NO. 18-952

In the
Supreme Court of the United States

CHRISTOPHER ANTHONY MOUNTJOY, JR.,
Petitioner,
v.

STATE OF COLORADO,
Respondent.

On Petition for Writ of Certiorari to the Colorado Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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March 27, 2019

QUESTION PRESENTED

In the wake of *Blakely v. Washington*, 542 U.S. 296 (2004), Colorado's Supreme Court modified Colorado's sentencing scheme to clarify that, once a jury finds facts, a judge has discretion to conclude—as a legal determination—that a sentence higher than a standard range is appropriate based on those facts. *Lopez v. People*, 113 P.3d 713 (Colo. 2005). This Court later approved that approach, along with those of other states with similar schemes, indicating they comported with *Blakely*. *See Cunningham v. California*, 549 U.S. 270, 294 n.17 (2007) (recognizing that the Colorado Supreme Court had modified Colorado's sentencing system after *Blakely* by "calling on the jury . . . to find any fact necessary to the imposition of an elevated sentence").

Petitioner challenges Colorado's approach, but he can only prevail in his challenge by interpreting Colorado's statute to operate in a manner that is different from the way it functions after the Colorado Supreme Court modified it to comply with *Blakely*. The question presented is:

Should this Court grant certiorari to re-interpret Colorado's sentencing statute in a way that creates a constitutional problem, and then strike down the statute as unconstitutional?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

As interpreted by the Colorado Supreme Court, Colorado's general aggravated sentencing scheme is functionally equivalent to those used by other States. And this Court approved Colorado's approach, as well as that of several other states, in *Cunningham v. California*, 549 U.S. 270 (2007). Petitioner has not presented a persuasive reason for this Court to revisit the issue.

STATEMENT OF THE CASE

I. Colorado's General Aggravated Sentencing Scheme

For every class of felony, Colorado establishes a presumptive sentencing range. Colo. Rev. Stat. § 18-1.3-401(1)(a). Generally, the court should sentence within the presumptive range unless it concludes that extraordinary aggravating or mitigating circumstances warrant a sentence outside of that range. Colo. Rev. Stat. § 18-1.3-401(6). If extraordinary aggravating circumstances are present, the court may impose a sentence up to twice the maximum term in the presumptive range. *Id.*[1]

Within the penalty ranges established by the legislature, the discretion of the court to choose a particular sentence is "extremely broad," as is the range, kind, and quality of information that may be considered. *People v. Newman*, 91 P.3d 369, 371-72 (Colo. 2004). The court generally need not provide a point-by-point discussion of every consideration supporting the sentence. *People v. Walker*, 724 P.2d

[1] Other sentencing provisions not at issue in this case also permit or require sentences outside of the presumptive range.

666, 669 (Colo. 1986). But if the court imposes a sentence outside of the presumptive range, it must make findings "detailing the specific extraordinary circumstances which constitute the reasons for varying from the presumptive sentence." Colo. Rev. Stat. § 18-1.3-401(7); *accord Walker*, 724 P.2d at 669.

Colorado's sentencing statutes did not explicitly provide a system for juries to decide whether aggravating circumstances existed. Defendants therefore claimed that the sentencing scheme was unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). In *Lopez v. People*, 113 P.3d 713 (Colo. 2005), the Colorado Supreme Court considered those claims and concluded that the sentencing scheme could be interpreted in a manner that would allow an aggravated sentence to be constitutionally imposed.

Lopez held that the scheme should be interpreted as functionally equivalent to the Washington sentencing scheme addressed in *Blakely*. *Lopez*, 113 P.3d at 729. Under that interpretation, "the existence of a constitutionally-permissible aggravating or mitigating fact widens the sentencing range on both the minimum and maximum ends, to a floor of one-half the presumptive minimum up to a ceiling of double the presumptive maximum." *Id.* at 731. Aggravating facts include any facts related to the offender or the offense that are not "generic circumstances common to all" those who have committed the crime. *Id.* at 725 (internal quotation omitted). "The sentencing judge then has full discretion to sentence within this widened range according to traditional sentencing considerations."

Id.; *see also DeHerrera v. People*, 122 P.3d 992, 994 (Colo. 2005) ("Although the existence of a prior conviction opens the aggravated sentencing range, the trial judge is not required to impose a sentence within that range.").

Lopez noted that *Blakely* had not held, when considering Washington's equivalent scheme, that the jury must determine whether the aggravating facts warranted an aggravated sentence. *Lopez* 113 P.3d at 726 n.11 (citing *Blakely*, 542 U.S. at 305 n.8). Because Colorado's expanded sentencing range is permitted by the finding of any constitutionally permissible fact beyond the bare elements of the offense, "[t]he subsequent determination that those facts are extraordinary aggravators is a legal determination that remains in the discretion of the trial court as long as it is based on permissible facts." *Id.* at 727-28.

II. Factual and Procedural Background

A jury found Petitioner, Christopher Anthony Mountjoy, Jr., guilty of reckless manslaughter, illegal discharge of a firearm, and tampering with physical evidence. Pet. App. 4a. At sentencing, the trial court determined that a number of constitutionally permissible facts warranted maximum aggravated-range sentences for each offense. Pet. App. 15a-17a.

For the first time on appeal, Petitioner argued that *Lopez* was wrongly decided in light of *United States v. Gaudin*, 515 U.S. 506 (1995), and *Hurst v. Florida*, 136 S. Ct. 616 (2016).[2] *See* Pet. App. 11a-15a.

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[2] Trial counsel never mentioned *Gaudin* or *Hurst* at sentencing, instead arguing that the trial court should apply, rather than

The Colorado Court of Appeals summarily rejected that claim. Pet. App. 34a-35a.

The Colorado Supreme Court granted certiorari review and reaffirmed *Lopez*. Pet. App. 2a-15a. The court once again held that Colorado's general aggravated sentencing scheme is functionally equivalent to the Washington sentencing scheme considered in *Blakely*. Pet. App. 8a, 15a. It held *Gaudin* inapposite because "[Petitioner's] case is about sentencing; *Gaudin* is about proof of guilt." Pet. App. 12a. And it reiterated that a jury was not required to determine whether the constitutionally permissible facts that opened the aggravated sentencing range warranted an aggravated sentence. Pet. App. 12a-15a. It also rejected Petitioner's assertion that *Hurst* had held "a jury, rather than a judge, must make the legal determination of whether facts found by a jury beyond a reasonable doubt warrant aggravation." Pet. App. 13a-15a.

Two dissenting justices would have revisited the statutory interpretation question addressed in *Lopez* and held that a specific finding of extraordinary aggravating circumstances was statutorily required before the aggravated sentencing range was opened. Pet. App. 20a-21a ("In my view, this statute makes

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overrule, *Lopez*. Pet. App. 69a-73a, 84a-86a. Thus, even if this Court were to grant the petition for a writ of certiorari and reverse the Colorado Supreme Court's judgment, Petitioner may still not be entitled to any relief. *See, e.g.*, *Scott v. People*, 2017 CO 16, ¶¶ 17-18 (holding that a defendant cannot establish plain error where he is asserting an argument that has been previously rejected by a Colorado appellate court).

clear that the sentencing enhancer at issue is the existence of 'extraordinary . . . aggravating circumstances,' not, as the majority states, whether a person died, the defendant used a weapon, or the defendant tampered with evidence."). Accordingly, they would have held Petitioner had a right to a jury trial regarding that issue. Pet. App. 21a.

Petitioner now petitions this Court for a writ of certiorari to review the judgment of the Colorado Supreme Court.

REASONS FOR DENYING THE PETITION

This Court has already approved Colorado's general aggravated sentencing scheme; the Court listed it as an example that other States could follow in *Cunningham v. California*, 549 U.S. 270 (2007). And there are no persuasive reasons for this Court to revisit the issue. The Colorado Supreme Court's decision here is consistent with the decisions of this Court and other state courts of last resort. Even the dissenting opinion in this case reflects only a disagreement about Colorado law, not federal law.

I. In *Cunningham*, this Court approved Colorado's aggravated sentencing scheme, deeming it to comport with *Blakely*.

In *Blakely*, this Court addressed the Washington aggravated sentencing scheme. Under that scheme, a sentencing court could impose an aggravated sentence if it found that an aggravating factor other than those used in calculating the standard range for the offense provided a substantial and compelling reason to impose an exceptional sentence. *Blakely*, 542 U.S. at 299. The Court held that the provision was unconstitutionally applied in that case because the

fact supporting the aggravated sentence was not found in a constitutionally permissible manner. *Id.* at 301-05. But the Court did not hold that the jury was required to determine whether an aggravating factor provided a substantial and compelling reason to sentence within the aggravated range. *See id.* at 305 n.8 (distinguishing between the facts that permit a sentence enhancement and the "judgment that they present a compelling reason for departure").

Subsequently, Washington and other jurisdictions with similar sentencing schemes, including Colorado, considered whether those schemes could be constitutionally applied. Each concluded that they could so long as the sentencing court relied on at least one constitutionally permissible fact in determining that an upward departure was warranted. *See, e.g.*, *Lopez*, 113 P.3d at 728-29; *State v. Rourke*, 773 N.W.2d 913, 919-20 (Minn. 2009) (upholding sentencing provision requiring the trial court to find that "there exist identifiable, substantial, and compelling circumstances to support a sentence outside the range on the grids" so long as the aggravating facts relied on by the trial court to support that determination were constitutionally permissible); *State v. Upton*, 125 P.3d 713, 718 (Or. 2005) (upholding statute permitting an upward departure "if [the trial court] finds there are substantial and compelling reasons justifying" the departure so long as the aggravating facts relied on to support that determination were constitutionally permissible); *State v. Hughes*, 110 P.3d 192, 200-04 & n.3 (Wash. 2005) (upholding statute permitting a sentence above the standard sentence range "if [the trial court] finds . . . that there are substantial and

compelling reasons justifying an exceptional sentence" so long as the aggravating facts relied on to support that determination were constitutionally permissible), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212 (2006); *see also State v. Duncan*, 243 P.3d 338, 341 (Kan. 2010) (stating in dicta that its similar sentencing scheme, which requires a presumptive sentence "unless the judge finds substantial and compelling reasons to impose a departure sentence" based on facts that are constitutionally permissible, *see* Kan. Stat. Ann. § 21-6815, is constitutional).

In *Cunningham v. California*, this Court indicated that the holding in *Lopez*, as well as the similar sentencing schemes in Kansas, Minnesota, Oregon, and Washington, complied with *Blakely*. *See* 549 U.S. 270, 294 & n.17 (2007) (identifying the Colorado Supreme Court's ruling in *Lopez* and the sentencing schemes in Kansas, Minnesota, Oregon, and Washington as appropriately "calling upon the jury—either at trial or in a separate sentencing proceeding—to find any fact necessary to the imposition of an elevated sentence" and stating that "California may follow the paths taken by its sister States"). This Court has therefore already considered and approved the constitutionality of Colorado's general aggravated sentencing scheme.

II. There is no persuasive reason for this Court to revisit the issue.

Petitioner suggests that Colorado is an outlier because, even with a jury's finding of aggravated facts, a Colorado judge can impose an aggravated range sentence only if the judge concludes that the

aggravating circumstances found by the jury are "extraordinary." Pet. 11. But in that regard, Colorado's approach is very similar to that of other States.

In Washington, for example, "[i]f the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence," the judge may impose a sentence in the aggravated range if the judge finds those facts are "substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code § 9.94A537(6).

Kansas, too, has a similar scheme. There, facts that would increase the sentence beyond the standard range must be submitted to a jury. Kan. Stat. 21-6815(a). But a judge may depart from the standard range, based on the jury-found facts, only if the judge deems those facts to be "substantial and compelling reasons" for departure. Kan. Stat. Ann. § 21-6815(a).

While Washington and Kansas use the phrase "substantial and compelling" instead of Colorado's term, "extraordinary," in all three States the judge is simply passing legal judgment on whether, under all the circumstances, a sentence beyond the standard range is warranted. What opens up the higher sentencing range for the judge's consideration is the jury's determination that aggravating facts exist, not the judge's subsequent assessment that all the circumstances taken together are "substantial and compelling," or "extraordinary."

Other States also properly entrust the judge to decide whether an elevated sentence is warranted, even if their statutes do not explicitly articulate a standard such as "substantial and compelling," or

"extraordinary." *See*, *e.g.*, N.C. Gen. Stat. Ann. § 15A-1340-16(b) (allowing court to depart from the presumptive range, based on facts found by jury, if court deems those facts sufficient to outweigh any mitigating factors that are present); Alaska Stat. § 12.55.155(c) ("The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence above the presumptive range …").

As in those States, a Colorado judge does not, by deeming the circumstances to be "extraordinary," open up the aggravated sentencing range for consideration. The aggravated sentencing range is instead opened by the existence of *Blakely*-compliant facts. *DeHerrera*, 122 P.3d at 994. The determination that those facts are "extraordinary" aggravators is a legal determination that remains in the trial judge's discretion. *Id.*; *Lopez* 113 P.3d at 727-28.

Given the similarity between the approaches of these States, it is unsurprising that this Court recognized Colorado's sentencing scheme alongside other States as complying with *Blakely*, when it provided guidance in *Cunningham*. *See* 549 U.S. at 294 n.17. And none of this Court's decisions cast any doubt on the validity of *Cunningham* or *Lopez*.

Rather, this Court has repeatedly reaffirmed that the right to a jury trial applies to "the determination of any *fact*" that increases the penalty for an offense. *Southern Union Co. v. United States*, 567 U.S. 343, 346 (2012) (emphasis added); *accord, e.g.*, *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016); *Alleyne v. United States*, 570 U.S. 99, 103 (2013); *Oregon v. Ice*, 555 U.S. 160, 167 (2009).

And this Court has consistently found a constitutional violation only when the sentencing court imposed an aggravated sentence unsupported by any constitutionally permissible fact. *See Hurst*, 136 S. Ct. at 620-24 (holding that a statute permitting the trial court to impose the death sentence based on facts that were not found by the jury—i.e., that the murder was especially heinous, atrocious, or cruel and that it occurred while the defendant was committing a robbery—was unconstitutional);[3] *Alleyne*, 570 U.S. at 103 (holding that a fact that increased the mandatory minimum—that the defendant brandished a firearm—was an element); *Southern Union Co.*, 567 U.S. at 358-59 (holding that the right to a jury trial applied to a finding of fact—the number of days a company had violated a statute—because there is no "constitutionally significant difference between a fact that is an 'element' of the offense and one that is a 'sentencing factor,'" and because "[s]uch a finding is not fairly characterized as merely 'quantifying the harm' Southern Union caused[; r]ather, it is a determination that for each given day, the Government has proved that Southern Union committed all of the acts constituting the offense").

This Court has also explicitly approved judicial "factfinding used to guide judicial discretion in selecting a punishment within limits fixed by law."

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[3] *Hurst* did not suggest that if those facts had been found by the jury, the trial court's determination that they warranted the death penalty would have to be made by the jury. Indeed, Florida subsequently amended its statute to comply with *Hurst* by requiring a jury to find aggravating factors, but still leaves for the trial court to decide whether those aggravating factors warrant a death sentence. Fla. Stat. Ann. § 921.141.

Alleyne v. United States, 570 U.S. 99, 113 n.2 (2013) (quotation omitted). "While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing." *Id.* "[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." *Id.* at 116.

As a matter of state law, under Colorado's general aggravated sentencing scheme, it is the underlying aggravated fact that opens up the aggravated sentencing range. *Lopez*, 113 P.3d at 726-28 & n.11. Any factfinding thereafter is that permissibly used to guide judicial discretion within the limits fixed by law. *Id.* at 731.

Moreover, the discretionary legal determination that an aggravated sentence is warranted is not itself a fact, but rather is a conclusion describing "the moral or penal weight of actual facts." *Morgan v. State*, 829 N.E.2d 12, 17 (Ind. 2005) (addressing statute that permits aggravation based on legal determinations supported by constitutionally permissible facts). The trial court's explanation of why a constitutionally permissible fact warrants an aggravated sentence "do[es] not involve finding facts, nor is it a role that has traditionally belonged to the jury." *Rourke*, 773 N.W.2d at 920. "Consequently, these discretionary acts by the district court are not subject to the rule announced in *Blakely*." *Id.* "Nothing in *Blakely* precludes a sentencing court from deciding whether jury-determined aggravating factors constitute a substantial and compelling reason to impose a

sentence that exceeds the presumptive range." Upton, 125 P.3d at 718.

Petitioner has not identified conflicting authority from any United States courts of appeal or state court of last resort. Indeed, even the dissenting opinion in this case does not support granting a writ of certiorari.

The dissent's position is rooted in a dispute over the proper statutory interpretation of Colorado's general aggravated sentencing scheme. The dissent noted that the majority had held "the sentencing enhancer at issue is . . . whether a person died, the defendant used a weapon, or the defendant tampered with evidence." Pet. App. 20a-21a. But the dissent would have interpreted the statute so that "the existence of extraordinary aggravating circumstances was the fact that the jury was required to find" in order to open the aggravated range. Pet. App. 21a. Whatever the merits of the dissent's position,[4] that interpretation is not an issue on which this Court can side with the dissent. *See Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State.").

Petitioner's question presented is premised on accepting the dissent's statutory interpretation. He argues not that the Washington statutory scheme

[4] Under Colorado law, "if a statute is capable of alternative constructions, one of which is constitutional, then the constitutional interpretation must be adopted." *People v. McBurney*, 750 P.2d 916, 920 (Colo. 1988) (quotation omitted).

considered in *Blakely* is unconstitutional, but that it is distinguishable. *See* Pet. Writ Cert. 11. But the Colorado Supreme Court can and has interpreted Colorado's provision so that it is "functionally equivalent" to that scheme. Pet. App. 15a. And under that interpretation, the "sentencing factors" required to impose an aggravated sentence under Colorado law were found by a jury. Pet. App. 15a-17a. Thus, the question presented is not implicated by the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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