No. ___

IN THE

Supreme Court of the United States

ROBERT PAUL LANGLEY, JR., *Petitioner*,

v.

STATE OF OREGON, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the imposition of the death penalty pursuant to a statutory amendment to a state's capital sentencing scheme that adds an additional jury finding necessary to the constitutionality of the scheme and imposes a sentence beyond the statutory maximum, but fails to require the jury to make that finding beyond a reasonable doubt, violates the Sixth, Eighth and Fourteenth amendments?

2. Whether the retroactive application of changes to a state's capital sentencing scheme—one of which was necessary to the scheme's facial constitutionality—coupled with the amalgamation of subsequent changes to the scheme—one of which is acknowledged by Oregon courts as increasing the likelihood of a death sentence—violates the federal constitutional prohibition against *ex post facto* laws when those changes, in totality, culminate in a scheme more onerous than the prior scheme(s)?

LIST OF PARTIES

All parties are listed in the case caption. Mr. Langley was the Appellant below. The state of Oregon was the Appellee.

RELATED PROCEEDINGS

A first preceding direct appeal, *State v. Langley* (*Langley I*), SC No. S36746 (Or. S.Ct. Sept. 17, 1992) (reported at 839 P.2d 692) (*Langley I*), *on recon.*, *State v. Langley*, S36746 (Or. S.Ct. Nov. 18, 1993) (reported at 839 P.2d 692)

A second, preceding direct appeal, *State v. Langley*, SC No. S41885 (Or.S.Ct. Dec. 29, 2000) (reported at 16 P.3d 489) (*Langley II*)

A collateral habeas proceeding, *Langley v. Belleque*, CV 04-6197-AA (D.Or. Feb. 8, 2005) (reported at 2005 U.S. Dist. LEXIS 4867; 2005 WL 293639)

A third, preceding direct appeal, *State v. Langley*, SC S053206 (Or. S.Ct. March 29, 2012) (reported at 273 P.3d 901) (*Langley III*)

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Oregon Supreme Court in this capital case.

OPINION BELOW

The opinions of the Oregon Supreme Court are reported at *State v. Langley*, 424 P.3d 688 (Or. 2018) (*Langley IV*), *recon. allowed and adhered to as modified*, 446 P.3d 542 (Or. 2019), and appear in the Appendix to the petition at Appendices A (Pet. App. 1 a – 35 a) and B (Pet. App. 36 a – 38 a), respectively.

JURISDICTION

On August 16, 2018, the Oregon Supreme Court decided the underlying case. Mr. Langley filed a petition to reconsider which was allowed on August 1, 2019. The *Appellate Judgment*, which appears at Appendix C (Pet. App. 39 a), was issued on September 23, 2019. The enforcement of that judgment was stayed by the Oregon Supreme Court pursuant to petitioner's motion on September 25, 2019. This Court granted the application to extend the time to file a petition for a writ of certiorari from December 22, 2019, to February 20, 2020.

This Court has jurisdiction pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be…deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a

speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Eighth Amendment provides in pertinent part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law[.]"

STATUTORY PROVISIONS INVOLVED

The Oregon death penalty statute, ORS 163.150 (2014), was applied to Mr. Langley in the underlying case. It provided in pertinent parts:

> "(1)(b) Upon the conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
>
> > "(A) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;
> >
> > "(B) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;
> >
> > "(C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; and

> "(D) Whether the defendant should receive a death sentence."

ORS 163.150(1)(c) (2014) provided:

> "(A) The court shall instruct the jury to consider, in determining the issues in paragraph (b) of this subsection, any mitigating circumstances offered in evidence, including but not limited to the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed.
>
> "(B) The court shall instruct the jury to answer the question in paragraph (b)(D) of this subsection 'no' if, after considering any aggravating evidence and any mitigating evidence concerning any aspect of the defendant's character or background, or any circumstances of the offense and any victim impact evidence as described in paragraph (a) of this subsection, one or more of the jurors believe that the defendant should not receive a death sentence."

ORS 163.150(1)(d) (2014) provided:

> "The state must prove each issue submitted under paragraph (b)(A)(C) of this subsection beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue considered."

ORS 163.150(1)(f) (2014) provided:

> "If the jury returns an affirmative finding on each issue considered under paragraph (b) of this subsection, the trial judge shall sentence the defendant to death."

In 2019, the Oregon legislature made multiple prospective-only changes to the capital scheme, including amending ORS 163.150(1)(b) to provide:

> "(1)(b) Upon the conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
>
> "(A) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;

> "(B) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; and
>
> "(C) Whether the defendant should receive a death sentence."

The 2019 Oregon legislature also amended ORS 163.150(1)(d) to prospectively provide:

> "The state must prove each issue submitted under paragraph (b) of this subsection beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue considered."

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Mr. Langley was indicted on August 18, 1988, on 19 counts of *Aggravated Murder* related to the December, 1987, death of Anne Gray.

In the three decades since, Mr. Langley has undergone one bifurcated capital trial (with a guilt and sentencing phase) and three sentencing-only remand trials. On the first direct review, the Oregon Supreme Court affirmed the judgment of conviction on all but one of the counts, vacated the sentence of death in light of *Penry I*, and ordered a sentencing-only remand. *State v. Langley I*, 839 P.2d 692 (1992), *on recon.*, 861 P.2d 1012 (Or. 1993). On the second direct review, the Oregon Supreme Court vacated the second sentence of death and ordered a sentencing-only remand. *State v. Langley II*, 16 P.3d 489 (Or. 2000). On the third direct review, the Oregon Supreme Court vacated the third sentence of death and ordered a sentencing-only remand. *State v. Langley III*, 273 P.3d 901 (Or. 2012).

On May 22, 2014, after an approximately five-week trial, the 2014 jury returned a verdict of death after answering affirmatively (proven beyond a

reasonable doubt) the questions in ORS 163.150(1)(b)(A)—(C), and answering affirmatively (according to no standard of proof) ORS 163.150(1)(b)(D). The Marion County Circuit Court, the Honorable Mary Mertens James, sentenced Mr. Langley to death on June 6, 2014. The Oregon Supreme Court affirmed Mr. Langley's convictions and death sentences, *Langley IV*, 424 P.3d at 721, with the *Appellate Judgment* issuing on September 23, 2019.

B. THE OREGON DEATH PENALTY STATUTE

In December, 1984, Oregon voters authorized an amendment to the Oregon Constitution that allowed capital punishment only upon "requiring unanimous jury decisions on guilt and again on the appropriateness of the death penalty instead of a life sentence—with all decisions made on the basis of "beyond reasonable doubt."[1] In addition to the constitutional amendment authorizing capital punishment, voters revised the state statutes to use a capital sentencing scheme modeled after that used in Texas. Voters specifically required one jury to determine both culpability and sentencing, and, in the sentencing, required that jurors be asked to answer three special issues. Each of the three special issues was subject to a beyond a reasonable doubt standard; jurors' affirmative findings on all three special issues mandated the trial court perform a non-discretionary duty to impose a death sentence.

Oregon's capital sentencing scheme was subject to the same frailties as this Court observed in the Texas statute at issue in *Penry v. Lynaugh*, 492 U.S. 302

[1] Official 1984 General Election Voters' Pamphlet, p. 29, appearing at Appendix D (Pet. App. 41 a). The Voters' Pamphlet appears in the underlying record before the Oregon Supreme Court in the Appendix (APP-049-052).

(1989) (*Penry I*), frailties underscoring the necessity that capital sentencing schemes ensure that punishment is directly related to the personal culpability of the defendant, more specifically, that schemes afford jurors a vehicle by which they can give mitigating effect to proffered mitigation evidence. 492 U.S. at 328. In light of *Penry I*, this Court vacated the death sentence in *Wagner v. Oregon*, 492 U.S. 914 (1989), remanding that case to the Oregon Supreme Court. At the time of the *Wagner I* remand, 23 persons had already been convicted, sentenced to death, and were pending appeal under the 1984 scheme. Mr. Langley was included in that class.

In light of *Penry I*, the Oregon legislature revised the capital sentencing statute to include a Fourth Question to act as a vehicle for the introduction and consideration by jurors of constitutionally relevant mitigation evidence. The Fourth Question, requiring that the jury make a determination as to the defendant's moral culpability, is a finding necessary to the constitutional imposition of a death sentence. Contemporaneous with the addition of the Fourth Question and other changes, the legislature created a sentencing-only remand provision prescribing remand for sentencing only where reversible error was confined to the sentencing phase. ORS 163.150(5)(a) (1989).

In *State v. Wagner*, 786 P.2d 93 (Or. 1990) (*Wagner II*), the Oregon Supreme Court upheld the Oregon capital sentencing scheme against a facial challenge, noting that the statute did not preclude the addition of a Fourth Question to meet this Court's Eighth Amendment command in *Penry I*. 786 P.2d at 94, 96, 99, 101. The Oregon Supreme Court later observed that, absent the addition of the Fourth

Question to the capital sentencing statute, Oregon's scheme would be facially unconstitutional. *State v. Guzek*, 906 P.2d 272, 281 (Or. 1995) (*Guzek II*) (*citing Wagner II*, 786 P.2d at 94). The *Guzek II* Court further noted that the Fourth Question was developed for the sole purpose of giving effect to mitigation evidence, 906 P.2d at 282, so as to comply with *Penry I*. *Id*. Finally, the *Guzek II* Court emphasized that the addition of a Fourth Question "was not to let in more aggravation evidence[,]" 906 P.2d at 283, as the Oregon legislature would have understood that the introduction of aggravating evidence by way of that question would have transformed the character of the question into one to be proven by the State beyond a reasonable doubt. 906 P.2d at 279.

At the time of the crimes in this case—December, 1987—Oregon's capital sentencing statute remained functionally the same as when the 1984 voters authorized capital punishment, *i.e.*, in its pre-*Penry I* state. Throughout the years, voters have not expressed a changed understanding of the foundational requirements upon which they authorized capital punishment, e.g., their insistence on reliability of all determinations leading to a death sentence through use of the beyond a reasonable doubt standard. Notwithstanding the dictate of the *Guzek II* Court, however, since 1995, the Oregon legislature has amended the capital sentencing statutes to allow for the introduction of aggravating evidence, specifically, victim impact evidence, by way of the Fourth Question, subject to no standard of proof.

C. THE JURY INSTRUCTIONS ON, AND THE BURDEN OF PROOF APPLIED TO, THE FOURTH QUESTION

The capital sentencing scheme under which Mr. Langley was most recently sentenced to death, ORS 163.150(1)(b) (2014), made the imposition of a death sentence contingent upon the sentencing-only jurors making affirmative findings as to the following:

> "(A) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;
>
> (B) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;
>
> (C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; and
>
> (D) Whether the defendant should receive a death sentence."

Upon jurors' unanimous affirmative answers to the four questions "the trial judge shall sentence the defendant to death." ORS 163.150(1)(f). That statute, however, required application of a beyond a reasonable doubt standard solely to the first three questions, with no standard of proof applying as to the Fourth Question. ORS 163.150(1)(b)(D).

Over Mr. Langley's objection, the 2014 sentencing jury in this case was instructed on the Fourth Question as follows: "[t]he burden of proof beyond a reasonable doubt does not apply to this fourth question." Specifically, the 2014 jury was instructed:

> "The fourth question asked by the law is, shall a death sentence be imposed? The burden of proof beyond a reasonable doubt does not apply to this fourth question. Regarding this question neither side bears any burden of proof. The

> question calls for a discretionary determination to be made by each of you based on the evidence.
> * * *
> "You must answer this question no if after considering any mitigating evidence concerning any aspect of the defendant's character or background or any circumstances of the offense *or any victim impact evidence relating to the personal characteristics of the victim or the impact of the crime on the victim's family*, one or more of you believe that the defendant should not receive a death sentence."

5/21/2014 TR 4218-4219 (emphasis added).[2]

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

This petition presents fundamental questions regarding the viability of a state's capital sentencing scheme where this Court's interpretation of the Sixth Amendment, as explained in *Apprendi*, *Ring*, and *Blakely*, calls into question the standard of proof associated with the constitutionally required mechanism used by the state to comply with this Court's Eighth Amendment command in *Penry I*. This Court should grant the certiorari to give states much needed guidance as to whether an additional jury finding necessary to comport with a new constitutional command is subject to the statutory maximum methodology as explained in *Blakely*, to ensure that the burden of proof associated with that additional finding is in accordance with the Constitution, and whether the statute governing the underlying proceedings was more onerous than the scheme in effect at the time of the crimes or the scheme reflecting the post-*Penry I* statutory fix. These are important federal

[2] "TR" refers to the trial transcript from the 2014 sentencing-only remand proceeding, that transcript filed with the Oregon Supreme Court.

questions decided by the Oregon Supreme Court in a way that conflicts with relevant decisions of this Court. Sup. Ct. Rule 10 (c).

B. First Question Presented

1. *"Statutory Maximum" for* Apprendi *Purposes Applies in the Capital Sentencing Context*

In *Apprendi v. New Jersey*, 530 U.S. 455, 490 (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." In *Blakely v. Washington*, 542 U.S. 296 (2004), this Court explained, that the "statutory maximum" for *Apprendi* purposes is that "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." 542 U.S. at 303-304. Application of these teachings brings consequences, including in the capital sentencing context.

At the time of the crimes in the underlying case, the statutory maximum sentence that could have been imposed on Mr. Langley was life with parole. The addition of the Fourth Question allowed for a sentence—a death sentence—beyond the statutory maximum and beyond that which was constitutionally available at the time of the crimes but did not require that additional finding be made beyond a reasonable doubt. The Oregon Supreme Court determined that the Fourth Question—Oregon's method of meeting this Court's Eighth Amendment *Penry I*

command—was not subject to this Court's methodology in determining the "statutory maximum" for *Apprendi* purposes and, thus, the Fourth Question as applied to Mr. Langley, was exempt from any standard of proof. Otherwise explained, the statutory amendment intended to save the capital sentencing scheme under the Eighth Amendment—the addition of the Fourth Question to satisfy *Penry I*, without which Mr. Langley could not be subjected to a sentence beyond life with parole—created a Sixth Amendment violation in that the state was not required to prove and jurors were not required to find the Fourth Question beyond a reasonable doubt before subjecting him to a sentence beyond the statutory maximum, specifically, a death sentence.

For nearly 20 years, this Court has underscored a basic, bright-line rule of the Sixth Amendment: "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Hurst v. Florida*, 136 S.Ct. 616, 621 (2016) (*quoting Apprendi*, 530 U.S. at 494). Where a factual finding is a necessary precursor to an enhanced or increased sentence, such as a death sentence, any distinction between "elements" of the crime and "sentencing factors" is dissolved for *Apprendi* purposes. *Apprendi*, 530 U.S. at 494. As noted in *United States v. Haymond*, 139 S.Ct. 2369, 2373 (2019), two narrow exceptions to *Apprendi's* general rule exist, namely, proof of fact of a defendant's prior conviction, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and facts affecting whether a defendant with multiple sentences serves them concurrently or consecutively. *Oregon v. Ice*, 555 U.S. 160 (2009). Neither exception is implicated here. Instead, consistent with this Court's directive,

"[o]nly a jury, acting on a proof beyond a reasonable doubt, may take a person's liberty[,]" *Haymond*, 139 S.Ct. at 2373, any one juror's finding that a capital defendant's moral culpability rises to the level such that his life should be extinguished necessitates the same standard of proof. *Cf*, *Furman v. Georgia*, 408 U.S. 238, 447 (1972) (Powell, J., dissenting) ("The Due Process Clause admits of no distinction between the deprivation of 'life' and the deprivation of 'liberty.'").

The requirements of proof beyond a reasonable doubt and a jury verdict are interrelated. *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). Given that interrelationship, it is not surprising that jury involvement in capital sentencing does not, alone, satisfy the Constitution. Rather, a jury finding that exposes a defendant to a sentence beyond the statutory maximum only meets constitutional standards if it is made unanimously, based on proof beyond a reasonable doubt. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (stating the accused's guilt of the crime, and, hence, the corresponding maximum exposure to punishment he faces, must be "determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*").

2. *Oregon Fails to Apply "Statutory Maximum" to its Capital Sentencing Scheme*

Rather than applying these precepts, the Oregon Supreme Court sanctioned Oregon's capital sentencing scheme by concluding that, "the prescribed statutory maximum penalty for the crime of aggravated murder is death[.]" *State v. Terry*, 37

P.3d 157, 171 (Or. 2001).[3] The Oregon Supreme Court reasoned that *Apprendi* and *Blakely* are inapplicable to the Fourth Question as it is a discretionary decision, and, therefore, "does not involve any determination of fact[,]" *Langley IV*, 424 P.3d at 721 (Pet. App. 35 a), and thus, a jury determination of the Fourth Question need not be evaluated under the "statutory maximum" methodology established by this Court. Notwithstanding the Oregon court's analysis, this Court's instruction is that, "the relevant inquiry is one not of form, but of effect." *Ring v. Arizona*, 536 U.S. 584, 602 (2002). The effect of the addition of the Fourth Question as to Mr. Langley—allowing him to be subject to a sentence beyond life with parole—requires application of and adherence to this Court's "statutory maximum" methodology.

The Oregon Supreme Court's understanding of "statutory maximum" as established by *Apprendi* and *Blakely* is irreconcilable with this Court's precedent. Pursuant to the statute in effect at the time of the crimes in this case—the pre-*Penry I*, pre-Fourth Question statutory scheme—the statutory maximum sentence the trial court could impose on Mr. Langley based on affirmative, beyond a reasonable doubt, findings by the jury under ORS 163.150(1)(b)(A)—(C), was life with parole. The Fourth Question, added in response to *Penry I*, is an additional finding that "expose[s] the defendant to a greater punishment than that authorized by the jury's" verdict and affirmative findings under 163.150(1)(b)(A)—(C). *Cf.*

[3] The Oregon Supreme Court's *Terry* decision preceded *Blakely* by three years. Three years after *Blakely*, however, according to the state's highest court, Oregon's courts were still engaged in "efforts …to understand, follow, and apply the United States Supreme Court's decisions in [*Apprendi*] and [*Blakely*]." *State v. Ramirez*, 173 P.3d 817, 818 (Or. 2007).

Apprendi v. New Jersey, 530 U.S. at 494. An affirmative finding on the Fourth Question is "necessary" to both the constitutionality of the statute and the imposition of death; the rule of *Apprendi, Ring*, and *Blakely* thus requires proof beyond a reasonable doubt on that jury finding.[4]

The Oregon Supreme Court's labeling of the Fourth Question as a "discretionary decision" dates back to its 1990 *Wagner II* decision, 786 P.2d at 100, issued in light of *Penry I*. At that time, the Fourth Question was a mitigation-only question, intended to bring Oregon's capital sentencing scheme in line with *Penry I's* Eighth Amendment command. The retroactive application of the Fourth Question was intended to save the State's ability to seek death against those 23 capital defendants including Mr. Langley who had been tried and sentenced to death pre-*Penry I*.

From the genesis of the Fourth Question to Mr. Langley's 2014 sentencing-only remand proceeding, various statutory and constitutional amendments worked to transmogrify the Fourth Question from a mitigation-only question to a question by which the jury weighs aggravating factors against mitigating factors. *State v. Longo,* 148 P.3d 892, 906 n.19 (Or. 2006).[5] Despite that transmogrification, Oregon courts persisted in their use of *Wagner II*'s label of a "discretionary determination."

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[4] Whereas, post-*Blakely*, in its criminal sentencing statutes and practices, Oregon has gradually changed course and implemented this Court's teachings relative to "statutory maximum," *Cf. State v. Dilts*, 103 P.3d 95 (Or. 2004) (on remand from *Dilts v. Oregon*, 542 U.S. 934 (2004)) (vacating and remanding for further consideration in light of *Blakely*); and *State v. Ice*, 204 P.3d 1290 (Or. 2009); that evolution has not reached the capital sentencing context.

[5] In *Longo*, Oregon Supreme Court explained that, the court shall instruct the jury to answer the Fourth Question, ORS 163.150(b)(D) 'no' if, after considering "any aggravating evidence and any mitigating evidence concerning any aspect of the defendant's character or background, or any circumstances of the offense and any victim impact evidence, one or more of the jurors believe that the defendant should not receive a death sentence." 148 P.3d at 906 n.19.

Notwithstanding Oregon courts' use of labels, the Fourth Question is *the* vehicle Oregon chose by which jurors assess and make a determination of a capital defendant's moral culpability. Analogously, when assessing whether or not a capital defendant has been prejudiced due to counsel's failure to investigate and present mitigation evidence, this Court directs that courts determine whether there is a reasonable probability that the omitted evidence would have influenced any one juror's appraisal of a defendant's moral culpability. *Cf. Wiggins v. Smith*, 539 U.S. 510, 538 (2002). The Fourth Question as applied to Mr. Langley in 2014 was required to be proven by the State and decided subject to a beyond a reasonable doubt standard.

Consistent with the fundamental propositions espoused in this Court's *Apprendi* and *Blakely* jurisprudence, the 2019 Oregon legislature amended Oregon's death penalty statute. In doing so, the Oregon legislature expressed its view that the former statute—the statute under which Mr. Langley was sentenced to death—was flawed in that, "the standard of proof [for the Fourth Question] appears to be less than what we believe the U.S. Supreme Court would require if a challenge went to that Court."[6] The legislative amendment was signed into law by the governor on the same day that the Oregon Supreme Court ultimately affirmed the death sentence imposed on Mr. Langley. The 2019 amendment was specifically drafted to apply prospectively, thus not affording Mr. Langley relief.

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[6] *Transcript of Proceedings before the House Committee on Rules*, 6/5/2019 TR 12, testimony of Senator Prozanski. A certified copy of the transcript of the proceedings cited is available with counsel.

3. *Conclusion as to the First Question Presented—"Statutory Maximum"*

Absent the Fourth Question, the statutory maximum sentence that could be imposed upon Mr. Langley based on affirmative findings under ORS 163.150(1)(b)(A)-(C) (1987) is a life sentence. The addition of the Fourth Question and an affirmative jury finding as to that question effectively exposed Mr. Langley to a greater punishment than that authorized by law without it. In order to obtain a death sentence, therefore, the State was required to obtain an affirmative jury finding on the Fourth Question according to the beyond a reasonable doubt standard. That did not occur; the judgment of death imposed against Mr. Langley, therefore, fails to adhere to this Court's precedent. Moreover, the absence of a jury finding beyond a reasonable doubt as to the Fourth Question "also divested the 'people at large'—the men and women who make up a jury of a defendant's peers—of their constitutional authority to set the metes and bounds of judicially administered criminal punishments." *Haymond*, 139 S.Ct. 2378-2379 (2019) (Opinion of Gorsuch, J.) (quoting *Blakely*, 542 U.S., at 306) (quoting Letter XV by the Federal Farmer (Jan. 18, 1788), in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed. 1981)).

An affirmative finding on the Fourth Question is "necessary" to the imposition of death, and thus, the rule of *Apprendi, Blakeley*, *Ring*, and *Hurst* requires it be proven by the State beyond a reasonable doubt. Oregon's capital sentencing scheme is in conflict with this Court's Sixth Amendment jurisprudence. The Court should grant the writ to provide states—and juries—with much-needed

guidance as to the standard of proof necessary to extinguish a capital defendant's life.

C. Second Question Presented

1. *The Statute Governing the 2014 Proceedings was More Onerous than the Scheme in Effect at the Time of the Crimes or the Scheme Reflecting the* Post-Penry I *Statutory Fix*

Statutory, constitutional, and judicial interpretive changes to Oregon's capital sentencing scheme, enacted and/or found after the time of the crimes in this case, were retroactively and cumulatively applied to Mr. Langley to make him eligible for the death penalty in the underlying 2014 sentencing-only remand proceeding.

Two criminal elements must be present for a criminal law to be *ex post facto*: it must be retrospective and it must disadvantage the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). This Court also teaches that the retroactive application of a law is *ex post facto* if the law "alters the rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender." *Calder v. Bull*, 3 U.S. (3 Dall) 386, 390-391 (1798). Further clarifying, in *Dobbert v. Florida*, 432 U.S. 282 (1977), this Court held that, "any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto." 432 U.S. at 292 (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925).

As noted above in this petition, during the 2014 sentencing-only remand proceeding, Mr. Langley was subject to, first, the statute-saving changes to the otherwise facially unconstitutional capital sentencing scheme in effect at the time of the underlying crimes (post-*Penry I* changes); and, second, he was subject to a host of additional disadvantageous changes to that scheme. The retroactive and cumulatively applied changes disadvantaged Mr. Langley by stripping him of a plethora of pre-existing statutory and constitutional rights and protections, thus increasing the likelihood that the 2014 jury would impose a death sentence against him.

The 1989 Oregon legislative response to *Penry I*'s Eighth Amendment command was to enact a Fourth Question allowing jurors to consider and give effect to a capital defendant's mitigation evidence. Since the creation of the Fourth Question, however, and as retroactively applied to Mr. Langley, it has become a procedural tool allowing for the introduction and consideration of aggravating evidence implicating the Sixth and Fourteenth amendments. The practical, down-to-details, non-speculative effect of the post-*Penry I* scheme, as altered by subsequent statutory and state constitutional amendments, has been to hobble the defense while allowing the State to present ever-expanding categories and pieces of aggravating evidence in its pursuit of a death sentence, even in the context of the Fourth Question, all to Mr. Langley's disadvantage.

The Oregon Supreme Court's 1990 *Wagner II* decision upheld the post-*Penry I* capital sentencing statute against a facial challenge, with that court later observing that, "if the statute did not permit a 'fourth question,' the statute would

be facially unconstitutional." *Guzek II*, 906 P.2d at 281 (citing *State v. Wagner II*, 786 P.2d at 94). The court's *Wagner II* decision did not uphold the statute against an as-applied challenge for the simple reason that no as-applied challenge was pending before that court. Rather, as applied to Mr. Langley and other pre-*Penry I* capital defendants, it is indisputable that, circa *Wagner II*, the Oregon Supreme Court's sanctioning of the retroactive application of the Fourth Question and other post-*Penry I* changes was based upon at least three fundamental underpinnings. First, the Fourth Question "was developed for the sole purpose of giving effect to the constitutional requirement that the jury must consider mitigating evidence." *Guzek II*, 906 P.2d at 282. Second, and related, the Fourth Question, was absolutely "not to let in more aggravating evidence." *Guzek II*, *Id.* at 283. Third, to the extent that aggravating factors were to be considered in the context of the Fourth Question, it was the clear intent and understanding of the legislature that such factors would be required to be proven by the State beyond a reasonable doubt. *Id.* at 279.

The Oregon Supreme Court's underlying decision upholding the death sentence against Mr. Langley eschews all three underpinnings, each of which was necessary to that court's 1990 *Wagner II* decision finding Oregon's capital sentencing statute facially constitutional. In other words, it is only by the faithful adherence to the three underpinnings that Oregon's capital sentencing statute was saved from facial unconstitutionality, yet, in affirming Mr. Langley's death sentence, the Oregon Supreme Court was inconstant to those underpinnings as application of the amalgamation of subsequent changes unraveled the delicate

balance established post-*Penry I*, resulting in the 2014 application of a more burdensome scheme to Mr. Langley that violated his right against the application of *ex post facto* laws.

2. *The Disadvantageous Effects of the Amalgamation of Changes to the Oregon Capital Sentencing Scheme, as Applied to Mr. Langley*

The 2014 sentencing-only remand proceeding subjected Mr. Langley to the retroactive application of changes to the capital sentencing scheme that, taken individually and cumulatively, were more onerous and disadvantageous than the capital sentencing scheme in effect at either the time of the crimes or at the time of the post-*Penry I* statutory fix. Mr. Langley offers non-exhaustive examples of the ways the amalgamation of changes disadvantaged him relative to the following three (of many) changes: application of the sentencing-only remand provision, admission and consideration of aggravating victim impact evidence, and the addition and/or operation of an additional finding without requiring its proof beyond a reasonable doubt.

Mr. Langley was clearly disadvantaged by the loss of the pre-existing entitlement, under statute in effect at the time of the crimes, of the protective and corrective process of a new guilt phase rather than a sentencing-only remand upon the appellate court finding reversible error in the penalty phase alone. Compare, ORS 163.150(1)(a) (1987), requiring, per the 1984 voters' intent, the same jurors consider and decide both culpability and punishment, with ORS 163.150(5)(a) (1989), providing that if a reviewing court finds prejudicial error in the sentencing proceeding only, the court may set aside the sentence of death and remand the case

to the trial court; no error in the sentencing proceeding shall result in reversal of the defendant's conviction for aggravated murder. *Langley IV*, 424 P.3d at 716 (Pet. App. 30 a).[7]

One example of the disadvantageous effect of the retroactive application of that sentencing-only remand provision to Mr. Langley in the 2014 proceeding was to deny him a defense that was available at the time of the crimes in this case, for example, the ability to construct and present a unified defense theory. The Oregon Supreme Court recognizes the importance of a unified defense theory, noting that counsel should, "whenever possible, [] *develop a unified defense theory for both the guilt and penalty phases of the trial*, with an eye toward minimizing the risk that a jury that convicts will impose the death penalty." *Johnson v. Premo*, 399 P.3d 431, 444 (Or.2017) (emphasis added).[8] The retroactively applied legislative amendment prescribing sentencing-only remands stripped Mr. Langley of the protective and corrective process of a new guilt phase, a process that had allowed the defense to

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[7] The Oregon Supreme Court's underlying decision claims that the 1990 *Wagner II* decision addressed and dispensed with Mr. Langley's as-applied assertions of more onerous substantially disadvantageous, and non-ameliorative effects as a result of the retroactive application of changes to the capital sentencing scheme. *Langley IV*, 424 P.3d at 720 (Pet. App. 34 a). It did not. *Wagner II* was limited to the facial challenge before that court. Moreover, *Wagner II* was decided at a time during which the Oregon Supreme Court failed to understand the Eighth and Fourteenth amendment need for a heightened standard of meaningful appellate review commensurate with a capital case, instead believing that, "[t]he scope of appellate review in death penalty cases is the same as in all other criminal cases." *State v. Montez I*, 789 P.2d 1352, 1380 (Or. 1990). Finally, the additional changes made to the scheme, to which Mr. Langley was subjected in 2014, occurred after the court's *Wagner II* decision.

[8] *See also*, Goodpaster, Gary, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L .REV. 299, 334 (May, 1983) (discussing the necessity of integrating the guilt and penalty phase cases); Lyon, Andrea, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695 (1990); and *see generally,* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, e.g., Guideline 1.1 *Objective and Scope of Guidelines*, 31 HOFSTRA L. REV. 913, 926 (2003) ("[C]ounsel must coordinate and integrate the presentation during the guilt phase of the trial with the projected strategy for seeking a non-death sentence at the penalty phase.").

implement a unified defense theory as between both the guilt and penalty phases. The change instituting sentencing-only remands was neither designed nor operated to appropriately determine the defendant's culpability, but instead was for the convenience of the State. *Cf. Montgomery v. Louisiana*, 136 S.Ct. 718, 729-730 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. at 353) (substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the state's power to impose," while procedural rules "are designed to enhance the accuracy of a conviction or sentence by regulating the manner of determining the defendant's culpability."). The change hobbled the defense, removing the well-established practice of a unified theory of defense from the range of possibilities, and changed the ingredients and dynamics of what was necessary for one juror to make a finding that Mr. Langley's moral culpability supported a negative finding on the Fourth Question.

Mr. Langley was clearly disadvantaged through the retrospective application of the 1995 and 1997 revisions[9] by which the rules of evidence were altered to allow the State to present aggravating victim impact evidence in the context of the Fourth Question. That evidence was neither relevant nor admissible at the time of the crimes in this case for purposes of the first three penalty phase questions, and similarly was neither relevant nor admissible under the Fourth Question as that question was to be applied to pre-*Penry I* defendants including Mr. Langley.[10] These

[9] Those changes were made in the context of newly enacted victims' rights to be heard in sentencings. Or Laws 1995 ch 531 § 2.; Or Laws 1997 ch 784 § 1; and the 1999 addition of Article I, section 42, to the Oregon Constitution.

[10] In *Guzek III*, the defendant argued that the "retroactive application of the [1995 and 1997] victim impact evidence provisions" violated the state and federal constitutional prohibitions against *ex post*

retroactively applied changes allowed the prosecutor to emphasize that aggravating victim impact evidence testimony in urging the 2014 jurors to each make an affirmative finding as to the Fourth Question, and required the trial judge to instruct those jurors to consider the full scope of the aggravating victim impact evidence in deciding whether Mr. Langley should receive a death sentence.

The introduction of aggravating victim impact evidence and argument was not admissible at the time of the crimes in this case, much less in the context of the post-*Penry I* addition of the mitigation-only Fourth Question. *Guzek II*, 906 P.2d at 286 ("[V]ictim impact statements are not 'relevant to sentencing' in capital cases under ORS 163.150(1)(b) (1989), because those statements are not relevant to any of the four substantive questions that a jury must answer pursuant to that statute and *Wagner II,* [786 P.2d at 100]."); and *see also*, *State v. Guzek III*, 86 P.3d 1106, 1115 (Or. 2004) ("[U]nder the 1989 version of the death-penalty statutory scheme…the admission of victim-impact evidence constituted reversible error.").

The introduction of aggravating victim impact evidence and argument—the very kind of aggravating evidence forbidden under either the scheme in effect at the time of the crimes or the scheme reflecting the post-*Penry I* statutory fix—clearly disadvantaged Mr. Langley. Indeed, Oregon courts hold that the admission and use of victim impact evidence makes a death sentence more likely. *See, e.g., Hayward v. Belleque*, 273 P.3d 926, 937-938 (Or. Ct. App. 2012), *rev. den.*, 297 P.3d

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facto law. *State v. Guzek III*, 86 P.3d 1106, 1115 (Or. 2004). As to the Oregon Constitution, the Oregon Supreme Court explained that a crime victim had a state constitutional right "to be heard" under Article I, section 42(1)(a), that expressly superseded the *ex post facto* provisions of Article I, section 21, *Guzek III*, 86 P.3d at 1115-1116, notwithstanding Section 42 not having been adopted until approximately nine years after *Wagner II* was decided.

480 (Or. 2013) ("in our view…making victim impact evidence available during the penalty phase. . .makes a death sentence more likely"); and *Guzek II*, 906 P.2d at 287. In other words, the introduction of aggravating victim impact evidence does not merely create a, "speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes[,]" *California Dept. of Corr. v. Morales*, 514 U.S. 499, 513 (1995), but instead increases the likelihood that a defendant will be sentenced to death.

Retroactive application of the cumulative changes making up the 2014 capital sentencing scheme, applied to Mr. Langley, is in conflict with the *ex post facto* teachings of this Court. Rather than adhere to those teachings, the Oregon Supreme Court's underlying decision exalted subsequently enacted victims' rights changes, sanctioning the admission of aggravating victim impact evidence against Mr. Langley, and finding no state or federal *ex post facto* violation. *Langley IV*, 424 P.3d at 715 n.12 (Pet. App. 29 a) (declining to "revisit" what the Oregon Supreme Court represented as its holding in *Guzek III*, namely, that retroactive application of victims' rights constitutional amendment "did not offend the *ex post facto* prohibitions of either the state or federal constitutions.").

The Oregon Supreme Court's underlying decision fails to recognize the undisputed statute-saving "mitigation only" purpose of the post-*Penry I* Fourth Question as to Mr. Langley. That decision further fails to recognize that the Fourth Question given to the 2014 sentencing-only remand jurors was substantially dissimilar from that considered in *Wagner II* in that it specifically *required* jurors to consider the aggravating factor of victim impact evidence in their determination

whether Mr. Langley should be sentenced to death. The 2014 Fourth Question did so, however, without heeding the well-accepted proposition of some members of this Court that aggravating factors must be proven by the state beyond a reasonable doubt,[11] a proposition consistent with the understanding of the post-*Penry I* legislature. *Guzek II*, 906 P.2d at 279. Finally, the underlying decision fails to recognize the disadvantageous effects resulting from the retroactive application to Mr. Langley of these and other changes to the Oregon capital sentencing scheme.

Mr. Langley is further disadvantaged by the Oregon Supreme Court's refusal to afford him his Sixth and Fourteenth amendment protections, specifically, adherence to this Court's "statutory maximum" methodology in favor of its outdated 1990 *Wagner II* Eighth Amendment rationale—outdated because the post-*Penry I* scheme was substantially altered but also because the *Wagner II* rationale predated and failed to anticipate the *Apprendi* line of cases.

"[A] 'criminal prosecution' continues and the defendant remains an 'accused' with all the rights provided by the Sixth Amendment, until a final sentence is imposed." *Haymond*, 139 S.Ct. at 2379. At the time of the 2014 sentencing-only remand proceeding, Mr. Langley had a Sixth Amendment right to have any fact that increases the penalty for the crime of *Aggravated Murder* beyond the statutory maximum of a life sentence proved by the state and found by a jury beyond a

[11] *Ring*, 536 U.S. at 612 (2002) (Scalia, J., joined by Thomas, J., concurring) ("[W]hether or not the States have been erroneously coerced into the adoption of 'aggravating factors' wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.").

reasonable doubt. Mr. Langley timely invoked his Sixth and Fourteenth amendment rights, however, he was not afforded the protections of those rights in regard to the jury's determination that his moral culpability rose to the level such that his life should be extinguished. The Oregon Supreme Court affirmed the jury's finding that Mr. Langley should be sentenced to death, relying on its Eighth Amendment understanding of the Fourth Question as it existed in the 1990 *Wagner II* decision, labeling that question a discretionary determination. Time and subsequent cases have washed away any logic that the Fourth Question is a discretionary determination and thus beyond the reach of this Court's reasoning and guidance in *Apprendi*, *Ring*, and *Blakely*. As applied to Mr. Langley, the Fourth Question is a jury finding necessary to the imposition of a sentence beyond life with parole, specifically, a death sentence. The *Wagner II* Court's Eighth Amendment understanding of the Fourth Question is incompatible with this Court's teachings relative to the Sixth Amendment "statutory maximum" methodology.

3. *CONCLUSION AS TO THE SECOND QUESTION PRESENTED*

A retrospective law can be constitutionally applied to a person only if it is not to his detriment. *Weaver*, 450 U.S. at 33. The retrospectively applied statutory scheme was more onerous than the prior law. *Dobbert*, 432 U.S. at 294.[12] Mr. Langley was clearly disadvantaged by the retroactively applied statutory, state

[12] *Dobbert* involved the constitutionality, under the *ex post facto* clause of Article I, section 10, of the United States Constitution, of the imposition of the death penalty for first-degree murder under Florida statutes in effect at the time of the defendant's initial trial, even though the killing occurred at a time when the death penalty was governed by earlier Florida statutes that were later (but before the defendant's trial) held to be unconstitutional. This Court held that there was no *ex post facto* violation because the change in the death penalty statute was *procedural and ameliorative*. 432 U.S. at 294.

constitutional, and judicial interpretive changes that, taken individually and cumulatively, were used to obtain a death sentence against him, violating his right against *ex post facto* laws.

CONCLUSION

This case comes to this Court on direct review bearing a record in which the at-issue constitutional issues are well-preserved. This case presents an ideal vehicle for this Court to decide both questions presented, which are equally worthy of this Court's attention. Petitioner respectfully prays this Court grant certiorari.

Respectfully submitted,

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APPENDIX