No. 19-7743

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT PAUL LANGLEY, JR.,

Petitioner,

v.

STATE OF OREGON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

On Petition for Writ of Certiorari of the
Supreme Court of the State of Oregon

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CAPITAL CASE

QUESTIONS PRESENTED

1. At the time that petitioner was sentenced, Oregon law provided that the jury must answer four questions during the penalty phase of a capital murder trial in Oregon, and that a death sentence may not be imposed unless the jury unanimously answers each of the four questions "yes." Or. Rev. Stat. § 163.150(1) (2014). Each of the first three questions presents an issue of fact, and Oregon law required that, to answer those questions "yes," the jury must find each fact "beyond a reasonable doubt." Or. Rev. Stat. § 163.150(1)(e) (2014). The fourth question presented only a discretionary decision for the jury: "Whether the defendant should receive a death sentence." Or. Rev. Stat. § 163.150(1)(b)(D) (2014). Oregon law did not impose a burden of proof on either party with respect to the fourth question. Did the submission of the fourth question create a sentence-enhancement fact for which the federal constitution requires that the jury apply a standard of proof beyond a reasonable doubt?

2. During the 2014 sentencing proceeding, was petitioner subject to changes in the law that violated the Ex Post Facto Clause of Article I, section 10, of the United States Constitution?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is a capital case in which petitioner presents two legal issues for this Court's review, contending that each of the federal-law issues he defines are well-preserved and worthy of this Court's attention. That is not correct. As explained below, neither issue has merit or warrants review by this Court.

A. The aggravated murder convictions at issue

This matter comes before the Court following the fourth jury determination that petitioner should be sentenced to death for the 1987 aggravated murder of A. Gray. At the time of Gray's death, petitioner—while serving a term of incarceration for crimes not at issue here—lived in a cottage on the grounds of the Oregon State Hospital, where he participated in a low-security Correctional Treatment Program for mentally or emotionally disturbed inmates. (Pet. App. 6a). The program in which petitioner was enrolled was a transition program in which inmates, nearing the end of a prison term, received extensive psychological counseling, learned job and independent living skills, and was assisted in establishing a productive post-prison life in the community. *Id.*

Gray—a neighbor of petitioner's girlfriend—disappeared on December 10, 1987. *Id*. That same day, petitioner enlisted his girlfriend's help to

transport a large, awkward bundle wrapped in a comforter from Gray's apartment to the home of petitioner's aunt. *Id*. In April 1988, Gray's decomposed body was found buried in a grave in petitioner's aunt's backyard. *Id*. Gray died from asphyxiation, her body was very tightly bound in the fetal position by multiple bindings, including duct tape wrapped around her head to cover her nose and mouth, a shoestring-type ligature knotted tightly around her neck, and numerous bandages, tapes and ropes tied around her wrists, ankles, torso and legs. *Id*. Gray's asphyxiation was caused by both the neck ligature and the duct tape covering her nose and mouth. *State v. Langley*, 314 Or. 247, 251, 839 P.3d 692, 696 (1992) (*Langley I*).

The discovery of Gray's body was facilitated by the discovery a day earlier of petitioner's second victim, L. Rockenbrant. Rockenbrant disappeared in April 1988 after reportedly going out to meet with petitioner, and his bludgeoned remains were found shortly thereafter buried behind petitioner's Oregon State Hospital cottage. (Pet. App. 6a n.1). The grave into which Rockenbrant's body had been placed was marked by a note identifying it as "Cottage 18 garden plot. Please leave alone." *Id*. When hospital staff discovered the "garden plot" and attempted to speak with petitioner about it,

petitioner fled in an automobile that belonged to Rockenbrant.[1] *Id.* Upon learning of Rockenbrant's murder, the daughter of petitioner's aunt contacted police concerning a large hole that petitioner had dug in her mother's backyard that previous winter. *Id*.

In December 1989, a jury found petitioner guilty of aggravated murder for killing Gray and determined that he should receive a death sentence. In 1992, the Oregon Supreme Court affirmed petitioner's convictions but set aside his death sentence on the ground that the trial court failed to give a proper jury instruction on the consideration and use of mitigating evidence. *Langley I*, 314 Or. at 247.

A second penalty-phase proceeding followed, and the jury again determined that petitioner should receive a death sentence. On direct review, the Oregon Supreme Court set aside petitioner's death sentence, concluding that the trial court erred by refusing to allow petitioner to waive any *ex post facto* objection to having the jury consider a true-life sentencing option. *State v. Langley*, 331 Or. 430, 16 P.3d 489 (2000) (*Langley II*).

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[1] For killing Rockenbrant, petitioner was separately convicted of aggravated murder and received a life sentence with the possibility of parole after 30 years. *See State v. Langley*, 314 Or. 511, 840 P.2d 691 (1993). Those convictions are not at issue in this case.

On remand for a third penalty-phase proceeding, petitioner—this time representing himself—was once again sentenced to death. On direct review in 2012, the Oregon Supreme Court concluded that the trial court erred by not securing a valid waiver of petitioner's right to counsel, and petitioner's case was remanded for another penalty-phase proceeding. *State v. Langley*, 351 Or. 652, 273 P.3d 901 (2012) (*Langley III*).

The penalty phase was tried for a fourth time in 2014, and a jury again sentenced petitioner to death. At the time that petitioner was sentenced, Oregon law required trial courts to submit four questions to the jury:

> (b) Upon conclusion of the presentation of 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 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 the death sentence.

Or. Rev. Stat. § 163.150(1)(b) (2014). Oregon law required that to answer each of the first three questions "yes," the jury must find each fact unanimously beyond a reasonable doubt, but Oregon law did not impose a burden on either

party with respect to the fourth question. Or. Rev. Stat. § 163.150(1)(d)-(e) (2014).

The trial court instructed the jury in accordance with that statute. The jury unanimously answered each of the four questions "yes," and the trial court imposed a death sentence. (Pet. App. 5a-6a).

B. The Oregon Supreme Court rejected the arguments that petitioner raises in this Court.

On direct review, petitioner raised 77 claims of error, all of which the Oregon Supreme Court rejected in affirming the death sentence. (Pet. App. 5a, 35a). Petitioner raises two issues in this Court, both of which stem from changes to Oregon's capital sentencing scheme after petitioner committed the murder. In rejecting those assignments of error, the Oregon Supreme Court outlined relevant portions of the history of Oregon's capital sentencing scheme. (Pet. App. 30a-31a). Because that history is important to understanding the context of petitioner's claims in this Court, the state presents it here.

At the time that petitioner killed the victim, Oregon law required jurors to consider three statutory questions—the first three questions outlined in the 2014 statute—regarding the applicability of the death penalty. Or. Rev. Stat. § 163.150 (1987). Each question had to be proved beyond a reasonable doubt, and if the jury unanimously answered each question affirmatively, the trial court was required to impose a death sentence. *Id.*

Two years after petitioner's crime, this Court decided *Penry v. Lynaugh*, 492 U.S. 302 (1989). In *Penry*, the Texas statutory capital sentencing procedure required a trial court to submit three questions to the jury. 492 U.S. at 310. The defendant in *Penry* requested a special instruction on the use of mitigation evidence that the trial court refused to give. This Court held, as relevant here, that the trial court erred in refusing to give the defendant's requested instruction because in the absence of an instruction informing the jury that it could consider and give effect to mitigating evidence by declining to impose the death penalty, the jury had not been provided with a vehicle for expressing a reasoned and moral response to such evidence in reaching its capital sentencing decision. *Id*. at 328.

At the time, Oregon's death penalty instructions had been modeled after the Texas statutory scheme applied in *Penry*. (Pet. App. 30a). In an effort to codify this Court's decision in *Penry*, the Oregon legislature amended its capital sentencing statute, adding a fourth question that provided jurors with a discretionary decision of whether the death penalty should be imposed and permitted them to use mitigating evidence in answering that question. Or. Rev. Stat. § 162.150(1)(b)(D) (1989). One month after the legislature added the fourth question, the Oregon Supreme Court took up *Wagner II*. *State v. Wagner*, 309 Or. 5, 786 P.2d 93, *cert. den.*, 498 U.S. 879 (1990) (*Wagner II*).

Wagner II became necessary after this Court required the court to reexamine its first decision in *State v. Wagner*, 305 Or. 115, 752 P.2d 1136 (1988) (*Wagner I*), *vacated and remanded* 492 U.S. 914 (1989), in light of *Penry*.

In *Wagner II* the Oregon Supreme Court considered, among other things, the constitutionality of Oregon's pre-*Penry* 1987 capital sentencing statute—the statute in effect at the time that petitioner committed the murder in this case. The Oregon Supreme Court concluded that the pre-*Penry* statute was constitutional because (1) it allowed the introduction of all constitutionally relevant mitigating evidence, and (2) state law otherwise allowed trial courts to submit a fourth question to juries, to comply with the Eighth Amendment, that would permit them to spare a capital defendant from death—the type of instruction that the defendant in *Penry* did not receive. *Wagner II*, 309 Or. 6, 15-16.

With that history in mind, the Oregon Supreme Court rejected both claims that petitioner raises in this Court. (Pet. App. 24a-35a).

First, the Oregon Supreme Court rejected petitioner's claim that the trial court erred by failing to instruct the jurors that the fourth question posed to the jury had to be proved by the state beyond a reasonable doubt. (Pet. App. 35a). Petitioner asserted that the addition of the fourth question—whether he should receive the death sentence—was a sentence enhancement fact because, in his

view, it made the death penalty a constitutional possibility when it had not existed before. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (other than the fact of a prior conviction, any fact that increases a criminal penalty beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt). But the Oregon Supreme Court rejected that argument, concluding—as it had in *State v. Longo*, 341 Or. 580, 605-06, 148 P.3d 892 (2006), *cert. den.*, 552 U.S. 835 (2007)—that *Apprendi* does not require the state to prove the fourth question beyond a reasonable doubt because the question calls for a discretionary decision rather than a factual determination. (Pet. App. 35a).

Second, relying on its well-established precedent, the Oregon Supreme Court rejected petitioner's *ex post facto* challenges based on changes to Oregon's capital sentencing structure after *Penry*. The court rejected petitioner's constitutional challenge to Oregon's *pre-Penry* capital sentencing structure—as it had over 30 years earlier in *Wagner II*—because petitioner's argument hinged on a misinterpretation of Oregon caselaw and this Court's decision in *Penry*, 492 U.S. 302 (1989). (Pet. App. 32a-35a). The Oregon Supreme Court also relied on its established caselaw—*State v. Guzek*, 336 Or. 424, 86 P.3d 1106 (2004) (*Guzek III*)—in rejecting petitioner's argument that the introduction of victim impact evidence violated the *ex post facto* clause of

Article I, section 10, of the United States Constitution. The court noted that it rejected the same argument in *Guzek III* and declined to revisit its holding in that case. (Pet. App. 29a n.12). Rather than discussing petitioner's claim regarding the "sentencing-only remand," the court summarily rejected it. (Pet. App. 35a).

REASONS TO DENY REVIEW

The Oregon Supreme Court correctly rejected petitioners' constitutional challenges to Oregon's death penalty statutes. As discussed further below, none of the claims that petitioner asserts in his petition has merit or warrants review by this Court. The issues that petitioner raises do not implicate any split of authority and have only limited forward-looking significance. In this case, the Oregon Supreme Court simply applied this Court's settled law—and interpreted its own state law—in rejecting petitioner's varied challenges to his death sentence.

A. The Oregon Supreme Court correctly rejected petitioner's standard-of-proof argument, because the jury's decision to impose a death sentence is not a factual finding.

The trial court instructed the jury that it could impose a death sentence only if it unanimously determined that no mitigating circumstances warranted a lesser sentence. The court explained that that was a discretionary determination

for each juror, and that the burden of proof beyond a reasonable doubt did not apply to that question. The Oregon Supreme Court correctly rejected petitioner's argument that the instructions violated this Court's holding in *Apprendi* that facts that increase a penalty must be proved beyond a reasonable doubt. (Pet. App. 35a). Because the jury was not asked to make a factual determination, *Apprendi*'s rule was not implicated.

As discussed, Oregon law at the time that petitioner was sentenced provided that the jury must answer four questions during the penalty phase and that a death sentence may not be imposed unless the jury unanimously answered each of the four questions "yes." Or. Rev. Stat. § 163.150(1) (2014). Each of the first three questions presented an issue of fact, and Oregon law required that, to answer each of those questions "yes," the jury must find that fact beyond a reasonable doubt. Or. Rev. Stat. § 163.150(1)(d)-(e) (2014). After answering the first three questions the jury then considered the fourth question, which presented only a discretionary decision: "Whether the defendant should receive a death sentence." Or. Rev. Stat. § 163.150(1)(b)(D) (2014). In answering that question, the jury was instructed to consider "any mitigating circumstances offered in evidence," Or. Rev. Stat. § 163.150(1)(c)(A) (2014), but the jury was not charged with making any specific "findings" of mitigating circumstances.

The Oregon Supreme Court has repeatedly held that the fourth question does not present an issue of fact and so Oregon law does not require jurors to apply a standard of proof beyond a reasonable doubt when they answer that question and that neither the Sixth nor the Eighth Amendment imposes such a requirement. *See State v. Longo*, 341 Or. 580, 605-06, 148 P.3d 892 (2006), *cert. denied*, 552 U.S. 835 (2007) ("[b]ecause the fourth question does not involve a determination of fact, *Apprendi/Blakely* does not require the state to prove it beyond a reasonable doubt."); *see also State v. Washington*, 355 Or. 612, 664, 350 P.3d 596, *cert. den.*, 574 U.S. 1016 (2014) (observing that the fourth question frames a discretionary inquiry).

Nevertheless, in this case, petitioner asked the trial court to instruct the jurors that they had to apply the standard of proof beyond a reasonable doubt when they answered the fourth question. (Pet. App. 35a). The trial court denied that request and instructed the jury in accordance with Oregon law, the jury imposed a death sentence, and petitioner complained on direct review that the trial court erred when it denied his requested jury instruction. In rejecting that claim of error, the Oregon Supreme Court—citing *Longo*—reiterated that the fourth question does not carry a burden of proof because it is discretionary inquiry and does not "involve a determination of fact." (Pet. App. 35a).

The Oregon Supreme Court correctly concluded that petitioner's contrary argument fails to appreciate the fundamental distinction between *factual* findings and a discretionary decision. (Pet. App. 35a). In support of his argument, petitioner relies on *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016). (Pet. 13-20). But the Oregon Supreme Court's ruling is entirely consistent with both of those decisions, which require only that a jury find the aggravating circumstance that makes the defendant death eligible. *Hurst*, 136 S. Ct. at 619; *Ring*, 536 U.S. at 612. As this Court recently reiterated, *Ring* "has nothing to do with jury sentencing[,]" and requires only that a capital jury must "find the existence of the fact that an aggravating factor exists" in order to impose a death sentence. *McKinney v. Arizona*, 140 S. Ct. 702, 707-08 (2020). Notably, both *Ring* and *Hurst* approved of capital jurors exercising discretion during sentencing proceedings so long as the sentence is within the range prescribed by statute. *Id*. at 707. And, as *McKinney* makes clear, a capital jury is not constitutionally required to weigh aggravating and mitigating circumstances when making the ultimate sentencing determination. *Id*. at 708-09.

As discussed, under Oregon law the fourth question posed to jurors is discretionary and they answer that question only if they have found—unanimously and beyond a reasonable doubt—the existence of the three

aggravating factors outlined in the first three questions that make defendant eligible for the death penalty, the statutory maximum. Or. Rev. Stat. § 163.150 (2014). In answering the fourth question, jurors are not required to make any factual determinations, nor expressly balance the aggravating factors against the mitigating circumstances in order to determine whether one outweighed the other. Rather, Oregon law required that if any juror concluded, "after considering" whatever mitigating circumstances the defendant proffered, that a sentence less than death should be imposed, then the jury must answer the fourth question "no." Or. Rev. Stat. § 163.150(1)(c)(B) (2014). And under that statutory scheme, a juror may choose to answer the fourth question "no" without finding that the defendant established any mitigating circumstances. Because the fourth question did not entail a *factual* determination, the Oregon Supreme Court correctly held that the federal constitution did not impose a standard of proof beyond a reasonable doubt.[2]

In any event, regardless of whether the fourth question is a "discretionary" decision, *Apprendi* is not implicated for a second reason: the fourth question is a mitigating determination that exempts a defendant from the

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[2] In 2019, the Oregon legislature amended the statute to require that the state to prove each question submitted under Or. Rev. Stat. § 163.150(1)(d) beyond a reasonable doubt. That change, which has no bearing on the constitutionality of petitioner's sentencing procedure, diminishes the forward-looking significance of the issue raised here.

maximum sentence that is otherwise authorized by law based on the jury's other factual findings. The fourth question is the mechanism for jurors nonetheless to exercise their discretion to impose a *lesser* sentence. But this Court's holding in *Apprendi* only requires jurors to find, beyond a reasonable doubt, "any fact that *increased* the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury[.]" 530 U.S. at 490 (emphasis added); *accord Alleyne v. United States*, 570 U.S. 99 (2013) (holding that factual findings that increase mandatory minimum sentences are subject to *Apprendi*). Consequently, *Apprendi* does not apply to the fourth question. *See, e.g.*, *State v. Cuevas*, 358 Or. 147, 158-59, 361 P.3d 581 (2015) (concluding that *Apprendi* does not apply to factual findings that limit or reduce the length of sentence); *Oregon v. Ice*, 555 U.S. 160, 164 (2009) (when a state statute imposes a presumptive consecutive sentence, it is "undisputed" that states may permit sentencing judges, rather than juries, to make findings for the imposition of concurrent sentences "without transgressing the Sixth Amendment").

The decision below is consistent with this Court's Sixth Amendment case law and does not warrant further review.

B. The Oregon Supreme Court correctly rejected petitioner's *ex post facto* challenges.

Petitioner's fourth sentencing proceeding in 2014 was held largely under the statute in effect at the time rather than the statute in effect in 1987, when he

committed the crime.[3] Any changes to the statute that were applied to petitioner's trial were procedural or ameliorative. None of them reduced the state's burden or made a death sentence more likely. The Oregon Supreme Court therefore correctly held that the sentencing proceeding did not violate petitioner's rights under the Ex Post Facto Clause.

1. The Oregon Supreme Court correctly rejected petitioner's constitutional challenge to Oregon's capital sentencing scheme as outlined in Or. Rev. Stat. § 163.150 (1987).

As discussed, at the time that petitioner killed the victim Oregon law required that a jury that had convicted a defendant of aggravated murder answer three statutory questions regarding the applicability of the death penalty. Or. Rev. Stat. § 163.150 (1987). If the jury unanimously answered each question affirmatively, the trial court was required to impose a death sentence.

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[3] The parties agreed not to apply the 1995 and 1997 amendments to Or. Rev. Stat. § 163.150 that permitted jurors in 2014 to consider "any aggravating evidence" in the context of the fourth question. (Pet. App. 25a); *accord Guzek III*, 336 Or. at 430-39 (retroactive application of amendments to death penalty statute allowing the admission of "any aggravating evidence" in a penalty-phase violated *ex post facto* prohibitions where the defendant's offenses predated the amendments). On review, the Oregon Supreme Court rejected petitioner's claim that the trial court erred by not abiding by that agreement and held that "the trial court did not permit aggravating facts relevant only to the fourth question to be presented to the jury, nor did the trial court instruct the jury to consider such facts as part of its fourth-question determination." (Pet. App. 29a).

Two years after petitioner's crime, this Court decided *Penry* and held that the trial court erred in refusing to give the defendant's proffered instruction on mitigating evidence because, in the absence of an instruction informing the jury that it could consider and give effect to mitigating evidence presented by the defendant, the jury was not provided with a vehicle for expressing a reasoned and moral response to such evidence in reaching its capital sentencing decision. *Penry*, 492 U.S. at 328.

In response to *Penry*, the Oregon legislature amended the state's death penalty statute adding a fourth question that directed trial courts to instruct jurors, when constitutionally required, to consider mitigating evidence presented by the defendant in deciding whether to impose a death sentence. Or. Rev. Stat. § 162.150(1)(b)(D) (1989). And shortly thereafter, the Oregon Supreme Court construed that fourth question and the constitutionality of Oregon's pre-*Penry* death penalty statute—the version in effect when petitioner committed his crimes—in *Wagner II*. The court held that the pre-*Penry* statute was facially constitutional, and that *Penry* did not require a different conclusion because Oregon law in effect before *Penry* required trial courts, upon request, to submit instructions to capital jurors on the use of mitigating evidence. *Wagner II*, 309 Or. at 15-16.

Despite that holding, petitioner insists that Oregon's capital sentencing scheme in place at the time that he murdered Gray was facially unconstitutional. Based on that assertion, petitioner reasons that the imposition of a death sentence amounts to an *ex post facto* violation.

But this Court rejected the same argument in *Dobbert v. Florida*, 432 U.S. 282, 297 (1977). There, as here, the petitioner claimed that at the time he murdered his victim, "there was no [constitutionally valid state] death penalty 'in effect[.]'" *Id*. Dobbert claimed that was so because "after the time he acted," the state death penalty statute was found to be invalid by the state supreme court. *Id*. As a result, Dobbert claimed, "there was no valid' death penalty in effect in [the state] as of the date of his actions" and applying the amended statute to him violated the Ex Post Facto Clause. *Id*. This court rejected that argument, concluding that it "mocks the substance of the Ex Post Facto Clause" because the existence of the statute "provided fair warning" that the state would seek the death penalty for murder. *Id*. As in *Dobbert*, the Oregon statute in effect when petitioner murdered Gray gave him fair notice that it was a capital crime. For that reason, his *ex post facto* argument fails.

Indeed, this Court has long held that changes in the law that are procedural or ameliorative do not trigger *ex post facto* protections. *Id*. at 293-95. Yet petitioner's complaints about Oregon's death penalty statute target only

changes that are procedural or ameliorative. Petitioner's complaint to this Court hinges on the incorrect premise that Oregon's pre-*Penry* capital sentencing scheme was unconstitutional given the absence of the fourth question (or presumably another statutory provision requiring the consideration of mitigating evidence by the sentencing jury). (Pet. 16, 25-26). But that argument fails because his challenge to the statute targets an amendment that merely codified what was already the law.

As discussed, that is precisely why the Oregon Supreme Court long ago held in *Wagner II* that Oregon's pre-*Penry* capital sentencing statute—the version in effect at the time of petitioner's crime—was constitutional. In rejecting petitioner's argument in this case, the Oregon Supreme Court concluded that his claim was indistinguishable from the claim it rejected in *Wagner II*:

> The principle that we draw from our discussion of *Wagner II* is this: With regard to mitigating evidence in capital sentencing proceedings held before *Penry* and *Wagner II*, Oregon law did not prohibit a capital defendant from presenting mitigating evidence to the jury or having that jury rely upon such evidence to spare the defendant's life. Thus, the proposition advanced here by defendant that those rights did not exist before *Penry* does not square with *Wagner II* and the Supreme Court's decision in *Jurek*. Defendant is correct that, after *Penry*, the legislature added a statutory fourth question and this court articulated a fourth question in *Wagner II*. However, the majority of this court in *Wagner II* had already rejected defendant's current arguments[.]

(Pet. App. 34). Thus, petitioner's challenge fails because the subsequent

amendment to Oregon's death penalty statute did not represent a change in Oregon law. *See e.g.*, *Dobbert*, 432 U.S. at 293-94; and *State v. Montez*, 324 Or. 343, 363-64, 927 P.2d 64 (1996), *cert den*, 520 U.S. 1233 (1997) (same).

In sum, petitioner's *ex post facto* argument fails because his challenge to the statute is based an amendment that merely codified what was already the law, and it codified a procedural rule that (as compared to the 1987 law) benefits capital defendants by giving capital jurors an opportunity to impose a lesser sentence than what is supported by their findings on the first three questions and by allowing defendants to argue mitigation evidence in support of such a sentence. Any changes were procedural and ameliorative and therefore do not violate the Ex Post Facto Clause. And to the extent that petitioner disagrees with the Oregon Supreme Court's interpretation of the state's pre-*Penry* capital sentencing statutes, this Court does not have authority to review that purely state-law question. [4]

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[4] Petitioner also argues that the Ex Post Facto Clause was violated by the trial court's submission of the fourth question to the jury without requiring that the jury find that question beyond a reasonable doubt, but that argument fails for three reasons already discussed: (1) *Apprendi* does not apply to discretionary determinations, (2) Oregon's pre-*Penry* statute is constitutional, and (3) the submission of a discretionary question—one that benefitted petitioner by permitting any juror to exercise his or her discretion to vote "no" on a death sentence for any reason—did not increase the penalty of the crime or lower the burden of proof.

2. Contrary to his assertions to this Court, petitioner was never "entitled" to a new guilt phase proceeding.

Petitioner asserts that he was "denied the entitlement, under the statutes in effect at the time of the crimes," of a new guilt phase trial rather than "a sentencing-only remand." (Pet. 20). But petitioner was never "entitled" to a new guilt phase trial.

The Oregon Supreme Court long ago held that under the 1987 capital-sentencing scheme—the version that was in effect when petitioner committed his crimes—when it finds on direct review of a judgment imposing a death sentence that no error was committed in the guilt phase that requires a new trial but that the trial court committed a reversible error in the penalty phase, the proper remedy is to affirm the defendant's convictions for capital murder and to remand for a retrial only of the penalty phase. The court explained:

> We do not agree with defendant's contention that the requirement in ORS 163.150(1)(a) that the sentencing proceeding "shall be conducted * * * before the *trial jury* as soon as practicable" has any implications in the case of a remand for resentencing. (Emphasis added.) That provision is nothing more than a procedural directive to the trial court in the ordinary of events. **There is no statutory or constitutional requirement, or persuasive jurisprudential rationale, to compel a resentencing before the original trial jury** (to the contrary, a new statute requires a new jury) **or to require a new guilt trial or default sentencing to something less than death simply because the original guilt phase jury has been discharged.** If the state elects to pursue the death penalty, the new sentencing jury shall be selected in the same manner that the trial jury in a capital case is selected.

Wagner II, 309 Or. at 17-18 (italics in original; boldface added). To be sure, Oregon later enacted statutes that expressly provided for a remand for a retrial only of the penalty phase. *See* Or. Laws 1989, ch 720, § 2, and ch 790, § 135b (amending Or. Rev. Stat. § 163.150); Or. Rev. Stat. § 138.012(2). But the *Wagner II* decision was based on the law as it existed in 1987, not on the curative statutory amendments that were enacted in 1989.

Thus, contrary to petitioner's argument to this Court, the application of the penalty-phase only remand was not a change in Oregon law as of the date that petitioner committed the murder. Still further, to the extent that *Wagner II* was an interpretation of state law, this Court does not have authority to review it. At the least, any change was procedural and did not trigger *ex post facto* protections. [5]

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[5] Petitioner also argues that the penalty-phase remand denied him the opportunity to present a "unified defense theory" to the same jury at the guilt and penalty phases. (Pet 20-21). But such a claim provides no basis for review for the reasons discussed above. Nor does it make sense: The idea behind the unified-defense theory—a trial strategy—is to minimize the risk that the same jury, having already rejected a defendant's argument that the defendant was not guilty, will be predisposed to impose the death penalty. *See Johnson v. Premo*, 361 Or. 688, 710, 399 P.3d 431 (2017). When a new sentencing jury is empaneled on remand, that risk has already been minimized.

3. Petitioner's claim regarding the introduction of victim-impact evidence is not preserved and, in any event, lacks merit.

Next, petitioner argues that he was disadvantaged by the introduction of "aggravating victim impact evidence in the context of the Fourth Question." (Pet. 22). But the Oregon Supreme Court correctly rejected that claim.

As a threshold matter, there is a substantial question whether petitioner adequately preserved his federal-law argument for this Court's review. Although he sufficiently raised a general, categorical *ex post facto* objection to the admission of "victim impact" evidence, he made no attempt to identify for the trial court any *specific* evidence or testimony that he believed would qualify as such and that would not otherwise be independently admissible, let alone identify any specific evidence that he found to be "aggravating" victim impact evidence. That is significant because before this Court—as he did before the Oregon Supreme Court—petitioner continues to fail to identify any specific evidence actually presented that he deems to be "aggravating victim-impact evidence" or explain why such evidence would not otherwise have been admissible under Oregon statute or the rules of evidence. Thus, with respect to the admission of what petitioner may now view to be aggravating victim-impact evidence, he failed to preserve his claim for review. *See, e.g.*, *State v. Hayward*, 327 Or. 397, 414, 963 P.2d 667 (1998) (the defendant's "generic objection" to admission of victim-impact evidence was not sufficient to preserve ex post

facto claim to specific evidence, because much of the evidence at issue was independently admissible); *Puckett v. United States*, 556 U.S. 129, 134 (2009) (explaining that preservation circumscribes appellate review). Consequently, his complaint does not warrant this Court's review.[6]

But even if petitioner preserved his claim, it still fails. In *Payne v. Tennessee*, this Court concluded that the admission of victim-impact evidence in capital-sentencing proceedings does not violate the Eighth Amendment because such evidence is "relevant to the jury's decision as to whether or not the death penalty should be imposed." 501 U.S. 808, 827 (1991). After the decision in *Payne*, and after petitioner committed the aggravated murder at issue here, the Oregon Legislature amended Or. Rev. Stat. § 163.150(1) to allow for the admission at a capital-sentencing trial the type of victim-impact evidence this Court approved in *Payne*. Similarly, Or. Rev. Stat. § 163.150(1)(c)(B) was amended to allow the jury to consider "any victim impact evidence" when answering the fourth question.

Petitioner argues that the admission of aggravating victim-impact evidence violated the *ex post facto* prohibitions of the Federal Constitution

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[6] To be sure, petitioner disputed the state's assertion in the Oregon Supreme Court that his claimed error was unpreserved. (App. Reply Br. at 170-73). The court did not address the parties' preservation arguments and rejected petitioner's arguments based on established precedent. The serious preservation question, however, counsels against granting review here.

because those provisions were added to Or. Rev. Stat. § 163.150(1) after he committed the aggravated murder and, in his view, increased the likelihood that the jury would impose a death sentence. In a footnote, the Oregon Supreme Court rejected petitioner's argument observing that it had rejected the very same argument in *Guzek III*, 336 Or. at 445-47, and it declined to reconsider that holding. (Pet. App. 29a, n.12).

In *Guzek III*, the Oregon Supreme Court concluded that the admission of victim-impact evidence did not amount to a *per se* violation of the Ex Post Facto clause of Article I, section 10, of the United States Constitution. In reaching that conclusion, the court applied the well-established *ex post facto* principles outlined by this Court in *Carmell v. Texas*, 529 U.S. 512, 532-33 (2000). *Guzek III*, 336 Or. at 445-47. The court held that the statutory amendments permitting the admission of victim-impact evidence did not trigger *ex post facto* protections because the amendments did not lower the quantum of proof necessary for the state to obtain a sentence of death:

> With that standard in mind, we again turn to the 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B) that permit the admission of victim-impact evidence. We agree with the state that nothing about those amendments lowers the quantum of proof necessary for the state to obtain a sentence of death. The state must prove each issue submitted to the jury under ORS 163.150(1)(b)(A) to (C) beyond a reasonable doubt, ORS 163.150(1)(d), just as Oregon law previously required it to do. Although the retroactive application of a change in the law that permits the state to introduce a new kind of evidence against a

> defendant might tip the balance in favor of the state, it does not "unfair[ly]" tip it, *Carmell*, 529 US at 533 n 23, for purposes of the federal *Ex Post Facto* Clause, as does a change in the law that reduces the sufficiency of the evidence standard. That distinction is dispositive. As the Supreme Court explained in *Carmell*, not every rule that increases the state's likelihood of success on the merits constitutes an *ex post facto* law under Article I, section 10. * * * Accordingly, the admission of victim-impact evidence against defendant under the 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B) does not violate the *Ex Post Facto* Clause of the United States Constitution.

Guzek III, 336 Or. at 446-47 (footnotes omitted). Put simply, the retroactive application of a change in the law that permits the state to introduce victim-impact evidence does not "unfair[ly]" tip the balance in favor of the state so as to trigger federal *ex post facto* protections. *Carmell*, 428 U.S. at 533 n.23; *see also Dobbert*, 432 U.S. at 293-94 ("even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto" if it does not reduce the degree of proof necessary to establish guilt or increase the range of punishment); *Hopt v. Utah*, 110 U.S. 574, 589-90 (1884) (change in law that allowed for a convicted felon to testify as a witness was not *ex post facto* because the crime for which defendant was indicted "the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remain unaffected by the subsequent statute"). At the least, petitioner fails to show that, even if his claim theoretically had merit, he suffered any actual prejudice.

In sum, petitioner fails to identify a legitimate basis for review because no *ex post facto* violation occurred. Petitioner's arguments for review amount to nothing more than either a disagreement with the Oregon Supreme Court's application of settled federal law or a disagreement with the Oregon Supreme Court's interpretation of state law. Consequently, his claims do not warrant this Court's review.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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