*** CAPITAL CASE ***

No. 18-5278

IN THE

Supreme Court of the United States

CHRISTOPHER COLLINGS, *Petitioner*,

v.

STATE OF MISSOURI, *Respondent.*

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

REPLY BRIEF FOR PETITIONER

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Missouri does not dispute the existence of the significant expert scientific evidence showing that Mr. Collings was under "acute significant alcohol intoxication" resulting in aggressive brain functioning impairments on the night of the crime. (App. 11a). Nor does Missouri dispute that Mr. Collings may have been in a state of "blackout," without working memory, that his ability to process and comprehend events was significantly compromised, and that his jury was instructed that they could not consider any evidence of his severe intoxication. (App. 11a).

Missouri argues instead that this issue was not preserved or addressed below (BIO 7-10), that there is no split of authority upon whether capital juries may consider evidence of voluntary intoxication upon a defendant's mental state (BIO 10-13), and that Missouri capital juries may consider voluntary intoxication on the issue of punishment. (BIO 13-17). These arguments are factually and legally incorrect.

I. The Supreme Court of Missouri addressed the question presented

Missouri argues that Mr. Collings' Eighth Amendment claim is not properly before this Court, asserting that neither the motion court nor the Supreme Court of Missouri addressed the federal question. (BIO 7). Contrary to this assertion, both the Due Process and Eighth Amendment claims were pleaded in both the Amended Motion before the state motion court and in Mr. Collings' brief to the Supreme Court of Missouri. (See Pet. Post-Conviction Legal File, p. 15, and Pet. App. Br. 21). Specifically, in his Amended Motion, Mr. Collings asserted the following:

- "Because RSMo Section 562.076 and the guilt phase instruction on voluntary intoxication prevented the jury from considering evidence on an essential element of the offense of murder in the first degree, Movant was denied due process and unlawfully subjected to ***cruel and unusual punishment***."

(PCR LF 15) (emphasis added);

- "Because of the voluntary intoxication statute in Missouri and the corresponding jury instruction, the jury in Mr. Collings' case was not allowed to consider voluntary intoxication as a defense to all of the elements of the charged offense of first degree murder."

(PCR LF 16);

- "Because Missouri's Voluntary Intoxication Statute (RSMo 562.076) and the accompanying instruction violate due process, the application of that statute to his case and the reading of that instruction at trial resulted in a violation of Christopher Collings' due process rights and ***exposed him to cruel and unusual punishment prohibited by the Eighth Amendment*** to the U.S. Constitution and Article 1, Section 21 of the Missouri Constitution."

(PCR LF 18) (emphasis added).

Clearly, the Eighth Amendment claim was raised in the motion court, despite Missouri's protests to the contrary. The motion court denied Mr. Collings' claims, relying solely on *Montana v. Egelhoff*, 518, U.S.37 (1996), and noting that,

"[i]n 20 years, however the United States Supreme Court has yet to re-examined (sic) this long-standing legal principle. In addition, none of the four justices who dissented in *Egelhoff*, are presently sitting on the Supreme Court." (PCR LF 181-182).

Further, Mr. Collings' Due Process and Eighth Amendment claims were raised in his brief to the Supreme Court of Missouri. (Pet. App. Br. 21). While Missouri's Brief in Opposition intentionally omits, through an ellipsis, the reference to the Eighth Amendment in Mr. Collings' appellate brief, a simple review of his brief shows inclusion of the Eighth Amendment claim. Specifically, Mr. Collings' brief alleged:

> "The motion court clearly erred in denying Christopher's claim *§562.076* and its corresponding jury instruction, *MAI-CR3d 310.50*, unconstitutionally prohibit Christopher's right to present a defense and, alternatively, trial counsel were ineffective in failing to present evidence to challenge the statute's and instruction's constitutionality because these rulings denied Christopher effective assistance of counsel, due process, and ***freedom from cruel and unusual punishment***, U.S. Const. Amends. VI, ***VIII,*** and XIV, in that the ***Federal Constitution*** requires the jury find beyond a reasonable doubt that Christopher, a capital defendant, personally acted with a knowing and deliberate mental state in causing the death of another person before he can be convicted and death-sentenced, and the jury

> cannot do so without considering Christopher's actual *mens rea* which likely was affected by intoxication[.]"

(Pet. App. Br. 21) (emphasis added).

While Missouri argues that the Supreme Court of Missouri should have rejected Mr. Collings' claim as violating procedural briefing rules, that Court clearly had a chance to review Mr. Collings' compliance with procedural briefing rules and made no mention whatsoever that his brief violated any such rule.

Finally, the Supreme Court of Missouri addressed the federal question raised in the Petition, specifically denying Mr. Collings' claim that the voluntary intoxication statute and its corresponding instruction violate the Eighth and Fourteenth Amendments. (App. 8a-15a). In relying on *Montana v. Egelhoff*, *supra*, the Supreme Court of Missouri specifically noted that *Egelhoff* itself cited that the policy behind the common law rule of disallowing consideration of voluntary intoxication, "has the effect of increasing the punishment for all unlawful acts committed in that state," and "serves as a specific deterrent[.]" *Collings v. State*, 543 S.W.3d 1, 22, FN7 (Mo. banc 2018). The Court specifically cited *State v. Roberts*, 948 S.W.2d 577 (Mo. banc 1997), showing that there is no distinction in disallowing voluntary intoxication evidence in capital cases.

II. A split of authority exists among the 31 death penalty states (19-12) regarding consideration of voluntary intoxication on the mental state.

Of 31 death penalty states, 19 allow consideration on specific intent and 12 do not:

31 DEATH PENALTY STATES

Vol. Intox. CAN negate specific intent (19)	Vol. Intox. CANNOT negate specific intent (12)
ALABAMA Ala. Code 1975 § 13A-3-2 *Jackson v. State*, 791 So.2d 979 (Ala. Crim. App. 2000) (Question whether a defendant's intoxication rendered it impossible for him to form particular mental state is a question for the jury.)	ARIZONA Ariz. Rev. Stat. Ann. § 13-503 *State v. Payne*, 314 P.3d 1239 (Ariz. 2013) (Statute prohibits jury from using voluntary intoxication to negate intent; jury could not consider voluntary intoxication as a basis for concluding that defendant lacked state of mind for aggravating circumstance.)
CALIFORNIA Cal. Penal Code § 29.4(b) *People v. Berg*, 23 Cal. App. 5th 959 (Cal. App. 2018) (Evidence of voluntary intoxication admissible on whether defendant actually formed required specific intent, when specific intent crime charged.)	ARKANSAS Ark. Code Ann. § 5-2-207 *Flowers v. State*, 370 S.W.3d 228 (Ark. 2010) (Voluntary intoxication is not a defense to any crime in Arkansas.)
COLORADO C.R.S. § 18–3–102(1)(a) *People v. Miller*, 113 P.3d 743 (Colo. 2005) (Evidence of voluntary intoxication is admissible to counter the specific intent element of first-degree murder.)	FLORIDA Fla. Stat. § 775.051 *Carter v. State*, 980 So.2d 473 (Fla. 2008) (Voluntary intoxication is not a defense to any offense and is not admissible to show lack of specific intent)
KANSAS K.S.A. 2017 Supp. 21-5205(b) *State v. Kidd*, 265 P.3d 1165 (Kan. 2011) (Voluntary intoxication defense may be used to negate the intent element of a specific intent crime.)	GEORGIA O.C.G.A. §16–3–4 *Foster v. State*, 374 S.E.2d 188 (Ga. 1988) (Inability to distinguish between right and wrong is no defense if inability is consequence of voluntary intoxication.)
KENTUCKY Ky. Rev. Stat. Ann. § 501.080 *Nichols v. Com.*, 142 S.W.3d 683 (Ky. 2004) ("[w]henever a defendant adduces sufficient evidence of voluntary intoxication, the defendant is entitled to an instruction on the defense of intoxication.")	IDAHO I.C.A. § 18–116 *State v. Kelly*, 353 P.3d 1096 (Ct. App. 2015) (Jury may not consider evidence of Defendant's voluntary intoxication in determining whether he possessed mental state required for conviction.)

LOUISIANA La. R.S. 14:15(2) *State v. Mickelson*, 149 So. 3d 178 (La. 2014) (Voluntary intoxication will not excuse a crime, but it is a defense to a specific intent offense if the circumstances demonstrate that intoxication precluded formation of the requisite intent.)	INDIANA Indiana Code §35–41–2–5 *Thomas v. State*, 61 N.E.3d 1198 (Ind. Ct. App. 2016) (Intoxication is not a defense in a prosecution and may not be taken into consideration in determining the existence of a mental state that is an element of the offense.)
NEBRASKA *State v. Dubray*, 854 N.W.2d 584 (Neb. 2014) (Under Nebraska common law, intoxication is not a justification or excuse for a crime, but it may be considered to negate specific intent.)	MISSISSIPPI *Evans v. State*, 226 So.3d 1 (Miss 2017) ("[t]he law in Mississippi is clear that voluntary intoxication is not a defense to a specific-intent crime.")
NEVADA Nev. Rev. Stat. § 193.220 *Nevius v. State*, 699 P.2d 1053 (Nev. 1985) (Voluntary intoxication may negate specific intent, and an accused is entitled to an instruction to that effect if there is some evidence in support of his defense theory of intoxication.)	MISSOURI Mo. Rev. Stat. § 562.076.3 *State v. Roberts*, 948 S.W.2d 577 (Mo. banc 1997). ([T]estimony of voluntary intoxication is not admissible to negate the mental state of an offense.)
NEW HAMPSHIRE N.H. Rev. Stat. § 626:4 (Intoxication is not, as such, a defense. The defendant may, however, introduce evidence of intoxication whenever it is relevant to negate an element of the offense charged.)	MONTANA Mont. Code Ann. § 45-2-203 (An intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense.)
NORTH CAROLINA *State v. Walls*, 463 S.E.2d 738 (NC 1995) (defense may "produce substantial evidence which would support a conclusion that he was so intoxicated that he could not form a deliberate and premeditated intent to kill.")	OHIO Ohio Rev. Code Ann. § 2901.21(E) *State v. Sekulic*, 92 N.E.3d 234 (Ohio Ct. App. 2017) (Lack of capacity to form intent to commit a crime due to self-induced intoxication no longer a defense where a mental state is an element.)
OKLAHOMA Okla. Stat. Ann. tit. 21, § 153 (voluntary intoxication not a defense to criminal culpability, except where the accused was so intoxicated that his mental abilities were totally overcome and it became impossible for him to form criminal intent.)	SOUTH CAROLINA *State v. Vaughn*, 232 S.E.2d 328 (SC 1977) (Voluntary intoxication, where it has not produced permanent insanity, is never an excuse for or a defense to crime, regardless of whether the intent involved be general or specific.)

OREGON ORS 161.125(1) *State v. Smith*, 490 P.2d 1262 (Ore.1971) ("[V]oluntary intoxication is not a complete defense; however, jury might find that defendant was so intoxicated that he did not have the intent to commit the crime.")	TEXAS Tex. Pen. Code § 8.04(a) *Davis v. State*, 313 S.W.3d 317 (Tex. Crim. App. 2010) "§ 8.04(a) bars the use of evidence of voluntary intoxication to negate the culpable mental state of a crime."
PENNSYLVANIA 18 Pa. C.S. § 308 *Holston v. Overmyer*, 2018 WL 3756640, (M.D. Pa. Aug. 8, 2018) (Evidence of defendant's intoxication or drugged condition may be offered whenever relevant to reduce murder from higher to lower degree.)	
SOUTH DAKOTA S.D. Cod. Laws § 22-5-5 *State v. Kills Small*, 269 N.W.2d 771 (S.D. 1978) (Voluntary intoxication is not a defense to any criminal act, but can be considered in determining whether the defendant possessed the necessary specific mens).	
TENNESSEE *Jones v. Parris*, 2018 WL 4016447 (W.D. Tenn. Aug. 22, 2018) ("[I]ntoxication of a defendant does not justify the crime," but "its existence may negate a finding of specific intent.")	
UTAH Utah Code Ann. § 76-2-306 *State v. Thompson*, 405 P.3d 892 (Utah 2017) (Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense)	
VIRGINIA *Tisdale v. Com.*, 778 S.E.2d 554 (App.2015) (Defendant may negate the specific intent requisite for capital or first-degree murder by showing he was so greatly intoxicated as to be incapable of deliberation or premeditation, and thereby reduce the conviction from first-degree murder to second-degree murder.)	

WASHINGTON Wash. Rev. Code Ann. § 9A.16.090 *State v. Gill*, 200 Wash. App. 1019 (Wa. App. 2017) (Voluntary intoxication "can render the defendant incapable of forming the specific intent necessary for conviction of the crime.")	
WYOMING Wyo. Stat. Ann. § 6-1-202 *King v. State*, 40 P.3d 700 (Wyo. 2002) (Defendant entitled to have jury instructed that voluntary intoxication may be considered to negate the requisite specific intent.)	

Missouri asserts that there is no division of authority on the question presented (BIO 10-13). As shown by the above chart, there is a clear split among the 31 death penalty states upon the question of whether a jury may consider evidence of a defendant's intoxication at the time of the crime in evaluating whether he deliberated – i.e., had the specific intent – at the time of the crime. Missouri asserts that this is solely a matter of state statutory law, and that there is no true conflict on the question of federal law presented in the petition (BIO 12-13).

Missouri wholly misunderstands the question. As this Court has made clear, the Eighth Amendment requires that, to be sentenced to death, the defendant must be found beyond a reasonable doubt to have personally acted knowingly and with a deliberative mental state in causing the death; the death penalty is not per se excessive "when a life has been taken deliberately by the offender." *Gregg v. Georgia*, 428 U.S. 152, 187 (1976). The division in the States, illustrated above, shows that more than half of the

death penalty states allow capital juries to the consider evidence of "voluntary intoxication" when determining whether the defendant acted knowingly and with a deliberative mental state in cause the death. The remaining 12 states, Missouri included, do not allow juries to consider such evidence. In these states there exists a statutory presumption that the defendant has acted as a reasonable, non-intoxicated person. In fact, juries in these states are specifically instructed that they may not consider any evidence of voluntary intoxication on the defendant's mental state. (See MAI-CR3d 310.50).

But this Court insists that "[t]he focus must be on *his* culpability…for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,'" *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)), "which means that we must focus on 'relevant facets of the character and record of the individual offender.'" *Id.* (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). In the 19 death penalty states that allow consideration of such evidence on the defendant's culpable mental state, their voluntary intoxication statues do not violate federal Eighth Amendment law because their capital juries may fully consider evidence of intoxication on the defendant's "deliberative mental state." The remaining statutes, however, preclude such consideration. The question is whether states like Missouri comply with federal capital jurisprudence, when their statues preclude consideration of voluntary intoxication on the defendant's deliberative mental state.

III. Missouri capital juries cannot adequately consider voluntary intoxication evidence on the issue of punishment, when they previously have been instructed to ignore it.

Missouri concedes that, in the guilt phase of a first-degree murder trial, the defendant may not rely on voluntary intoxication to negate the intent of deliberation. (BIO 13) (citing Rev. Stat. Mo. § 562.076 (2000); MAI-CR3d 310.50). However, Missouri then argues that it is sufficient to allow the jury to consider voluntary intoxication during the penalty phase of the capital trial. But it is unclear as to what level of proof would be required to establish such mitigating instruction, *State v. Johnston*, 957 S.W.2d 734, 752 (Mo. banc 1997) (Insufficient evidence to show that his evidence showed that his consumption of alcohol on the night he beat his wife to death impaired his ability to appreciate the wrongfulness of his conduct and to conform his conduct to the law).

Further, having already been instructed not consider voluntary intoxication on the question of the defendant's mental state, without being told to ignore such guilt phase instructions, reasonable jurors would clearly have understood that they are prevented from considering evidence of the defendant's intoxication in mitigation. *See State v. Stone*, 567 S.E.2d 244, 248 (SC 2002). And if the effect of this confusion is to prohibit the jury from considering the mitigating circumstance of Mr. Collings' intoxication at the time of the crime, it violated the Eighth Amendment. *See Payne v. Tennessee*, 501 U.S. 808, 822 (1991), *citing Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (Eighth

Amendment prohibits state from limiting sentencer's consideration of "any relevant mitigating evidence" which could cause the jury to decline to impose the death penalty).

Finally, the mitigating instruction that Missouri proposes as a panacea for initially excluding voluntary intoxication evidence from the jury, does not provide the remedy it suggests. As the Supreme Court of Missouri has explained, "the submission of a statutory mitigating circumstance necessarily presumes the mental capacity of the defendant was such that he knowingly caused a victim's death after deliberation." *State v. Johnson*, 968 S.W.2d 686, 702 (Mo. banc 1998). "Thus, the statutory mitigating circumstance concerning the substantial impairment of a defendant's ability 'to appreciate the criminality of his conduct or to conform his conduct to the requirements of law' speaks directly to a mental disorder that falls short of a mental disease or defect and, consequently, falls short of a defense to murder in the first degree." *Id.*

This Court's Eighth Amendment jurisprudence, however, instructs that the defendant's mental state at the time of the crime is a "circumstance of the particular offense" to be considered in determining the appropriate penalty, *Woodson*, 428 U.S. at 304, and a "critical facet of the individualized determination of culpability required in capital cases, *Tison v. Arizona*, 481 U.S. 137, 156 (1987). The Supreme Court of Missouri, itself, acknowledges that the statutory mitigator, suggested by Respondent as a cure-all for the Eighth Amendment violation, is not adequate for the consideration of a defendant's actual, subjective mental state. Such voluntary intoxication evidence must be allowed during both phases of the capital trial – as 19 states allow – to satisfy the Eighth Amendment. This Court must resolve this split; this case is the perfect vehicle to do so.

CONCLUSION

Wherefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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