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

REPLY BRIEF FOR PETITIONER

Megan A. Ring
COLORADO STATE PUBLIC DEFENDER
Jud Lohnes
1300 Broadway, Suite 300
Denver, CO 80203

Pamela S. Karlan
Brian H. Fletcher
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Jeffrey L. Fisher
Counsel of Record
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025
(650) 473-2633
jlfisher@omm.com

Yaira Dubin
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036

Jason Zarrow
O'MELVENY & MYERS LLP
1625 Eye St., NW
Washington, DC 20006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTE

REPLY BRIEF FOR PETITIONER

Instead of defending the Colorado Supreme Court's resolution of the question presented, the State tries to rationalize the Colorado Supreme Court's judgment on various alternative grounds. This will not wash. At a minimum, this Court should summarily reverse the Colorado Supreme Court's manifestly incorrect refusal to apply *United States v. Gaudin*, 515 U.S. 506 (1995), to the State's residual "extraordinary aggravating circumstance" sentencing factor. *See, e.g.*, *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761 (2018) (per curiam) (summarily reversing decision that failed to faithfully apply controlling precedent from this Court); *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016) (per curiam) (same); *James v. City of Boise*, 136 S. Ct. 685 (2016) (per curiam) (same); *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam) (same). In the alternative, the Court should grant plenary review.

1. The Colorado Supreme Court recognized and understood petitioner's argument: "Mountjoy contends that *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)], read alongside *United States v. Gaudin*, 515 U.S. 506 (1995), requires a jury to not only find specific facts beyond a reasonable doubt, but to also make the specific determination of whether these same facts actually constitute 'extraordinary aggravating circumstances' [permitting] sentencing outside of the presumptive range," Pet. App. 11a—that is, whether they show that the defendant "is a serious danger to society," *People v. Phillips*, 652 P.2d 575, 580 (Colo. 1982). And the Colorado Supreme Court directly answered that argument:

> We conclude that Mountjoy's reliance on *Gaudin* is misplaced. *Gaudin* is fundamentally different from Mountjoy's case. His case is about sentencing; *Gaudin* is about proof of guilt. . . . Here, 'aggravation' is not an element of any of the crimes charged. Therefore, *Gaudin* is inapposite.

Pet. App. 12a. On the Colorado Supreme Court's view, then, a statute imposing higher sentences for "material" false statements could validly authorize judges rather than juries to determine materiality—the very question at issue in *Gaudin*—so long as materiality was classified as a sentencing factor rather than an offense element.

The State's BIO offers no defense whatsoever of this constitutional holding; in fact, the State does not even cite *Gaudin* in the argument section of its brief. For good reason: it is impossible to defend the Colorado Supreme Court's refusal to apply *Gaudin* to a sentencing factor covered by *Apprendi*. The *Apprendi* doctrine allows no distinction between elements of an offense and sentencing factors that expose defendants to increased punishment. *See* Pet. 9-10. And the Sixth Amendment, as explicated in *Gaudin*, requires juries to find not only historical facts but also to apply governing legal standards to those facts. Pet. 7-8; *see also* Pet. App. 19a-21a (dissenting opinion).

At the very least, this Court should grant review and reverse the Colorado Supreme Court's manifestly incorrect interpretation of *Gaudin* as applying only to designated "elements" of crimes.

2. If this Court wishes to venture beyond the Colorado Supreme Court's *Gaudin* error, it should reject the State's alternative arguments as well.

a. The State maintains that this Court already held in *Cunningham v. California*, 549 U.S. 270 (2007), that the changes Colorado made to its sentencing system after *Blakely v. Washington*, 542 U.S. 296 (2004), brought it entirely into compliance with the Sixth Amendment. BIO 5-7. But *Cunningham* involved California's sentencing system, not Colorado's. And the sole footnote referencing Colorado law supported nothing more than the proposition that "several States have modified their systems in the wake of *Apprendi* and *Blakely* to retain determinate sentencing." *Cunningham*, 549 U.S. at 294 & n. 17. The Court said nothing about whether any of those modifications—much less *Colorado*'s modifications—complied with the Sixth Amendment.

To be sure, the alterations the Colorado Supreme Court ordered in *Lopez v. People*, 113 P.3d 713 (Colo. 2005), brought certain state law aggravating factors into compliance with the Sixth Amendment. *See* Pet. 3-4. All of the enumerated factors listed at Colo. Rev. Stat. § 18-1.3-401(8) that do not relate to prior convictions must now properly be found by juries. But this case does not involve an enumerated aggravator. Instead, it concerns Colorado's residual, or default, concept of an "extraordinary aggravating circumstance." Footnote 17 in *Cunningham* says nothing about whether juries must apply the legal definition of that standard to the historical facts they find.

b. The State next suggests that Colorado state law allows a judge to impose an enhanced sentence based

solely on the jury's finding of historical facts beyond the elements of the crime of conviction. BIO 9-11. But this is simply untrue. A court may not impose an enhanced sentence unless *two* determinations are made: (i) that historical facts exist "outside of the elements of the crime [of conviction] itself," Pet. App. 8a, *and* (ii) that those facts "actually constitute 'extraordinary aggravating circumstances,'" Pet. App. 11a. *See also People v. Fiske*, 194 P.3d 495, 497 (Colo. App. 2008); Pet. 3; Amicus Br. of Colo. Crim. Defense Bar 4-5. "[I]t would be error to sentence in the aggravated range without finding any *Blakely*-compliant or exempt fact to be extraordinarily aggravating." *People v. Lopez*, 148 P.3d 121, 124 (Colo. 2006).

Perhaps realizing as much, the State characterizes the second required finding—namely, that the historical facts at issue are extraordinarily aggravating—as a "legal determination." BIO 11. But this is just a label. And substance, not labeling, is what matters for purposes of the Sixth Amendment. *See Apprendi*, 530 U.S. at 476; *Ring v. Arizona,* 536 U.S. 584, 602 (2002). In particular, the relevant constitutional question is whether the determination at issue involves an "application of the law to the facts." *Gaudin*, 515 U.S. at 512-13. It is inescapable that determining whether certain historical facts are extraordinarily aggravating—that is, whether they constitute "unusual aspects" of the defendant or the events surrounding the crime that indicate "he is a serious danger to society," *Phillips*, 652 P.2d at 580—involves just such a determination.

3. Finally, the State contends Colorado's residual aggravator is "very similar" to the residual aggravator in a few other states' systems. BIO 8. But that descriptive claim does not bolster the State's position. The State does not point to case law from any of these jurisdictions—and petitioner is not aware of any—refusing to apply *Gaudin* to a residual aggravator such as Colorado's. So the law in other states can provide the State no support here.

At any rate, even if the State could show that other states have residual aggravators that operate like Colorado's and that are treated as exempt from *Gaudin*, that still would not aid the State's cause. It would just reinforce the importance of the question presented. If other state sentencing systems include the same infirmity as Colorado's, that would accentuate the need for certiorari, not diminish it.

CONCLUSION

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

Respectfully submitted,

Megan A. Ring
COLORADO STATE PUBLIC DEFENDER
Jud Lohnes
1300 Broadway, Suite 300
Denver, CO 80203

Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Jeffrey L. Fisher
Counsel of Record
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025
(650) 473-2633
jlfisher@omm.com

Yaira Dubin
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036

Jason Zarrow
O'MELVENY & MYERS LLP
1625 Eye St., NW
Washington, DC 20006

April 9, 2019