No. 08-

In The Supreme Court of the United States

HENRY JOSEPH ANDERSON
Petitioner,

v.

STATE OF LOUISIANA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

JELPI P. PICOU, JR.*
G. BEN COHEN
BIDISH J. SARMA
THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955
* *Counsel of Record for Petitioner*

CAPITAL CASE

QUESTION PRESENTED

Louisiana law provides that after the jury finds that an aggravating circumstance exists, "[a] sentence of death shall not be imposed unless the jury . . . after consideration of any mitigating circumstances, determines that the sentence of death should be imposed." La. Code Crim. Proc. art. 905.3. In *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), this Court held that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be . . . submitted to a jury, and proven beyond a reasonable doubt." The Louisiana Supreme Court rejected petitioner's claim that *Apprendi* applies to the culpability determination, holding instead that jurors need not employ any standard for determining which defendants convicted of first-degree murder and an aggravating circumstance are culpable enough to receive a death verdict.

This gives rise to the following constitutional question: Whether the jury's determination that death should be imposed must be made beyond a reasonable doubt?

PARTIES TO THE PROCEEDING

The petitioner is Henry Joseph Anderson, the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner Henry Joseph Anderson respectfully petitions for a writ of certiorari to review the Louisiana Supreme Court's judgment in this case.

OPINION BELOW

The Louisiana Supreme Court's opinion, in *State v. Anderson*, authored by Justice Johnson, is reported at __ So. 2d __, 2008 La. Lexis 1744, and is reprinted in the Appendix at Pet. App. A. 1a-102a. The rehearing denial is reprinted in the Appendix at Pet. App. B. 103a.

JURISDICTION

The Louisiana Supreme Court's opinion was entered on September 9, 2008. That court denied Mr. Anderson's timely petition for rehearing on October 31, 2008. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

> Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury[.]

The Eighth Amendment to the United States Constitution provides, in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Article 905.3 of the Louisiana Code of Criminal Procedure provides, in pertinent part:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines

> that the sentence of death should be imposed.
> ...

Article 905.6 of the Louisiana Code of Criminal Procedure provides, in pertinent part:

> A sentence of death shall be imposed only upon a unanimous determination of the jury. . . .

Article 905.8 of the Louisiana Code of Criminal Procedure provides:

> The court shall sentence the defendant in accordance with the determination of the jury. If the jury is unable to unanimously agree on a determination, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

STATEMENT

The Louisiana legislature drafted a capital sentencing statute that renders life without the possibility of parole the maximum punishment available for first-degree murder (even after the jury's finding that an aggravating circumstance exists) unless a jury, after considering any mitigating evidence, unanimously determines that death should be imposed.[1]

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[1] In addition to the jury's assessment of any mitigating evidence, La. Code Crim. Proc. art. 905.2 requires the jury to consider: the "circumstances of the offense, the character and propensities of the offender, and the victim, and the impact

While this Court clarified in *Ring v. Arizona*, 536 U.S. 584 (2002), that the *Apprendi* rule[2] applies to the finding that a statutory aggravating circumstance exists, *Ring* explicitly left unanswered the question of *Apprendi*'s applicability to other capital sentencing determinations. *Id.* at 597 n.4.[3] This case presents an opportunity to address whether the Constitution requires the Louisiana statute's second determination (which encompasses

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that the crime has had on the victim, family members, friends, and associates . . ." before deciding whether death should be imposed. Moreover, regardless of its culpability determination, or its consideration of the 905.2 sentencing factors, the jury is never required to return a death sentence. *See, e.g., State v. Lucky*, 755 So. 2d 845, 861 (La. 1999) ("[W]hile a jury is never obliged to impose a death sentence, there is no general requirement to so charge"); *id.* citing *State v. Watson*, 449 So. 2d 1321, 1331-32 (La. 1984) (sanctioning an instruction that jurors may return a life sentence as a gratuitous act of mercy).

[2] *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (holding that 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).

[3] *See also Kansas v. Marsh*, 548 U.S. 163, 175 (2006) (finding that "Kansas' procedure narrows the universe of death-eligible defendants consistent with Eighth Amendment requirements," but noting as "significant" that under the Kansas scheme the state carries the burden of persuasion, beyond a reasonable doubt, on the question of death-worthiness).

consideration of any mitigating evidence) to be made beyond a reasonable doubt.[4]

The district court did not require petitioner's sentencing phase jury to conclude beyond a reasonable doubt that, after considering any mitigating evidence, death should be imposed. In fact, the district court provided no guidance at all to petitioner's jury regarding how it was to consider the impact of any mitigating evidence before determining that Anderson should be sentenced to death. Nonetheless, the Louisiana Supreme Court affirmed Anderson's death sentence, holding that "neither *Ring*, nor Louisiana jurisprudence for that matter, requires the jurors to reach their ultimate sentencing determination beyond a reasonable doubt." Pet. App. at 89a.

Over the last six years, fourteen other state courts of last resort and four federal courts of appeals have wrestled with whether and how *Apprendi* and *Ring* affect the portions of their capital sentencing schemes that subsume the determination whether any mitigating evidence is sufficient to exclude the defendant from the category of

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[4] The Louisiana statute plainly accords with the *Apprendi* rule's Sixth Amendment element (trial by jury). However, the statute is silent on the burden of proof that controls the jury's decision that death should be imposed notwithstanding any mitigating evidence (i.e. the *Apprendi* rule's Fourteenth Amendment (Due Process) element).

murderers culpable enough to receive a death sentence. A majority of the courts that have considered the issue hold *Apprendi* inapplicable, but a strong minority of states require the culpability determination, no matter how the state labels that finding, to be based on proof beyond a reasonable doubt.

This Court should grant review to resolve the conflict, and hold that where a jurisdiction conditions a death sentence upon a finding that, after consideration of mitigating evidence, death should be imposed—as Louisiana does here—that culpability determination must be made beyond a reasonable doubt.

FACTUAL BACKGROUND

Oneatha Brinson, an elderly white[5] woman, was stabbed to death in her home in Ouachita Parish, Louisiana, on September 29, 2000.

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[5] Petitioner, an African-American, asserted that race infiltrated the trial. The Louisiana Supreme Court rejected this notion, holding that "the race of the victim was never bantered about as one of her virtues," and that "in all respects, defendant's capital trial appears to have been conducted free of any racial taint." Pet. App. at 96a; *but see id.* at 67a (refraining from redressing prosecutor's failure to provide race neutral explanations under *Johnson v. California*, 545 U.S. 162 (2005), because in "this pre-*Johnson* landscape, the trial judge in the present case took a very active role in voir dire."); *see also id.* at 62a (observing that Louisiana law prevents infiltration of racism and "codifies the *Batson* ruling in La. C.Cr. P. art. 795. *See also State v. Snyder*, 1998-1078 (La. 9/5/06), 942 So.2d 484,

Petitioner, an African-American man, was arrested and charged with first-degree murder on October 2, 2000. Pet. App. at 2a. As detailed in the Louisiana Supreme Court opinion, Mr. Anderson explained to authorities that he did yard work for Mrs. Brinson, and that an argument ensued concerning when he would return to finish. Mr. Anderson stated that in the midst of the argument Mrs. Brinson said "you nigger you need to go on and do the yard work." Pet. App. at 7a-8a. At that point, as petitioner's statement to the police indicates, he just "went off." *Id.* Petitioner took a knife from Ms. Brinson's kitchen and stabbed her ten times. Throughout the remainder of his statement, and at trial, petitioner conceded responsibility for the murder.

Petitioner defended against the death sentence with evidence indicating that he was categorically exempt from capital punishment due to mental retardation.[6] Mr. Anderson also introduced

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rev'd on other grounds, Snyder v. Louisiana, ___ U.S. ___, 170 L. Ed. 2d 175, 128 S. Ct. 1203 (2008). ").

[6] At trial, a defense psychologist testified that his administration of a battery of tests including the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III) placed Petitioner in the "borderline mental retardation" range. Pet. App. at 23a. The state's rebuttal psychiatrist, Dr. George Seiden, testified that petitioner's IQ score of 73 placed him outside the range of mild mental retardation. "Dr. Seiden further opined that defendant does not meet the Louisiana definition of mental retardation, because he was never

evidence to show that the death penalty was unjustified in this instance because he had suffered neurological damage after the age of 18 that diminished his personal culpability.[7]

The State submitted three aggravating circumstances in this case. The jury found that only two were supported by the evidence: (1) the victim was 65 years of age or older; and (2) the offense was committed in an especially heinous, atrocious or cruel manner. La. Code of Crim. Proc. art. 905.4(A)(10), (7).

Given clear evidence of the victim's age, there was no question that at least one aggravating circumstance existed. The only question at the penalty phase was whether the jury would decide, after considering mitigating evidence, that death was the appropriate punishment.

Ultimately, the jury returned a death verdict. Neither the trial court nor the verdict form required the jury to determine, after considering any

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diagnosed as mentally retarded before age 18." Pet. App. at 28a.

[7] Mr. Anderson suffered a significant brain trauma when he was thirty-two years old as the result of a vicious beating that left him with a contusion to the temporal region on the left side of his brain, a blow-out fracture of his eye, and a concussion with bleeding inside the brain. A doctor that observed petitioner a year after the beating noted that Mr. Anderson had slow mentation and difficulty responding to questions.

mitigating circumstances, that death was the appropriate punishment beyond a reasonable doubt.

On appeal, Petitioner observed that Louisiana's sentencing scheme required two separate findings prior to the imposition of a death sentence. Petitioner argued that, like the first determination that an aggravating factor exists, the second determination (whether, after considering mitigating evidence, death should be imposed) must be made beyond a reasonable doubt. At Mr. Anderson's penalty phase, the trial court did not instruct the jury that this latter finding needed to be made according to any particular burden of proof.

The Louisiana Supreme Court rejected petitioner's claims:

> [D]efendant asserts that the Louisiana death penalty statute is unconstitutional because it fails to require the jury to determine that death is the appropriate punishment "beyond a reasonable doubt." Citing *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), defendant complains that Louisiana's capital sentencing scheme is based on "standard-less jury discretion" which violates the Eighth and Fourteenth Amendments.
>
> However, *Ring* requires that jurors find beyond a reasonable doubt all of the predicate facts which render a defendant eligible for the death sentence, after consideration of the mitigating evidence. *Id.*, 536 U.S. at 609 While

> defendant now argues that *Ring* should extend such a requirement to the ultimate sentence as well as the predicate facts, neither *Ring*, nor Louisiana jurisprudence for that matter, requires the jurors to reach their ultimate sentencing determination beyond a reasonable doubt. *State v. Koon*, 96-1208, p. 27 (La. 5/20/97), 704 So.2d 756, 772-73 ("Louisiana is not a weighing state. It does not require capital juries to weigh or balance mitigating against aggravating circumstances, one against the other, according to any particular standard.")

Pet. App. at 89a.

On October 31, 2008, the Louisiana Supreme Court denied Petitioner's timely application for a rehearing. This petition ensues.

REASONS FOR GRANTING THE WRIT

The *Apprendi* and *Ring* decisions call into question the constitutionality of Louisiana's death penalty scheme. The Louisiana Code provides that a death sentence shall not be imposed unless two predicate findings are made: first, the jury must unanimously determine beyond a reasonable doubt that a statutory aggravating circumstance exists, and second, after considering any mitigating circumstances, the jury must determine that a death sentence should be imposed. The law does not provide a standard of proof for the latter determination.

Under Louisiana law, the maximum punishment authorized for a conviction of first-degree murder and the finding of an aggravating circumstance is life without the possibility of parole. Therefore, the finding that, after consideration of mitigating evidence, death should be imposed, necessarily increases the sentencing ceiling from life imprisonment to a death sentence. Thus, the Louisiana legislature drafted its capital sentencing statute in a manner that triggers Sixth and Fourteenth Amendment protections at each of its two steps.

In addition, the unrivaled need for accuracy in the outcome of capital sentencing determinations underscores the need for the Court to step in and decide this issue. The Eighth Amendment limits imposition of the death penalty to "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (internal citations omitted).

Only the beyond a reasonable doubt standard satisfies the Eighth Amendment's reliability demands, and accurately signals to the sentencer the degree of seriousness society affixes to the culpability determination. Since Louisiana law does not require the determination that, after consideration of mitigating evidence, a death sentence should be imposed be made "according to any particular standard" this case provides a manifestly appropriate vehicle for doing so. Pet.

App. at 89a; *see also State v. Lucky*, 755 So. 2d 845, 850 (La. 1999) ("Louisiana does not provide any standard for a juror to weigh mitigating circumstances against aggravating circumstances.").

I. *Apprendi* Applies to a Louisiana Jury's Death-Determination.

The Louisiana legislature created a sentencing scheme that makes life without the possibility of parole the maximum punishment unless the jury determines, after consideration of any mitigating evidence and the moral culpability of the offender, that death is the appropriate punishment.[8] Petitioner suggests that the jury's determination that death is the appropriate punishment – no matter how it is described – must be made upon proof beyond a reasonable doubt.

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[8] Whether this codification was done to meet the state's Eighth Amendment obligations or for other reasons, the Sixth Amendment right to a jury trial is applicable. *See Ring*, 536 U.S. at 606 (observing, the idea "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.") (internal citations omitted); id. at 611 (Scalia, J., concurring) ("[I]t is impossible to identify with certainty those aggravating factors whose adoption has been wrongfully coerced by *Furman*, as opposed to those that the State would have adopted in any event.").

A. The Fifth and Sixth Amendments require any finding that increases the maximum punishment possible to be proved beyond a reasonable doubt.

In *Sullivan v. Louisiana*, the Court observed:

> the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. *It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty*, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt.

508 U.S. 275, 278 (1993) (emphasis added). Thereafter, the Court became more explicit, holding that "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." *Apprendi*, 530 U.S. at 476. Subsequently, in *Ring v. Arizona*, the Court made clear that the beyond a reasonable doubt standard applies to a jury's finding of an aggravating factor in a capital trial's sentencing phase. *See Oregon v. Ice*, No. 07-901, slip op. at 5 (U.S. Jan. 14, 2009) (noting

the Court in *Ring* applied "*Apprendi*'s rule to facts subjecting a defendant to the death penalty . . . .").[9]

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[9] In *Oregon* v. *Ice*, this Court identified *Apprendi*'s "animating principle" as "preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." *Ice*, No. 07-901, slip op. at 6. The Court "accordingly considered whether the finding of a particular fact was understood as within the 'domain of the jury . . . by those who framed the Bill of Rights.'" *Id.* (internal citations omitted). Because the death penalty was mandatory at the time the Constitution was framed, the jury had no explicit role in sentencing (though it is well-recognized that juries often found defendants not guilty to ensure they were not executed). By the time the Sixth Amendment became law, "the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established. Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind." *Walton* v. *Arizona*, 497 U.S. 639, 711 (1990) (Stevens, J., dissenting) (internal citations omitted). *Woodson* v. *North Carolina* removed any remaining doubt of the jury's proper role in capital sentencing determinations. In *Woodson*, this Court held the mandatory death penalty unconstitutional, forever changing the role of juries in capital cases. Due to Eighth Amendment requirements that the jury find a statutory aggravating circumstance and the sentencer consider mitigating evidence, the jury is a constitutionally necessary bulwark between the State and accused in a capital trial. And the requirements of the Eighth Amendment cannot be used to undermine the protections guaranteed by the Sixth Amendment. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring).

B. The *Apprendi* rule applies to the finding that, after consideration of any mitigating evidence, death is the appropriate punishment.

Louisiana Code of Criminal Procedure article 905.3 states unambiguously: "[a] sentence of death shall not be imposed *unless* the jury . . . after consideration of any mitigating circumstances, determines that the sentence of death should be imposed" (emphasis added). The plain meaning of the words "shall not" and "unless" establish that a death sentence may not be imposed without a jury finding that death is the appropriate punishment. *See Blakely v. Washington*, 542 U.S. 296, 303 (2004) (the "statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings"); *Apprendi*, 530 U.S. at 494 ("the relevant inquiry is one not of form, but of effect."). The *Apprendi* rule applies because the finding that death is the appropriate punishment elevates the maximum sentence available.

C. Seven state legislatures and four other state courts of last resort have concluded that the finding that death should be imposed despite any mitigating evidence must be made beyond a reasonable doubt.

The statutory law of seven states supports the notion that *Apprendi* should apply to the question of

whether mitigating evidence diminishes an offender's culpability to a degree that a death sentence would not be appropriate.[10]

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[10] ARK. CODE ANN. § 5-4-603 (Arkansas) ("jury [must] unanimously return written findings that . . . aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist . . . Aggravating circumstances justify a sentence of death beyond a reasonable doubt."); KAN. STAT. ANN. § 21-4624 (Kansas) (death penalty not imposed unless "by unanimous vote, the jury finds beyond a reasonable doubt . . . that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist . . ."); OHIO REV. CODE ANN. 2929.03(D) (Ohio) (jury [must] unanimously find[], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors); OR. REV. STAT. § 163.150 (1)(c)-(d) (Oregon) (requiring life sentence unless proof beyond a reasonable doubt that, after considering "any aggravating evidence and any mitigating evidence concerning any aspect of the defendant's character or background, or any circumstances of the offense and any victim impact evidence" that defendant should "receive a death sentence."); TENN. CODE ANN. 39-13-204 (g)(1)(B) (Tennessee) ("If the jury unanimously determines that a statutory aggravating circumstance [exists], but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt, the jury shall . . . sentence the defendant . . . to . . . life."); UTAH CODE ANN. 76-3-207 (5)(b) (Utah) ("death penalty shall only be imposed if . . . the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation."); WASH. REV. CODE ANN. 10.95.060 (Washington) (jury must be convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency).

Four state courts of last resort hold 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 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."). The Connecticut and Wyoming Supreme Courts interpret their state statutes and constitutions to comply with *Apprendi* and *Ring*. *See State v. Rizzo*, 266 Conn. 171, 242 (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 . . ."); *Olsen v. State*, 2003 WY 46, 67 (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)).

D. Ten state courts and four federal circuits hold *Apprendi* inapplicable to any capital sentencing determination beyond the finding of an aggravating circumstance.

Employing varying rationales, ten state courts and four federal circuits hold *Apprendi* inapplicable

to the culpability determination. Six state courts of last resort explain that *Apprendi* does not apply because the weighing process mandated by their capital sentencing schemes is not a factual determination. The Illinois Supreme Court, in *People v. Ballard*, 206 Ill.2d 151 (2002), addressed the applicability of the *Apprendi* rule to capital sentencing determinations beyond the finding of an aggravating factor. Ballard contended that it was "inaccurate to conclude that the death penalty is authorized by the facts found by the jury after the first stage of death penalty proceedings, because this second finding must still be made, unanimously, before that penalty can be imposed." *Id.* at 203. The Illinois Supreme Court noted that the defendant's argument "appear[ed] to find some support in *Ring*." That Court ultimately distinguished *Ring*, however, on the basis that Ballard's "complaint concern[ed] mitigating, not aggravating, factors," and though it was bound by this Court's precedents, it was "not bound to extend the decisions." *Id.* at 205; *see also Ex parte Waldrop*, 859 So.2d 1181, 1189 (Ala. 2002) ("weighing process is not a factual determination," but instead "a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum"); *accord People v. Lewis*, 43 Cal. 4th 415, 521 (2008) ("[t]here is no federal constitutional requirement that a jury [] conduct the weighing of aggravating and mitigating circumstances . . ."); *Oken v. State*, 835 A.2d 1105, 1151-52 (Md. 2003) ("the weighing process is not a fact-finding one based on evidence."); *Commonwealth*

v. *Roney*, 866 A.2d 351, 360 (Pa. 2005) ("[b]ecause the weighing of the evidence is a function distinct from fact-finding, *Apprendi* does not apply here."); *State* v. *Fry*, 126 P.3d 516, 534 (N.M. 2005) ("balancing process is not 'a fact necessary to constitute the crime with which [the defendant] is charged' such that it would invoke the constitutional requirement of proof beyond a reasonable doubt . . ." (internal citation omitted)).

Four other state courts of last resort hold *Apprendi* inapplicable, asserting the weighing function does not increase the maximum punishment. *See Ritchie* v. *State*, 809 N.E.2d 258, 268 (Ind. 2004) ("The outcome of weighing does not increase eligibility . . . [and] is therefore not required to be found by a jury under a reasonable doubt standard.");[11] *Brice* v. *State*, 815 A.2d 314, 322 (Del. 2003) ("the weighing . . . does not increase the punishment [but] ensures that the punishment imposed is appropriate and proportional."); *State* v. *Gales*, 265 Neb. 598, 627-628 (2003) ("These [weighing] determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination."); *Torres* v. *State*, 58 P.3d 214, 216

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[11] *But see Ritchie*, 809 N.E.2d at 273 (Rucker, J., dissenting in part, concurring in part) ("The plain language of Indiana's capital sentencing scheme makes death eligibility contingent upon certain findings that must be weighed by the jury . . . they are at a minimum the type of findings anticipated by *Apprendi* and *Ring* and thus require proof beyond a reasonable doubt.").

(Ok. Crim. 2002) ("It is [the aggravating factor] finding, not the weighing of aggravating and mitigating circumstances, that authorizes jurors to consider imposing a sentence of death.").

Four federal courts of appeals similarly refuse to apply *Apprendi* to stages of the capital sentencing procedure beyond the finding of an aggravating factor. In *United States v. Mitchell*, 502 F.3d 931, 993 (9th Cir. 2007), the Ninth Circuit held, over the dissent of Judge Reinhardt,[12] that the beyond a reasonable doubt standard does not apply at the weighing stage because "the weighing step is an equation that merely channels a jury's discretion by providing it with criteria by which it may determine whether a sentence of life or death is appropriate." *Id.*; *see also United States v. Sampson*, 486 F.3d 13, 31 (1st Cir. 2007) ("the requisite weighing [provision of the Federal Death Penalty Act] constitutes a process, not a fact to be found."); *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007) ("the jury's decision that the aggravating factors outweigh the mitigating factors is not a finding of fact [but rather]

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[12] Dissenting, Judge Reinhardt, underscored: "There is no doubt that the finding that aggravating factors outweigh mitigating factors increased Mitchell's maximum punishment [under the Federal Death Penalty Act]." *Id.* (citing 18 U.S.C. § 3593(e) ("whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death. . .")). "Absent this finding," Judge Reinhardt reasoned, "the maximum sentence the court could have imposed would have been life imprisonment without the possibility of release." *Id.*

it is a 'highly subjective,' 'largely moral judgment' 'regarding the punishment that a particular person deserves.'"); *accord United States v. Barrett*, 496 F.3d 1079, 1107-1108 (10th Cir. 2007) (same).

E. Confusion exists in at least three states regarding not if, but how *Apprendi* applies.

On remand from this Court's decision in *Ring v. Arizona*, the Arizona Supreme Court dismissed the state's contention that the *Apprendi* rule did not apply to the weighing stage of the state sentencing statute. *See State v. Ring*, 204 Ariz. 534 (Ariz. 2003) (Ring II); *but see State ex rel. Thomas v. Granville*, 211 Ariz. 468 (2005) (finding that the trial court erred in proposing to instruct jurors that if they entertained a doubt whether death was the appropriate sentence they must impose a sentence of life in prison).

Similarly, in Missouri, the state Supreme Court determined that *Apprendi* applied to its statute's weighing determination. *See State v. Whitfield*, 107 S.W.3d 253, 261 (Mo. 2003). However, the same court validated the legislative scheme that placed the burden of persuasion for the weighing determination on the defendant rather than the State. *See State v. McLaughlin*, 265 S.W.3d 257, 268 (Mo. Banc 2008) (upholding death sentence where jury did not unanimously determine that mitigating evidence outweighed aggravating

evidence); *see also McLaughlin v. Missouri*, No. 08-822 (*petition for certiorari*, filed Dec. 29, 2008).

Whether the culpability determination must be made beyond a reasonable doubt also remains unclear in Idaho. *See State v. Lovelace*, 90 P.3d 298, 301 (Idaho 2004) (noting that a revision of the statute after *Ring* requires "that a jury find and consider the effect of aggravating and mitigating circumstances in order to decide whether a defendant should receive a death sentence," but not stating whether that determination must be made beyond a reasonable doubt).

F. *Sattazahn v. Pennsylvania* illustrates why the determination that death should be imposed is constrained by the Sixth and Fourteenth Amendments.

In *Sattazahn*, this Court observed:

> we held [in *Ring*] that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt. We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an

> "offence" for purposes of the Fifth Amendment's Double Jeopardy Clause.

Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003). *Sattazahn* held that jeopardy did not attach when the jury at petitioner's capital murder trial could not decide whether death was warranted. However, the Court explained, had the jury found that no aggravating factors existed, then "double-jeopardy protections [would have] attach[ed] to that 'acquittal' on the offense of 'murder plus aggravating circumstance(s).'" *Id.* at 112. If the jury, after considering the mitigation evidence and the previously found aggravating circumstances, decided to impose a sentence of life imprisonment, the Double Jeopardy Clause would prevent the state from re-trying the sentencing phase in the event of reversal on appeal.[13] *Bullington v. Missouri*, 451 U.S. 430 (1981).

G. The *Apprendi* rule applies even though the jury's finding that death is the appropriate punishment is a moral determination.

Though several state courts reject the application of *Apprendi* because the finding that

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[13] Given *Sattazahn*'s holding that Fifth and Sixth Amendment "facts" are coterminous, courts that have held the death-worthiness determination to be something other than a factual finding have implied that jeopardy does not attach to the death sentence.

death is appropriate is a moral determination, other jury findings often involve exactly this type of moral determination. *See Schriro v. Summerlin*, 542 U.S. 348, 361 (2004) (Breyer, J., dissenting) ("The leading single aggravator charged in Arizona . . . requires the factfinder to decide whether the crime was committed in an 'especially heinous, cruel, or depraved manner.'") (internal citations omitted); *Id.* ("Words like 'especially heinous,' 'cruel,' or 'depraved' – particularly when asked in the context of a death sentence proceeding – require reference to community-based standards, standards that incorporate values."). In fact, morality based fact-finding performs an essential Eighth Amendment function by narrowing the universe of offenders for whom the death penalty is appropriate. *See, e.g., California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (rendering of a death sentence must be "directly related to the personal culpability of the criminal defendant," and "reflect a reasoned moral response to the defendant's background, character, and crime . . . ."); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (the "risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"). Moreover, the determination that a defendant is culpable enough to receive a death sentence is no different (functionally) from a determination that a homicide is justified, mitigated by heat of passion, or deliberate. These determinations involve applying facts (mitigating

and aggravating) to a moral inquiry in order to make a judgment.[14]

H. *Apprendi*'s applicability does not turn on capital sentencing nomenclature.

Capital sentencing determinations – no matter how they are labeled – require the fact-finder to consider the mitigation evidence in the context of the aggravating circumstances and then decide whether death should be imposed. Some states instruct the fact-finder to weigh mitigation evidence against aggravation evidence, other states ask whether the mitigation evidence is sufficient to call for a sentence of life imprisonment (as opposed to a death sentence), and still others, like Louisiana, require the fact-finder to consider mitigation evidence and then simply decide whether to impose death.[15]

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[14] It would violate the Sixth Amendment for a jury to determine that a defendant committed a homicide beyond a reasonable doubt, but that the offense was intentional and not mitigated by heat of passion by only a preponderance of the evidence. *Cf. Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975) ("[R]efusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in Winship.").

[15] *See Brown v. Sanders*, 546 U.S. 212, 216-17 (2006) ("The [weighing/non-weighing] terminology is somewhat misleading, since we have held that in *all* capital cases the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence against the defendant's mitigating evidence." (emphasis in original)).

Where life without the possibility of parole is the maximum punishment without a jury's determination that, after considering any mitigation evidence, death is an appropriate punishment, the culpability finding must be made beyond a reasonable doubt regardless of whether or not the state labels it a weighing determination. *See Ice*, No. 07-901, at dissenting op. 2 (Scalia, J., dissenting) ("We have taken pains to reject artificial limitations upon the facts subject to the jury-trial guarantee. We long ago made clear that the guarantee turns upon the penal consequences attached to the fact, and not to its formal definition . . . .").

In Louisiana, the culpability determination – no matter how the state labels it – is a prerequisite to the imposition of a death sentence. The applicability of the *Apprendi* rule does not turn on whether the finding at issue implicates the selection or eligibility phase. *See Buchanan v. Angelone*, 522 U.S. 269, 279 (1998) (Scalia, J., concurring) ("drawing an arbitrary line in the sand between the 'eligibility and selection phases' of the sentencing decision is, in my view, incoherent and ultimately doomed to failure."). The claim that a death sentence is the statutorily available punishment once a defendant is found death-eligible misconstrues the term "eligible" and is incorrect in states such as Louisiana where life without the possibility of parole is the maximum punishment absent a finding by the jury that, after any considering mitigating evidence, death is the appropriate punishment.

II. The Eighth Amendment Forbids Standard-Less Procedures for Determining Death-Appropriateness.

A. The Eighth Amendment requires heightened accuracy in the administration of capital punishment.

At the adoption of the Eighth Amendment, states "uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses." *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976). Legislatures moved away from mandatory sentencing only as juries became unwilling to impose death sentences for certain offenders, and issued "not guilty" verdicts in order to avoid authorizing capital punishment. *See id.* at 291 ("Juries continued to find the death penalty inappropriate in a significant number of first-degree murder cases and refused to return guilty verdicts for that crime.").[16] As mandatory capital sentencing disappeared from the national landscape, this Court found that "the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and

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[16] *See also Andres v. United States*, 333 U.S. 740, 753 (1948) (Frankfurter, J., concurring) (discretionary sentencing in capital cases "was impelled both by ethical and humanitarian arguments against capital punishment, as well as by the practical consideration that jurors were reluctant to bring in verdicts which inevitably called for its infliction.").

the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 288 (barring mandatory imposition of the death penalty as inconsistent with the Eighth Amendment).

Not only must capital sentencing determinations be individualized, but "[t]he rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application." *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2665 (2008). Moreover, to comply with the Eighth Amendment, capital sentencing procedures must reliably determine that offenders who receive the death penalty are those who have committed the most severe crimes and have personal histories that do not diminish their culpability to a degree where the death penalty would be inappropriate. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."); *id.* at 605 (the "risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.").

B. Louisiana's standard-less procedure for determining when death should be imposed does not fulfill the Eighth Amendment's accuracy and consistency requirements.[17]

The Louisiana sentencing scheme "does not require capital juries to weigh or balance mitigating against aggravating circumstances, one against the other, according to any particular standard." Pet. App. at 89a. Nor does the Louisiana scheme provide a standard of proof to measure the level of certainty that the jury has in making the determination that death should be imposed. In short, Louisianna imposes no safeguard to ensure that those who receive a death sentence are more culpable than those against whom the jury found an aggravating circumstance but nonetheless recommended a life sentence.[18]

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[17] This standard-less system for determining which defendants should receive a death sentence notwithstanding any mitigating evidence may be responsible for the significant number of death sentences in Louisiana for juveniles and individuals with mental retardation prior to this Court's decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Atkins v. Virginia*, 536 U.S. 304 (2002).

[18] This Court last considered Louisiana's statutory scheme for determining which defendants should live, and which should die, in 1988. *Lowenfield v. Phelps*, 484 U.S. 231 (1988). Since *Lowenfield*, Louisiana has drastically expanded the statutory aggravating circumstances available to the prosecution, while reducing limitations on other evidence that the jury may consider in making the death determination. When this Court

C. The proof beyond a reasonable doubt standard captures the gravity of the decision to sentence a person to death.

Assignment of a standard of proof clues in the jury as to the "degree of confidence our society thinks [it] should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). Thus, because society has "minimal concern" for the outcome of civil suits, the plaintiff's burden of proof in private suits is "a mere

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decided *Loceyfield*, the Louisiana statute contained five aggravating factors at the guilt phase and nine aggravating factors at the penalty phase. *See id.* at 241 & 243 n.6. Subsequently the Louisiana Legislature has added four aggravating factors at the guilt stage, including a factor that was alleged and found in this case: the age of the victim was over sixty-five. La. R.S. 14:30 (5). Similarly, the legislature added three additional circumstances at the penalty phase, including the age of the victim. *See* La. C. Cr. P. art. 905 (4)(A)(10). Moreover, in a number of decisions since *Loceyfield*, the Louisiana Supreme Court has vastly expanded the type of evidence admissible for the jury to consider in addition to the evidence in support of an aggravating circumstance. At the same time, the Court has increasingly constrained its review of underlying capital convictions. The expansion of the class of capital defendants, along with the Louisiana Supreme Court's reluctance to carefully review capital convictions, exacerbates the problem that juries are repeatedly instructed that there is no standard for determining who should live and who should die. By failing to ensure that only the "worst of the worst" are sentenced to death, the Louisiana scheme raises grave Eighth Amendment and Fourteenth Amendment Due Process Clause concerns.

preponderance of the evidence." *Addington v. Texas*, 441 U.S. 418, 423 (1979). On the other hand, in criminal cases, "society imposes almost the entire risk of error upon itself . . . [by requiring] the state prove the guilt of an accused beyond a reasonable doubt." *Id* at 424 (citing *In re Winship*, 397 U.S. at 370 (1970)). The reason for the more stringent burden in criminal cases stems from the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 423–24.

Given the constitutional command that capital sentencing determinations be more accurate and reliable than the outcome of any other criminal determination, the finding that death should be imposed must be made according to society's most stringent standard. *See Summerlin*, 542 U.S. at 362 (Breyer, J., dissenting) (the law "requires a correspondingly greater degree of scrutiny of the capital sentencing determination than of other criminal judgments") (citing *California v. Ramos*, 463 U. S. 992, 998-99 (1983)); *id.* ("This Court has made clear that in a capital case the Eighth Amendment requires a greater degree of accuracy . . . than would be true in a noncapital case. Hence, the risk of error that the law can tolerate is correspondingly diminished.") (citing *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993)); *see also Baze v. Rees*, 128 S. Ct. 1520 (2008) (Stevens, J., concurring) ("[G]iven the real risk of error in this class of cases, the irrevocable nature of the consequences is of decisive importance to me); *Id.* ("Whether or not any

innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses.").

D. A growing number of states limit the death penalty to instances where a jury has determined beyond a reasonable doubt that death is the appropriate punishment.

Fourteen states, as well as the District of Columbia, ban capital punishment.[19] At least twelve additional states require the determination that death is the appropriate sentence to be made on proof beyond a reasonable doubt. *See* pp 21-22 *and* n.10, *supra*.[20]

III. The Issue is Ripe for this Court's Resolution.

There is no ambiguity in the decision below: In Louisiana, no standard guides the jury's death-determination of whether death is the appropriate

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[19] *See* Death Penalty Information Center, Death Penalty Policy By State, *available at* http://www.deathpenaltyinfo.org/death-penalty-policy-state (last visited December 10, 2008).

[20] Arizona, Arkansas, Colorado, Connecticut, Idaho, Kansas, Ohio, Oregon, Tennessee, Utah, Washington, and Wyoming.

punishment.[21] The constitutional concerns raised by this standard-less procedure are squarely presented on this record. *See* Pet. App. at 89a. No procedural impediments exist. Moreover, the conflict in the lower courts over *Apprendi*'s applicability to the culpability-finding is entrenched, and their holdings

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[21] *Cf. Smith v. North Carolina*, 459 U.S. 1056 (1982) (Stevens, J., respecting the denial of the petitions for certiorari) (citing to *State v. Wood*, 648 P. 2d 71, 83 (Ut. 1982)). In *Smith*, Justice Stevens noted that the *Wood* opinion described "the appropriate standard to be followed by the sentencing authority":

> After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.

Id. (quoting *Wood*). Justice Stevens' comments concerning the denial of certiorari noted that the statute in North Carolina merely provided ambiguity under which the jury might erroneously ascribe the incorrect standard, and that the question remained "open for consideration in collateral proceedings." In Louisiana, the issue does not involve the ambiguity of the instruction but rather implicates directly the statutory scheme. While the issue is directly presented for this Court's review by this petition, the availability of collateral review on that issue is now an open question. *See Tyler v. Cain*, 533 U.S. 656 (2001). Resolving this issue here and now will provide accuracy, reliability, and constitutional fidelity to the administration of capital punishment in Louisiana.

are often outcome determinative in capital cases. Further percolation is unlikely to provide clarity or to ease the tensions below.[22] This Court should resolve the issue here and now to ensure accuracy and reliability in the administration of capital punishment in Louisiana.

CONCLUSION

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

Respectfully submitted,

JELPI P. PICOU*
G. BEN COHEN
BIDISH J. SARMA
THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955

* *Counsel of Record for Petitioner*

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[22] A similar issue was raised in *McLaughlin v. Missouri*, 08-822, presently before this Court. Petitioner suggests that the question presented in this case overlaps with the issue presented in *McLaughlin* and in the other jurisdictions dealing with the lacunae addressed in this petition.