No. 18-1109

IN THE

Supreme Court of the United States

JAMES ERIN MCKINNEY,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ of Certiorari to the Supreme Court of Arizona

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Counsel of Record
KYMBERLEE C. STAPLETON
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

QUESTIONS PRESENTED

As stated by Petitioner:

1. Whether the Arizona Supreme Court was required to apply current law when weighing mitigating and aggravating evidence to determine whether a death sentence is warranted.

2. Whether the correction of error under *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), requires resentencing.

Fairly included in Petitioner's Question 1:

3. Whether current federal law regarding weighing aggravating and mitigating evidence is materially different from the law in effect at the time of the initial direct appeal.

TABLE OF CONTENTS

III

TABLE OF AUTHORITIES

Cases

United States Statutes

Secondary Authorities

IN THE

Supreme Court of the United States

JAMES ERIN MCKINNEY,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest.

In this case, the Arizona Supreme Court exercised the authority to correct a purported error in capital sentencing by reweighing the circumstances itself. This procedure was upheld nearly 30 years ago by this Court, and neither the approving case nor its theoretical basis has been undermined by recent decisions.

1. Both parties have filed blanket consents for *amicus* briefs.

   No counsel for a party authored this brief in whole or in part. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

A decision overturning long-settled practice would cause further delay in the execution of well-deserved sentences for those murders, others similarly situated, and potentially a great many others. This result would be contrary to the interests CJLF was formed to protect.

SUMMARY OF ARGUMENT

Petitioner's stated question of whether the Arizona Supreme Court was required to apply current law fairly includes the question of whether current federal law is materially different from prior law on a question that was before that court. It is not.

This Court's death penalty jurisprudence requires a two-stage process in capital sentencing. First, there is a decision as to whether the defendant is within a limited class of murderers *eligible* for the death penalty. Second, there is the question of whether the defendant should be *selected* from the eligible class for execution. In a series of cases, including *Proffitt* v. *Florida*, *Spaziano* v. *Florida*, *Hildwin* v. *Florida*, and *Walton* v. *Arizona*, this Court repeatedly upheld the choice of several states to allow judges rather than juries to make the sentencing decision. *Ring* v. *Arizona* and *Hurst* v. *Florida* overruled these cases only to the extent that they allowed juries to make the eligibility decision, *i.e.*, the finding of at least one aggravating factor. *Spaziano* and *Walton* are still good law to the extent that they allow judges rather than juries to make the selection decision. *Clemons* v. *Mississippi*, allowing appellate court reweighing, is based on the not-overruled portion of *Spaziano* and is also still good law.

The *Apprendi* rule is based on preserving the historical role of the jury to find the elements of the offense. It prevents the legislature from diminishing

that role by recasting elements as sentencing factors when they operate to change the range of allowed punishments to the defendant's detriment, either raising the ceiling or raising the floor. As both the *Ring* and *Hurst* decisions recognized, the eligibility finding of at least one mitigating circumstance fits the *Apprendi* concept of a factor which is really an element of a higher degree of offense. *Apprendi* itself disclaims any restriction on the other decisions made in sentencing, including the selection of a punishment within the allowed range and the findings of aggravating and mitigating facts that inform that judgment. The selection stage of capital sentencing is a sentencing decision as traditionally understood, and it does not come within the scope of the *Apprendi* rule.

Extending *Apprendi* into the selection stage would not only require that choice to be made by a jury, as most states presently do, but it would also require that the jury be required to make its "weighing" finding beyond a reasonable doubt, which many states do not. This Court has repeatedly assured the states over the course of many years that no particular standard is required in the selection decision. A turnabout on this long-standing rule would require retrial of every capital case pending on direct review. It would be a disastrous aggravation of the problem of delay, which is already a major source of injustice.

ARGUMENT

I. Current federal law does not require that a jury make the selection decision, as distinguished from the eligibility decision.

A. The Antecedent Question Presented.

Most of the briefing submitted by Petitioner and supporting *amici* addresses the argument that the Arizona Supreme Court was required to apply current law when correcting what the Ninth Circuit majority believed was an error in this case.[2] Obviously, this has to mean current *federal* law. Petitioner invokes this Court's jurisdiction under 28 U. S. C. § 1257(a), see Brief for Petitioner 5, and that section is limited to federal questions. Further, he asserts Article III and the Supremacy Clause as the sources of his "current law" argument, see Brief for Petitioner 19, and those sources have nothing to do with state law.

As explained in Part II-C, *infra*, capital cases involve a conviction, a finding of eligibility, and a final selection of penalty. Reopening one of these does not necessarily require reopening earlier ones. In *Sattazahn* v. *Pennsylvania*, 537 U. S. 101, 110-113 (2003), the plurality applied *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000) and *Ring* v. *Arizona*, 536 U. S. 584 (2002), to hold that the eligibility determination has finality independent of the selection determination for the purpose of the Double Jeopardy Clause.

In this case, the Arizona Supreme Court did not need to apply any federal law, past or present, to the eligibility determination. That decision from the

---

2. As explained by the Ninth Circuit dissent, Pet. App. 68a-118a, and discussed in Part II-D of the Brief for Respondent, the Ninth Circuit majority was mistaken, and the Arizona Supreme Court's original decision was correct.

original trial stood unimpaired, and Petitioner has not cited any rule of federal law that prevents a state court from separately reconsidering the selection decision.

The Arizona Supreme Court has decided that it can reweigh the aggravating and mitigating circumstances in this situation, rather than reconsider the eligibility decision as well or remand for a new sentencing trial. See *State* v. *Styers*, 227 Ariz. 186, 188, ¶ 7 & n. 1, 254 P. 3d 1132, 1134 (2011). This is a matter of *state* law. See *Clemons* v. *Mississippi*, 494 U. S. 738, 747 (1990). It is not subject to this Court's review.

Petitioner's Question 1 is not actually presented unless *Ring* (1) already applies to the selection stage, or (2) is extended to selection in this case. We address (1) in this Part and (2) in the next Part.

B. Pre-Apprendi Capital Sixth Amendment Cases.

In the wake of *Furman* v. *Georgia*, 408 U. S. 238 (1972), Congress and an overwhelming majority of the states enacted new death penalty laws. See *Gregg* v. *Georgia*, 428 U. S. 153, 179-180 (1976) (lead opinion). Florida opted to make the judge the sentencer, retaining an advisory role for the jury. See *Proffitt* v. *Florida*, 428 U. S. 242, 248-249 (1976) (lead opinion). The judge was directed to impose a sentence of death upon finding, " '(a) [t]hat sufficient [statutory] aggravating circumstances exist ... and (b) [t]hat there are insufficient [statutory] mitigating circumstances ... to outweigh the aggravating circumstances.' " *Id*., at 250 (quoting Fla. Stat. Ann. § 921.141(3); alterations in the opinion). The *Proffitt* lead opinion upheld the system and evidently did not think that the choice of judge rather than the jury even raised a serious constitutional question. "This Court has pointed out that jury sentencing in a capital case can perform an important societal function [citation], but it has never suggested

that jury sentencing is constitutionally required." *Id*., at 252. As for the Eighth Amendment imperative of avoiding arbitrariness, the *Proffitt* lead opinion indicated that having the judge decide the sentence was better, not worse, than jury sentencing. See *ibid*. Three other Justices concurred in the judgment upholding the system, not deeming the judge v. jury issue to be worth mentioning. See *id*., at 260-261 (opinion of White, J.).

Eight years later, the Court returned to the question in *Spaziano* v. *Florida*, 468 U. S. 447 (1984). In that case, a majority of the advisory jury had voted in favor of life imprisonment, but the trial court had nonetheless found that a death sentence was appropriate. See *id*., at 451-452. Spaziano challenged his sentence under both the Eighth and Sixth Amendments. See *id*., at 457-458. Although Spaziano tried to limit his argument to the jury override situation, the Court noted that the premise of his argument, if accepted, would require jury sentencing in all capital cases. See *id*., at 458.

The year before *Spaziano*, this Court had clarified the two-step nature of capital sentencing, requiring an eligibility determination, circumscribing the class eligible for the death penalty, and a selection decision, "selecting, from among that class, those defendants who will actually be sentenced to death." *Zant* v. *Stephens*, 462 U. S. 862, 878 (1983). The eligibility decision usually consists of finding true at least one of a list of aggravating factors beyond the minimum elements of murder. See *Brown* v. *Sanders*, 546 U. S. 212, 216 (2006).

The jury portion of the *Spaziano* opinion focused primarily on the determination that death was the appropriate punishment for the crime, *i.e.*, the selection decision rather than the eligibility decision. Eligibility was not seriously in dispute in *Spaziano*. Prior conviction of a violent felony is an aggravating circumstance

in Florida, and Spaziano had a prior conviction for rape. See *Spaziano* v. *State*, 393 So. 2d 1119, 1122-1123 (Fla. 1981).

Rejecting the Sixth Amendment argument did not take the *Spaziano* Court long. First, the Court distinguished the double jeopardy cases. See 468 U. S., at 458-459. Then the Court returned to the same observation it had made in *Proffitt*. "[A] capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding–a *determination of the appropriate punishment* to be imposed on an individual. [Citations.] *The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue*." *Id*., at 459 (emphasis added).

When it comes to the Sixth Amendment, *Spaziano* tells us, death is not different. The jury trial right covers the same territory as in noncapital cases. The Court then went on to reject the Eighth Amendment "death is different" argument, see *id*., at 459-465, as the lead opinion had in *Proffitt* but at greater length.

While *Spaziano* did not mention the findings of the aggravating circumstances, that issue came before the Court in *Hildwin* v. *Florida*, 490 U. S. 638 (1989) (*per curiam*). Hildwin argued that "the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida." *Id*., at 638. *Hildwin* noted that *Spaziano* did not specifically address the aggravating circumstance findings. *Id*., at 640. That correct observation is followed by a curious statement: "If the Sixth Amendment permits a judge to *impose* a sentence of death when the jury recommends life imprisonment, however, it follows that it does not forbid the judge to make the written findings that *authorize* imposition of a death sentence when the jury unanimously recommends a death sentence." *Ibid*. (emphasis added). Actually, that does

not follow at all. The distinction between the factual finding that brings a sentence within the legal range and the discretionary choice to impose that sentence is what the *Apprendi* line is all about, as discussed in Parts II-A and II-B, *infra*.

A year after *Hildwin*, the Court decided *Walton* v. *Arizona*, 497 U. S. 639 (1990). For the purpose of the Sixth Amendment issue, the Arizona system was not significantly different from the Florida system upheld in *Proffitt*, *Spaziano*, and *Hildwin*. *Id*., at 647-648. Walton argued that all circumstances, aggravating and mitigating, must be decided by the jury, but then it would be constitutional for the judge to do the weighing and impose the sentence. See *id*., at 647. The Court noted that this argument had been "soundly rejected by prior decisions of this Court" as to both the imposition of the sentence and the prerequisite findings. *Ibid*. (quoting *Clemons* v. *Mississippi*, 494 U. S. 738, 745 (1990)).

In Justice Stevens' dissent, we finally see the emergence of the Sixth Amendment theory of the rule we now call *Apprendi*. He notes that "under Arizona law, ... a first-degree murder is not punishable by a death sentence until at least one statutory aggravating circumstance has been proved." *Id*., at 709. From this it follows that the aggravating circumstances "operate as statutory 'elements' of capital murder under Arizona law because, in their absence, that sentence is unavailable under" the pertinent state statutes. *Id*., at 709, n. 1. This equivalence to a higher degree of offense would become the essence of the *Apprendi* line of cases.

The *Walton* majority rejected the "elements" analogy. The majority noted that the defendant's qualification for an exemption from capital punishment imposed by federal law need not be decided by a jury. *Id*., at 648-649. From this, the majority concluded that aggravating

circumstances defined by state law need not be considered elements either. *Id*., at 649. That conclusion does not follow. The elements of a crime, and the functional equivalent of elements, as the state legislature chooses to define a crime are different from constraints imposed from outside the state legislative process.

The year before *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), this Court summarized the state of the law on this point in *Jones* v. *United States*, 526 U. S. 227, 250-251 (1999). *Jones* construed subsections of the carjacking statute, which imposed greater penalties upon the finding of additional facts, as defining different and greater offenses, rather than as sentencing factors for a choice of sentence for basic carjacking. See *id*., at 229. The interpretation was driven in part by the doctrine of constitutional doubt, see *id*., at 239, and to establish that the question was in doubt *Jones* needed to determine that it had not been resolved by *Spaziano*, *Hildwin*, or *Walton*. See *id*., at 250.

Jones noted that *Spaziano* had addressed only capital sentencing as a whole with "no discussion of the sort of factfinding before us in this case," *ibid*., *i.e.*, a finding of fact that raises the sentencing ceiling. See *id*., at 242. *Hildwin* did raise the issue, but the *Jones* Court distinguished it on the basis that it followed a jury recommendation in which the jury had necessarily found that "at least one aggravating factor had been proved." *Id*., at 250-251. As for *Walton*, the *Jones* Court noted that the case "dealt with an argument only slightly less expansive than the one in *Spaziano*," and much broader than the argument in *Jones*, "that every finding underlying a sentencing determination must be made by a jury." *Id*., at 251. Thus the *Jones* Court's "careful reading of *Walton*'s rationale," *ibid*., was that *Walton* was not focused on the distinction between a

choice within a range and facts changing the range, even though that argument was made in the dissent.

C. Ring and Hurst.

In 2000, this Court decided *Apprendi*, which is discussed further in Part II, *infra*. The *Apprendi* Court distinguished sentencing factors "that support[] a specific sentence *within the range* authorized" for an offense from those that are "the functional equivalent of an element of a greater offense ...." 530 U. S., at 494, n. 19 (emphasis in original). The element-equivalent factors, other than prior convictions, must be tried to a jury and proved beyond a reasonable doubt.

Apprendi, *supra*, at 497, distinguished *Walton* with a block quote from Justice Scalia's dissent in *Almendarez-Torres* v. *United States*, 523 U. S. 224, 257, n. 2 (1998), which described *Spaziano*, *Hildwin*, and *Walton* as involving situations where "a *jury* has found the defendant *guilty* of *all the elements* of an offense which carries as its maximum penalty the sentence of death ...." (Emphasis in original.) Between *Apprendi*'s redefinition of "elements" and "offense" and the way the Arizona statute works, that distinction was untenable, as the dissenters pointed out. See 530 U. S., at 536-539 (O'Connor, J., dissenting). Justice Thomas wrote a concurring opinion, joined by Justice Scalia, offering a more plausible rationale for distinguishing *Walton*, that death is different in that the States were constrained by this Court's Eighth Amendment decisions, creating a "unique context." *Id*., at 522-523.

The tension between *Apprendi* and *Walton* returned to this Court in *Ring* v. *Arizona*, 536 U. S. 584 (2002). The Arizona Supreme Court had confirmed in its decision of the case that the *Apprendi* dissent's description of the state's capital sentencing law was "precisely right." *Id*., at 603. Ring then brought to this Court a

"tightly delineated" claim. His Sixth Amendment challenge went only to the findings on aggravating circumstances. *Id*., at 597, n. 4. He did not question that the trial judge may make the findings on mitigating circumstances or the "ultimate determination." *Ibid*. "He does not question the Arizona Supreme Court's authority to reweigh," *id*., at 598, n. 4, the very question in the present case.

Throughout the opinion, *Ring* makes clear again and again that it is holding only the finding of an aggravating factor[3] to be *Apprendi* error. The maximum sentence for murder absent an aggravating factor is life in prison, and without the finding of at least one aggravating factor "a 'death sentence may not legally be imposed.' " *Id*., at 597 (quoting the Arizona Supreme Court opinion). It is the aggravating factor in *Ring*, not the weighing, that is equivalent to bias motive finding in *Apprendi*. See *id*., *at* 604.

Ring did not overrule *Walton* in its entirety or even its entire Sixth Amendment holding. Instead, the overruling is carefully limited. "[W]e overrule *Walton to the extent* that it allows a sentencing judge, sitting without a jury, *to find an aggravating circumstance* necessary for imposition of the death penalty." *Id*., at 609 (emphasis added). It is only "Arizona's enumerated aggravating factors" that *Ring* held "operate as 'the functional equivalent of an element of a greater offense' [such that] the Sixth Amendment requires that they be found by a jury." *Ibid*. (quoting *Apprendi*).

To the extent that *Walton* rejected Walton's more expansive Sixth Amendment claim, see *Jones*, 526 U. S., at 251, *Walton* remained good law after *Ring*, and it

---

3. The opinion uses the terms "factor" and "circumstance" interchangeably.

remains good law today. It is still the law that the trial judge may constitutionally make additional findings and impose a sentence of death, *Walton*, 497 U. S., at 647, after the eligibility hurdle has been cleared.

Hurst v. *Florida*, 577 U. S. __, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), is very similar to *Ring*, although it does have a few additional wrinkles. *Hurst* correctly summarizes *Ring* as identifying the required finding of "at least one aggravating circumstance" as the one that *Apprendi* requires be made by a jury. *Id*., 136 S. Ct., at 621, 193 L. Ed. 2d, at 511 (slip op., at 5). *Hurst* then finds that the Florida system is not distinguishable for this purpose despite the advisory jury's recommendation. *Id*., 136 S. Ct., at 622, 193 L. Ed. 2d, at 511 (slip op., at 6).[4] *Hurst*'s holding is then based on *Ring*, without any indication the Court is expanding *Ring*'s scope beyond the finding of at least one aggravating circumstance. See *ibid*.

The *Hurst* opinion then goes on to reject Florida's arguments for affirming the sentence despite *Ring*. In Part III-A, reiterating that the advisory jury is not a significant distinction, *Hurst* mentions the further finding " '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances,' " *id*., 136 S. Ct., at 622, 193 L. Ed. 2d, at 512 (slip op., at 7), but it does not state that it is taking the major step of expanding *Ring* to the weighing decision. This passage is focused on refuting the claim that the advisory jury makes a difference, and it concludes that the jury's recommendation cannot constitute "the necessary factual finding that *Ring* requires," which is

4. The fact that the Court's more recent decision in *Jones*, 526 U. S., at 250-251, distinguished *Hildwin* on precisely that basis is not mentioned.

unambiguously the finding of at least one aggravating circumstance.

This reading of Part III-A is confirmed by Part III-B. There the *Hurst* Court refutes Florida's argument that *Ring* is satisfied because Hurst "admitted in various contexts that an aggravating circumstance existed." *Ibid*. If an admission of an aggravating circumstance was insufficient to satisfy *Ring* because *Ring* also applied to the weighing decision, it would have been enough to simply say so. Instead, *Hurst* rejects the argument on the ground that there has been no waiver of jury trial of this issue. *Id*., 136 S. Ct., at 623, 193 L. Ed. 2d, at 512 (slip op., at 8).

Most important is *Hurst*'s treatment of the *stare decisis* argument. *Hurst* "expressly overrule[s] *Spaziano* and *Hildwin* in relevant part." But what is the "relevant part" of *Spaziano*?

As discussed in Part I-B, *supra*, *Spaziano* discusses sentencing by the trial court generally in a case where the eligibility determination of an aggravating circumstance was satisfied by a prior conviction and not in dispute, while *Hildwin* is focused on the finding of the aggravating circumstance. *Hurst* quotes *Hildwin* for the proposition that " 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury' " and then notes this "conclusion was wrong, and irreconcilable with *Apprendi*." *Id*., 136 S. Ct., at 623, 193 L. Ed. 2d, at 513 (slip op., at 9). *Hurst* does not cite or quote any passage of *Spaziano* for this proposition because *Spaziano* did not address it. See *Jones*, 526 U. S., at 251.

The conclusion of the *stare decisis* portion of *Hurst* is unambiguous. *Spaziano* and *Hildwin* "are overruled to the extent they allow a sentencing judge to find *an*

aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Id*., 136 S. Ct., at 624, 193 L. Ed. 2d, at 513 (slip op., at 9) (emphasis added). *Hurst* did not overrule *Spaziano* to the extent that it permits a sentencing judge to make findings other than the aggravating circumstance, including the ultimate determination of the sentence. See *Spaziano*, 468 U. S., at 459.

Clemons v. *Mississippi*, 494 U. S. 738, 745-746 (1990), rests on the not-overruled portion of *Spaziano* and therefore is not undermined by *Ring* and *Hurst*. While the key passage of *Clemons* does mention the now-overruled *Hildwin*, it does not depend on it. No appellate finding of a death-eligibility aggravating circumstance was involved in that case or this one.

Current law therefore requires rejection of McKinney's federal constitutional claim. *Clemons* and the portions of *Spaziano* and *Walton* not overruled by *Ring* and *Hurst* require rejection. The Arizona Supreme Court is correct that "*Ring* requires jury findings only of aggravating factors that make a defendant eligible for the death penalty," *State* v. *Styers*, 227 Ariz. 186, 188, 254 P. 3d 1132, 1134 (2011), so it does not matter whether its reweighing is considered direct or collateral review when neither the guilt verdict nor the eligibility finding has been disturbed in subsequent proceedings.

The only way that McKinney can prevail in this case is if this Court in this case expands the *Ring* rule beyond the eligibility-stage aggravating circumstance to the selection-stage weighing. Such a step is not warranted by *Apprendi*, its progeny, its purpose, or the history on which it is based, so the question of whether

such an expansion could be made in this case need not be addressed.[5]

II. The *Ring*/*Hurst* rule should not be extended to the selection decision.

A. Apprendi.

When applying *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), to a new context, it is not sufficient to simply quote the opinion's capsule summary of its rule, see *id*., at 490, and go wherever those words, lifted out of context, may point. Instead, *Apprendi* must be applied with reference to the history in which it is rooted and with an eye to preservation of the jury's historical role from encroachment. See *Oregon* v. *Ice*, 555 U. S. 160, 167-168 (2009). The historical role is to find *elements* of *offenses*, not "every fact with a bearing on sentencing." See *Jones* v. *United States*, 526 U. S. 227, 248 (1999).

Throughout the *Apprendi* opinion, we see an emphasis on the equivalence between the sentencing factors to which the *Apprendi* rule applies and elements of an offense. The Court begins by noting the requirement that the law give notice of what constitutes a crime and what the punishment for it may be. See 530 U. S., at 476. It summarizes the constitutional entitlement as " 'a jury determination that [the defendant] is guilty of every *element of the crime* with which he is charged, beyond a reasonable doubt.' " *Id*., at 477 (quoting

5. See *Schriro* v. *Summerlin*, 542 U. S. 348, 358 (2004) (*Ring* is a procedural rule, not retroactive on habeas corpus); *Teague* v. *Lane*, 489 U. S. 288, 316 (1989) (plurality opinion) (rule that would not be retroactive on collateral review cannot be created on collateral review).

United States v. *Gaudin*, 515 U. S. 506, 510 (1995)) (emphasis added).

Apprendi's historical discussion overstates the linkage between offense and sentence "during the years surrounding our Nation's founding." See *id*., at 478. Felony sentencing was in flux during these years. It is true that Blackstone praised the strong linkage existing in the criminal law of England a decade before the Revolution. See *id*., at 478-479. A decade after the Revolution, however, the same Congress that proposed the Bill of Rights also passed a federal sentencing law in which fixed penalties were the exception and discretionary ranges were the norm. Mandatory death sentences were prescribed for the most serious offenses, including treason, murder in federal enclaves, and piracy, murder, or robbery in the maritime jurisdiction. See Act of April 30, 1790, 1 Stat. 112, §§ 1, 3, 8. For most lesser offenses, the law prescribed only a maximum, leaving the court with complete discretion in the range from zero to the maximum. See *id*., §§ 15 (stealing or falsifying court records), 16 (theft), 18 (perjury), 22 (obstruction of justice). Bribery, curiously, was punishable by being "fined and imprisoned at the discretion of the court," *id*., § 21, with no range stated. The First Congress is a better reference for the original understanding of the Bill of Rights than a pre-Revolution English commentator, even a renowned one.

Given the subsequent growth of discretionary sentencing and its extent in contemporary America, *Apprendi* could hardly have required a return to the Blackstone model, and the Court took care to note that it is entirely constitutional "for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." 530 U. S., at 481 (emphasis in original). For judges to take

into consideration those various factors, the factors must necessarily be found to be true, and nothing in *Apprendi* suggests that juries must make the findings or that they must be proved beyond a reasonable doubt.

For this reason, even though a "distinction between an 'element' of a felony offense and a 'sentencing factor'" may have been unknown to pre-Revolutionary criminal practice, *id*., at 478, the distinction does exist, and the question is where to draw the line. *Apprendi* establishes that the legislature does not have *carte blanche*, and "constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense ...." *Id*., at 486. Conversely, facts that are not necessary to constitute a criminal offense do not come within the *Apprendi* rule, and standards of judgment that are not facts at all most certainly do not.

In the end, *Apprendi* provides this summary of its holding. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury and proved beyond reasonable doubt." *Id*., at 489 (emphasis added). As an alternative phrasing, *Apprendi* also approved, subject to the prior conviction exception, a statement from Justice Stevens' concurrence in *Jones*, which is substantially the same as a statement in Justice Scalia's concurrence in the same case. " '[I]t is 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.' " *Ibid*. (quoting *Jones*, 526 U. S., at 252-253 (Stevens, J., concurring), and citing *id*., at 253 (Scalia, J., concurring)). Both formulations require a determination of what the "statutory maximum" or "range" is for this purpose. Neither requires jury determination of anything which is not a fact.

If there were any doubt that these formulations do not preclude judicial findings of mitigating facts, *Apprendi* dispelled it in a footnote at this point. The Court recognized the distinction between aggravating and mitigating facts, citing *Martin* v. *Ohio*, 480 U. S. 228 (1987). *Id*., at 491, n. 16. *Martin* approved placing the burden of proof in mitigation on the defendant. Under *Apprendi*, the state may assign the fact-finding in mitigation to the judge. *Ibid.*

Subsequent noncapital cases in the *Apprendi* line[6] have largely focused on the question of whether a factual finding changes the range of punishments which the judge could impose without that finding. But this Court has not lost sight of the historical basis of the *Apprendi* rule. Its purpose is to protect the role of the jury in finding the facts that define the offense, including the degree of offense. Where that purpose is not served, the *Apprendi* rule ought not extend.

B. Defining the Range.

In non-capital cases, this Court has decided a number of cases applying *Apprendi* to a number of different sentencing laws. The consistent theme is that a sentencing factor is equivalent to an element of an offense (singular) for this purpose if and only if it changes the range of allowable sentences to the defendant's detriment, *i.e.*, raising the ceiling or raising the floor. Factors which go to the choice within the allowed range or to the effect of multiple sentences for different crimes are not equivalent to elements and are not subject to *Apprendi*. Deciding whether a factor defines the range or guides a choice within the range has not always been easy, as the long string of closely divided

6. Capital cases are discussed in Part I-C, *supra*.

cases illustrates, but it is straightforward in the present case.

Blakely v. *Washington*, 542 U. S. 296 (2004), is the first major noncapital case in the line after *Apprendi* itself. Blakely pleaded guilty to second-degree kidnaping, a crime with a statutory range of up to 10 years, and he admitted allegations of domestic violence and firearm use. *Id*., at 299. Under the Washington sentencing guidelines, the standard range for second-degree kidnaping with a firearm enhancement was 49 to 53 months. Upward departure from the range required finding an aggravating factor. The statute provided a list, but it was not exclusive. *Ibid*. The sentencing judge found the statutory aggravating factor of deliberate cruelty and imposed a sentence of seven and a half years, three years and a month above the top of the standard range. *Id*., at 300.

A narrowly divided Court held that this procedure violated *Apprendi*. Significantly for this case, *Blakely* reiterated that the range of authorization of the death penalty in *Ring* was defined solely by the finding of "1 of 10 aggravating factors." *Id*., at 303. A fact is one that increases the range for the purpose of *Apprendi* if it would be reversible error to impose the higher sentence without finding that fact. See *id*., at 304. The death penalty came within the legally allowable range in *Ring* "upon finding an aggravator," *ibid*., not upon finding an aggravator plus insufficient mitigating circumstances to warrant leniency. So in *Blakely*, the enhanced sentence came within the authorized range upon finding "*any* aggravating fact." *Id*., at 305.

The *Blakely* Court recognized that once the facts were found the trial judge would further have to "make a judgment that they present a compelling ground for departure," *id*., at 305, n. 8, but that judgment is not a fact, and *Blakely* does not hold or even remotely imply

that this judgment must be made by a jury rather than the judge. It was the judge's "disputed finding that [Blakely] had acted with 'deliberate cruelty' " that violated *Apprendi*, *id*., at 313, not the judgment that deliberate cruelty warranted the additional three years.

The following year this Court divided narrowly again on the question of whether the federal sentencing system was distinguishable from the Washington system in this regard. See *United States* v. *Booker*, 543 U. S. 220, 237 (2005); *id*., at 334 (Breyer, J., dissenting). The *Booker* majority reiterated that "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *Id*., at 233. For the Arizona capital sentencing system, the range is defined by "the presence or absence of [one or more of] the aggravating factors." *Id*., at 231.

Cunningham v. *California*, 549 U. S. 270 (2007), applied *Apprendi* to California's triad determinate sentencing system, in which felonies below the highest tier generally have a choice of three terms. At the time, a statute required a judge to find " 'circumstances in aggravation or mitigation' " in order to choose the upper or lower term. *Id*., at 277. Court rules provided only a little more specificity. The circumstances must be facts, and they are illustrated by nonexhaustive lists. *Id*., at 278. The Court held that *Apprendi* applied. The top of the range of punishments that could be imposed " 'solely on the basis of the facts reflected in the jury verdict,' " *id*., at 288 (quoting *Apprendi*) was the middle term, not the upper term. *Id*., at 293.

In reaching this result, the *Cunningham* Court emphasized the factual nature of the requirement, that it had to be a finding of an additional fact and not "a policy judgment or subjective belief." *Id*., at 280. It was

the character of the requirement as "factfinding" and not discretion that rendered invalid the California Supreme Court's attempt to analogize the system to the federal post-*Booker* system. See *id*., at 292.

The next two major cases in the line illustrate that *Apprendi*'s capsule description of its holding—"any fact that increases the penalty for a crime beyond the prescribed statutory maximum"—is not the immutable final word. Reference must be made to the underlying purpose and history of the rule. That reference may include within the *Apprendi* rule a fact that does not come within the capsule description or exclude one that does.

Oregon v. *Ice*, 555 U. S. 160 (2009), involved the choice between consecutive and concurrent sentences for two offenses, traditionally a judicial function in which the jury played no part. *Id*., at 163. The choice is fully discretionary in most states, but Oregon had added a requirement of factual findings before the judge could choose consecutive sentences. See *id*., at 164-165. The dissent asserted that the factfinding requirement came within the wording of the rule as expressed in *Apprendi*, *Blakely*, *Booker*, and *Ring*. *Id*., at 173-174 (Scalia, J., dissenting). The opinion of the Court did not dispute this but instead asserted that "the scope of the constitutional jury right must be informed by the historical role of the jury at common law. [Citation.] It is therefore not the case that ... the federal constitutional right attaches to every contemporary state-law 'entitlement' to predicate findings." *Id*., at 170.

Absent a threat to the jury's historic role of finding the facts that are the elements of an offense, the federalism interest in leaving the States with their historic control over their criminal justice system assumes controlling importance. Adding structure to what had previously been a purely discretionary func-

tion serves the important interests of promoting proportionality and reducing disparities. *Id*., at 170-171. "Neither *Apprendi* nor our Sixth Amendment traditions compel straitjacketing the States" so as to prevent such salutary developments. *Id*., at 171.

In *Harris* v. *United States*, 536 U. S. 545 (2002), this Court held that the *Apprendi* rule did not apply to a finding of fact that narrows the sentencing range by increasing the minimum sentence, *i.e.*, raising the floor. The plurality portion of the opinion noted, correctly, that a floor-raising fact does not come within the capsule description of the rule. It does not "increase 'the penalty for a crime beyond the prescribed statutory maximum.' " *Id*., at 563 (quoting *Apprendi*, 530 U. S., at 490).

Even so, this Court overruled *Harris* and reached the opposite result in *Alleyne* v. *United States*, 570 U. S. 99 (2013). *Alleyne* notes that the touchstone of whether a fact is subject to the *Apprendi* rule is "whether the fact constitutes an 'element' or 'ingredient' of the charged offense." *Id*., at 107. Despite its literal wording, *Apprendi* was extended to cover findings of fact that alter the range of allowable sentences to the defendant's detriment on either end.

In summary, this Court's post-*Apprendi* cases establish that the rule applies to findings of *fact*, not normative judgments, that alter the range of punishments within the sentencer's discretion in a way that makes the facts function as elements of a greater offense than the base offense found by the jury, either by raising the ceiling or raising the floor. *Apprendi* does not apply to the exercise of discretion within the allowed range, it does not preclude further factfinding to enlighten the discretion within that range, and it does not apply in contexts that do not resemble the

finding of elements of offenses traditionally within the jury's domain.

C. Elements, Eligibility, and Selection.

The task of deciding which murderers should be sentenced to death has occupied a great deal of this Court's time over the last half-century, perhaps more than any other issue. The distinction between eligibility for capital punishment and the selection from within the eligible class of which murderers should be executed took many years and many cases to clarify. This is no time to muddy these waters again.

The two-part structure results from "twin objectives," namely "measured, consistent application and fairness to the accused." See *Eddings* v. *Oklahoma*, 455 U. S. 104, 110-111 (1982); *Spaziano* v. *Florida*, 468 U. S. 447, 459-460 (1984). Accommodation of these "twin objectives" has not been an easy task for the States, and some Justices have concluded that it is not possible. See *Walton* v. *Arizona*, 497 U. S., at 664 (Scalia, J., concurring); *Callins* v. *Collins*, 510 U. S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

These individual doubts notwithstanding, a blueprint has emerged from the opinions of this Court. First, statutory aggravating circumstances are constitutionally required to "circumscribe the class of persons *eligible* for the death penalty." *Zant* v. *Stephens*, 462 U. S. 862, 878 (1983) (emphasis added). This eligibility determination is followed by a selection stage where the emphasis is on making "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Id*., at 879 (emphasis in original).

The selection stage is quite different from the element-finding function that *Apprendi* sought to preserve for the jury. As Justice Rehnquist noted concurring in the judgment in *Zant*, "sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does." *Id*., at 902. "In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt." *California* v. *Ramos*, 463 U. S. 992, 1008 (1983). "Elements" includes eligibility factors,[7] as *Ring* and *Hurst* established. Then the character of the proceeding changes. "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." *Ibid*.

Eligibility factors, like elements of crimes, cannot be too vague. See *Maynard* v. *Cartwright*, 486 U. S. 356, 363-364 (1988) ("especially heinous, atrocious, or cruel"); cf. *United States* v. *Davis*, 588 U. S. __, 139 S. Ct. 2319, 2323, 204 L. Ed. 2d 757, 764 (2019). Factors too vague to be considered for eligibility, however, can be perfectly valid in the wide-ranging selection stage. *Zant* v. *Stephens*, 462 U. S., at 885-888; see also *Tuilaepa* v. *California*, 512 U. S. 967, 969, n.*, 977-978 (1994) (including "circumstances of the crime"). Selection factors need not be facts at all. The jury may

7. Because terminology varies among states, *Brown* v. *Sanders*, 546 U. S. 212, 216, n. 2 (2006), introduced "the term 'eligibility factor' to describe a factor that performs the constitutional narrowing function."

consider such matters as the possibility of future commutation of a life-without-parole sentence. See *Ramos*, 463 U. S., at 995-996, 1008.

The two stages are not distinguished only by the number and types of factors considered, however. The difference runs deeper. The selection stage is a "normative process." *Kansas* v. *Marsh*, 548 U. S. 163, 180 (2006). While the sentencer at this stage must decide whether alleged facts not previously established have been proved at the penalty phase, this is not generally the heart of the argument. More often, the dispute is over how much weight to give to various selection factors. In the present case, for example, the Arizona Supreme Court in its reweighing did not dispute that McKinney was diagnosable with Post-Traumatic Stress Disorder (PTSD) but found that neither this factor nor the others he proffered were "sufficiently substantial to warrant leniency." App. to Pet. for Cert. 5a-6a, ¶¶ 8-11.

The state legislature is not required to put any structure at all into the selection stage decision. Once the eligibility requirement has been met, it is constitutional to simply tell the sentencer to consider all the circumstances and reach a decision. See *Zant*, 462 U. S., at 873-875. Many states attempt to put a modest degree of guidance into their statutes with instructions such as determining whether the aggravating circumstances outweigh the mitigating circumstances. In reality, though, all sentencers in capital cases today weigh the aggravating against mitigating circumstances whether told to in those terms or not. See *Brown* v. *Sanders*, 546 U. S., at 216-217.

The weighing that sentencers perform in the selection stage of capital cases bears no resemblance to the function of finding elements of crimes that the *Apprendi* Court sought to preserve for the jury. This is pure discretionary sentencing of the type that was typically

done by the trial judge in early America for crimes punished by a range of sentences rather than a fixed sentence. The fact that most states assigned the unbounded discretion in capital cases to juries rather than judges from the nineteenth century until the 1970s, see *McGautha* v. *California*, 402 U. S. 184, 199-200 (1971), did not change the nature of the process. It was still sentencing, not a higher degree of offense, and it is still sentencing today.

Apprendi/*Ring* applies only to the eligibility stage of capital sentencing and not to the selection stage. The eligibility determination from McKinney's original trial still stands. Only the selection determination was required to be "corrected" by the Ninth Circuit's decision. Whether and under what circumstances Arizona requires a jury to make that determination remains a matter of state law. There is no federal constitutional restriction on it today any more than there was at the time of McKinney's original trial, and nothing *Apprendi* or its progeny warrants extending it to the selection stage. This case does not present a question of whether current or former federal law must be applied.

III. A new constitutional rule requiring that capital juries be given a "reasonable doubt" instruction with regard to weighing in capital cases would be a disaster.

Petitioner's argument that findings regarding the weight of aggravating and mitigating circumstances in capital cases are findings of fact subject to the *Apprendi* rule would have far-reaching consequences. Bringing a rule under the umbrella of *Apprendi* does not merely require that it be found by a jury rather than the judge, it also requires that the jury be instructed to find that

fact beyond a reasonable doubt. See *Apprendi*, 530 U. S., at 490. While *Ring* and *Hurst* have affected only the minority of states that chose capital sentencing by the trial court rather than the jury, the proposed new rule would affect every state with capital punishment that has not instructed its juries to make their selection decision using a standard of "beyond a reasonable doubt."

Many states have not instructed their juries that way for the obvious reason that weighing is not a factual finding, and the reasonable doubt standard is not appropriate. See, *e.g.*, *People* v. *Box*, 23 Cal. 4th 1153, 1216, 5 P. 3d 130, 172 (2000). This Court has indicated repeatedly, from the beginning of the modern capital sentencing era, "that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." *Zant* v. *Stephens*, 462 U. S., at 876, n. 13 (citing *Jurek* v. *Texas*, 428 U. S. 262 (1976)); *Tuilaepa* v. *California*, 512 U. S. 967, 979 (1994) (discussing precedents). States have relied on this indication to a massive extent, enacting statutes, trying cases, and conducting appeals and collateral reviews.

Walton v. *Arizona*, 497 U. S., at 649-651, rejected a claim that Arizona's death penalty was unconstitutional for placing the burden on the defendant to establish "mitigating circumstances sufficiently substantial to call for leniency." This part of *Walton* was reaffirmed post-*Apprendi* and post-*Ring* in *Kansas* v. *Marsh*, 548 U. S. 163 (2006). "At bottom, in *Walton*, the Court held that a state death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances." *Id*., at 173. While the specific argument before the Court involved the Eighth Amendment rather than the Sixth Amendment, the Court was surely well aware of

Apprendi and *Ring* at the time it decided *Marsh*. For this Court to tell the States that something is constitutionally required after decades of saying it is not, merely by invoking a different amendment, would be a massive bait-and-switch and require exceptionally compelling justification. There is none here.

As the Eighth Circuit noted with regard to the federal capital sentencing statute, "it makes no sense to speak of the weighing process mandated by 18 U. S. C. § 3593(e) as an elemental fact .... In the words of the statute, it is a 'consideration,' ... that is, the lens through which the jury must focus the facts that it has found to produce an individualized determination regarding" the appropriate sentence. *United States* v. *Purkey*, 428 F. 3d 738, 750 (8th Cir. 2005).

Apprendi's jury and reasonable doubt requirements are conjoined twins that cannot be separated. Extending one beyond the eligibility stage to the selection stage means extending both. Every case pending on direct review would have to be retried in those states that have not heretofore required a reasonable doubt instruction in reliance on this Court's repeated assurances. California alone has nearly 500 death sentences that would be affected. See Cal. Dept. of Corrections and Rehabilitation, Condemned Inmate List (Secure), https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-list-secure-request/ (viewed Oct. 29, 2019). Such a mass reversal would further aggravate the extended delays that everyone involved in this area agrees are deplorable. See *Knight* v. *Florida*, 528 U. S. 990, 998 (1999) (Breyer, J., dissenting) (delay due to failure of State "to apply constitutionally sufficient procedures at sentencing"); *id*., at 991 (Thomas, J., concurring) (delay due to "this Court's Byzantine death penalty jurisprudence"). We have had enough such reversals. The people and the victims deserve better. *Cf*.

Bucklew v. *Precythe*, 587 U. S. __, 139 S. Ct. 1112, 1134, 203 L. Ed. 2d 521, 544 (2019) (slip op., at 29).

CONCLUSION

The judgment of the Supreme Court of Arizona should be affirmed.

November, 2019

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation