No. 15-533

In The
Supreme Court of the United States

KEVIN CHARLES ISOM,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Indiana

REPLY BRIEF

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REPLY BRIEF

Pursuant to Rule 15.6, Petitioner Kevin Charles Isom files this Reply Brief. The State's *Brief in Opposition* (hereinafter BIO) conflates the two separate arguments raised supporting the petition.

The first issue – whether the *beyond a reasonable doubt* burden is the appropriate standard for determining that death is the appropriate punishment – responds to this Court's observation that "[t]he tension between general rules and case-specific circumstances has produced results not all together satisfactory. . . . Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed." *Kennedy v. Louisiana*, 554 U.S. 407, 436-437 (2008). The issue, though not constrained by a traditional split amongst the courts, presents "an important question of federal law that has not been, but should be, settled by this Court." *See* Sup. Ct. R. 10(c).

The second, more narrow, issue – whether *Apprendi* applies to the determination that aggravators outweigh mitigators – is subject to the classic divide amongst the courts and has received considerable scrutiny in law reviews and treatises. *See* Sup. Ct. R. 10(b). While it remains correct that states such as Indiana could amend their statutes to eliminate the requirement that aggravators outweigh mitigating circumstances, having imposed that element, the

prerequisites of *Apprendi,*[1] *Ring*[2] and *Cage v. Louisiana*,[3] apply.

I. The State's BIO Transforms The Question Presented In A Manner That Mischaracterizes The Deliberation Process In Indiana.

The question presented by Petitioner in this case accurately frames the issue under Indiana state law – whether the jury's determination that aggravating circumstances *outweigh* mitigating circumstances must be made by a unanimous jury, beyond a reasonable doubt. In contrast, the State's BIO attempts to avoid the Sixth Amendment constraints by suggesting that Indiana merely requires a jury to acknowledge the "relative weights of aggravating and mitigating circumstances." State's BIO at i. In so re-arranging the question presented, the BIO converts the jury's necessary factual finding into a participation medal.

Indiana is not a *Lowenfield*[4] state, where the jury is solely required to make an eligibility determination based upon the finding of an aggravating factor, and then consider the aggravating and mitigating evidence before making a death determination. Instead, the statutory scheme makes clear that, before a jury

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[1] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[2] *Ring v. Arizona*, 536 U.S. 584 (2002).

[3] *Cage v. Louisiana*, 498 U.S. 39 (1990).

[4] *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988).

can even consider imposing a death sentence, it must first determine that the aggravating factors outweigh the mitigating factors. Cast in the State's terms, before a jury can even ask the "moral" question of whether a defendant should live or die for his crime, the State must carry its burden on the factual weighing question.

II. While States Need Not Adopt Identical Sentencing Procedures, Every Jury Finding Must Comply With The Sixth Amendment.

Acknowledging, for the moment,[5] that the Court has yet to adopt a unifying principal for "confining the instances in which capital punishment is imposed," the State is correct that "states need not use identical capital sentencing procedures." However, where a state capital sentencing scheme provides a standard for assessing whether a defendant is eligible for the death penalty, that standard must comply with *Apprendi* – meaning that "all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

In Indiana – as pointed out by Petitioner at the pre-trial hearing where he requested the instruction

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[5] But *see infra* § 4.

– in order for a jury to sentence a defendant to death, the jury must find, inter alia, that aggravating factors outweigh mitigating factors. This is a quintessential jury determination – that, under *Apprendi* and its progeny, must be proven beyond a reasonable doubt.

Petitioner did not write the Indiana statute, nor compel Respondent to adopt it. Indiana could have promulgated a statute that did not require the jury to find that aggravators outweigh mitigators.[6] Some statutes have no weighing requirement. *See Lowenfield*, *supra*. In others, such as Kansas, a jury must find that aggravators are at least in equipoise with mitigating circumstances – but even there, that finding must be made beyond a reasonable doubt. *See Kansas v. Marsh*, 548 U.S. 163, 173 (2006) ("In contrast, the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators. . . .").

Indeed, in response to *Ring v. Arizona*, a number of states modified their statutes to avoid the error that exists in Indiana.[7] But what Indiana may not do,

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[6] Whether statutes that eliminated critical measuring of aggravating and mitigating circumstances would satisfy the Eighth Amendment's requirement of narrowing is a decidedly different question.

[7] *Cf.* Danielle J. Hunsaker, *The Right To A Jury "Has Never Been Efficient; But it Has Always Been Free": Idaho Capital Juries After* Ring v. Arizona, 39 IDAHO L. REV. 649, 688 (2003)

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is "sap and undermine" the jury trial right "by introducing new and arbitrary methods of trial." *Jones v. United States*, 526 U.S. 227, 246 (1999) ("little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.").

III. There Is A Firm Division In The Lower Courts On Whether The Determination That Aggravators Equal Or Outweigh Mitigating Circumstances Must Be Made Beyond A Reasonable Doubt.

Respondent's BIO suggests that the issue is not worthy of this Court's review because there is no split in the Courts regarding this issue. Contrary to the State's position, Isom's petition correctly identified the nature and extent of the nationwide split. *See* Pet. for Cert. 10-12 (explaining that seven states have statutorily applied *Apprendi* to the weighing determination, and that other States have imposed varying – and vague – standards of proof). Five state courts of last resort have held that *Apprendi* applies to the determination of whether death should be imposed despite any mitigating evidence. *See Woldt v. People*, 64 P.3d 256, 265 (Colo. 2003) (*en banc*) (a jury – rather than a three-judge panel – must "be convinced beyond a reasonable doubt that any mitigating

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(noting "Different states responded in different ways – Nebraska, New Mexico, and Colorado held special sessions.").

factors did not outweigh the proven statutory aggravating factors."); *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002) (*Apprendi* rule applicable to weighing determination because a "finding [that no mitigation evidence outweighs aggravation evidence] is necessary to authorize the death penalty in Nevada."); *Olsen v. State*, 67 P.3d 536, 590 (Wyo. 2003) ("If the jury is to be instructed to 'weigh' . . . *the burden of negating this mitigating evidence by proof beyond a reasonable doubt remains with the State*.") (emphasis added).[8]

The BIO asserts that the Colorado Supreme Court's interpretation of *Ring* is "inconsequential" because it depends on Colorado's "unique use of weighing to determine eligibility." *See* BIO at 4. But this is the very heart of the matter: confronting a similar

[8] Two state courts of last resort imposed this obligation prior to legislative action replacing capital punishment with life without parole. Prior to the legislature's abolition of capital punishment, New Jersey found that the *beyond a reasonable doubt formulation* applied to the determination that death was the appropriate punishment. *State v. Biegenwald*, 524 A.2d 130 (N.J. 1987). The Connecticut Supreme Court also held that *Apprendi* applied to the weighing of aggravators and mitigators. *See State v. Rizzo*, 833 A.2d 363, 378 (Conn. 2003) (finding "the jury must be instructed that its level of certitude be beyond a reasonable doubt when determining that the aggravating factors outweigh the mitigating factors."). Petitioner acknowledges that the impact of the split is muted due to New Jersey and Connecticut's abolition of capital punishment, but notes the reasoning underlying the decisions of these state courts of last resort continues to inform the disagreement in interpreting the "weighing process."

statute that requires the jury determine that aggravators outweigh mitigators before imposing a death sentence, the Colorado Supreme Court recognized that *Apprendi*/*Ring* applied to that determination. Indiana has determined that *Apprendi*/*Ring* do not apply to that determination. That is the definition of a split.

Moreover, Respondent's other principal cases confirm the degree of entrenchment nationwide. *See, e.g.*, *Ritchie v. State*, 809 N.E.2d 258, 267-268 (Ind. 2004) (rejecting argument that weighing process was a factual determination after acknowledging division among the States on this issue); *Oken v. State*, 835 A.2d 1105, 1166-1169 (Md. 2003) (dissenting opinion) (observing split among courts on this issue); *United States v. Sampson*, 486 F.3d 13, 31-33 (1st Cir. 2007) (affirming constitutionality of Federal Death Penalty Act in case where jury was instructed, "the prosecution must convince you *beyond a reasonable doubt that the aggravating factor or factors sufficiently outweigh the mitigating factors* to make death the appropriate penalty in this case") (emphasis added).[9]

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[9] Moreover, the cases cited in Respondent's BIO support, rather than detract, from Petitioner's description of the intractable split in the courts of last resort. For instance, the BIO cites the Indiana Supreme Court's decision in *Ritchie* as an example of how there is no split in the state courts of last resort. But a careful reading of *Ritchie* acknowledges the split in the circuits. *Ritchie v. State*, 809 N.E.2d 258, 267-268 (Ind. 2004) *citing inter alia Johnson v. State*, 59 P.3d 450 (Nev. 2002); *see also* BIO *citing Oken v. State*, 835 A.2d 1105 (Md. 2003) (depending on

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IV. The *Beyond A Reasonable Doubt Standard* Provides An Appropriate Unifying Principle To Limit Application Of Capital Sanction.

Respondent's BIO suggests that Petitioner provides insufficient support for the proposition that "lack of uniformity produced arbitrary results." "Isom cites only data regarding death sentences imposed in 2014."

Data from 2015 suggests further evidence of the arbitrariness. In 2015, only fourteen states and the federal government returned death sentences. Only 49 death sentences were imposed, a 33% decline from the 73 death sentences imposed in 2014 – which was itself less than 25% of the number of death sentences imposed in 1999.[10] Three states imposed more than half of the death sentences in 2015. But it is not simply Petitioner who asserts a lack of uniformity. *See Glossip v. Gross*, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting). As Justice Breyer explained:

> By the early 2000's, the death penalty was only actively practiced in a very small number of counties: between 2004 and 2009, only 35 counties imposed 5 or more death sentences . . . between 2010 and 2015 (as of

Borchardt v. State, 786 A.2d 631 (Md. 2001)) (dissenting) *citing State v. Biegenwald*, 524 A.2d 130 (N.J. 1987).

[10] *See The Death Penalty in 2015: Year End Report*, Death Penalty Information Center, http://deathpenaltyinfo.org/documents/2015YrEnd.pdf.

> June 22), only 15 counties imposed five or more death sentences. In short, the number of active death penalty counties is small and getting smaller.

Id. (internal citations omitted). While Respondent argues that it does not matter that there is a correlation between states that do not impose *Apprendi*/*Ring* to the death-determination and the states that return the majority of death sentences, that contention is misguided. Contrary to Respondent's dismissals, the correlation demonstrates that the States that have applied *Apprendi* and *Ring* to the entirety of the capital sentencing process have identified the "unifying principle" that produces both more reliable and more restrained decision-making and as a result produces fewer arbitrary death sentences. Granting Mr. Isom's petition would afford this Court the opportunity to further that trend.

Finally, while the BIO argues that "history" establishes the traditional distinction between elemental facts and punishment factors, history does the opposite. At the founding of the country, the standard for determining whether a defendant deserved death was at least, "beyond a reasonable doubt." Indeed, it is appropriate to impose this standard to the sentencing determination because the historical origins of the *beyond a reasonable doubt standard* are located in the exact (and current) concern over the application of capital punishment. Commentators note that the origins of the reasonable doubt instruction were "related to the increasing resistance of the public – both American and British – to the application of the

capital sanction." Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45, 51 (Winter 2005).[11] *See also id*. at 51 (noting the origins of the *beyond a reasonable doubt standard* as contemporaneous to the Boston Massacre trials of 1770, arising from concern of "[c]ommentators, and perhaps society at large, . . . as a way of ensuring that only the worst among the truly guilty were subject to that penalty."); *id*. ("It seems likely that the rise of the reasonable doubt standard was related to the increasing resistance of the public – both American and British – to the application of the capital sanction.").

The application of the *beyond a reasonable doubt standard* to the weighing of aggravating circumstances is consistent with "[t]he rule of evolving standards of decency with specific marks on the way to full progress and mature judgments," which require "resort to the penalty must be reserved for the worst of crimes *and* limited in its instances of application." *Kennedy v. Louisiana*, 554 U.S. 407, 446-447 (2008) (emphasis added). The standard is consistent with the observation that "[i]n most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to

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[11] Lillquist cites, among other authorities, JOHN LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (Oxford University Press, 2003); Larry Laudan, *Is Reasonable Doubt Reasonable?*, 9 LEGAL THEORY 295, 297 (2003); Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 148-149, nn.206-207 (2002).

allow him to understand the enormity of his offense." *Id*. at 447.

CONCLUSION

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

Respectfully submitted,

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