No. 19-7743

IN THE

Supreme Court of the United States

ROBERT PAUL LANGLEY, JR., *Petitioner*,

v.

STATE OF OREGON, *Respondent.*

REPLY TO THE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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REPLY

The State's *Brief in Opposition* not only rewrites the questions presented in Mr. Langley's petition but, throughout, makes claims of dubious credibility. Mr. Langley stands by the veracity of the assertions in his *Petition for Certiorari*. He provides one example by which this Court may assess the veracity of the State's claims. In its recounting of the history of Mr. Langley's case, the State suggests that Mr. Langley chose to represent himself in the last sentencing proceeding: "[o]n remand for a third penalty-phase proceeding, petitioner—this time representing himself…"[1] In its briefing before the Oregon Supreme Court in the underlying case, however, the State recounted that last proceeding as follows: "in *State v. Langley*, 351 Or. 652, 654-655, 273 P.3d 901 (2012) (*Langley III*), this court held that the trial court committed reversible error when it required defendant 'to proceed to trial on the sentencing phase of a capital murder case without the assistance of legal counsel[.]'"[2]

1. REPLY AS TO THE FIRST QUESTION PRESENTED

In an attempt to discourage this Court from granting certiorari, the State eschews party presentation principles by reframing the first question presented, makes arguments it failed to make in state court, disregards this Court's teachings regarding effect over form, and fails to apprise this Court that its arguments in opposition to certiorari are in direct contradiction with admissions the State made approximately two months ago in State court.

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[1] *Brief in Opposition*, p. 4.
[2] *State v. Langley*, SC S062353, *Respondent's Answering Brief*, 9/28/2016, p. 216.

The State asserts that *Apprendi*[3] does not apply to the Fourth Question, claiming that it is a mechanism allowing jurors to impose a lesser rather than an increased sentence.[4] Not only did the State fail to make that argument below, but, approximately two months before filing its *Brief in Opposition*, in the context of another pre-*Penry I* [5] Oregon capital case, the State admitted that "[a]n affirmative finding on the Fourth Question is necessary to the imposition of death under the Oregon capital scheme"[6] and that "[t]he Fourth Question is an additional finding that exposes an Oregon capital defendant to a greater punishment than that authorized by the jury's guilty verdict alone."[7]

Given the State's admissions, and as identified by the *First Question Presented*, at issue is the viability of Oregon's capital sentencing statute as applied to Mr. Langley, since Oregon long ago chose a burden-less Fourth Question as the mechanism to comply with this Court's Eighth Amendment command in *Penry I*, and that lack of a beyond a reasonable doubt standard being at odds with this Court's "statutory maximum" methodology under the Sixth Amendment, as explained in *Apprendi*, *Ring*,[8] and *Blakely*.[9] In response, the State's sole refrain is to urge that this Court dispense with its Sixth Amendment teachings regarding

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[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
[4] *Brief in Opposition*, p. 14.
[5] *Penry v. Lynaugh*, 492 U.S. 302 (1989).
[6] *Montez v. Kelly*, Marion County Circuit Court No. 20CV08482, *Petition for Post-Conviction Relief*, 2/20/2020, paragraph 439 at p. 142; and, in the same case and in reference to paragraph 439, *Answer to Petition for Post-Conviction Relief*, 3/30/2020, p. 7, line 24 ("admits the allegations").
[7] *Montez v. Kelly*, Marion County Circuit Court No. 20CV08482, *Petition for Post-Conviction Relief*, 2/20/2020, paragraph 440 at p. 142; and, in the same case and in reference to paragraph 440, *Answer to Petition for Post-Conviction Relief*, 3/30/2020, p. 7, line 24 ("admits the allegations").
[8] *Ring v. Arizona*, 536 U.S. 584 (2002).
[9] *Blakely v. Washington*, 542 U.S. 296 (2004).

additional findings beyond the statutory maximum because Oregon has attached a "discretionary determination" label to the Fourth Question—a label affixed to that question as it was worded and existed 30 years ago. The discretionary determination label, however, fails to relieve the State of its Sixth Amendment obligations, and further fails to acknowledge that the Fourth Question circa 2014 was fundamentally distinct from the mitigation-only question approved by the Oregon Supreme Court in *State v. Wagner*, 786 P.2d 93 (Or. 1990) (*Wagner II*).

Wagner II upheld the Oregon capital sentencing statute against a facial challenge,[10] noting that the statute did not preclude the addition of a Fourth Question to meet this Court's Eighth Amendment command in *Penry I*,[11] the Oregon Supreme Court later noting that the Fourth Question was developed for the sole purpose of giving effect to mitigation evidence.[12] *Guzek II*, 906 P.2d at 282. The Fourth Question, specifically, "was not to let in more aggravation evidence[,]" 906 P.2d at 283, in that the Oregon legislature would have understood that 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. This is the historical context in which the Oregon Supreme Court labeled the Fourth Question "discretionary" and approved no standard of proof be assigned to that question.

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[10] The Oregon Supreme Court later observed that, absent the addition of the Fourth Question, Oregon's capital sentencing statute would be facially unconstitutional. *State v. Guzek*, 906 P.2d 272, 281 (Or. 1995) (*Guzek II*) (citing *Wagner II*, 786 P.2d at 94).
[11] *Wagner II*, 786 P.2d at 94, 96, 99, 101.
[12] *Guzek II*, 906 P.2d at 282.

The State attempts to steer this Court's attention to an issue not presented by Mr. Langley, asserting that the 2014 jurors were not balancing aggravation against mitigation.[13] As an initial matter, Mr. Langley does not make a "balancing" argument. Beyond that, the underlying record contradicts the State's assertion. In the context of the Fourth Question, the jurors were specifically instructed to consider, and were without discretion to refuse to consider, aggravating victim impact evidence that was not admissible at the time of the crimes,[14] and the mitigation evidence presented by Mr. Langley. The Oregon Supreme Court's underlying opinion reflects that mitigating evidence and aggravating victim impact evidence "were the jury's sole concern in rendering its fourth question determination in this case."[15]

The Oregon Supreme Court's reliance on its *Wagner II* rationale in rejecting the questions before this Court was misplaced as it failed to take into account that time and subsequent decisions by this Court have washed away any logic that the Fourth Question is a discretionary determination, is contrary to the State now having admitted that the Fourth Question is an additional finding that exposes an Oregon capital defendant to a greater punishment than that authorized by the

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[13] The State claims that the jurors do not "expressly balance the aggravating factors against the mitigating circumstances in order to determine whether one outweighed the other." *Brief in Opposition*, p. 13.

[14] 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.").

[15] Pet. App. 29 a.

jury's guilty verdict alone, ignores the consequence of such a finding in view of this Court's "statutory maximum" methodology, and further overlooks this Court's instruction that "the relevant inquiry is one not of form, but of effect[.]" *United States v. Haymond*, 139 S.Ct. 2369, 2377 (2019).

2. REPLY AS TO THE SECOND QUESTION PRESENTED

The State concedes that the 2014 sentencing-only remand proceeding was held largely under the statute in effect as of 2014 rather than the statute in effect at the time of the 1987 crimes.[16] The 2014 sentencing-only remand proceeding subjected Mr. Langley to the retroactive application of various changes to the capital sentencing statute that, taken individually and cumulatively, were more onerous and disadvantageous than the capital sentencing statute in effect at either the time of the crimes or at the time of the post-*Penry I* statutory fix.

A. PROCEDURAL AND AMELIORATIVE *EN TOTO*

A retrospective law can be constitutionally applied to a person only if it is not to his detriment. *Weaver v. Graham*, 450 U.S. 24, 33 (1981). "Whether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question." *Id*. The retrospectively applied 2014 statutory scheme was more onerous than the prior law. *Dobbert v. Florida*, 432 U.S. 282, 294 (1977). Mr. Langley was clearly disadvantaged by the retroactively applied changes that, considered individually and cumulatively, were used to obtain a death sentence against him, violating his right against *ex post facto* laws.

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[16] *Brief in Opposition*, pp. 14-15.

The Oregon Supreme Court's underlying decision states 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 statute. *State v. Langley IV*, 424 P.3d 688, 720 (Or. 2018) (Pet. App. 34 a). It did not. *Wagner II* was limited to the facial challenge before that court, which obviously did not include the legislature's 1995 and 1997 amendments adding aggravating victim impact evidence to, and requiring jurors to consider that evidence in the context of, the Fourth Question. Despite this, the State asserts, "Yet petitioner's complaints about Oregon's death penalty statute target only changes that are procedural or ameliorative."[17]

Mr. Langley provided this Court with non-exhaustive examples of the ways in which the retroactively applied statutory scheme was more onerous than the prior law.[18] Mr. Langley further demonstrated to this Court how he was clearly disadvantaged by the retroactively applied changes that, taken individually and cumulatively, were used to obtain a death sentence against him, violating his right against *ex post facto* laws. The State points to no Oregon Supreme Court authority analyzing together the non-exhaustive issues presented by Mr. Langley holding that Oregon's retroactively applied changes were less onerous, less burdensome, and ameliorative.[19]

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[17] *Brief in Opposition*, pp. 17-18.
[18] *Petition*, pp. 20-27.
[19] A search of Oregon caselaw reveals that the Oregon Supreme Court has never held the statute, or the component parts identified by Mr. Langley, ameliorative.

B. UNIFIED DEFENSE

As explained in his *Petition for Certiorari*, Mr. Langley was clearly disadvantaged by the loss of the pre-existing entitlement under the statute in effect at the time of the crimes to 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. The State attempts to mislead this Court by asserting that, "the application of the penalty-phase remand was not a change in Oregon law as of the date that petitioner committed the murder[,]"[20] and claims that 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."[21] To the contrary, in its determination that a pre-*Penry I* defendant was not entitled to the pre-existing entitlement of a new guilt phase but instead a sentencing-only remand, the *Wagner II* Court specifically relied on the 1989 legislative amendment, emphasizing that the "new statute requires a new jury[.]"[22] Moreover, wholly absent from the *Wagner II* Court's decision is any analysis or determination as to whether stripping Mr. Langley of the protective and corrective process of a new guilt phase was to Mr. Langley's detriment or whether that change was procedural and ameliorative.

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[20] *Brief in Opposition*, p. 21. The State is incorrect. As the State is well aware, and as Mr. Langley briefed the underlying court, *the State's own representative testified* before the 1989 Oregon legislature that, "under the [pre-*Penry I*] scheme, the same jury is required for both the guilt phase and sentencing phase of the proceeding. *As a result, there must be a new trial on guilt in order to have a new trial on the sentence if the sentence is reversed*." July 1, 1989, written testimony of Deputy Attorney General James E. Mountain, Jr., before the House and Senate Conference Committee regarding 1989 House Bill 2250 (Amendments to Death Penalty Statute) (emphasis added).
[21] *Brief in Opposition*, p. 21.
[22] *Wagner II*, 309 Or. at 18.

In addition to misrepresenting the state of the law at the time of the crimes versus at the time of *Wagner II*, the State additionally claims that a unified defense does not make sense.[23] The State's opinion runs counter to deep and established practice standards dating to 1983, by established, well-respected capital defense practitioners.[24] Moreover, as noted in Mr. Langley's *Petition for Certiorari* yet ignored by the State, in the context of another capital case, the Oregon Supreme Court likewise has recognized 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).[25] Application of the legislative change to impose a sentencing-only remand on Mr. Langley rather than afford him a whole new trial was certainly not ameliorative but instead was more onerous and burdensome, leading to Mr. Langley being sentenced to death.

C. AGGRAVATING VICTIM IMPACT EVIDENCE

The *Second Question Presented* correlates with Mr. Langley's *Assignments of Error Nos. 58 and 59* in the underlying state court briefing. The State, in its state court answering brief, conceded that, "Defendant adequately preserved the claims of error that he asserts on appeal."[26] Here, however, the State raises questions of preservation, claiming that the specific evidence qualifying as victim impact

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[23] *Brief in Opposition*, p. 21 n.5.
[24] *See Petition for Certiorari*, p. 21, n.8.
[25] *Johnson* is noted in Mr. Langley's *Petition for Certiorari*, p. 21.
[26] *State v. Langley*, SC S062353, *Respondent's Answering Brief*, 9/28/2016, p. 225.

evidence was not identified. The State's assertion is without merit in that it was the trial prosecutor himself that identified the victims' testimony as victim impact testimony, both during their testimony and during his closing argument to the jurors.[27] Mr. Langley's underlying briefing to the Oregon Supreme Court cited to that exact identification.

The State's *Brief in Opposition* makes much of the parties at the 2014 sentencing-only remand proceeding agreeing *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.[28] Apart from "any aggravating evidence," however, the State fails to acknowledge the salient points: at the time of the 1987 crimes, aggravating victim impact evidence was not admissible in the penalty phase;[29] prior to the 1995 and 1997 statutory amendments, aggravating victim impact evidence was not admissible in a penalty phase against Mr. Langley;[30] the 2014 statute treated "any aggravating evidence" and victim impact evidence distinctly; and Mr. Langley did not agree and/or waive his *ex post facto* rights as to the admission of aggravating victim impact evidence in the 2014 sentencing-only remand proceeding. Despite this, the State now claims

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[27] *See*, *State v. Langley*, S062353, *Respondent's Answering Brief*, 9/28/2016, p. 177, in which the State quotes defense trial counsel Clayhold reminding the trial court of the previously litigated victim impact evidence objection in advance of the victim's sister's testimony, with the court responding "[t]he court has already ruled on that, and the objection is preserved[.]" *See also* at p. 178, in which the State quotes the trial prosecutor's framing of the issue relative to the victim's daughter's testimony for the trial court by characterizing it as "victim impact evidence." Finally, *see State v. Langley*, S062353, *Opening Brief*, 2/5/2016, pp. 406–407, quoting the trial prosecutor's closing argument to jurors: "Next part is victim impact" and going on to describe in detail the testimony of the victim's daughter.

[28] *Brief in Opposition*, p. 15 n.3.

[29] *See*, *supra*, n.14.

[30] *Id*. (noting specifically that the admission of victim-impact evidence constituted reversible error).

that all of the changes to the statute as applied to Mr. Langley were procedural and ameliorative,[31] an argument the State has not only never before made below, but is contrary to the State's position before the Oregon Supreme Court in another pre-*Penry I* era capital case.[32]

D. BEYOND A REASONABLE DOUBT

The State asserts in its *Brief in Opposition* that the *Wagner II* Court construed then-existing Oregon law in a manner to find the capital statute facially constitutional by finding that the statute allowed for the submission of a fourth question to comply with the constitutional rule announced in *Penry I*.[33] As noted in the *Petition for Certiorari*, the Oregon death penalty statute at the time of both *Penry I* and *Wagner II* existed as a result of 1984 Oregon voters authorizing 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.'"[34] Approximately two months before filing its *Brief in Opposition*, the State admitted that, "[t]he determination that all decisions were to be made beyond a reasonable doubt reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the parties."[35]

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[31] *Brief in Opposition*, pp. 15, 17-18, 19.
[32] *See*, *State v. Guzek II*, 906 P.2d at 278 (As related by the Oregon Supreme Court: "The state argues that the victim impact evidence *tends to prove the existence of an aggravating circumstance* under the fourth statutory question, 'whether a sentence of death should be imposed.'") (emphasis added).
[33] *Brief in Opposition*, pp. 16-17.
[34] Pet. App. 41 a.
[35] *Montez v. Kelly*, Marion County Circuit Court No. 20CV08482, *Petition for Post-Conviction Relief*, 2/20/2020, paragraph 426 at pp. 138–139 142; and, in the same case and in reference to paragraph 426, *Answer to Petition for Post-Conviction Relief*, 3/30/2020, p. 7, line 24 ("admits the allegations").

No burden of proof was assigned to the Fourth Question within the 2014 statute under which Mr. Langley was sentenced to death. The absence of a jury finding beyond a reasonable doubt affects not only the individual criminal defendant but also implicates the judgment of the people at large as to distribution of risk in the setting of "the metes and bounds of judicially administered criminal punishments." *Haymond*, 139 S.Ct. 2378-2379 (2019). The State nonetheless asserts that "[n]one of [the changes to the statute] reduced the state's burden or made a death sentence more likely[,]"[36] and further argues that the issues Mr. Langley has brought to this Court amount to no more than his own individual disagreement with the Oregon Supreme Court's application of federal law[37] rather than interests including those of the public at large.

Mr. Langley is further disadvantaged by the Oregon Supreme Court's refusal to require a beyond a reasonable doubt finding as to the Fourth Question, eschewing this Court's "statutory maximum" methodology. The Oregon Supreme Court's *Wagner II* Eighth Amendment understanding of the Fourth Question is incompatible with this Court's teachings relative to the Sixth Amendment "statutory maximum" methodology. The State fails to respond or provide a basis for disregarding the Sixth Amendment teachings of *Apprendi*, *Ring*, and *Blakely* in favor of the outdated nature of the death penalty statute under which Mr. Langley was sentenced to death—outdated given the substantial and various alterations to

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As noted previously in this *Reply*, *Montez* is another pre-*Penry I* capital case. The State's admission is consistent with this Court's authority. *Cf. Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (citing *Addington v. Texas*, 441 U.S. 418 (1979)).

[36] *Brief in Opposition*, p. 15.

[37] *Brief in Opposition*, p. 26.

the post-*Penry I* scheme and the State's reliance on the *Wagner II* rationale to refuse to adhere to the *Apprendi* line of cases.

CONCLUSION

As to the *First Question Presented*, the Fourth Question is an additional finding that exposed Mr. Langley to a greater punishment than that authorized by the jury's guilty verdict alone. The failure to apply a beyond a reasonable doubt standard to that question fails to comply with this Court's teachings as explained in *Apprendi*, *Ring*, and *Blakely*.

As to the *Second Question Presented*, retroactive application of the changes making up the 2014 capital sentencing statute, cumulatively applied to Mr. Langley, is in conflict with the *ex post facto* teachings of this Court. The Oregon Supreme Court's underlying decision summarily denied Mr. Langley's asserted *ex post facto* error relying solely on its 30-year-old decision in *Wagner II* (which necessarily did not address the changes Mr. Langley identifies), doing so without engaging in an analysis of the statutory scheme as it existed at the time of the crimes (and at the time of the post-*Penry I* statutory fix) and as applied, *en toto*, to Mr. Langley in 2014.

For the reasons set forth in his *Petition for Certiorari* and this *Reply*, and because the societal judgment in allocating risk as expressed in the standard of

proof is a matter of importance to the public, as distinguished from merely of interest to the parties, petitioner respectfully prays this Court grant certiorari.

Respectfully submitted,

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