No. A-_____

In the Supreme Court of the United States

ERICK VIRGIL HALL,

Applicant,

v.

STATE OF IDAHO,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

Pursuant to 28 U.S.C. § 2101(d) and Rule 13.5 of the Rules of this Court, applicant Erick Virgil Hall respectfully requests a 60-day extension of time, to and including November 25, 2018, within which to file a petition for a writ of certiorari to review the judgment of the Idaho Supreme Court in this case.

The Idaho Supreme Court denied a timely petition for rehearing on June 28, 2018. Unless extended, the time to file a petition for a writ of certiorari will expire on September 26, 2018. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1257(a). Copies of the Idaho Supreme Court's opinion and the order denying rehearing are attached.

1. Applicant was convicted of first-degree murder, kidnapping, and rape. Slip op. 1-2. The State sought the death penalty for the murder conviction, asserting that four aggravating circumstances defined by Idaho's capital sentencing statute had been established: (1) the murder "was especially heinous, atrocious or cruel, manifesting

exceptional depravity" (the "HAC aggravator") (Idaho Code Ann. § 19-2515(9)(e)); (2) "[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life" (*id.* § 19-2515(9)(f)); (3) "[t]he defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society" (*id.* § 19-2515(9)(h) (2004))[1]; and (4) "[t]he murder was committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem and the defendant killed, intended a killing, or acted with reckless indifference to human life" (the "felony-murder aggravator") (*id.* § 19-2515(9)(g)). The jury found all four of these aggravating circumstances present, and applicant was sentenced to death. Slip op. 2.

On appeal, applicant contended, among other things, that the HAC, utter-disregard, and propensity aggravators are unconstitutionally vague, and that the felony-murder aggravator is unconstitutionally broad because it fails to meaningfully narrow the class of persons subject to the death penalty. Slip op. 31-32, 35-36. But the Idaho Supreme Court rejected these arguments. *Id.* at 31-37.

Regarding the HAC aggravator, the court below recognized that this Court has held that similar language, referring to conduct that was "especially heinous, atrocious, or cruel," did not give a sentencing jury constitutionally sufficient guidance. Slip op. 33

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[1] The propensity aggravator has since been clarified to read as follows: "The defendant, by his conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society." Idaho Code Ann. § 19-2515(9)(i). This non-substantive change has no bearing on the question presented.

(quoting *Maynard* v. *Cartwright*, 486 U.S. 356 (1988)). And the Idaho Supreme Court also acknowledged that the Eighth Circuit has held that the term "exceptional depravity," applied to narrow the HAC aggravator, is facially unconstitutional as a capital-sentencing aggravator. *Ibid.* (citing *Moore* v. *Clarke*, 904 F.2d 1226 (8th Cir. 1990)). Nevertheless, the court below noted that it had upheld the constitutionality of the HAC aggravator after the decision in *Moore* and declined to revisit that post-*Moore* holding, finding it immaterial that Idaho law had since been modified to give juries rather than judges the lead role in capital sentencing. *Id.* at 33-34. The court similarly rejected the vagueness challenges to the utter-disregard and propensity aggravators, again pointing to Idaho precedent and finding that "[t]he advent of jury sentencing does not alter the constitutional vagueness analysis." *Id.* at 34-35.

Finally, the Idaho court held that the felony-murder aggravator sufficiently narrows the class of persons subject to the death penalty. Slip op. 36-37. Although the court recognized that a capital sentencing regime must "'genuinely narrow the class of persons eligible for the death penalty'" and also must "'reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder'" (slip op. 36 (quoting *Lowenfield* v. *Phelps*, 484 U.S. 231, 244 (1998))), it found that requirement satisfied here by the felony-murder aggravator. That provision, the court asserted, "applies only to those murders which are committed in perpetration of 'arson, rape, robbery, burglary, kidnapping or mayhem.' This language may apply to many murders, but it certainly does not apply to *every* first-degree murder—which is all the narrowing required." *Id.* at 37.

Justice Kidwell dissented, "find[ing] the aggravators and limiting construction unconstitutionally vague under the Eighth Amendment." Slip op. 114. And rejecting the Idaho Supreme Court's holding that the HAC aggravator is rendered constitutional by the addition of the "exceptional depravity" qualifier, Justice Kidwell "respectfully suggest[ed] that this is just word salad. Vague words remain vague when more vague words are added." *Id.* at 113. See also *id.* at 116 ("T]he limiting construction is no less vague than the one struck down in *Maynard*."). He found the same defect in the utter-disregard aggravator, which contains no "language [that] could guide any sentencer, or limit the class eligible to receive the death penalty." *Id.* at 116.

In addition, Justice Kidwell reasoned that "[t]he majority's approach understate[d] the magnitude of the transition from the judge as a sentencer, to the jury as a sentencer." Slip op. 116. As he explained, because "[m]any jury members have not been involved in sentencing before[] and are unfamiliar with the law and its implications," "jurors need specific and detailed guidance on which murderers should receive the death penalty as opposed to only life in prison. The aggravators in Idaho do not provide such guidance, and result in the arbitrary, capricious and unconstitutional imposition of the death penalty." *Id.* at 117 (citing *Gregg* v. *Georgia*, 428 U.S. 153 (1976)).

2. Among other things, the petition for certiorari will argue that review is warranted because the Idaho Supreme Court's decision upholding the constitutionality of Idaho's capital sentencing statute departs from the rulings of this Court and other courts, on a matter of profound importance. For the reasons explained by Justice

Kidwell in dissent below, the Idaho HAC aggravator contains language that does not differ materially from that invalidated by this Court in *Maynard* and by the Eighth Circuit in *Moore*. The Idaho utter-disregard and propensity aggravators are similarly vague and overbroad; their failure to "channel[] and limit[] * * * the sentencer's discretion in imposing the death penalty" departs from the "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard*, 486 U.S. at 362. At the same time, the felony-murder aggravator does not "genuinely narrow the class of persons eligible for the death penalty [or] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Lowenfield*, 484 U.S. at 244 (quotation omitted).

And, as Justice Kidwell also recognized, the holding below cannot be squared with this Court's recognition of the significant distinctions between judge and jury sentencing regimes. As the Court has explained, "the logic" of decisions addressing sentences imposed by juries "has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions." *Walton* v. *Arizona*, 497 U.S. 639, 53 (1990), overruled on unrelated grounds by *Ring* v. *Arizona*, 536 U.S. 584 (2002). In contrast, "the members of a jury will have had little, if any, previous experience in sentencing, [and] they are unlikely to be skilled in dealing with the information they are given." *Gregg*, 428 U.S. at 192. See also *Proffitt* v. *Florida*, 428 U.S. 242, 252 (1976). As a consequence, the Idaho Supreme Court erred in holding that the same standards govern constitutional vagueness challenges to sentences imposed by judges, on the one hand, and by juries, on the other.

3. Applicant requests this extension of time to file the petition for a writ of certiorari because undersigned counsel were recently retained and had no involvement in the trial or appellate proceedings before the state courts. They accordingly seek additional time to review and familiarize themselves with the record and with the complex issues presented here.

In addition, counsel primarily responsible for preparing the petition have responsibility for a number of other matters with proximate due dates, including: an opposition to a motion to dismiss in *American Trucking Ass'ns, Inc.* v. *Alviti*, No. 1:18-cv-00378 (D.R.I.) (due September 21, 2018); a brief for appellant in *United States* v. *Jenkins*, No. 14-2898 (7th Cir.) (due September 21, 2018); a supplemental brief in *Bakalian* v. *Central Bank, Republic of Turkey*, Nos. 13-55664, 13-55742, 13-55765, 13-55804 (9th Cir.) (due November 2, 2018); a preliminary injunction hearing in the Southern District of Texas in *American Farm Bureau Federation* v. *EPA*, No. 15-cv-165, on September 11, 2018; and a summary judgment hearing the District of Maryland in *Benisek* v. *Lamone*, No. 13-cv-3233, on October 4, 2018. Accordingly, an extension of time is warranted.

For the foregoing reasons, the application for a 60-day extension of time, to and including November 25, 2018, within which to file a petition for a writ of certiorari in this case should be granted.

Respectfully submitted.

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