No. 18-____

IN THE

Supreme Court of the United States

CHRISTOPHER ANTHONY MOUNTJOY, JR.,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the rule of *United States v. Gaudin*, 515 U.S. 506 (1995)—namely, that the Sixth Amendment requires juries to find not just historical facts but also that those facts satisfy the legal definitions of elements of offenses—applies to "sentencing factors" that are covered by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Anthony Mountjoy, Jr., respectfully requests a writ of certiorari to review the judgment of the Supreme Court of Colorado.

OPINIONS BELOW

The decision of the Colorado Supreme Court is reported at 430 P.3d 389 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-24a. The decision of the Colorado Court of Appeals is reported at 431 P.3d 631 and reprinted at Pet. App. 25a-51a. The pertinent trial court proceedings and orders are unpublished and reprinted at Pet. App. 52a-96a.

JURISDICTION

The Colorado Supreme Court issued an initial decision on November 19, 2018, and then issued a modified decision on December 3, 2018. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

Colo. Rev. Stat. § 18-1.3-401 is reprinted at Pet. App. 98a-121a.

STATEMENT OF THE CASE

A. Colorado's Sentencing System

1. For every felony conviction, Colorado law establishes a "presumptive" sentencing range. Pet. App. 6a-7a. Absent additional findings (or other circumstances not relevant here), a sentence may not exceed the top of that range. *See Lopez v. People*, 113 P.3d 713, 723-25 (Colo. 2005).

But if at least one "extraordinary aggravating circumstance" is present, the trial court may impose a sentence up to "twice the maximum authorized in the presumptive range." Pet. App. 7a (citing Colo. Rev. Stat. § 18-1.3-401(6)). Colorado defines an "extraordinary aggravating circumstance"—as relevant here—as an "unusual aspect[]" of the events surrounding the crime that indicates the defendant "is a serious danger to society." *People v. Phillips*, 652 P.2d 575, 580 (Colo. 1982); *see also* People's Answer Br. in Colo. Ct. App. at 25-26 (noting that Colorado Supreme Court's construction of statute in *Phillips* remains definitive). Accordingly, "[a] trial court may not impose an aggravated sentence based solely upon the fact that the elements of the offense were proven." *People v. Leske*, 957 P.2d 1030, 1044 n.18 (Colo. 1998).

Colorado law enumerates certain facts that automatically qualify as extraordinary aggravating circumstances. *See* Colo. Rev. Stat. § 18-1.3-401(8). In cases where a jury finds one of those facts (or a judge finds one that falls within *Apprendi*'s prior conviction exception), an enhanced sentence is automati-

cally permissible. The jury has found every fact necessary to justify such a sentence.

This case, by contrast, involves the default concept of an extraordinary aggravating circumstance without any more particularized elaboration. Finding this sort of "extraordinary aggravating circumstance" involves two steps. First, historical facts "outside of the elements of the crime itself" must be present. Pet. App. 8a. Second, those facts must "actually constitute [an] 'extraordinary aggravating circumstance[].'" *Id.* 11a; *see also People v. Fiske*, 194 P.3d 495, 497 (Colo. App. 2008). The first inquiry is purely factual, while the second involves applying Colorado's legal definition of "extraordinary aggravating circumstance" to the historical facts.

2. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that, "[o]ther 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 a reasonable doubt." *Id.* at 490. And in *Blakely v. Washington*, 542 U.S. 296 (2004), this Court clarified that "the relevant 'statutory maximum'" for this Sixth Amendment rule "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04.

In the wake of these decisions, the Colorado Supreme Court has recognized that Colorado's aggravated sentencing system implicates the *Apprendi/Blakely* doctrine. Pet. App. 9a-10a. That court has held, therefore, that any historical fact supporting an aggravated sentence must be "found by a jury

beyond a reasonable doubt" or otherwise be "*Blakely*-compliant" or "*Blakely*-exempt." *Id.*; *see also Lopez*, 113 P.3d at 719. At the same time, the Colorado Supreme Court stated years ago that step two of the "extraordinary aggravating circumstance" process—the application of the legal definition of "extraordinary aggravating circumstance" to historical fact—need not be submitted to the jury. *Lopez*, 113 P.3d at 727 n.11.

That statement regarding step two gives rise to this case.

B. Factual and Procedural Background

1. Petitioner Christopher Mountjoy was convicted in Colorado state court of reckless manslaughter, illegal discharge of a firearm, and tampering with physical evidence. At sentencing, the State requested aggravated sentences on all three charges. Pet. App. 65a. Tracking Colorado's legal definition of "extraordinary aggravating circumstance," the prosecution argued that "the events surrounding the crime" indicated that Mountjoy was "a serious danger to society." *Id.* 62a.

The trial court recognized that granting the State's request would require it to "make specific findings on the record of the case detailing the specific extraordinary circumstances which constitute the reasons for varying from the presumptive sentence." Pet. App. 90a. The court then did so. For each conviction, the trial court observed, the jury had found historical facts beyond the elements of that offense (for example, as related to the manslaughter conviction, that Mountjoy had discharged a firearm

and tampered with evidence). *Id.* 91a, 94a-95a. Furthermore, the trial judge specifically "f[ou]nd"—as required by state law, and over petitioner's Sixth Amendment objection—that the historical facts the jury had found beyond the elements of the crimes of conviction "make[] this case extraordinarily aggravated." *Id.* 91a. Based on those findings, the trial court imposed aggravated sentences for all three offenses, to run consecutively, for a total of 21 years' imprisonment. *Id.* 5a; *see id.* 95a.[1]

2. The Colorado Court of Appeals affirmed. As relevant here, petitioner renewed his argument that, under the Sixth Amendment, the jury must not only find historical facts that could support an aggravated sentence but "must *also* conclude" that these facts actually constitute "extraordinary aggravated circumstances." Pet. App. 34a. The court of appeals rejected that argument, reciting the Colorado Supreme Court's prior statement that determining whether the additional facts constitute extraordinary aggravated circumstances "remains within the discretion of the trial court." *Id.* 36a (quoting *Lopez*, 113 P.3d at 727 n.11).

3. The Colorado Supreme Court granted discretionary review and affirmed by a 5-2 vote.

The majority recognized that in *United States v. Gaudin*, 515 U.S. 506 (1995), this Court held that a

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[1] The trial judge also relied on other facts beyond the jury's verdict, such as the fact that petitioner discharged his firearm eight times. *See* Pet. App. 17a. But the Colorado Supreme Court declined to rely on those findings. *See id.* So they are irrelevant here. *See Blakely*, 542 U.S. at 300 n.4.

defendant's Sixth Amendment right "to demand that a jury find him guilty of all the elements of the crime charged" applies not only to historical facts but also to applications of law to such facts—otherwise known as mixed determinations of law and fact. Pet. App. 11a; *see also Gaudin*, 515 U.S. at 513 (defendants may "demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts"). But the majority held that petitioner's "reliance on *Gaudin* is misplaced. His case is about sentencing; *Gaudin* is about proof of guilt." Pet. App. 12a.

Justices Gabriel and Hart disagreed "that *Gaudin* is distinguishable because it concerned an element of the offense and proof of guilt, whereas here we are dealing with sentencing aggravation." Pet. App. 21a. In the dissenters' view, the majority's reasoning "ignores . . . that the Supreme Court has long and consistently rejected any distinction between an element of an offense and a sentencing factor" covered by *Apprendi*. *Id.* (citing *S. Union Co. v. United States*, 567 U.S. 343, 358-59 (2012); *Washington v. Recuenco*, 548 U.S. 212, 220 (2006); and *Apprendi*, 530 U.S. at 478, 482-84).

The dissenters acknowledged that their conclusion contradicted the Colorado Supreme Court's prior statement in *Lopez* that judges may determine whether the historical facts the jury found constitute an extraordinary aggravating circumstance. Pet. App. 21a-22a. But they noted that the court "so concluded without ever mentioning *Gaudin*." *Id.* 22a. And, "for the reasons set forth above," the dissenters

maintained the court's prior statement "was directly contrary to *Gaudin*." *Id.*

Finally, the dissenters "c[ould] not say that the constitutional error here was harmless beyond a reasonable doubt." Pet. App. 24a. Consequently, they would have "reverse[d] Mountjoy's aggravated-range sentences and remand[ed] this case for the imposition of constitutionally valid sentences." *Id.*

REASONS FOR GRANTING THE WRIT

This Court's precedent leaves no doubt that the Sixth Amendment rule of *United States v. Gaudin*, 515 U.S. 506 (1995), applies to "sentencing factors" covered by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny. Indeed, the Colorado Supreme Court's holding to the contrary is so obviously incorrect that summary reversal would be appropriate. But whatever course this Court takes, it is vital that it correct the Colorado Supreme Court's error. Not only should this Court protect the integrity of its Sixth Amendment jurisprudence, but it is critical that the sentencings conducted on virtually a daily basis throughout the State of Colorado comply with the fundamental right of trial by jury.

A. The Colorado Supreme Court's holding directly contravenes this Court's Sixth Amendment precedent.

1. *Gaudin* involved the "materiality" element of the federal crime of making false statements to governmental officials, 18 U.S.C. § 1001. As the Court explained, establishing that element involves a two-step process. First, the Government must prove the "purely historical fact" that the defendant made a

false statement to a governmental official. *Gaudin*, 515 U.S. at 512. Second, the Government must prove "the statement was material," which involves "applying the legal standard of materiality . . . to the[] historical facts." *Id.* The Government argued in *Gaudin* that while the purely historical facts in step one must be proved to the jury, the Sixth Amendment allowed the second step in the process—the "application of the law to the facts"—to be left to the judge. *Id.* at 512-13.

This Court rejected that argument. Writing for a unanimous Court, Justice Scalia explained that the Government's argument had "absolutely no historical support." *Gaudin*, 515 U.S. at 512. Nor was there any modern basis for the Government's conception of "the criminal jury as mere factfinder." *Id.* at 514. The jury's "constitutional responsibility" has always been "not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence" of any given charge. *Id.*

2. Under Colorado law, the presence of an "extraordinary aggravating circumstance" enables a court to impose a sentence twice as long as is otherwise permissible. Therefore, the Colorado Supreme Court acknowledged here, as it has in the past, that this aggravated sentencing provision implicates the rule of *Apprendi*—namely, that "[o]ther 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 a reasonable doubt," 530 U.S. at 490. Pet. App. 9a-10a, 15a-16a; *see also Lopez v. People*, 113 P.3d 713, 719 (Colo. 2005).

At the same time, the Colorado Supreme Court found *Gaudin* inapplicable here. The court conceded that the Sixth Amendment requires juries to find the historical facts supporting a finding under state law that an "extraordinary aggravating circumstance" is present. Pet. App. 9a-10a. But the Colorado Supreme Court held that defendants do not have a Sixth Amendment right to have juries determine whether the historical facts satisfy that legal standard. This case "is about sentencing," it asserted, whereas "*Gaudin* is about proof of guilt . . . of an actual element of the crime charged." *Id.* 12a.

That holding is exactly wrong. As the dissenters below recognized (Pet. App. 21a), it relies on the very sort of formalistic reasoning this Court has "uniformly rejected." *S. Union Co. v. United States*, 567 U.S. 343, 358-59 (2012). In case after case, states have argued that "there is a constitutionally significant difference between a fact that is an 'element' of the offense" and one that state law classifies as a "sentencing factor" exposing a defendant to increased punishment. *Id.* And in case after case, this Court has held that the Sixth Amendment admits no such distinction. *Id.* It has insisted that such sentencing factors that expose defendants to increased punishment must be "treated . . . like elements"—that is, they must "be tried to the jury and proved beyond a reasonable doubt." *Washington v. Recuenco*, 548 U.S. 212, 220 (2006); *see also Apprendi*, 530 U.S. at 478 (the Sixth Amendment does not tolerate "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor'" that exposes the defendant to increased punishment); *id.* at 484 (same).

This Court's reasoning in *Recuenco* is especially instructive. That case presented the question whether violations of the *Apprendi* doctrine are subject to the same harmless-error inquiry as violations of the Sixth Amendment requirement that all elements of the charged offense be proven to the jury. The Court noted that, under *Gaudin*, materiality is an element of federal fraud offenses. *Recuenco*, 548 U.S. at 219. And the failure to submit that element to the jury is subject to the harmless-error rubric of *Chapman v. California*, 386 U.S. 18, 24 (1967). *See Recuenco*, 548 U.S. at 219. The Court then concluded that an *Apprendi* error was "indistinguishable" from a *Gaudin*-type error. *Id*. at 220. Indeed, because *Apprendi* commands "that elements and sentencing factors [that expose defendants to increased punishment] must be treated the same for Sixth Amendment purposes," it would have "defie[d] logic" to hold otherwise. *Id*. at 220, 222.

In short, the whole point of this Court's *Apprendi* jurisprudence is that sentencing factors that expose the defendant to enhanced punishment must be proven exactly the same way as elements of criminal offenses. The Colorado Supreme Court's decision here flouts that principle.

3. The Colorado Supreme Court also claimed to find support for its refusal in this case to apply *Gaudin* in *Blakely v. Washington*, 542 U.S. 296 (2004). *See* Pet. App. 12a-13a. Again, the Colorado Supreme Court misread this Court's precedent.

Blakely involved a sentencing system allowing an enhanced sentence only if "substantial and compelling reasons" beyond the elements of the crime of

conviction were present. 542 U.S. at 299 (quoting state law). State law then listed several "aggravating factors" that automatically satisfied that requirement. *Id.* This Court held that the *Apprendi* doctrine required juries to find those factors. *Id.* at 299, 303-05. The Court also noted that it did not matter "that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for a departure." *Id.* at 305 n.8.

The Colorado Supreme Court asserted that "if *Gaudin* were as far-reaching as [petitioner] asserts, the *Blakely* Court would have held that a jury must determine beyond a reasonable doubt not only that facts outside the elements of a conviction exist, but also that those facts themselves warrant an aggravated sentence." Pet. App. 12a. But this assertion misunderstands the state law at issue in *Blakely*. In *Blakely*, once an aggravating fact was found to exist, state law required judges to ensure the aggravator was valid as a matter of state law. 542 U.S. at 299, 305 n.8. But that was a strictly legal assessment; it did not require the judge to make any additional factual findings—or to apply any historical facts to law—to impose such sentences. *Id.*

Here, by contrast, the jury's verdict alone does not empower a Colorado judge to impose a heightened sentence. The judge must also make a "'subsequent determination'" that the extra fact(s) the jury found constitute "extraordinary aggravating" circumstances, *People v. Fiske*, 194 P.3d 495, 496-97 (Colo. App. 2008) (quoting *Lopez*, 113 P.3d at 728)—that is, that they are "unusual aspects" of the events surrounding the crime that indicate the defendant

"is a serious danger to society." *People v. Phillips*, 652 P.2d 575, 580 (Colo. 1982). Indeed, under Colorado law, a trial court will be reversed if it fails to make this additional determination. *People v. Lopez*, 148 P.3d 121, 124 (Colo. 2006).

Under *Apprendi* and *Gaudin*, that extra determination—that "application of law to the facts"—is subject to Sixth Amendment strictures. *Gaudin*, 515 U.S. at 513; *see also S. Union*, 567 U.S. at 348 ("[W]hile judges may exercise discretion in sentencing, they may not 'inflic[t] punishment that the jury's verdict alone does not allow.'") (quoting *Blakely*, 542 U.S. at 304). That is, if a Colorado prosecutor seeks an aggravated sentence, juries—not judges—must decide whether the historical facts include unusual aspects of the crime of conviction that indicate the defendant is a serious danger to society.

B. It is critical that this Court correct the Colorado Supreme Court's error.

1. The Colorado practice at issue here implicates the constitutional rights of a wide range of defendants. This is because in any case where a defendant is convicted of more than one offense, a jury will, by definition, have made historical findings with respect to each offense of conviction that go beyond the elements of that offense—namely, it will have found the historical facts necessary for the other offenses of conviction. And under the Colorado rule condoned here, a judge can use those "*Blakely*-compliant" facts as the basis for declaring the existence of an "extraordinary aggravate[ed]" circumstance and thereby justify his decision to inflict an otherwise unauthorized sentence. *See Lopez*, 113 P.3d at 728. The

defendant has no right to have a jury decide whether those facts are actually extraordinary or aggravating. *See id.*

In *People v. Bass*, 155 P.3d 547 (Colo. App. 2006), for example, the defendant was convicted of using of a stun gun and attempted robbery of an "at-risk" person (that is, an adult over sixty years old). Based on the trial court's determination that the age of the victim was an extraordinary aggravating circumstance for the gun offense, the judge imposed an aggravated sentence. *See id.* at 555. The same type of double-counting occurred here—for all three of petitioner's convictions. *See* Pet. App. 4a-5a.

Furthermore, a sentence for a single offense may be aggravated if the defendant, in the course of pleading guilty, admits any fact outside the elements of the offense. *See, e.g.*, *People v. Watts*, 165 P.3d 707, 708-712 (Colo. App. 2006). This is true even if the defendant does not admit that the fact is an "extraordinary aggravating circumstance." *Id.* at 711 (quoting *Lopez*, 113 P.3d at 727 n.11).

2. The *Apprendi* doctrine safeguards constitutional protections of "surpassing importance." 530 U.S. at 476. In particular, the right to trial by jury—a right tracing its origins to the Magna Carta—guarantees criminal defendants the right to have their peers decide allegations necessary to impose any given punishment. *See Duncan v. Louisiana*, 391 U.S. 145, 151, 155-56 (1968). The *Apprendi* doctrine preserves this "great bulwark of [our] civil and political liberties," 3 Joseph Story, *Commentaries on the Constitution of the United States* 652 (1833), by requiring any fact that subjects a defendant to height-

ened punishment to be proven to the jury. The doctrine ensures that, regardless of whether a required finding is labeled an element or sentencing factor, "the judge's authority to sentence derives wholly from the jury's verdict." *Blakely*, 542 U.S. at 306.

In light of the stakes involved, this Court has applied the *Apprendi* doctrine "to a variety of sentencing schemes" that allowed judges to make findings increasing defendants' maximum sentences. *S. Union*, 567 U.S. at 348. The Court has done so even when the sentencing scheme at issue was unique to a particular state. *See Hurst v. Florida*, 136 S. Ct. 616 (2016); *Cunningham v. California*, 549 U.S. 270 (2007). The same action is called for here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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