate fact in Johnson's case in accordance with the statutory parameters set forth by section 558.021.2, the court allowed Johnson to be sentenced as a predatory sexual offender.[223]

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216. *See supra* Part III.C.; *Johnson*, 524 S.W.3d at 523–24 (Stith, J., dissenting); Hurst v. Florida, 136 S. Ct. 616, 621 (2016).

217. *Hurst*, 136 S. Ct. at 622.

218. *Id.* at 624.

219. *Johnson*, 524 S.W.3d at 522 (Stith, J., dissenting).

220. *Id.* at 513–14 (majority opinion).

221. *Id.* at 515.

222. *Id.* at 512–13.

223. *Id.* at 515.

The court maintained the trial court's violation of section 558.021.2 could not have result in manifest injustice because Johnson did not assert that the government failed to put forth evidence supporting his predatory sexual offender charge or was unfairly given "two bites at the apple."[224] The court's decision to limit the manifest injustice analysis to the aforementioned scenarios is perplexing. By making such a categorically-based decision, the court seemed to be basing its holding that no manifest injustice occurred on a retributivist justification that Johnson got what he deserved and that violations of judicial technicalities do not change that.

The Supreme Court of Missouri has previously recognized that manifest injustice exists when a defendant is "sentenced to a punishment greater than the maximum sentence for an offense."[225] Specifically, the court has recognized that a trial court's failure to follow the procedural requirements of section 558.021.2 results in prejudice when such failure results in a defendant "being subjected to a much longer sentence than that recommended by a jury of his peers."[226] Further, the Supreme Court of Missouri has stated that plain error can be found "if the error was outcome determinative."[227]

The court mistakenly concluded that no manifest injustice resulted from the trial court's failure to comply with the procedural requirements of section 558.021.2 because the trial court's violation was determinative of whether Johnson was sentenced as a predatory sexual offender. Without a predatory sexual offender finding, Johnson would have been entitled to unconditional release after serving a twenty-five-year sentence.[228] In reality, with a predatory sexual offender finding, Johnson was sentenced to life in prison with his first parole eligibility at twenty-five years.[229] The trial court did not find the predicate fact necessary to deem Johnson a predatory sexual offender prior to submission of the case to the jury.[230] Such a finding by the trial court should have prevented Johnson from being sentenced as a predatory sexual offender, regardless of whether the jury subsequently found Johnson guilty of the predicate fact beyond a reasonable doubt.

In finding that no manifest injustice resulted in Johnson's case, the Supreme Court of Missouri emphasized the fact that Johnson waived his statutory right to jury sentencing.[231] The court distinguished Johnson's case from *Teer*, where the court found manifest injustice resulted after a trial judge found a

224. *Id.* at 514 (quoting State v. Severe, 307 S.W.3d 640, 645 (Mo. 2010) (en banc)).

225. *Id.* at 519–20 (Stith, J., dissenting) (quoting *Severe*, 307 S.W.3d at 642); *see also supra* Part III.D.

226. *Johnson*, 524 S.W.3d at 515 (quoting State v. Teer, 275 S.W.3d 258, 262 (Mo. 2009) (en banc)).

227. *Id.* (Stith, J., dissenting) (quoting Deck v. State, 68 S.W.3d 418, 427 (Mo. 2002) (en banc)).

228. *Id.*

229. *Id.*

230. *Id.* at 509–10 (majority opinion).

231. *Id.* at 515.

defendant as a predatory sexual offender after the jury had already recommended a sentence, because Johnson was not deprived of the opportunity to receive a more lenient sentence by a jury of his peers, as he had previously waived his right to jury sentencing. This attempted distinction, however, lacks muster. Had the trial judge maintained his original determination that Johnson was not a predatory sexual offender prior to submission of the case to the jury, the judge and the jury would have come out differently on the issue of whether Johnson should be deemed a predatory sexual offender.[232]

The consequence of the judge and jury's disagreement would have been that Johnson escaped being sentenced as a predatory sexual offender, as both the judge and the jury must find the defendant to qualify as a predatory sexual offender in order for sentencing enhancement to apply.[233] By agreeing to reconsider the government's request that Johnson be sentenced as a predatory sexual offender after the jury verdicts, which convicted Johnson of twelve of thirteen sexual felony counts, had been released, it is clear that the trial judge did not make the predicate findings required by section 558.021.2 independently from the jury. Indeed, it appears clear that the trial judge conveniently changed his mind after learning that the jury convicted Johnson.

VI. CONCLUSION

Because declaring section 566.125.5(3) unconstitutional when applied to acts that form the bases for the current charges would have permitted sexual offenders who, like Johnson, allegedly committed sexual acts against multiple victims to escape the wrath of enhanced sentencing, the approach taken by the court was likely motivated by its desire to avoid this policy result. It is possible that the Supreme Court of Missouri's approach in *Johnson* was motivated by the tough-on-crime mentality that has been sweeping the nation since the early 1970s and 1980s. Regardless of the policy justification, this approach failed to adhere to the *Alleyne* precedent and compromised Johnson's Sixth Amendment right.

Despite the *Alleyne* precedent, analysis of the majority's decision in *Johnson* indicates that the court attempted to circumvent the requirement that the jury – and the jury alone – find all facts that increase a defendant's mandatory minimum sentence by requiring that the trial judge additionally find the requisite facts necessary for sentence enhancement. On the other hand, had the Supreme Court of Missouri properly applied the precedent of *Alleyne*, then, for the reasons outlined above,[234] it would have found the statute unconstitutional when applied to acts that serve as the bases for the current charges.

In *Johnson*, the Supreme Court of Missouri defied the United States Supreme Court's clear holdings of *Alleyne* and *Hurst* in interpreting the Sixth

232. *Id.* at 509.
233. *Id*. at 521–22 (Stith, J., dissenting).
234. *See supra* Part V.A & B.

Amendment jury-trial guarantee, as well as its duty to declare the statute unconstitutional when applied to acts that form the bases for the current charges. By failing to properly enforce and adhere to the procedural requirements delineated in section 558.021.2, the Supreme Court of Missouri took part in the exact type of "judicial emasculation of the legislative direction"[235] that the court itself previously warned against.

The Supreme Court of Missouri's faulty application of the *Alleyne* precedent is concerning, but the court's express excusal of the trial court's disregard for the statutory procedure mandated by section 558.021.2 is possibly more concerning. The sentencing scheme presented by the predatory sexual offender statutes is clearly incompatible with *Alleyne* precedent. Although the scheme itself cannot be remedied by the Supreme Court of Missouri, it can and should be identified as unconstitutional as applied to currently charged acts, as in Johnson's case, so that justice may be served through legislative revision of the statute. The Supreme Court of Missouri's decision in *Johnson* sends a clear message to the lower courts in Missouri that it is okay, and even encouraged, to violate statutory procedural mandates. By endorsing such conduct, the Supreme Court of Missouri sends an even clearer message that it is okay for the courts to sidestep the interests of justice in favor of engaging in a form of self-help correction of perceived errors in legislative enactments.

235. *Johnson*, 524 S.W.3d at 520 (Stith, J., dissenting) (quoting State v. Teer, 275 S.W.3d 258, 262 (Mo. 2009) (en banc)).