No. 18-952

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

AMICUS CURIAE BRIEF OF THE COLORADO CRIMINAL DEFENSE BAR IN SUPPORT OF 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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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Colorado Criminal Defense Bar (CCDB) was formed in 1979 and, with nearly one thousand members, is the largest criminal defense bar association in the State of Colorado. Our members—attorneys, paralegals, investigators, and law students, in both the public and private sectors—are dedicated to the representation of criminal defendants, including the indigent. The CCDB works to ensure that Colorado's criminal justice system embodies the principles of liberty, justice, and equality. As the leading voice supporting the work of criminal defense attorneys across the State of Colorado, the CCDB has a particular interest in ensuring that Colorado's sentencing laws comport with the clear commands of the Sixth Amendment and this Court's decisions in *Gaudin* and *Apprendi*.[1]

SUMMARY OF THE ARGUMENT

The Sixth Amendment guarantees criminal defendants the right to trial by jury. U.S. Const. amends.

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[1] Pursuant to Sup.Ct.R. 37.6, undersigned counsel hereby discloses that no part of this brief was authored by counsel for any party, no party or counsel made any monetary contribution intended to fund the preparation or submission of this brief, and no person or entity other than *amicus* or its members made such a monetary contribution.

All parties received 10-day notice of *amicus curiae*'s intention to file this brief. This brief is filed with the consent of all parties.

VI, XIV. Under *United States v. Gaudin*, the jury trial right demands that the jury determine not just the historical facts of a case but also whether those historical facts establish guilt. 515 U.S. at 514. The constitutional role of the jury, therefore, is to find facts *and* to apply law to facts. *Id.*

In the decision below, the Colorado Supreme Court acknowledged the rule in *Gaudin* but limited its application to the elements of an offense rather than sentencing factors that increase sentencing ranges. *Mountjoy v. People*, 430 P.3d 389, 394 (Colo. 2018). Based on this limitation, the Supreme Court upheld the aggravated sentences imposed on Christopher Anthony Mountjoy, Jr., which were based on the trial court's "conclusions that various facts of the criminal episode constituted extraordinary aggravating circumstances." *People v. Mountjoy*, 431 P.3d 631, 640–41 (Colo. App. 2016) (Jones, J., specially concurring).

The decision of the Colorado Supreme Court is exactly wrong. As this Court has explained, "elements and sentencing factors [that increase sentencing ranges] must be treated the same for Sixth Amendment purposes." *Washington v. Recuenco*, 548 U.S. 212, 220 (2006). *See Apprendi*, 530 U.S. at 490 (holding 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").

This brief proceeds in two parts. It first outlines Colorado's felony sentencing scheme. It then illustrates

that sentencing scheme in practice. Because the Colorado Supreme Court's decision exposes defendants across the State of Colorado to sentences that violate the Sixth Amendment, this Court should grant Mr. Mountjoy's petition for a writ of certiorari and reverse.

ARGUMENT

I. Colorado's felony sentencing scheme.

1. Colorado law recognizes ten classes of felony offenses: six classes of non-drug felonies, Colo. Rev. Stat. § 18-1.3-401(1)(a)(V)(A.1), and four classes of drug felonies, Colo. Rev. Stat. § 18-1.3-401.5(2)(a). Each class of felony is subject to a presumptive sentencing range. Colo. Rev. Stat. §§ 18-1.3-401(1)(a)(V)(A.1), 18-1.3-401.5(2)(a).[2] Absent the presence of an "extraordinary aggravating circumstance," trial courts are statutorily powerless to impose a sentence longer than the presumptive maximum. Colo. Rev. Stat. §§ 18-1.3-401(6), 18-1.3-401.5(8). By contrast, if an "extraordinary aggravating circumstance" is present, the court is free to impose a sentence up to twice the maximum of the presumptive range. Colo. Rev. Stat. §§ 18-1.3-401(6), 18-1.3-401.5(8).

[2] The only exceptions, not relevant here, are class 1 felonies, which carry a sentence of life without parole or death, Colo. Rev. Stat. § 18-1.3-401(1)(a)(IV)-(V), and class 1 drug felonies, which require a prison sentence of between 8 to 32 years. Colo. Rev. Stat. §§ 18-1.3-401.5(2)(a), (7).

In turn, Colorado law anticipates three types of circumstances potentially qualifying as extraordinarily aggravating: (1) certain circumstances expressly enumerated by statute, Colo. Rev. Stat. §§ 18-1.3-401(8), 18-1.3-401.5(10); (2) prior convictions, *Lopez v. People*, 113 P.3d 713, 730 (Colo. 2005); and (3) facts found by a jury and later determined by a judge to be "extraordinarily aggravating," Colo. Rev. Stat. §§ 18-1.3-401(6), 18-1.3-401.5(8).

This case concerns the third type of "extraordinary aggravating circumstance," what Mr. Mountjoy's petition for a writ of certiorari refers to as the "default concept of an extraordinary aggravating circumstance." Pet. 3. Such a circumstance is an "unusual aspect[] of the defendant's character, past conduct, habits, health, age, the events surrounding the crime, [or] pattern of conduct . . . indicat[ing] whether he is a serious danger to society." *People v. Phillips*, 652 P.2d 575, 580 (Colo. 1982).

To aggravate a defendant's sentence above the presumptive maximum based on the presence of a default extraordinary aggravating circumstance, two conditions must be satisfied. First, the jury must make a finding of historical fact "outside of the elements of the crime itself," or the defendant must admit to such a fact. *Mountjoy*, 430 P.3d at 393.[3] Second, the court must determine that the historical fact found by the

[3] "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).

jury or admitted by the defendant qualifies as "extraordinarily aggravating." *Id.*

2. As Mr. Mountjoy forcefully explains in his petition, this procedure violates the Sixth Amendment. There is no dispute that *Apprendi* applies to Colorado's conception of an "extraordinary aggravating circumstance." *Mountjoy*, 430 P.3d at 392–94. Therefore, under *Gaudin*, the jury and not the judge must decide whether a particular fact qualifies as an "extraordinary aggravating circumstance." *Gaudin*, 515 U.S. at 514 (holding that a jury's role is "not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence").

II. Aggravated felony sentencing in practice.

Criminal defendants are sentenced every day in Colorado in every corner of the State. And while there does not appear to be published data documenting the rate at which defendants receive sentences above the presumptive maximum based on a judge's conclusion, rather than a jury's, that a particular fact qualifies as extraordinarily aggravating, there is no doubt it happens with some frequency.[4] A few examples make the point.

[4] There is no easy way to track how frequently aggravation results from a default extraordinary aggravating circumstance as opposed to a jury's finding regarding a statutorily-enumerated aggravator or the presence of a prior conviction. Default extraordinary aggravating circumstances are not charged in a criminal information or indictment, and their presence is not noted on the

1. There are three classes of cases in which default extraordinary aggravating circumstances arise. The first class of cases, like Mr. Mountjoy's, involves multiple convictions. In multiple-conviction cases, the first condition for aggravation will always be satisfied. By convicting the defendant of two or more offenses, the jury necessarily will have made findings of historical fact outside the elements of each crime of conviction. The historical facts underlying crime A are outside the elements of crimes B and C, the historical facts underlying crime B are outside the elements of crimes A and C, and so on. To satisfy the second condition for aggravation, all the government needs is a judge willing to conclude that the elements of one count of conviction constitute "extraordinary aggravating

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judgment of conviction or mittimus. The only practical way to know of their existence is by reviewing the transcript of sentencing hearings or by speaking directly with an attorney involved.

Moreover, because Colorado law is settled "that a jury is not required to find that a fact is an 'extraordinary aggravating circumstance,' " *People v. Bass*, 155 P.3d 547, 555 (Colo. App. 2006), appellate decisions addressing judge-based aggravation are generally unpublished. *See* Colo. R. App. P. 35(e) (providing that "[n]o court of appeals opinion shall be designated for official publication unless it satisfies one or more of the following standards: (1) the opinion establishes a new rule of law, or alters or modifies an existing rule, or applies an established rule to a novel fact situation; (2) the opinion involves a legal issue of continuing public interest; (3) the majority opinion, dissent, or special concurrence directs attention to the shortcomings of existing common law or inadequacies in statutes; or (4) the opinion resolves an apparent conflict of authority"). Unpublished decisions from the Colorado Court of Appeals are not available online. *See* Colorado Judicial Branch, Opinion Request, https://www.courts.state.co.us/Courts/Court_Of_Appeals/Opinion_Request.cfm (last visited Feb. 19, 2019).

circumstances" for another count of conviction. The trial judge in Mr. Mountjoy's case was more than willing, aggravating each of the three sentences it imposed.

Mr. Mountjoy's case is not the only example. Colorado's criminal code is vast in scope, and prosecutors can almost always charge more than one offense based on a single criminal act. *See People v. Zubiate*, 411 P.3d 757, 765 (Colo. App. 2013) ("[A]n accused may be convicted of multiple offenses arising out of the same transaction if the General Assembly makes clear its intent to punish the same conduct with more than one conviction and sentence."), *aff'd*, 390 P.3d 394; *People v. Renander*, 151 P.3d 657, 659 (Colo. App. 2006) ("It is solely the authority of the prosecutor to decide matters involving the charging of offenses."). In response to an informal survey of our members and the State Public Defender's office,[5] one attorney reported to us a case involving multiple convictions for various drug felonies. Using the quantity of drugs underlying the most serious of the felonies (a class 1 drug felony, which required proof of more than 225 grams of a schedule I or II controlled substance, *see* Colo. Rev. Stat. § 18-18-405(2)(a)(I)(A)), the trial court aggravated the sentences on the other drug felony convictions. The trial court imposed sentences on those counts above the presumptive maximum even though the jury was never asked to decide whether possessing more than 225

[5] In light of the lack of published data regarding aggravation, *supra* note 4, we conducted an informal survey to determine the contexts in which judge-based aggravation most commonly occurs.

grams of a controlled substance was "extraordinarily aggravating."

2. The second class of cases involves a defendant admitting to a fact outside the elements of the offense. In *People v. Watts*, for example, the defendant pleaded guilty and admitted that his vehicular assault conviction involved two victims. 165 P.3d 707, 712 (Colo. App. 2006). The defendant did not, however, admit that his conduct was "extraordinarily aggravating." *Id.* Even so, the district court imposed an aggravated sentence based on the fact that there were two victims. *Id.* at 711–12.

In another case reported to us, the defendant pleaded guilty to a class 4 drug felony in exchange for dismissal of a class 2 drug felony. Even though the defendant had no prior criminal history, the court imposed a sentence above the presumptive maximum for a class 4 drug felony based on its determination that the defendant's failure to appear at a court hearing was an "extraordinary aggravating circumstance."

3. The third class of cases involves a fact found by special interrogatory. In *Lopez v. People*, the Colorado Supreme Court affirmed that "the jury can be asked by interrogatory to determine facts potentially needed for aggravated sentencing." 113 P.3d at 716. Even where the jury is asked to determine such a fact, however, the jury is not tasked with deciding whether the fact so-found qualifies as an "extraordinary aggravating circumstance." *See id.*

Another attorney reported to us a case involving two convictions for vehicular homicide, driving under

the influence (DUI). *See* Colo. Rev. Stat. § 18-3-106(1)(b)(I). Based on special jury findings that the defendant's blood alcohol concentration (BAC) was more than twice the legal limit, as was the speed at which she/he drove, the trial court imposed sentences on both counts exceeding the presumptive maximum. *See* Colo. Rev. Stat. § 18-1.3-401(1)(a)(V)(A) (providing a presumptive maximum of twelve years' incarceration for a class 3 felony). The special interrogatories at issue, however, did not ask the jury to decide whether the defendant's BAC and speed were "extraordinary aggravating circumstances."

* * *

As the above examples show, without notice and in the absence of any jury finding or admission that a historical fact constitutes an extraordinary aggravating circumstance, Colorado judges aggravate sentences in a wide variety of contexts. Absent intervention by this Court, Colorado judges will continue to do so in violation of the Sixth Amendment right to trial by jury. As in *Apprendi*, "[a]t stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6." 530 U.S. at 476–77.

Moreover, left intact, the decision below will have profound consequences. It will affect the ability of defense counsel to properly advise clients regarding the

sentences they face. And to avoid the "massive risk" of an aggravated sentence, it will force some defendants to plead guilty instead of taking meritorious cases to trial. *See Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) (explaining that plea bargaining "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense"). The stakes in this case are high, and they warrant certiorari review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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