No. 15-

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Since at least *Ring v. Arizona*, this Court has required a jury to determine beyond a reasonable doubt whether the defendant is eligible for the death penalty. After the eligibility determination, the jury turns to a moral determination through consideration of aggravating and mitigating circumstances. There is a broad split in the states concerning the standard a jury must use to determine a defendant's moral culpability. Seven states require the jury make this moral determination unanimously, beyond a reasonable doubt.

Indiana's death penalty scheme requires the prosecution to prove that "any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances." However, Indiana, along with a number of other states, provides no appropriate standard for making that determination. The question in this case is:

Whether the determination that aggravating circumstances outweigh mitigating circumstances must be made by a unanimous jury, beyond a reasonable doubt?

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Petitioner Kevin Charles Isom respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Indiana.

OPINION BELOW

The opinion of the Supreme Court of Indiana is reported at *Isom v. State*, 31 N.E.3d 469 (Ind. 2015), and is reproduced at Pet. App. 1a. That court's order denying rehearing is reported at *Isom v. State*, 2015 Ind. LEXIS 673 (Ind. 2015), and is reproduced at Pet. App. 48a.

JURISDICTIONAL STATEMENT

The judgment and opinion of the Supreme Court of Indiana was entered on May 20, 2015. Petitioner's petitions for rehearing were denied on July 28, 2015. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and

unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State 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." U.S. Const. amend. XIV.

Ind. Code § 35-50-2-9(l) provides:

> *Before a sentence may be imposed under this section,* the jury, in a proceeding under subsection (e), or the court, in a proceeding under subsection (g), *must find* that:
>
> (1) the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances listed in subsection (b) exists; *and*
>
> (2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

SUMMARY OF ARGUMENT

This Court should grant certiorari to address whether the Sixth and Eighth Amendments require the determination that aggravating circumstances outweigh mitigating circumstances be made beyond a reasonable doubt.

This case brings to the fore two separate strands of this Court's jurisprudence. In *Ring v. Arizona*, the Court expressly left open the question of whether the Sixth Amendment applies to consideration of whether aggravating circumstances outweigh mitigating circumstances. Over the past decade, state courts of last resort have divided bitterly over *Ring*'s applicability to the weighing of mitigating and aggravating circumstances. *Ring v. Arizona*, 536 U.S. 584, 597 n.4 (2002). Legislation in different states provides different standards. *Compare, e.g.*, Ohio Rev. Code Ann. § 2929.03(D)(2) (applying beyond-a-reasonable-doubt standard to weighing determination) *with* 21 Okla. St. Ann. § 701.11 (refusing application of a standard of proof to weighing determination).

This Court has also held that the Eighth Amendment limits capital punishment "to those offenders who commit a narrow category of the most serious crimes *and* whose extreme culpability makes them the most deserving of execution." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (internal citations omitted; emphasis supplied). While a finding on the existence of an aggravating circumstance (eligibility) adequately protects the "most serious crimes" half of the equation, a finding

of insufficient mitigating circumstances helps ensure that States do not impose the death penalty "in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

Indiana proceeds half-way down the constitutional framework: a jury cannot consider imposing a death sentence unless the jury first determines that the aggravating circumstances outweigh the mitigating circumstances. But yet the statute provides no burden of proof for the jury to make the moral determination.

This Court's decision in *Ring* provides guidance. The weighing determination—which itself amounts to a determination of the defendant's moral culpability—is a "fact on which the legislature conditions an increase in the[] maximum punishment" and "the Sixth Amendment requires [that it] be found by a jury." *Ring*, 536 U.S. at 584. Because it is a factual finding necessary to increase the range of punishment, the finding must be made beyond a reasonable doubt.

Without this requirement, the Indiana statutory scheme fails to ensure that the death penalty is reserved for the worst offenses committed by the worst offenders. The Eighth Amendment's requirement of heightened reliability, *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985), is turned on its head when the jury determination that aggravating circumstances outweigh mitigating circumstances may be made based upon anything less than a beyond a reasonable doubt standard.

STATEMENT OF THE CASE

During the evening of August 6, 2007, Cassandra Isom, Ci'Andria Cole, and Michael Moore were found deceased in their apartment in Gary, Indiana. At about 10:30 pm, neighbors in a nearby apartment called the police reporting multiple gunshots, and several police officers arrived shortly thereafter. After initially attempting to contact the apartment occupants by phone and bullhorn with no response, a SWAT team assembled. Upon entry to the apartment, the SWAT team discovered the three victims in the kitchen and living rooms. All three were deceased of apparent gunshot wounds.

The SWAT team continued to sweep the apartment and soon found Petitioner sitting on the floor in a bedroom. Petitioner's left arm was underneath the bed, and after refusing to remove it, Petitioner was straddled and struck in the face several times by officers. Once restrained, Petitioner was taken to the hospital.

The next day, Petitioner was disoriented and confused. In a statement to a detective, Petitioner stated "I can't believe I killed my family, this can't be real." Petitioner was arrested and charged with three counts of murder, along with four counts of attempted murder. The State sought the death penalty, using the multiple victims as the sole statutory aggravating circumstance. *See* Ind. Code § 35-50-2-9(b)(8).

PROCEEDINGS BELOW

A. Guilt Proceedings

The jury trial to determine guilt began on November 26, 2012 and ended on February 5, 2013. At the conclusion of the proceedings, the jury found Petitioner guilty of the three counts of murder, as well as three counts of criminal recklessness as lesser included offenses of attempted murder.

B. Penalty Proceedings: Jury Instructions

The penalty proceedings against Petitioner began on February 6, 2013. Prior to the penalty phase, the parties met in an instruction conference to determine appropriate jury instructions. At this time, Petitioner objected to Preliminary Instruction No. 8, which read as follows:

> 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 charge and proven aggravating circumstance.

Pet. App. 27a.

Petitioner instead argued that the second element should read: "[t]he aggravating circumstance must outweigh the mitigating circumstance or circumstances *beyond a reasonable doubt*." Br. of Appellant at 19 (emphasis added) (footnote omitted). Petitioner argued that *Ring v. Arizona*, 536 U.S. 584 (2002) and *Blakely v. Washington*, 542 U.S. 296 (2004) required that the jury determine the weighing of the circumstances using a "beyond a reasonable doubt" standard. Although the Indiana Supreme Court had previously held contrary to this in *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004), Petitioner respectfully disagreed with its previous analysis and asked the court to revisit its decision.

The State opposed Petitioner's objection to Jury Instruction No. 8. The trial court sustained the State's objection and used the original Jury Instructions No. 8, over Petitioner's objection.

In support of their aggravating factor, the State incorporated all of the evidence at trial and submitted the death certificates of the three victims. Petitioner then offered significant mitigating evidence, including testimony from his mother about an impoverished upbringing in a dangerous, gang-ridden neighborhood and testimony from several doctors that showed that this experience caused post traumatic stress disorder and extreme emotional disturbance in Petitioner. Further, Petitioner

presented evidence of his exceptional behavior in the county jail in the six years since the murders.

The jury found that these mitigating factors were outweighed by the aggravating factor, and voted to impose a death sentence for each of the murders. The court subsequently sentenced Petitioner to three death sentences, to be served consecutively.

C. **Appellate Proceedings**

On appeal, Petitioner raised multiple assignments of error, including a challenge to the trial court's ruling on Jury Instruction No. 8 and the weighing standard of aggravating and mitigating circumstances. The Supreme Court of Indiana affirmed Petitioner's conviction and the trial court's pertinent ruling.[1]

The opinion declined to discuss the issue extensively, noting that the Court had recently ruled on the issue in *Inman v. State*, 4 N.E.3d 190 (Ind. 2014) (reaffirming *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004)). *Inman* and *Ritchie* held that the jury's determination that aggravating outweigh mitigating circumstances does not increase the maximum possible sentence to death but instead is a decision

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[1] The Supreme Court of Indiana did find that the imposition of consecutive death sentences exceeded the trial court's statutory authority and remanded the case with instructions to issue a new sentencing order accordingly. However, this does not nullify or otherwise affect the other issues presented on appeal or in this petition, all of which the Supreme Court of Indiana affirmed.

about whether that maximum sentence of death should be imposed or not. The Court referenced *Inman* and *Ritchie* briefly, then noted, "[w]e laid whatever uncertainty there may have been regarding this issue to rest in *Inman* and we decline to revisit the issue here." Pet. App. 29a.

On July 28, 2015, the Supreme Court of Indiana denied Petitioner's request for a rehearing. This petition follows.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PROVIDES A CLEAR PRESENTATION OF AN ISSUE THAT OFFERS A UNIFYING PRINCIPLE FOR THIS COURT'S CAPITAL JURISPRUDENCE

As the Court has noted, the effort to ensure that the death penalty is "reserved for the worst of crimes and limited in its instances of application" "has produced results not altogether satisfactory." *Kennedy*, 554 U.S. at 436. *See also id*. at 437 (noting that the response to this problem is still in "search of a unifying principle."). For certain classes of offenders, the inability to reliably determine which among them were most deserving of execution prompted this Court to exempt them from the punishment altogether. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (intellectually disabled offenders); *Roper v. Simmons*, 543 U.S. 551 (2005) (juveniles); *Kennedy*, 554 U.S. 407 (non-homicide offenders). But even outside those groups of offenders, there is little evidence that juries have adeptly separated the

worst offenders from those less deserving. *See, e.g.*, Smith, et al., *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221, 1253 (2014) ("Nearly nine of every ten executed offenders possessed an intellectual impairment, had not yet reached their twenty-first birthday, suffered from a serious mental illness, or endured marked childhood trauma.").

A central problem in the administration of capital punishment has been "the standardless discretion wielded by judges and juries." *Callins v. Collins*, 510 U.S. 1141, 1147 (1994) (Blackmun, J., dissenting) (citing *Furman v. Georgia*, 408 U.S. 238 (1972)). In the absence of direction from this Court, States (and juries) have rendered life-or-death decisions with varying degrees of certainty regarding the defendant's moral guilt. The results have been, at best, unsatisfactory.

Petitioner's case presents the Court with an opportunity to provide much-needed clarity to the most important decision a juror can make—whether an individual is sufficiently morally culpable to warrant his execution.

A. Inconsistent Standards of Proof Have Directly Contributed to the Arbitrary Imposition of the Death Penalty.

In the absence of direction from this Court, the States have employed various means of determining who deserves the death penalty, which in turn has produced arbitrariness in our administration of capital punishment. Nineteen jurisdictions have determined that no level of proof is sufficient to

warrant imposition of the death penalty.[2] Of those States that retain the death penalty, six have statutorily imposed a requirement that death-worthiness be proven beyond a reasonable doubt.[3] A seventh has imposed that standard judicially.[4]

The remaining death penalty jurisdictions are a patchwork with no discernible commonality.[5] Delaware, for instance, has explicitly imposed a preponderance standard for the death-worthiness determination.[6] Some States, such as Louisiana, Mississippi, and Oklahoma, simply reject the beyond-a-reasonable-doubt standard without providing further guidance as to the actual standard

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[2] The nineteen States without the death penalty are: Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

[3] *See* Ark. Code Ann § 5-4-603(b); Ohio Rev. Code Ann. § 2929.03(D)(2); Tenn. Code Ann. § 39-13-204(2); Utah Code Ann. § 76-3-207(b); Va. Code Ann. § 19.2-264.4(C); Wash. Rev. Code Ann. § 10.95.060(d).

[4] *See People v. Tenneson*, 788 P.2d 786, 792 (Colo. 1990).

[5] The discord among the States affects weighing and non-weighing jurisdictions equally, with States imposing various burdens of proof regardless of the process by which a jury reaches its sentencing decision. For this reason, the Court should impose a uniform standard binding across all jurisdictions, irrespective of whether it is a weighing or non-weighing state. *See Brown v. Sanders*, 546 U.S. 212, 219 (2006) ("This weighing/non-weighing scheme is accurate as far as it goes, but it now seems to us needlessly complex and incapable of providing for the full range of possible variations.")

[6] *See* 11 Del. C. § 4209(c)(3)(a)(2).

of proof.[7] Pennsylvania appears to forbid review of this decision entirely.[8] And still other States, such as North Carolina and New Hampshire, merely direct that the aggravating circumstances "sufficiently outweigh" mitigating circumstances in order to return the death penalty.[9]

Perhaps unsurprisingly, the lack of uniformity has produced arbitrary results. There were seventy-three death sentences in the United States in 2014, in only twenty states. All but six of these death sentences were imposed in states that did not require the jury to determine, beyond a reasonable doubt, that aggravating circumstances outweighed mitigating circumstances, or beyond a reasonable doubt that death was the appropriate punishment.

B. Beyond a Reasonable Doubt Is the Appropriate Unifying Standard for the Determination that an Individual Should Be Death-Eligible.

As the Court has recognized, "[t]he reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions based

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[7] *See State v. Anderson*, 06-2987 (La. 9/9/08); 996 So.2d 973, 1015; *Keller v. State*, 138 So. 3d 817, 868-69 (Miss. 2014); 21 Okla. Stat. Ann. § 701.11.

[8] *See Commonwealth v. Reyes*, 963 A.2d 436 (Pa. 2009) (explaining that court is not allowed to review weighing determination, which a jury makes without adherence to any specific standard of proof).

[9] *See* N.H. Rev. Stat. Ann. § 630:5(IV); N.C. Gen. Stat. § 15A-2000(b).

on error." *In re Winship*, 397 U.S. 358, 363 (1970). Emphasizing the importance of the reasonable-doubt standard, this Court stated:

> It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Id. at 364. Moreover, "[a]s the Court explained in *In re Winship*, because a defendant's liberty is a 'transcending value,' due process requires reducing the margin of error 'by placing on the [prosecution] the burden of . . . persuading the factfinder.'" Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 WASH. L. REV. 139, 150 (2012) (quoting *Winship*, 397 U.S. at 364).

The Court has made similar statements about the life-or-death determination. Recognizing that "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two," this Court has held that "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). As the Court explained more recently, a capital sentencing

"decision, given the 'severity' and 'finality' of the sanction, is no less important than the decision about guilt." *Deck v. Missouri*, 544 U.S. 622, 632 (2005) (quoting *Monge v. California*, 524 U.S. 721, 732 (1998)). And, as importantly, "[n]either is accuracy in making that decision any less critical. The Court has stressed the 'acute need' for reliable decisionmaking when the death penalty is at issue." *Deck*, 544 U.S. at 632 (quoting *Monge*, 524 U.S. at 732).

Stated simply, the concerns animating the Court's decision in *Winship* imposing a beyond-a-reasonable-doubt standard to findings of guilt apply with equal force to a capital sentencing decision. Just as there is a presumption of innocence affixed to all defendants, so, too, is there a constitutional requirement that the death penalty is the exception rather than the rule for homicide offenders. *See, e.g.*, *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (holding that death sentence is reserved for those offenders possessing a "consciousness materially more 'depraved' than that of any person guilty of murder") (quotation marks in original). And certainly, a defendant's life, no less than his liberty, is "an interest of transcending value" worthy of the Court's most stringent protection. *Winship*, 397 U.S. at 364. Indeed, the Court has been so concerned about reliable, accurate culpability determinations that it has exempted certain classes of individuals from the punishment when, despite a categorical risk of insufficient culpability, juries have nevertheless imposed the death penalty on those individuals. *See Atkins*, 536 U.S. 304; *Simmons*, 543 U.S. 551.

When the Court reinstated the death penalty nearly forty years ago, it recognized that a capital punishment "system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Gregg v. Georgia*, 428 U.S. 153, 195, n. 46 (1976).

The absence of uniform standards in determining who is sufficiently culpable to warrant a death sentence has ensured that result. The Court should grant certiorari to provide States—and juries—with much-needed standards for this critical decision.[10]

II. *Ring*'s Logic Applies With Equal Force To The Indiana Jury's Determination of Sufficient Moral Culpability.

Even if the Court elects not to impose a uniform standard upon the jury's assessment of the aggravating versus mitigating factors, it still must address Indiana's statute, which fixes as a necessary element the fact that aggravating factors outweigh

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[10] It should be noted that juries would still be permitted to bestow mercy upon the defendant, even if they had already determined beyond a reasonable doubt that the homicide was aggravated enough and the defendant, culpable enough to outweigh mitigating circumstances. But sufficient moral culpability is an eligibility step, and the standard of proof should reflect the gravity of the finding.

mitigating factors, but fails to require the finding of that fact be beyond a reasonable doubt.[11]

A. *Ring* and *Apprendi* Require Unanimous Juries to Find Any Fact that Increases a Defendant's Punishment Beyond a Reasonable Doubt

In 2000, this Court held that any finding, other than the existence of a prior conviction, "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 v. New Jersey*, 530 U.S. 466, 490 (2000) (emphasis added). Shortly thereafter, the Court clarified in *Ring v. Arizona* that this reasoning extended to findings in the sentencing phase of capital cases, confirming that aggravating factors essential to capital qualification were "the functional equivalent of an element of a greater offense" and must be tried and found by jury beyond a reasonable doubt. *Ring*, 536 U.S. at 609.

The Court emphasized throughout these cases that this Sixth Amendment requirement attached to

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[11] A decision only on the standard of proof governing death-eligibility determinations would not force the Court to answer the question of whether the Sixth Amendment requires that death-*worthiness*, as opposed to death-*eligibility*, be proven beyond a reasonable doubt, as the Sixth Circuit Court of Appeals once held. *See United States v. Gabrion*, 648 F.3d 307, 328 (6th Cir. 2011), *overruled by United States v. Gabrion*, 719 F.3d 511, 533 (6th Cir. 2013) (en banc).

any step essential to elevating the maximum sentence, regardless of how the statute labeled the step. *See Apprendi*, 530 U.S. at 494 ("the relevant inquiry is not one of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"). Justice Scalia further highlighted this point, stating findings "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*, 536 U.S. at 610 (Scalia, J., concurring).

Further, these cases made clear that it is not simply that a jury must make these determinations, but that the jury must do so using a beyond a reasonable doubt standard. The Court in *Apprendi* gave a detailed history of this standard and its importance dating back to the Framers, noting that applying this standard in all stages of a criminal case is a basic principle. *Apprendi*, 530 U.S. at 483. The Court specifically accentuated the importance of the standard's application to sentencing determinations, stating:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not-at the moment the State is put to proof of those circumstances-be deprived of

> protections that have, until that point, unquestionably attached.

Apprendi, 530 U.S. at 484.

Ring again stressed the importance of this standard, holding that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury *beyond a reasonable doubt*." *Ring*, 536 U.S. at 602 (emphasis and alteration added). Taken together, these opinions make clear that any finding required by statute before a sentence of death may be considered must be tried by a jury and found beyond a reasonable doubt.

This analysis is consistent with the Court's opinion in *Kansas v. Marsh*, which referenced at least three times that the factual determination set forth by the Kansas Legislature need be made "beyond a reasonable doubt." *Kansas v. Marsh*, 548 U.S. 163, 173 (2006) ("[T]he 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 and that a sentence of death is therefore appropriate"); *id.* at 176 (noting that the instruction given provided: "The appropriateness of the exercise of mercy can itself be a mitigating factor you may consider in determining whether the State has proved **beyond a reasonable doubt** that the death penalty is warranted."); *id.* at 178-79 ("If the State overcomes this hurdle, then it bears the additional burden of proving **beyond a reasonable doubt** that aggravating circumstances

are not outweighed by mitigating circumstances. . . . Significantly, although the defendant appropriately bears the burden of proffering mitigating circumstances—a burden of production—he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances. Instead, the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence. Absent the State's ability to meet that burden, the default is life imprisonment.").

Legislatures are given free rein to identify the elements of an offense – in Kansas, that the mitigating evidence does not outweigh the aggravating evidence; in Indiana, that the aggravating evidence outweighs the mitigating evidence; in California, that the aggravating evidence substantially outweighs the mitigating evidence. But the Constitution sets forth the standard for assessing for the jury's determination whether an element has proven – and in criminal cases that standard is uniformly beyond a reasonable doubt.

B. A Plain Reading of Indiana's Statute Confirms that the Weighing Determination Is a Factual Finding that Must Be Made Before a Jury Can Consider Imposing a Death Sentence.

On a more basic level, a plain reading of Indiana's statute points to the conclusion that the weighing determination is a factual finding that must be made

before a jury can consider imposing life or death. See Ind. Code § 35-50-2-9(l) and Ind. Code § 35-50-2-9(e).

Ind. Code § 35-50-2-9(l) reads:

> "*Before* a sentence may be imposed under this section, the jury, in a proceeding under subsection (e)… must find that:
>
> (1) the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances listed in subsection (b) exists; *and*
>
> (2) any mitigating circumstances that exist *are outweighed* by the aggravating circumstance or circumstances."

Ind. Code § 35-50-2-9(l)(emphasis added).

The words "before" "and" and "are outweighed" found in this provision play a critical role in establishing that the weighing test is a prerequisite to death penalty eligibility. The most logical reading of the plain terms of this statute is that if the jury does not make an affirmative finding regarding the weighing determination, a death sentence may not be imposed or even considered. A recommendation of death may only be handed up by the jury following this final critical decision.

This provision alone is enough to establish that the weighing test is a precondition to death penalty considerations, but a further look at the statute leaves no doubt. The provision authorizing a jury to impose a death sentence reads in pertinent part:

> "The jury may recommend:
>
> (1) the death penalty; or
>
> (2) life imprisonment without parole;
>
> *only* if it makes the findings described in subsection (l)"

Ind. Code § 35-50-2-9(e)(emphasis added).

Again, the use of the word "only" here makes it crystal clear that each and every finding in subsection (l) must be reached before a death sentence may be considered. The deliberate inclusion of the word "only" acts as a safeguard to implementation of this provision; without all of the required findings, including whether any mitigating circumstances are outweighed by aggravating circumstances, the death penalty provision of the code may not even be reached by a jury.

C. The Indiana Supreme Court Has Misapplied This Court's Jurisprudence.

Taken together, it is indisputable that the holdings of *Apprendi* and *Ring* cannot be reconciled with the Supreme Court of Indiana's deliberate omission of the beyond a reasonable doubt standard from the jury instructions. The language of Indiana's death penalty statute makes clear that the only possible scenario in which a death sentence may be imposed is after the weighing test has been undertaken by the jury and they have affirmatively decided the aggravating circumstances outweigh the mitigating circumstances. Without this decision, the

maximum possible penalty is a life sentence without the possibility of parole. Therefore, this weighing of circumstances is the last barrier to considering the death penalty as a possible sentence; it is the final fact that must be found before the maximum sentence may be increased to death.

The Supreme Court of Indiana has attempted to deny this logic, both in the instant case and others who have made similar arguments, using perplexing reasoning. In *Ritchie v. State*, the seminal Indiana case on point, the court claimed that "We believe the pivotal inquiry under *Apprendi* and *Ring* is whether exposure to punishment is increased, not whether the punishment should or should not be imposed in a given case." *Ritchie v. State*, 809 N.E.2d 258, 265 (Ind. 2004). The court used this argument again in *Inman*, on whose reasoning Petitioner's case is largely based. See *Inman v. State*, 4 N.E.3d 190, 195 (Ind. 2014) (quoting *Ritchie*). The court reasoned that, after finding an aggravating factor, "Indiana now places the weighing process in the hands of the jury, but this does not convert the weighing process into an eligibility factor. The outcome of weighing does not increase eligibility. Rather, it fixes the punishment within the eligible range." *Ritchie*, 809 N.E.2d at 268.

However, this reasoning cannot be so. The eligible range of sentences cannot increase to include death until after the weighing process is complete because without the determination that the aggravating circumstances outweigh the mitigating circumstances, the jury cannot proceed to apply the statutory provision considering death. If the jury

determines that the mitigating circumstances outweigh the aggravating, however, the inquiry ends entirely and the jury's sentencing options remain limited to a maximum of life without the possibility of parole.

The Supreme Court of Indiana has attempted to coalesce the weighing process and the sentencing process into one, when in fact they are separate and distinct. They are, in fact, two different steps that the jury must make consecutively, not concurrently.[12] The distinction is even clearer, however, when considering the actual sentencing process. If the jury does make a finding that the aggravating circumstances outweigh the mitigating circumstances, they then proceed to recommend a sentence. Here, when deciding between a life and death sentence, the jury may recommend a life sentence *even if they determined the circumstances weighed in favor of the State*. This finding does not automatically generate a death sentence recommendation; this grave decision requires an entirely separate jury consideration. Thus, a determination that the aggravating factors outweigh the mitigating factors is not the functional equivalent of recommending a death sentence because the jury preserves the ability to recommend a life sentence in this instance. It is evident that the balancing of the circumstances finding and the sentencing recommendation process are not one in

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[12] This Court explained the distinction in *Marsh*: "Weighing is not an end; it is merely a means to reaching a decision. The decision the jury must reach is whether life or death is the appropriate punishment." *Marsh*, 548 U.S. at 179.

the same, and the prior must be decided before the latter.

It naturally follows, then, that the jury finding that the aggravating circumstances outweigh the mitigating circumstances "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" *Apprendi*, 530 U.S. at 494. Indiana's attempt to abrogate the State's burden by labeling the finding as a "weighing process" exempt from due process holds no merit, as this Court emphasized that merely branding a finding by another name "surely does not provide a principled basis for treating them differently." *Id.* at 476. As the final, and arguably the most crucial, finding of fact the jury must make before the accused may be exposed to the death penalty, it is critical that the protection of a beyond a reasonable doubt standard is applied to the weighing of circumstances, as required by *Apprendi* and *Ring*.

CONCLUSION

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

Respectfully submitted,

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