No. 18-679

In the Supreme Court of the United States

ERICK VIRGIL HALL,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Idaho

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

REPLY BRIEF FOR PETITIONER

In opposing review, Idaho attempts to defend a jury instruction that this Court already has held unconstitutional. The State also insists that there are no constitutional distinctions that require different rules for judges and juries when they determine whether imposition of the death penalty is warranted—a position that this Court repeatedly has rejected. And Idaho effectively concedes the existence of a conflict between state courts of last resort on an important and recurring question about the rules governing capital punishment. On examination, the State's argument on each of these points demonstrates the *need* for further review.

That is especially so because the questions presented here are of undoubted importance. The State offers no response to our demonstration that the capital sentencing aggravators at issue here are used by numerous jurisdictions across the Nation, making clarity on the governing rules essential. And there is no denying that, in cases involving sentences of death, certainty and close adherence to Eighth Amendment principles "is a fundamental constitutional requirement" that must be maintained by this Court. *Maynard* v. *Cartwright*, 486 U.S. 356, 362 (1988). Because the court below departed from the governing rules in a manner that led to the insupportable imposition of a death sentence—an approach that, if not corrected, will lead to the same error being committed again in other cases, both in Idaho and elsewhere—this Court should grant review.

I. IDAHO'S AGGRAVATING CIRCUMSTANCES ARE UNCONSTITUTIONALLY VAGUE.

A. Idaho's HAC aggravator gives insufficient guidance to juries.

We showed in the petition that Idaho's HAC aggravator does not provide constitutionally adequate guidance to a sentencing jury and is inconsistent with this Court's decision in *Maynard*, which invalidated a materially identical aggravating circumstance. Pet. 11-18. In response, the State recognizes that our argument regarding *Maynard* "is correct as far as it goes" (Opp. 11) but insists that Idaho's HAC aggravator is saved by the limiting construction given to the provision by the Idaho Supreme Court. Opp. 9-10. This argument, however, reflects a fundamental misunderstanding of the principles announced by this Court.[1]

First, as we showed in the petition (Pet. 15 n.3)—and as the State does not deny—the limiting construction invoked by Idaho cannot save the capital sentence in this case because it was *not* given to the jury. As we also showed (and as the State also does not deny), the unconstitutionally vague instruction actually given in this case was not an aberration; the narrowing construction upon which Idaho relies before this Court does not appear in the State's pattern jury instructions and is not given to Idaho juries as a matter of

[1] The State's complaint that petitioner failed to raise his jury instruction challenge below is insubstantial. Opp. 13. Before the Idaho Supreme Court, petitioner argued that Idaho's HAC aggravator is unconstitutionally vague—an argument that by definition centered on how the jury was instructed regarding that aggravator. See Pet. App. 49a-52a.

course. See *ibid.*; Pet. App. 201a-202a (HAC instruction includes no reference to the "unnecessarily torturous" narrowing construction now relied upon by the State).

And it should go without saying that a narrowing construction that was not given to or considered by the jury cannot validate a death sentence imposed by that jury. This Court said exactly that in *Walton* v. *Arizona*, 497 U.S. 639, 653 (1990), where it explained that, "[w]hen a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process." It is not enough that the jury "was instructed only in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." *Ibid.* But that is just what happened in this case.

The State gets no further when it observes that juries, like judges, "are presumed to follow the law." Opp. 17. That may well be so, but it is beside the point when the jury is *not properly or adequately instructed* in the law. Nor is the State's observation responsive to the reality, recognized by this Court and demonstrated by Justice Kidwell below, that specificity in jury instructions is necessary because jurors lack the experience necessary to make the comparative judgments that are essential in sentencing—especially in capital cases—and that "can only be developed by involvement with the trials of numerous defendants." *Proffitt* v. *Florida*, 428 U.S. 242, 252 n.10 (1976) (plurality opinion) (citation omitted); accord Pet. App. 180a (Kidwell, J., dissenting). This does not involve "proportionality review," as the State asserts (Opp. 18); instead, it calls for exercise of "the requisite knowledge to balance the facts of the case against * * *

standard criminal activity." *Proffitt*, 428 U.S. at 252 n.10.[2]

Second, the State is wrong when it seems to assume that deficiencies in the jury instructions may be cured through post-sentencing review by an appellate court that itself applies the necessary narrowing construction. Opp. 18-19. That may have been true prior to *Ring* v. *Arizona*, 536 U.S. 584 (2002), when capital sentences could be imposed by judges without any involvement by a jury. See *Walton*, 497 U.S. at 653-654; *Clemons* v. *Mississippi*, 494 U.S. 738, 745-746 (1990). But that approach cannot survive *Ring*: capital defendants now are entitled to a jury determination of the existence of the aggravating circumstances that are necessary for the constitutionally valid imposition of the death penalty. See also *Hurst* v. *Florida*, 136 S. Ct. 616 (2016). If the State's contrary view were correct, *Ring* would be rendered a dead letter, as (in cases like this one) a jury would never make the factual findings that are constitutionally necessary to support imposition of the death penalty, and all the real sentencing work would be done by judges on appeal.[3]

Third, even if appellate review *could* substitute for inadequate jury instructions, the review provided

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[2] The State's repeated observation that not all Idaho trial judges have experience hearing capital cases is off the point. Opp. 18, 23. *All* judges—and *no* juries—are familiar with relevant background law and with the comparative judgments that are a necessary part of sentencing.

[3] This Court's holding in *Clemons* that state appellate review can render constitutional a jury's death sentence that depended on an unconstitutionally vague aggravator explicitly relied on *Spaziano* v. *Florida,* 468 U.S. 447 (1984), and *Hildwin* v. *Florida*, 490 U.S. 638 (1989), which were both overruled by *Hurst*, 136 S. Ct. at 623.

by the Idaho Supreme Court in this case did not suffice. Here, the Idaho Supreme Court did nothing more than cite its past endorsement of the "unnecessarily torturous" HAC narrowing construction; at no point did the court apply that construction to the facts of petitioner's case. Compare Pet. App. 50a-52a, with *Lewis* v. *Jeffers*, 497 U.S. 764, 776-777 (1990) (affirming sentence because reviewing court did engage in close factual review).

Fourth, even if all the State has to say about the HAC aggravator were correct, review *still* would be warranted because Idaho does not deny our demonstration that the Idaho Supreme Court's approval of the "unnecessarily torturous" narrowing construction conflicts with the California Supreme Court's holding that this same narrowing construction is unconstitutional. See Pet. 15 n.3 (citing *State* v. *Superior Court*, 647 P.2d 76, 78 (Cal. 1982)). If this Court were to take the "unnecessarily torturous" construction into account, this conflict would warrant review.

Fifth, the State is wrong in contending that the conflict between the holding below and *Moore* v. *Clarke*, 904 F.2d 1226 (8th Cir. 1990) ("*Moore I*"), was vitiated by the Eighth Circuit's subsequent en banc decision in *Moore* v. *Kinney*, 320 F.3d 767 (8th Cir. 2003) ("*Moore II*"). See Pet. 14; Opp. 15. Following the Eighth Circuit's decision in *Moore I*, which struck down the "exceptional depravity" component of Nebraska's HAC aggravator as unconstitutionally vague, the state court on resentencing applied a new and greatly narrowed construction of "exceptional depravity" to the facts of Moore's case. See *Moore II*, 320 F.3d at 772-773. *Moore II* simply held that the *new*

limiting construction for "exceptional depravity" is constitutional, a holding that has no bearing here.

To be sure, *Moore II* did question whether *Moore I* is correct and characterized that decision as a "misstep." *Moore II*, 320 F.3d at 771. But *Moore II* did not, and could not, disturb *Moore I*'s application of this Court's decision in *Maynard* to Nebraska's materially identical HAC aggravator. The proof of that point is provided by the decision below, which appeared to acknowledge its disagreement with *Moore I* but nowhere cited *Moore II*. Pet. App. 50a-52a. This Court should grant review to resolve this conflict and assure adherence to the dictates of *Maynard*.

B. The State's defense of its utter disregard and propensity aggravators rests on the discredited contention that identical sentencing rules apply to judges and juries.

The State's response crystallizes the issue presented by petitioner's challenge to Idaho's utter disregard and propensity aggravators. The State's defense of those aggravators turns almost entirely on its contention that judges and juries are constitutionally identical as capital sentencers: "the advent of juries has not changed the calculus in determining where a statutory aggravator and its limiting construction provide sufficient guidance to the factfinder." Opp. 20. The Court should make clear that the State is wrong.

First, the State is incorrect as a matter of theory. As we note above and show in the petition, this Court repeatedly has recognized the constitutionally material differences between judges and juries as capital sentencers. Pet. 3-4. Of course, the State is correct that juries are capable of making factual findings regarding such things as a defendant's "attitude" and

"intent." See Opp. 20-22. But that says nothing about the significant differences in knowledge, background, and sentencing experience that judges and juries bring to a case.

Second, Idaho's utter disregard and propensity aggravators, which were devised for application by judges, do not provide juries adequate guidance. The State's own presentation recognizes that this Court upheld Idaho's utter disregard aggravator when applied by a judge because, "[g]iven the statutory scheme, * * * a sentencing judge reasonably could find that not all Idaho capital defendants are 'cold blooded,'" as the judge could identify "some within the broad class of first-degree murderers [who] do exhibit feeling." *Arave* v. *Creech*, 507 U.S. 463, 475-476 (1993) (emphasis omitted). See Opp. 22 (quoting *Arave*, 507 U.S. at 475). As we showed in the petition (at 19-20), this reasoning expressly turns on the judge's awareness both of the statutory scheme and of how that scheme has been applied in prior cases. Judges have (or can acquire) that knowledge; jurors do not and cannot.

Similar problems inhere in Idaho's propensity aggravator. As we demonstrated in the petition (at 20-21), the terms used to instruct the jury on that aggravator—looking to whether the defendant is a "willing, predisposed killer," "who tends toward destroying the life of another," "who kills with less than the normal amount of provocation," and who has "a proclivity, a susceptibility, and even an affinity toward committing the act of murder" (Pet. App. 203a)—either could be thought to describe *everyone* convicted of first-degree murder (surely, as compared to most people, *all* murderers have a "susceptibility" to kill) or to require

knowledge that is beyond the experience of jurors (what is the "normal amount of provocation" that leads to murder?). The State makes no response at all to this point.

II. THE COURT SHOULD RESOLVE THE CONFLICT ON APPLICATION OF FELONY-MURDER AGGRAVATORS.

The Idaho Supreme Court is in acknowledged conflict with the Nevada Supreme Court on the nature of the Eighth Amendment requirement that a capital sentencing regime genuinely narrow the class of persons subject to the death penalty. Pet. 21-30; see *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983). The State's brief largely concedes this point. And the arguments against review that Idaho does offer are plainly wrong.

First, the State's principal argument against review—that petitioner's "narrowing" argument was not presented below (Opp. 26-28)—is incorrect. In his brief before the Idaho Supreme Court, petitioner argued that, because Idaho's first-degree murder statute was too broad to accomplish the constitutional narrowing function, "an aggravating circumstance that does nothing more than duplicate the elements of a defendant's first degree murder conviction does not narrow the class of murders eligible for the death penalty and therefore does not pass constitutional muster." Def. Idaho Sup. Ct. Br. 80. This argument took a full six pages of petitioner's brief. *Id.* at 78-83. The Idaho Supreme Court then devoted more than two pages to addressing whether "the felony-murder aggravator * * * does not meaningfully narrow the class of persons eligible for the death penalty in cases where the defendant is convicted on a felony-murder theory."

Pet. App. 54a-57a. That is the same argument presented in the petition: whether, because the felony-murder aggravator substantially duplicates Idaho's broad guilt-phase definition of felony murder, the aggravator fails to accomplish its constitutionally required narrowing purpose. This Court can, and should, resolve that question.[4]

Second, the State makes no meaningful response to our demonstration of a conflict between state courts of last resort on this question. Addressing the Nevada Supreme Court's decision in *McConnell* v. *State*, 102 P.3d 606 (Nev. 2004) (en banc) (per curiam), Idaho largely contents itself with the assertion that *McConnell* is an "outlier." Opp. 29.[5] Even if that were so, it would hardly be a reason to deny review; the State's "outlier" label is a backhanded concession that the supreme courts of two States disagree on a crucial question of federal constitutional law. And Idaho ultimately recognizes that *McConnell* actually is *not* an outlier: Addressing other decisions that reflect confusion among the lower courts on the constitutional "narrowing" requirement, Idaho acknowledges that the Wyoming Supreme Court has rejected its approach. All Idaho has to say about *Engberg* v. *Meyer*,

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[4] Even if the Court sees daylight between the argument in petitioner's brief below and the question presented in the petition, the Court has long held that "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Illinois* v. *Gates*, 462 U.S. 213, 220 (1983).

[5] The State's only attempt to distinguish *McConnell* rests on the number of aggravators found by the jury in that case. Opp. 29. But the number of aggravators at issue has nothing to do with how the narrowing requirement applies to the felony-murder aggravator.

820 P.2d 70, 90 (Wyo. 1991), is that the Wyoming court's decision is "unpersuasive"—which concedes the conflict in the courts. Opp. 31.

Third, the State's attempt to defend the ruling below on the merits of narrowing is mystifying.

- Idaho observes that narrowing can occur at either the guilt or the sentencing phase (Opp. 32-33)—but that is beside the point. Given the breadth of Idaho's felony-murder statute, narrowing *must* occur here at the sentencing phase. See Pet. 5-6, 25-30.
- Idaho mischaracterizes the relevance of *Loving* v. *United States*, 517 U.S. 748 (1996). See Opp. 33-34. We do not allege a violation of *Enmund* v. *Florida*, 458 U.S. 782 (1982), or *Tison* v. *Arizona*, 481 U.S. 137 (1987), as the State asserts; instead, *Loving* serves as an example of a case in which, because a guilt-phase statutory scheme did not sufficiently narrow, use of aggravators was constitutionally required at the sentencing phase.
- We accurately describe the Idaho rule as finding sufficient narrowing so long as the felony-murder aggravator does not apply to literally every felony-murder conviction. See Opp. 34. As we showed in the petition (at 23-26), and as the Nevada Supreme Court explained of Nevada's essentially identical system, the narrowing provided by Idaho's felony-murder aggravator is "largely theoretical." Pet. 25. The State makes no attempt to show that that statement is wrong.

- We do not argue for a "proportionality" requirement. Opp. 34-35. The key point, instead, is that, because the population of persons *convicted* of felony murder in Idaho is too broad to satisfy the narrowing requirement, so too is the population after application of Idaho's felony-murder aggravator.

III. THIS CASE IS AN APPROPRIATE VEHICLE WITH WHICH TO RESOLVE THE QUESTIONS PRESENTED.

Finally, the State is wrong in contending that error here would be harmless so long as any of the challenged aggravators is upheld "because, in Idaho, the jury is required to weigh the collective mitigation against the statutory aggravators individually." Opp. 37. Of course, we contend that *all* of the aggravators at issue here are constitutionally flawed, which, if true, would make the State's contention irrelevant. But the State would be incorrect even if certain of the aggravators were constitutional.

As we showed in the petition (at 34), under *Brown* v. *Sanders,* 546 U.S. 212, 220 (2006), "[a]n invalidated sentencing factor * * * will render [a death] sentence unconstitutional * * * *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." The State declares, without explanation, that *Sanders* is inapposite here, evidently because Idaho allows the jury to "weigh" the collective mitigators against the individual aggravators. Opp. 37-38. But that is wrong: The Court in *Sanders* explicitly stated that it was eliminating the distinction between "weighing" and

"non-weighing" States and applying its rule in *all* capital cases. 546 U.S. at 219-220.

And as we also showed, in this case invalidation of *any* of the aggravators would, under *Sanders*, require invalidation of the death sentence. Here, the aggravating circumstances before the jury each contained distinct elements and requirements; "if one of them [is] invalid the jury could not [have] consider[ed] the facts and circumstances relevant to that factor as aggravating in some other capacity." *Sanders*, 546 U.S. at 217. The State evidently means to concede this point; we made this representation in the petition (Pet. 34), and Idaho makes no response. Accordingly, there is no prudential reason for the Court to deny review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[*] The representation of a party by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.