No. 18-679

In the
Supreme Court of the United States

ERICK VIRGIL HALL,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BRIEF OF AMICUS CURIAE IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

Rule:

Other Authorities:

INTEREST OF AMICUS CURIAE[1]

Established in 1989, the Idaho Association of Criminal Defense Lawyers (IACDL) is a non-profit, voluntary organization of attorneys with more than 400 lawyer members. IACDL's membership includes both public defenders and private counsel, attorneys who work in both state and federal court, and attorneys who focus on trials, appeals, post-conviction, and federal habeas proceedings. One of IACDL's primary goals is to improve the quality of representation provided to criminal defendants in Idaho, especially those who cannot afford counsel. For these reasons, IACDL has a strong commitment to ensure that constitutional protections are afforded to Idaho defendants subject to the death penalty.

Furthermore, given the size and breadth of IACDL's membership, the organization has substantial expertise in the practical circumstances on the ground in Idaho regarding how defense attorneys, their clients, and courts operate. IACDL likewise has insight into the issues implicated by the case at bar, i.e., jury application of aggravating factors at the sentencing stage. Accordingly, IACDL has both the interest and the knowledge to assist the Court with its resolution of the petition for certiorari.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received 10 days' notice of the filing of this brief and provided written consent to its filing.

REASONS FOR GRANTING THE WRIT

IACDL agrees fully with the contentions made in the Petition for a Writ of Certiorari and offers the additional points below in support of Petitioner.

While the direct appeal of anyone sentenced to death such as Petitioner is significant, the HAC aggravator and felony-murder aggravator issues raised in this case are of great consequence. A substantial number of states have HAC aggravators similar to Idaho's, thirteen, and the federal government has a similar scheme. *See* Pet. 33. Those states, like Idaho, would benefit from this Court's consideration of the first Question Presented. As for the second Question Presented, this Court's clarification of felony-murder aggravators is necessary in Mr. Hall's case and could reduce the enormous financial burden of death penalty litigation nationwide.

I. Idaho's HAC aggravator is unconstitutionally vague.

Petitioner's first Question Presented presents a simple syllogism:

- In *Maynard v. Cartwright*, 486 U.S. 356 (1988), the HAC aggravator was struck down as unconstitutionally vague.
- Idaho's HAC aggravator is not materially different from the one in *Maynard*.
- Idaho's HAC aggravator is unconstitutionally vague.

The Court should grant the Petition and apply this simple syllogism for three reasons.

First, Idaho's HAC aggravator is not materially different from the Oklahoma aggravator in *Maynard*. Idaho's HAC aggravator applies to any murder that is "especially heinous, atrocious or cruel, manifesting exceptional depravity." Idaho Code Ann. § 19-2515(9)(e) (2006). Oklahoma's applied to any murder that was "especially heinous, atrocious, or cruel." *Maynard*, 486 U.S. at 359. The two are identical, but for the words "manifesting exceptional depravity" tacked on to the Idaho statute. These extra words are as vague as the immediately preceding ones. *See id.* at 363-64 (reasoning that "especially heinous, atrocious or cruel" "gave no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language" struck down as vague in *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) and "the addition of 'outrageously or wanton' to the term 'vile' did not limit the overbreadth of the aggravating factor"); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1221 (2018) (holding "crime of violence" definition in 18 U.S.C. § 16(b) unconstitutionally vague based partly on comparison to similar ACCA statute and reasoning that "this variance in wording cannot make ACCA's residual clause vague and § 16(b) not"); *People v. Superior Court of Santa Clara Cty.*, 647 P.2d 76, 78 (Cal. 1982) (holding that same HAC aggravator language used in Idaho was unconstitutionally vague and reasoning that "[t]he terms address the emotions and subjective, idiosyncratic values [and] stimulate feelings of repugnance, [with] no directive content").

Second, the issue is critically important under the Sixth Amendment, which requires that juries decide whether aggravators exist. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002) (overruling prior case "to the extent that it allows a sentencing judge, sitting

without a jury, to find an aggravating circumstance necessary for imposition of the death penalty"); *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016) (overruling prior cases "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for the imposition of the death penalty").

Overlooking this important development, the majority below relied on decisions in which *judges* applied aggravators, not juries. *See* Pet. 51a (citing *State v. Leavitt*, 822 P.2d 523 (Idaho 1991); *State v. Lankford*, 781 P.2d 197 (Idaho 1989); and *State v. Osborn*, 631 P.2d 187 (Idaho 1981)). These decisions actually underscore the need for this Court's review, now that juries apply aggravators.

In *Lankford*, for example, the court explicitly relied on Idaho's adherence to judicial sentencing in capital cases to distinguish *Maynard*, reasoning:

> These aggravating circumstances are terms of art that are commonly understood among the members of the judiciary. As a result, the potential for inconsistent application that exists as a result of jury sentencing is eliminated where the judge sentences.

781 P.2d at 214. In *Leavitt*, the court again relied on judicial sentencing to distinguish *Maynard*, stating that "given the Idaho legislature's statutory directive that a defendant be sentenced by a district judge rather than by a jury, Leavitt's reliance upon . . . *Maynard* is misplaced." 822 P.2d at 525.

As for *Osborn*, it not only predates the required jury determination of aggravators, it even predates

Maynard. In short, as one of the dissenting justices below explained:

> The majority's approach understates the magnitude of the transition from the judge as a sentencer, to the jury as a sentencer, and provides no legal basis for declining to reconsider case law that relied on judge sentencing as opposed to jury sentencing.

Pet. 179a (Kidwell, J., dissenting).[2]

Third, juries lack the experience needed to apply a HAC aggravator. Unlike judges, who preside over numerous cases and keep up with other trials in their jurisdictions, jurors have no ability to determine if a murder is "especially" heinous and manifests "exceptional" depravity. *See Proffitt v. Florida*, 428 U.S. 242, 252 (1976) ("a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those in analogous cases"). Jurors will almost always sit on no more than one death penalty jury, because death penalty cases are uncommon. Moreover, even if a juror in one death penalty case was called for jury duty in a later one, that person would almost certainly not serve in the second case.[3] The prior case experience would either subject the juror to a

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[2] Justice Kidwell's decades of legal experience include serving as an Associate Deputy Attorney General during the Reagan Administration and as Idaho's Attorney General, in addition to years of service on the Idaho Supreme Court, all of which gives him a long-term perspective to evaluate Idaho's HAC aggravator in light of this Court's death penalty jurisprudence.

[3] It is standard to ask potential jurors if they have previously served on a jury and, if so, the type of case and the decision reached.

challenge for cause or result in a peremptory challenge, by either the prosecution or defense, depending on the verdict in the prior case.

Furthermore, in the emotional setting of a death penalty case, passion and prejudice are likely to infuse jury aggravator findings. *See* Valerie L. Barton, *Knowing Evil When We See it: An Attempt to Rationalize Heinous, Atrocious, and Cruel*, 33 NOVA. L. REV. 679, 698 (2009) ("juries have their judgment colored by emotion when deciding whether a particular crime is heinous or depraved"). An empirical study in 1980 found that a "heinous [or] vile" aggravating factor would result in "wide differences" from one region of the country to another. William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 630 (1980). In particular, the study revealed that people may use the HAC aggravator to act on personal prejudice. *Id.* at 632 ("If relations in the community between majority and minority groups or between social classes are precarious, or the lines are strictly drawn, a killing that crosses class or racial boundaries may be viewed as especially shocking, heinous, and threatening.").

Thus, allowing jurors to apply a HAC aggravator runs the risk of letting emotion and prejudice override rational deliberation. Without effective guidance as to what constitutes "heinous, atrocious, or cruel," "it would be unrealistic to assume that an aggravating circumstance containing such terms could in any way channel a sentencer's discretion." Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 968 (1986).

Therefore, based on the similarity of Idaho's HAC aggravator to the one in *Maynard*, the Sixth Amendment's requirement that juries determine aggravators, and jurors' lack of expertise to apply HAC aggravators, the first Question Presented merits this Court's review.

II. The Court's review of felony-murder aggravators would reduce the massive cost of death penalty litigation.

If the Court grants review of the second Question Presented and narrows the class of death penalty-eligible felony murders, it will decrease the financial burden of death penalty litigation.

Citizens generally assume that states seek the death penalty consistently, in only the most severe cases, yet empirical studies have shown otherwise. *See generally* Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics:* Furman, McCleskey, *and a Single County Case Study*, 34 CARDOZO L. REV. 1227 (2013). Rather, the vast majority of death sentences come from particular counties in death penalty states. Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B. U. L. REV. 227, 231-32 (2012); *see also Glossip v. Gross*, 135 S. Ct. 2726, 2761 (2015) (Breyer, J., dissenting) ("[*W*]*ithin* a death penalty State, the imposition of the death penalty heavily depends on the county which the defendant is tried."); *State v. Gregory*, 427 P.3d 621, 645-46 (Wash. 2018) (Johnson, J., concurring) (noting that death sentences had been imposed in only 2 of Washington's 39 counties in a 12-year period and in only 10 of the state's counties over a 25-year period).

This erratic use of the death penalty has significantly increased the cost of death penalty litigation while simultaneously forcing those counties in which the death penalty is not sought to share the expenses of those counties in which it is frequently sought. DPIC, *The 2% Death Penalty: How A Minority of Counties Produce Most Death Cases At Enormous Costs to All 15* (Oct. 2013), *available at* https://deathpenaltyinfo.org/documents/TwoPercentReport.pdf.

Ten years ago the total cost of expenses in a single death-penalty case was about $3 million. *Id.* (citing J. Roman et al., *The Cost of the Death Penalty in Maryland,* THE URBAN INST. 2 (2008)). Similarly, the State of Washington's average cost of a death penalty case was $2.75 million.[4] Peter A. Collins et al., *An Analysis of the Economic Costs of Seeking the Death Penalty in Washington State*, 14 SEATTLE J. FOR SOC. JUST. 727, 768 (2016). Ohio spends nearly $17 million dollars per year on the death penalty. Laura Bischoff, *Execution Costs Rising,* DAYTON DAILY NEWS (Feb. 22, 2014, 11:30 PM), https://www.mydaytondailynews.com/news/crime--law/execution-costs-rising/c1UWGYDUls1ze8Cngno5yK/. New Jersey spent $11 million per year. Mary Forsberg, *Money For Nothing? The Financial Cost Of New Jersey's Death Penalty* 15 (2005).

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[4] The State of Washington recently became the twentieth state to abolish the death penalty, with the Washington Supreme Court concluding that the state's death penalty system had been administered arbitrarily and unfairly and was racially biased. *Gregory*, 427 P.3d at 635.

A former Ninth Circuit Judge noted that "since reinstating the death penalty in 1978, California taxpayers have spent roughly $4 billion to fund a dysfunctional death penalty system that has carried out no more than 13 executions." Arthur Alarcon, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle,* 44 LOY. L.A. L. REV. S41, S41 (2011). Because comparatively few death sentences actually result in death, taxpayers pay nearly $20 million per execution. DPIC, *supra,* at 15.

Nationwide, from this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), until 2011, there were nearly 8,300 death sentences. *Id.* Accordingly, using the $3 million per case average, the cost to taxpayers of death penalty litigation in just those years was about $25 *billion* dollars. *Id.* The brunt of this expense is borne by the 85% of counties that have never had a case result in execution. *Id.; see also* Richard C. Dieter, DEATH PENALTY INFO. CTR., *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis* 14-19 (2009), https://deathpenaltyinfo.org/documents/CostsRptFinal.pdf (discussing costs of the death penalty).

The runaway cost of death penalty litigation is one of the reasons why Maryland, Connecticut, Illinois, New Mexico, New Jersey, and New York have abolished the death penalty. *See* Richard C. Dieter, *The Issue of Costs in the Death Penalty Debate*, *in* America's Experiment With Capital Punishment 595-612 (James, R. Acker, Robert M. Bohm, Charles S. Lanier eds., 3d ed. 2014).

Idaho is no different than other states with regard to the enormous costs of death penalty litigation. In

1998, Idaho created the Capital Crimes Defense Fund, which helps counties pay for some of the trial costs of death penalty cases and is funded by voluntary contributions from counties. Idaho Code Ann. § 19-863A (2006). (The fund does not cover the costs of the defendant's lead attorney or the first $10,000 of trial expenses.) Office of Performance Evaluations Idaho Legislature, *Financial Costs of the Death Penalty*, 30 (2014). Since 1999, the fund has reimbursed 11 counties $4.1 million dollars. *Id.* at 31.

At the appellate level, from 2001 to 2013, the Idaho State Appellate Public Defender's Office worked a total of 79,187 billable hours defending 10 individuals sentenced to death, for an average of *7,918 hours per defendant*. *Id*. In contrast, for defendants subject to life without parole, attorneys spent a much smaller average of 179 hours per defendant. *Id.*

As in most other death penalty states, only a small proportion of defendants sentenced to death in Idaho are ever executed. Since the reinstatement of the death penalty, only 3 of 40 defendants sentenced to death in Idaho have been executed. *Id.* at iv. Accordingly, the taxpayers of Idaho bear the massive costs of death penalty litigation for a penalty that will hardly ever be used.

The felony murder aggravator is commonly found in death penalty litigation, contributing greatly to the cost. More than 60% of death-eligible defendants committed the felonies of rape, arson, burglary, kidnapping, or robbery, making them eligible for the felony-murder aggravator. David McCord, *Should the Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery Be Sufficient to Make*

a Murderer Eligible for a Death Sentence—An Empirical and Normative Analysis, 49 SANTA CLARA L. REV. 1, 1 (2009). In fourteen states the definition of death-eligible murders includes a contemporaneous felony that is listed as an aggravating circumstance. *See* Pet. 32. As of April 2018, these fourteen states accounted for 69% percent of individuals on death row. *Id.* Idaho is one of them.

The Court's resolution of the second Question Presented would likely narrow the class of death penalty-eligible murders, with the salutary effect of reducing the cost of death penalty litigation. If fewer defendants are eligible for the death penalty based on a felony-murder aggravator, the quantity and costs of death penalty trials, appeals, and post-conviction proceedings will greatly decrease.

CONCLUSION

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

Respectfully submitted,

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