No. 19-967

IN THE

Supreme Court of the United States

CRAIG M. WOOD,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

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

REPLY BRIEF FOR PETITIONER

Rosemary Percival
OFFICE OF THE MISSOURI
STATE PUBLIC DEFENDER
920 Main St.
Suite 500
Kansas City, MO 64105
(816) 889-7699

Tejinder Singh
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tsingh@goldsteinrussell.com

Counsel for Petitioner

CAPITAL CASE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

REPLY BRIEF FOR PETITIONER

The question presented is "[w]hether the Constitution requires that a jury, rather than a judge, weigh the aggravating and mitigating circumstances to determine whether a defendant may be sentenced to death." Pet. i. The question was deliberately phrased broadly enough to encompass two distinct arguments petitioner made below: First, that the Sixth Amendment requires the jury to conduct weighing under the line of cases including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016); and second, that the Eighth Amendment requires the same result for the reasons stated in Justice Breyer's concurrences in *Ring* and *Hurst*, *i.e.*, that capital punishment is principally about retribution, and that a jury should be the one to make such value judgments. *See Ring*, 536 U.S. at 614 (Breyer, J., concurring in the judgment).

After the petition was filed, this Court decided *McKinney v. Arizona*, 140 S. Ct. 702 (2020), holding that if a capital sentence is found to be invalid because the sentencing court failed to properly consider mitigating evidence in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), an appellate court considering the matter on collateral review could re-weigh the aggravating and mitigating circumstances to uphold the sentence, per *Clemons v. Mississippi*, 494 U.S. 738 (1990). The Court rejected the argument that *Ring* and *Hurst* had overruled *Clemons*, stating in the process that the Sixth Amendment does not require a jury to weigh aggravating and mitigating circumstances. *See McKinney*, 140 S. Ct. at 707.

The brief in opposition (Opp.) emphasizes *McKinney*, arguing that it definitively resolved the Sixth Amendment issue in this case. Opp. 1, 5-6. Because of the differences in the procedural posture (*McKinney* being on collateral review, and considering only the propriety of appellate reweighing, as opposed to initial sentencing), that statement is not clearly correct. The petitioner in *McKinney* argued that a court conducting a resentencing must apply current law, and that correction of an *Eddings* error requires resentencing. The underlying question of what the Sixth Amendment requires during the initial sentencing was not front-and-center. And indeed, the Court in *McKinney* stressed that the issue before it was "narrow"—perhaps to avoid prejudicing cases like this one. 140 S. Ct. at 706. For the reasons stated in the petition, the better reading of *Ring* and *Hurst* is that they do not permit a sentencing scheme like Missouri's—which allows a judge to sentence a defendant to death after a jury deadlock. But assuming *arguendo* that *McKinney* did resolve the Sixth Amendment issue (or could be extended to do so), that still leaves the Eighth Amendment question on the table.

Analytically, the Eighth Amendment issue turns on a different axis than the Sixth Amendment issue. While the Sixth Amendment inquiry focuses principally on whether weighing aggravating and mitigating circumstances constitutes a factual inquiry that could increase the defendant's sentence, the Eighth Amendment question is about the jury's role as the voice for the conscience of the community in capital cases. *See* Pet. 30-31 (collecting cases). That role matters whether the weighing step is a factual inquiry or a value judgment—indeed, if respondent and the court

below are correct that the weighing step is about values or mercy, then the jury is by far the better decision-maker. Moreover, while Sixth Amendment rules apply regardless of the type of sentencing (capital or otherwise), Eighth Amendment cases have long recognized that death is different, and that capital cases accordingly require unique procedural safeguards. *See, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) ("This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'") (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)); *see also Woodson v. North Carolina*, 428 U.S. 280, 287, 303-04 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

Respondent says almost nothing about the Eighth Amendment issue, addressing it in a single paragraph. Opp. 14. Respondent argues first that petitioner did not raise this issue "as a separate ground." *Ibid*. It is unclear what that means, but there is no doubt that the Eighth Amendment argument is properly before the Court. It was preserved below, Pet. App. 41a-42a, included within the question presented (Pet. 4), discussed in the petition (at 4, 9, 24-25, 30-33), and would be outcome-determinative if the Court decides it in petitioner's favor. Indeed, respondent does not argue otherwise.

Respondent argues next that the Eighth Amendment is only about the substance of punishments, and not about procedure. Opp. 14. That is incorrect. In *Ramos*, the Court said the opposite:

> In ensuring that the death penalty is not meted out arbitrarily or capriciously, the

> Court's principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty.

463 U.S. at 999. And in *Caldwell*, the Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29. The Court noted that "many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." *Id*. at 329 (collecting cases). That is exactly the sort of procedural concern implicated by this case: juries in Missouri are told that if they do not agree upon a sentence, the judge will choose for them—and that assurance may make an ambivalent jury more likely both to find aggravating factors and to kick the can to the judge.

Independently, respondent's argument obscures the core of the issue. Line-drawing between substance and procedure does not matter because the Eighth Amendment's substantive requirements go hand-in-glove with procedural safeguards. For example, the Eighth Amendment prohibits the execution of the mentally incompetent. *See Ford v. Wainwright*, 477 U.S. 399, 401 (1986). That guarantee would be meaningless without competency hearings. The Eighth Amendment also prohibits death sentences absent

consideration of mitigating evidence. *See Eddings*, 455 U.S. at 113-15. And it prohibits sentencing procedures that minimize the jury's sense of the importance of its role. *See Caldwell*, 472 U.S. at 329-30. Taking these propositions together, petitioner's contention is that the jury must consider mitigating circumstances in the first instance, and that—at a minimum—a judge should not have the power to choose death when, as here, the jury does not.

Respondent's final contention about the Eighth Amendment is that this Court rejected petitioner's argument in *Kansas v. Carr*, 136 S. Ct. 633 (2016). Opp. 14. That is incorrect. In *Carr*, the question was whether the Eighth Amendment requires capital-sentencing courts to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt. 136 S. Ct. at 642. The Court held that the answer was "no," in part, because it was difficult "to apply a standard of proof to the mitigating-factor determination." *Ibid*. That is so because "[w]hether mitigation exists . . . is largely a judgment call (or perhaps a value call)," and whether mitigating circumstances outweigh aggravating ones "is mostly a question of mercy." *Ibid*. While that language may be relevant to the Sixth Amendment issue in this case, which focuses in part on whether the outcome of the weighing step is a factual finding, it has little to say about the Eighth Amendment argument, which turns on different considerations altogether. Indeed, as explained above, the value-laden nature of the weighing step is precisely what makes it particularly well-suited for a jury.

Although the Eighth Amendment issue has not produced a separate split among lower courts, this

Court should grant certiorari and decide it in petitioner's favor. Whether the Constitution requires a jury to impose a death sentence is undeniably important to inmates and to States, and as the cases cited in both the petition and the brief in opposition show, the issue arises frequently.* Respondent does not dispute the petition's arguments about the importance of the issue—including that in Missouri, the deadlock procedure is applied with shocking frequency, and almost always results in a death sentence. Pet. 7, 20. This case is accordingly similar to other capital cases in which this Court has granted certiorari despite the lack of a split, including *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), and *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). Just as this Court granted certiorari in *McKinney* "[b]ecause of the importance of the case to capital sentencing in Arizona," 140 S. Ct. at 706, it should grant certiorari here because of the importance of Missouri's constitutionally dubious deadlock feature to capital sentencing there.

A focus on the Eighth Amendment argument also disables the remainder of respondent's arguments against certiorari. Respondent's arguments about the cases in the split are about the Sixth Amendment only—and they do not address the core of the issue,

---

* In addition to the cases cited on the split in the petition, respondent cites additional cases holding that juries need not conduct the weighing step under the Sixth Amendment. Opp. 11. There are reasons that some of these cases were not included in the petition, mostly having to do with differences between those States' capital sentencing schemes and Missouri's. But those reasons do not matter. All these cases prove that the issue is important: it has been litigated frequently, and States are legislating around it.

which is that States openly disagree about the answer to the Sixth Amendment question. At a minimum, the conflict between Missouri and Delaware is acute, as the court below announced that a decision of the Delaware Supreme Court was "wrongly decided." Pet. App. 32a n.12. The flip-flop among jurists in Florida also highlights that different judges disagree sharply about what the Constitution requires of capital sentencing schemes. *See* Pet. 17-18 & n.11. Moreover, States are legislating around their understanding of this Court's decisions—and to the extent any of those efforts are confused, this Court should clear them up. *See id*. at 14 n.10 (documenting changes to Idaho's statute).

Respondent's vehicle arguments are also unpersuasive. Respondent argues first that Missouri's statute does not "make[] the weighing process a prerequisite to determining death-penalty eligibility." Opp. 15. But the weighing process is a prerequisite to imposing a death sentence. If weighing never happens, then under *Eddings*, no death sentence can be imposed. Weighing is accordingly an indispensable component of capital sentencing—however one might choose to describe it. Thus, a flaw in the weighing process is surely enough to trigger Eighth Amendment concerns, and it ought to raise Sixth Amendment questions, too.

Respondent also argues that the jury found multiple aggravating circumstances. But that is beside the point because the jury also deadlocked as to punishment. Having considered each and every one of the aggravating circumstances respondent emphasizes, the jury was unable or unwilling to sentence petitioner to death. It is only because Missouri's statutory scheme requires judges to impose a sentence in deadlocked

cases that petitioner received the ultimate sentence. This case thus presents an ideal vehicle to decide whether a State may take such an important question away from a jury that did not choose death.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Rosemary Percival
OFFICE OF THE MISSOURI PUBLIC DEFENDER
920 Main St.
Suite 500
Kansas City, MO 64105
(816) 889-7699

Tejinder Singh
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tsingh@goldsteinrussell.com

Counsel for Petitioner

March 18, 2020