No. 17-8599

IN THE
Supreme Court of the United States

LANCE SHOCKLEY,
Petitioner,
v.

CINDY GRIFFITH, WARDEN,
POTOSI CORRECTIONAL CENTER,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Missouri

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT

Respondent makes four main arguments why the petition for writ of certiorari should be denied. Each of Respondent's arguments is without merit.

I. The Court Has Jurisdiction

Respondent speculates that the Missouri Supreme Court denied Petitioner's habeas petition on state procedural grounds, *i.e.*, that the habeas petition was procedurally barred because a habeas petition may not raise claims already rejected in earlier proceedings (BIO at 6-7). Respondent asserts that because the summary denial rested on an independent and adequate state law procedural ground, this Court lacks jurisdiction (BIO at 6).

The record does not support Respondent's speculation. Respondent overlooks that before Petitioner filed a habeas petition, he asked the Missouri Supreme Court to recall its mandate based on *Hurst v. Florida*, 136 S.Ct. 616 (2016). Petitioner argued that Missouri's deadlock procedure mirrored the procedure found unconstitutional in *Hurst*, in that the trial court imposed a death sentence based on its own extra layer of findings (Pet. At 5-6; Recall Mandate, p. 1-2, 27-29, 35, 49-50). The Missouri Supreme Court denied the motion to recall the mandate "without prejudice to filing a petition for writ of habeas corpus" (Pet. App'x. B). If Petitioner's *Hurst* claim was procedurally barred as Respondent speculates, the Missouri Supreme Court, knowing the nature of Petitioner's claims, would not have invited Petitioner to file a habeas petition. Thus, good reason exists to doubt that the

Missouri Supreme Court's decision rested on any independent and adequate state grounds. *Coleman v. Thompson,* 501 U.S. 722, 738 (1991).

As such, the summary denial was a presumptive ruling on the merits. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011); see also *Kernan v. Hinjosa*, 136 S.Ct. 1603, 1606 (2016) ("Containing no statement to the contrary, the Supreme Court of California's summary denial of Hinjosa's petition was therefore on the merits."). Because the state court did not clearly express its reliance on an adequate and independent state-law ground, and indeed invited Petitioner to file a state habeas petition, this Court may address the federal issues raised in Petitioner's state habeas petition. *Harris v. Reed*, 489 U.S. 255, 262–63 (1989) (citing *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

II. Petitioner is Entitled to Relief Under *Hurst*

Next, citing a footnote from a case about state water regulation, Respondent argues that this Court "cannot overturn a court's interpretation of its own law" (BIO at 8, citing *Montana v. Wyoming*, 563 U.S. 368, 377 n.5 (2011)). By that token, however, the Court would not have been able to strike down Florida's death penalty statute in *Hurst*. Petitioner's claims here are akin to the claims raised in *Hurst*. Just as the Court had the authority to find that Florida's death penalty statute violated

the Sixth Amendment, the Court may find that Missouri's death penalty statute violated the Sixth, Eighth, or Fourteenth Amendments.

Respondent also argues that the Missouri Supreme Court's decision denying relief was correct because *Hurst* does not apply retroactively to cases on collateral review (BIO at 8). But, as set forth above, the state court's decision was a presumptive merits ruling. *See, e.g.*, *Hinjosa*, 136 S.Ct. at 1606; *Richter*, 562 U.S. at 99; *Harris*, 489 U.S. at 262–63. Because the court reached the merits, it implicitly applied *Hurst* retroactively. Under *Danforth v. Minnesota*, 552 U.S. 264 (2008), the State of Missouri is free to grant greater protection than the federal constitution requires.

To no avail, Respondent next attempts to differentiate Missouri's death penalty procedure from the procedure stuck down in *Hurst*. Respondent argues that in Florida, the jury's findings were merely advisory, the trial court's role was central and singular, and the jury could not make specific factual findings that were binding on the judge (BIO at 9).

But these problems are present under Missouri's deadlock procedure too. In Florida, the jury found at least one statutory aggravating circumstance and weighed the aggravating and mitigating evidence. *Hurst*, 136 S.Ct. at 620, 625; see also 625 (Alito, J., dissenting); *State v. Steele*, 921 So. 2d 538, 545 (Fla. 2005). So too, in Petitioner's case, the jury found at least one statutory aggravating circumstance and weighed the aggravating and mitigating evidence. *State v. Shockley*, 410 S.W.3d 179, 185 (Mo. banc 2013). In both Florida and under Missouri's deadlock procedure, the

court then repeated the steps taken by the jury and imposed a death sentence. *Hurst*, 136 S.Ct. at 625 (Alito, J., dissenting); Mo. Rev. Stat. §565.030.4. In both states, the court was statutorily required to start from scratch, make its own findings, and assess the punishment based on those findings. *Hurst*, 136 S.Ct. at 620; see also 625 (Alito, J., dissenting); Mo. Rev. Stat. §565.030.4. In both states, the jury's findings were not binding. *Hurst*, 136 S.Ct. at 625 (Alito, J., dissenting); Mo. Rev. Stat. §565.030.4.

In both Florida and under Missouri's deadlock procedure, no death sentence was possible without findings by the court. *Hurst*, 136 S.Ct. at 622; *Shockley*, 410 S.W.3d at 198-99; Mo. Rev. Stat. §565.030.4. As the Missouri Supreme Court recognized, Missouri's deadlock procedure mandates "an extra layer of findings that must occur before the court may impose a death sentence." *Shockley*, 410 S.W.3d at 198-99. Just as the Florida trial court played a "central and singular" role in repeating the steps followed by the jurors and making its own findings before a death sentence could be assessed, *Hurst*, 136 S.Ct. at 622, the Missouri trial court had to repeat the jurors' steps and make extra findings before a death sentence could be assessed. *Shockley*, 410 S.W.3d at 198-99; Mo. Rev. Stat. §565.030.4. As in *Hurst*, no death sentence was possible without that extra layer of findings. *Id.*

Any differences in the two states' procedures further prove that Missouri's deadlock procedure violates *Hurst*. While the Florida court was required to give great weight to the jury's findings and sentence recommendation, *Hurst*, 136 S.Ct at 625 (Alito, J., dissenting), the Missouri court was not required to give the jury's findings any weight whatsoever. Mo. Rev. Stat. §565.030.4 (requiring merely that the court

"follow the same procedure" as the jury had). The Missouri jury's findings cannot even be considered "advisory."

Respondent argues that because Missouri's jury instructions now require the jury to answer two interrogatories before the judge assumes the jury's role, no *Hurst* violation occurred (BIO at 10). Through the interrogatories, the jury must list any statutory aggravating circumstance it found beyond a reasonable doubt and must state it did not unanimously find that the mitigating circumstances outweighed the aggravating circumstances. *Shockley*, 410 S.W.3d at 198. Thus, the interrogatories reveal what the jury concluded, in part.[1] But the interrogatories do not cure the underlying problem. The interrogatories do not change the fact that the trial court is statutorily required to start from scratch and make its own findings completely independent of what the jury found. Mo. Rev. Stat. §565.030.4. The judge is not required to give the jury's findings any weight:

> [W]hen the jury deadlocks, the jury's findings simply disappear from the case and the court is to make its own independent findings.... Thus, any presumptions as to what the jury may have found are simply irrelevant. Here, the judgment of death, based on the court's findings, constituted constitutional error.

State v. Whitfield, 107 S.W.3d 253, 271 (Mo. banc 2003). The fact that a reviewing court may see that the jury made certain findings is "irrelevant;" it does not lessen the fact that the actual death sentence was the product of the court's own, independent extra layer of findings. *Shockley*, 410 S.W.3d at 198-99 (court must

[1] As discussed in the petition for writ of certiorari, in the second interrogatory, the jury states that it did not unanimously find that the evidence in mitigation outweighed the evidence in aggravation. Thus, it does not reveal what the jury found, but only showed what the jury did not find. (Pet. at 26-27).

make "extra layer of findings" before death sentence may be imposed); see also *Whitfield*, 107 S.W.3d at 270 (death sentence imposed by trial court after the jury deadlocked was based on the court's findings of fact, not the jury's).

Respondent argues that since *Whitfield*, the Missouri Supreme Court has held that the jury's findings do not disappear and that the trial court is bound by those findings (BIO at 10, citing *Shockley*, 410 S.W.3d at 199 fn. 11; *State v. McLaughlin*, 265 S.W.3d 257, 264 (Mo. banc 2008)). But the cases do not go so far. They neither deny that the jury's findings disappear, nor hold that the trial court is bound by the jury's findings; indeed, the Missouri Supreme Court held that the court may reconsider the facts. *McLaughlin*, 265 S.W.3d at 264. The trial court cannot be bound by the jury's findings because the statute itself requires the trial court to repeat all the steps followed by the jurors. Mo. Rev. Stat. §565.030.4. The trial court is statutorily required to make its own factual findings as to the existence of aggravating circumstances and the weight of the aggravating and mitigating evidence. Mo. Rev. Stat. §565.030.4. It makes no sense that the trial court would be bound by the jury's findings when the statute requires the court to start from scratch and make its own findings before assessing the sentence.

Respondent's argument that the court is bound by the jury's findings is also refuted by the Missouri Supreme Court's recognition that the statute mandates "an extra layer of findings that must occur before the court may impose a death sentence." *Shockley*, 410 S.W.3d at 198-99. Any death sentence after jury deadlock is based on the court's "extra layer of findings," not the jury's findings. *Whitfield*, 107 S.W.3d at

270 ("the judge entered a judgment of death based on his own findings rather than those of the jury").

III. Respondent's Challenge to Petitioner's Eighth Amendment Claim is Contrary to Five Decades of this Court's Capital Jurisprudence

Respondent's only challenge to Petitioner's Eighth Amendment claim is to advance a proposition that this Court has rejected since at least as early as *Furman v. Georgia*, 408 U.S. 238 (1972). Respondent suggests that any "prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed." (BIO at 11-12) (citing *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) (quoting *Gardner v. Florida*, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting)). In *Ring*, Justice Scalia quoted Justice Rehnquist's *Gardner* dissent to support his position that the line of cases starting with *Furman* "had no proper foundation in the Constitution." *Ring*, 536 U.S. at 610 (Scalia, J., concurring). Over the past five decades, Justice Scalia's view has not been the position of the Court; instead, the Court has consistently held that the Eighth Amendment applies to the procedures by which the death penalty is imposed. *Welch v. United States*, 136 S. Ct. 1257, 1266 (2016) ("the Court has adopted certain rules that regulate capital sentencing procedures in order to enforce the substantive guarantees of the Eighth Amendment"); *Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014) (Florida's procedure for determining whether defendant was intellectually disabled violated Eighth Amendment); *Ring*, 536 U.S. at 614 (Breyer, J., concurring) ("This Court has held that the Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty"); *Furman*, 408 U.S. at 274

(Eighth Amendment requires that the death penalty not be imposed arbitrarily or capriciously) (Brennan, J., concurring). To follow Respondent's argument, the Court would need to overturn its capital jurisprudence from the past five decades.

Respondent ignores the fact that the overwhelming majority of death penalty states, as well as the federal government, mandate that any death sentence be imposed by a jury unanimously. (See Pet. at 14-16; Pet. Appx. D) Instead of addressing the Eighth Amendment's requirement that death penalty procedures comport with evolving standards of decency, as shown primarily through the legislation of the various states, Respondent insists that, for sentencing purposes, a death case should be treated no differently than a theft case or any other crime (BIO at 11). This Court has long held that death is different, in both its severity and finality, from any other punishment. See, *e.g., Gardner,* 430 U.S. at 357; *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976) (plurality opinion); *Gregg v. Georgia,* 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); see also *Furman,* 408 U.S. at 306 (Stewart, J., concurring). Because of those differences, death penalty cases have a heightened need for reliability, *Woodson*, 428 U.S. at 305, and death sentences face a correspondingly greater degree of scrutiny. *California v. Ramos*, 463 U.S. 992, 998-99 (1983).

In a capital case, jury assessment of sentence is crucial so the resulting decision reflects the moral conscience of the community, without which the sentence lacks moral and constitutional legitimacy. *Ring*, 536 U.S. at 615-16 (Breyer, J., concurring) (internal quotations and citations omitted) (*quoting Gregg*, 428 U.S. at 184;

Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)); see also *Spaziano v. Florida*, 468 U.S. 447, 482 (1984) (Stevens, J, dissenting) (majority opinion overturned in relevant part by *Hurst*, 136 S.Ct. at 623). Jury assessment of sentence in a capital case not only enhances the appearance of fairness, but also the actual fairness and reliability of the sentencing determination and thus ensures due process under the Fourteenth Amendment. See, e.g., *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) ("substantial doubt" exists "about the reliability and appropriate representation of [sentencing] panels smaller than six"); *Herring v. New York*, 422 U.S. 853, 863 n. 15 (1975). Judicial assessment of sentence risks the introduction of extraneous factors, such as the judge's chances for re-election, into the sentencing determination. As demonstrated in the Brief of *Amici Curiae* Retired Missouri Judges and Jurists, judicial sentencing after deadlock is badly skewed in favor of death, with judges opting for death at a much higher rate than juries. (Amici at 6-7).

IV. Respondent Fails to Differentiate the Opinions of the Florida and Delaware Supreme Courts

Respondent argues that no conflict exists between the opinions of the Missouri Supreme Court, on one hand, and the Florida and Delaware Supreme Courts, on the other (BIO at 12). In doing so, Respondent selectively points to one part of the Florida opinion, while ignoring another, and suggests a distinction between the Missouri and Delaware statutes that does not truly exist.

Respondent suggests that in Florida, under *Hurst v. State*, 202 So.3d 40 (Fla. 2016), the judge, not the jury, decides whether the jury lives or dies (BIO at 12). It is true that the trial court is the party that ultimately imposes a sentence, but the real

issue is whether that sentence was one that the jury first assessed. Despite Respondent's contention, the Florida Supreme Court specifically held that a trial court cannot consider imposing a death sentence unless the jury first unanimously decided that a death sentence was appropriate:

> [B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Id. at 57.

Respondent also argues that *Hurst v. State* was decided on state law grounds (BIO at 12). The Florida Supreme Court held that, "the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury—not the judge—must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty." 202 So.3d at 53 (relying on *Hurst*, 136 S.Ct. 621; *Ring*, 536 U.S. 584; and *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). Thus, the Florida Supreme Court held that the finding of aggravating factors, whether the aggravating factors are sufficient, whether the aggravating factors outweigh the mitigating factors, and whether a death sentence is to be imposed, must be found by the jury unanimously. *Hurst v. State*, 202 So.3d at 53. Although the Florida court initially stated that the unanimity requirement was founded in part on state law, see *id.*, it also expressly held that unanimity was required by the Eighth Amendment. *Id.* at 59-62.

Respondent also unsuccessfully attempts to differentiate the Delaware Supreme Court's opinion in *Rauf v. State*, 145 A.3d 430 (Del. 2016) (BIO at 13). Respondent suggests that while the weighing of the aggravating and mitigating circumstances is a required step for imposing a death sentence in Delaware, it is not a required step for imposing a death sentence in Missouri (BIO at 13). This is flat wrong. In Missouri, no death sentence can be imposed without a finding that the jurors did not unanimously find that the mitigating evidence outweighed the aggravating evidence. See, *e.g.*, *Shockley*, 410 S.W.3d at 198; Mo. Rev. Stat. §565.030.4. If the jury finds that the mitigating evidence outweighs the aggravating evidence, the sentence must be life without parole. *Shockley*, 410 S.W.3d at 198; Mo. Rev. Stat. §565.030.4. Missouri's death sentencing statute, like Delaware's, mandates the weighing of aggravating and mitigating factors as a prerequisite to imposition of the death penalty. Respondent is wrong to attempt to differentiate the two states on this basis.

CONCLUSION

Petitioner respectfully requests that the Court grant his petition for writ of certiorari.

Respectfully submitted,

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June 5, 2018