No. 15-533

IN THE
Supreme Court of the United States

KEVIN CHARLES ISOM,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

On Petition for Writ of Certiorari to the
Indiana Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

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CAPITAL CASE

QUESTION PRESENTED

Indiana's statutory sentencing scheme requires a jury, before it can recommend a capital sentence, to determine whether the state has proven one or more aggravating circumstances beyond a reasonable doubt, *and* whether the proven aggravating circumstances outweigh any mitigating circumstances.

The question presented is whether the Sixth Amendment requires that the *relative weights* of the aggravating and mitigating circumstances be found beyond a reasonable doubt.

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STATEMENT

Kevin Isom stands convicted and sentenced to death for the 2007 murders of his wife Cassandra, his thirteen-year-old stepdaughter Ci'Andria, and his sixteen-year-old stepson Michael, in Gary, Indiana. His petition follows from the direct appeal decision of the Indiana Supreme Court.

1. Isom used a 12-gauge shotgun, a .357 Magnum caliber handgun, and a .40 caliber handgun to shoot his wife and step-children multiple times. Police arrived shortly after the report of gunfire in the apartment complex, but were kept at bay by Isom's gunfire in their direction. After a SWAT team entered Isom's apartment, police discovered the bodies of the victims and Isom with the firearms. Police found blood from the three victims on this clothing, and Isom gave a statement to police describing the shootings. *Isom v. State*, 31 N.E.3d 469, 476-77 (Ind. 2015), *reh'g denied*.

2. The State of Indiana charged Isom with three counts of murder and three counts of attempted murder, and it requested the death penalty. The jury found Isom guilty as charged. The jury recommended a sentence of death, and the trial court agreed and issued a capital sentence. *Isom*, 31 N.E.3d at 477.

3. During the penalty phase, the jury was instructed:

> You may recommend the sentence of death or life imprisonment without parole only if you unanimously find:

> 1. That the State of Indiana has proven beyond a reasonable doubt that the charged aggravating circumstance exists as to each count in Counts VIII, IX and X
>
> and
>
> 2. That any mitigating circumstance or circumstances that exist are outweighed by the charged and proven aggravating circumstance.

Isom, 31 N.E.3d at 487. On direct appeal, Isom has argued that this was an incorrect statement of law. He claims the Sixth Amendment requires the jury to find that the aggravating circumstance outweighs any mitigating circumstances beyond a reasonable doubt before a court may sentence him to death.

4. Citing its precedents rejecting such claims, the Indiana Supreme Court unanimously concluded, "We laid whatever uncertainty there may have been regarding this issue to rest in *Inman* [*v. State*, 4 N.E.3d 190, 196 (Ind. 2014),] and we decline to revisit the issue here." *Isom*, 31 N.E.3d at 488.

REASONS TO DENY THE PETITION

I. No Lower-Court Conflict Justifies Supreme Court Review

Isom fails to offer any grounds enumerated by Supreme Court Rule 10 as support for granting his petition. His petition boldly claims that our Nation's

courts are "bitterly divided" over the application of *Ring v. Arizona*, 536 U.S. 584 (2002), but he does not—because he cannot—back that assertion with citations to any cases. He apparently means only that States have different procedures for making capital sentencing determinations. Pet. at 10–12. Variations in state sentencing policies and procedures, however, do not represent insoluble conflicts over national legal standards requiring this Court's attention.

In fact, there is no legal division among courts. For more than a decade, the federal circuits and individual states have considered the effect of *Apprendi* and *Ring* on their statutory schemes. All federal circuits that have considered the question agree that the Sixth Amendment does not require weighing to be determined beyond a reasonable doubt. *United States v. Gabrion,* 719 F.3d 511, 532–33 (6th Cir. 2013) (en banc), *cert. denied*; *United States v. Runyon,* 707 F.3d 475, 516 (4th Cir. 2013), *cert. denied*; *United States v. Fields,* 516 F.3d 923, 950 (10th Cir. 2008), *cert. denied*; *United States v. Mitchell,* 502 F.3d 931, 993–94 (9th Cir. 2007), *cert. denied*; *United States v. Sampson,* 486 F.3d 13, 31–32 (1st Cir. 2007), *cert. denied*; *United States v. Fields,* 483 F.3d 313, 345–46 (5th Cir. 2007), *cert. denied*; *United States v. Purkey,* 428 F.3d 738, 749–50 (8th Cir. 2005), *cert. denied*.

Many state appellate courts have also concluded that the relative weight of aggravators and mitigators need not be found beyond a reasonable doubt. *See, e.g., Ex parte Waldrop*, 859 So.2d 1181, 1189–90 (Ala. 2002), *cert. denied*; *People v. Prieto*, 66 P.3d 1123,

1147 (Cal. 2003), *cert. denied*; *Brice v. State*, 815 A.2d 314, 322 (Del. 2003); *State v. Gales*, 658 N.W.2d 604, 623 (Neb. 2003), *reaff'd by* 694 N.W.2d 124, 140–41 (Neb. 2005), *cert. denied*; *People v. Thompson*, 853 N.E.2d 378, 408 (Ill. 2006), *cert. denied*; *Ritchie v. State,* 809 N.E.2d 268, 264–68 (Ind. 2008), *cert. denied; Oken v. State*, 835 A.2d 1105, 1148–52 (Md. 2003), *cert. denied*; *State v. Johnson*, 284 S.W.3d 561, 587–89 (Mo. 2009), *cert. denied*; *State v. Addison*, 87 A.3d 1, 178–79 (N.H. 2014); *State v. Fry*, 126 P.3d 516, 531–36 (N.M. 2005), *cert. denied*; *Nunnery v. State*, 263 P.3d 235, 250–51 (Nev. 2011), *cert. denied*; *Torres v. State*, 58 P.3d 214, 216 (Okla. Crim. App. 2002), *cert. denied*; *Commonwealth v. Roney*, 866 A.2d 351, 360 (Penn. 2005), *cert. denied.*

It is inconsequential that the Colorado Supreme Court has interpreted *Ring* to require "proof" beyond a reasonable doubt for weighing aggravating and mitigating circumstances. *See Woldt v. People*, 64 P.3d 256, 265–66 (Colo. 2003), *cert. denied.* That holding arises from Colorado's unique use of weighing to determine *eligibility* for the death penalty. *Id.* In Colorado, that is, weighing is used for eligiblity, and a different process guides the decision whether to actually impose death on an eligible defendant. In contrast, Indiana and many other states require mere proof of an aggravating circumstance—rather than a balance of aggravators over mitigators—to trigger eligibilty for the death penalty. In that scheme, only after a jury determines death eligibility (via proof of an aggravator beyond a reasonable doubt) does the jury *weigh* aggravators against mitigators to decide an appropriate sentence. Consequently, the Colorado

Supreme Court's holding that *Ring* applies to eligibility-stage weighing creates no tension with decisions of other courts that *Ring* does *not* apply to determination-stage weighing.

With no serious legal conflict to resolve, there is no reason for the Court to take this case and call into question all death sentences imposed in several states in the last decade.

II. States Need Not Use Identical Capital Sentencing Procedures, and Isom Cites No Data Suggesting Arbitrary Results

Without any explanation or factual support, Isom contends that Supreme Court review is warranted because allowing juries to weigh aggravating and mitigating circumstances without requiring proof beyond a reasonable doubt leads to "arbitrary" results. Pet. at 10–12. Both the premise and the alleged results are off base.

First, Isom presumes that variation among state capital sentencing procedures is a species of conflict in need of judicial reconciliation. The Court has viewed matters to the contrary. Federalism and comity principles have led the Court to abjure one-size-fits-all death penalty procedures. *See Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006) (holding that as long as a state capital sentencing system rationally narrows the class of death-eligible defendants and permits a jury to render a reasoned, individualized sentencing determination, "a State enjoys a range of discretion in imposing the death penalty."). Under our constitutional system, each state may proscribe

different criminal acts and impose different penalties. It is not "arbitrary" that one who commits murder is eligible for capital punishment if the crime occurs in Indiana, but not if it occurs in Iowa.

In terms of outcomes, Isom contends that "lack of uniformity has produced arbitrary results." Pet. at 12. For support, Isom cites only data regarding death sentences imposed in 2014. Not only does a single year provide an insufficient data set for drawing any conclusions, but aggregate data about imposition of the death penalty across states suggest nothing about arbitrariness. One may look for arbitrary imposition of the death penalty only by comparing factually similar cases within common systems. It is an evaluation that can be made only by comparing the decisions of particular juries in particular cases.

Even so, Isom contends—without citation or support—that of seventy-three death sentences imposed in 2014, only six were in states that require weighing beyond a reasonable doubt. This is not surprising as (according to Isom) only seven states use that standard, only three of which imposed a death sentence in 2014. Critically, Isom provides no analysis as to whether the reasonable-doubt burden had any impact on sentencing determinations, so no reasonable conclusions can be drawn from his unsupported data in any event.

III. The Decision Below is Correct

In view of this Court's precedents, there is no valid claim that a jury may recommend imposition of the death penalty only if it weighs aggravators and mitigators beyond a reasonable doubt.

In *Apprendi v. New Jersey*, the Court held that the Sixth Amendment's right to a jury trial required that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." That standard applies to any "assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." 530 U.S. 466, 490 (2000) (quoting *Jones v. United States*, 526 U.S. 227, 252–53 (1999) (opinion of Stevens, J.)); *see also Blakely v. Washington*, 542 U.S. 296 (2004).

Ring extended this rule to capital cases and invalidated a procedure allowing a "sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609. If the death penalty is not an option absent an aggravating circumstance, *Apprendi* requires that factual determination be made by a jury beyond a reasonable doubt. *Id.* at 604–05. *Ring*, however, did not address whether *Apprendi* applies to *weighing* aggravators against mitigators. *Ring*, 536 U.S. at 597 n.4. (noting the petitioner's "tightly delineated" claim did not raise questions about mitigating circumstances, the ultimate

sentencing decision, or an appellate court's authority to reweigh aggravators and mitigators).

Fundamentally, *Apprendi* does not make weighing aggravators and mitigators an "element" of a crime. Any "application of *Apprendi* must honor the 'longstanding common-law practice' in which the rule is rooted." *Oregon v. Ice*, 555 U.S. 160, 167–68 (2009) (quoting *Cunningham v. California*, 549 U.S. 270, 281 (2007)). *See also Apprendi*, 530 U.S. at 476–90; *Jones*, 526 U.S. at 244–52; *Harris v. United States*, 536 U.S. 545, 561–64 (2002); *Ring*, 536 U.S. at 599; *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2350 (2012); *Alleyne v. United States*, 133 S. Ct. 2151, 2158–60 (2013). That history establishes the traditional distinction between elemental *facts* and punishment *factors*—which constitute systematic guidance for deciding a precise punishment. Weighing information is not a "fact"; rather, it is the traditional method of determining a defendant's sentence from a range of options.

Furthermore, in Indiana, weighing does not determine *eligibility* for death; it determines whether death is an appropriate sentence. It is nothing more than systematic guidance to juries on *matters of opinion*, not facts. The jury's weighing function is a moral judgment that serves to channel the discretion to impose death. This Court has properly understood this important distinction in the past. *See Tuilaepa v. California*, 512 U.S. 967, 979–80 (1994) (recounting this Court's approval of various weighing and non-weighing capital punishment schemes). Indiana's death penalty statute properly requires eligibility-

triggering aggravating circumstances to be proved to a jury beyond a reasonable doubt. *Apprendi* and *Ring* do not require the *moral weight* of aggravators, once proven, also to be found beyond a reasonable doubt—whatever that might mean.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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