No.

In the Supreme Court of the United States

ERICK VIRGIL HALL,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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***** CAPITAL CASE *****

QUESTIONS PRESENTED

To prevent arbitrary imposition of the death penalty, this Court has required use of "'clear and objective standards' that provide 'specific and detailed guidance'" to the sentencing authority responsible for determining whether imposition of a capital sentence is warranted. *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980) (footnotes and citations omitted). The Court also has emphasized that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant* v. *Stephens*, 462 U.S. 862, 874 (1983). In this case, petitioner contends that Idaho's capital sentencing regime fails to satisfy both of these requirements.

The questions presented are:

1. Whether certain of the "aggravating circumstances" used by Idaho to determine whether a defendant may be sentenced to death—those that ask whether the crime was especially "heinous, atrocious or cruel, manifesting exceptional depravity"; whether the defendant exhibited "utter disregard for human life"; and whether the defendant "has exhibited a propensity to commit murder"—fail to provide sentencing juries with constitutionally adequate guidance.

2. Whether Idaho's felony-murder aggravating circumstance, which substantially duplicates the State's felony-murder statute, violates the constitutional requirement that Idaho sufficiently narrow the class of persons subject to the death penalty.

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PETITION FOR A WRIT OF CERTIORARI

Erick Virgil Hall respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Idaho in this case.

OPINIONS BELOW

The opinion of the Idaho Supreme Court (App., *infra*, 1a-181a) is reported at 419 P.3d 1042. The relevant orders of the Idaho District Court (App., *infra*, 182-197) are unreported.

JURISDICTION

The Supreme Court of Idaho entered judgment on April 11, 2018, and denied a timely petition for rehearing on June 28, 2018. On September 14, 2018, the Chief Justice extended the time to file a petition for a writ of certiorari to November 25, 2018. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are reproduced at App., *infra*, 203a-205a.

STATEMENT

The standards Idaho uses to govern imposition of the death penalty—and that it applied in this case when sentencing petitioner to death—are not constitutional. This Court has recognized that capital sentencing regimes must both (1) effectively channel sentencing discretion and (2) narrow the class of defendants subject to the death penalty to those most deserving of capital punishment. Idaho's capital sentencing regime satisfies neither requirement.

First, certain of the aggravating circumstances that Idaho requires a jury to find in determining

whether a capital sentence is warranted—among them whether the crime was especially "heinous, atrocious or cruel, manifesting exceptional depravity"; whether the defendant exhibited "utter disregard for human life"; and whether the defendant "has exhibited a propensity to commit murder"—are so vague and lacking in intelligible standards as to provide juries with constitutionally inadequate guidance. The Idaho Supreme Court's decision upholding use of these "aggravators" cannot be reconciled with this Court's decision in *Maynard* v. *Cartwright*, 486 U.S. 356 (1988), which invalidated a materially identical "heinous, atrocious, or cruel" aggravator. The holding below also created an acknowledged conflict with a decision of the Eighth Circuit, which properly applied this Court's holding in *Maynard*.

Second, Idaho's felony-murder aggravator, which substantially duplicates its felony-murder statute, fails to narrow the class of persons subject to the death penalty in a constitutionally adequate manner. The decision below upholding that aggravator also contributes to a growing conflict among the state courts on application of the "narrowing" requirement to felony-murder aggravators—as the court below appeared to recognize in expressly declining to follow a contrary decision of the Nevada Supreme Court.

At bottom, as Justice Kidwell noted in dissent below, "jurors need specific and detailed guidance on which murderers should receive the death penalty as opposed to only life in prison. The aggravators in Idaho do not provide such guidance, and result in the arbitrary, capricious and unconstitutional imposition of the death penalty." App., *infra*, 180a. Because "channeling and limiting of the sentencer's discretion

in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" (*Maynard*, 486 U.S. at 362), review by this Court is warranted.

A. The governing death penalty principles

1. This Court has recognized that the Eighth Amendment "cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be * * * wantonly and * * * freakishly imposed." *Furman* v. *Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring). In *Furman*, the Court found that States had failed to provide sentencers with sufficient guidance in capital cases, leading to the arbitrary imposition of the death penalty throughout the United States. With unbridled sentence discretion, imposition of the death penalty had become "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 309.

The Court reiterated the importance of carefully guiding capital sentencer discretion in *Gregg* v. *Georgia*. "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

In subsequent years, the Court has implemented this constitutional requirement by holding that the Eighth Amendment's ban on cruel and unusual punishment requires States to narrow the class of offenders eligible for the death penalty. Such narrowing, the Court has indicated, may occur in one of two ways:

"The legislature may itself narrow the definition of capital offenses, * * * so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase." *Lowenfield* v. *Phelps*, 484 U.S. 231, 246 (1988). When a State uses the latter approach, the aggravating factors must "adequately differentiate" defendants sentenced to death "in an objective, evenhanded, and substantively rational way from the many" defendants on whom the death penalty may not be imposed. *Zant* v. *Stephens*, 462 U.S. 862, 879 (1983)

In addition to the narrowing requirement, the Court has attempted to minimize arbitrary imposition of the death penalty by precluding the use of aggravating factors that are too vague to provide meaningful guidance. This vagueness analysis asks whether the challenged provision offers "'clear and objective standards' that provide 'specific and detailed guidance.'" *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980) (footnotes omitted) (quoting *Gregg*, 428 U.S. at 198, and *Proffitt* v. *Florida*, 428 U.S. 242, 253(1976)); see also *Tuilaepa* v. *California*, 512 U.S. 967, 972 (1994) (noting that aggravating factor "may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder" *and* use standards that "may not be unconstitutionally vague").

2. More recently, States' death penalty schemes have undergone significant change: In *Ring* v. *Arizona*, 536 U.S. 584, 609 (2002), the Court held that capital defendants are entitled to a jury determination on the existence of aggravating circumstances

necessary for the imposition of the death penalty. In the wake of *Ring*, the five judge-only capital sentencing States (including Idaho) revised their death penalty sentencing schemes to make juries responsible for imposition of a capital sentence. See William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 937 (2006). In doing so, however, these States did not alter the language of their aggravating factors and limiting constructions.

The Court has repeatedly acknowledged that there are constitutionally meaningful differences between judges and juries as capital sentencers. The Court's ruling in *Proffitt*, for instance, relied on the assumption that "a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." 428 U.S. at 252 (opinion of Stewart, Powell, and Stevens, JJ). Similarly, in *Walton* v. *Arizona* (another pre-*Ring* case), the Court upheld the Arizona aggravator at issue expressly *because* sentencing was conducted by a judge rather than a jury. 497 U.S. 639, 653 (1990) (unlike jurors, "[t]rial judges are presumed to know the law and to apply it in making their decisions."), overruled on other grounds by *Ring*, 536 U.S. at 589; see also *Arave* v. *Creech*, 507 U.S. 463, 471 (1993) (upholding an aggravator in part because "the sentencer [was] a judge rather than a jury, [so] the federal court * * * presume[d] that the judge knew and applied any existing narrowing construction").

B. Idaho's capital punishment scheme

Idaho makes *all* persons who are convicted of first-degree murder potentially subject to the death

penalty, whether or not they "directly committed the acts that caused death." Idaho Code § 19-2515(1). See *Arave*, 507 U.S. at 475. "And the category of first-degree murders [in Idaho] also is broad," including, among others, all premeditated murders and second-degree murders that are accompanied "by one of a number of enumerated circumstances," including felony murder. *Ibid*; see also Idaho Code § 18-4003(a), (d).

Because Idaho makes a broad class of defendants eligible for the death penalty at the guilt stage, the State's capital sentencing scheme narrows the category of defendants who may be subjected to capital punishment through the use of aggravating factors at the sentencing stage. After a defendant is found guilty of first-degree murder, a "special sentencing proceeding" is conducted in which evidence and arguments are presented "in aggravation and mitigation of the offense." Idaho Code § 19-2515(5)(a). A jury (or judge, if the jury is waived) must find the existence of at least one statutory aggravating factor before the death penalty may be imposed. *Id.* § 19-2515(3)(b). If the jury finds such a factor, the death penalty will be imposed "unless mitigating circumstances * * * are found to be sufficiently compelling that the death penalty would be unjust." *Ibid.*

Idaho's death penalty scheme lists eleven statutory aggravating factors. Idaho Code § 19-2515(9)(a)-(k). Four are relevant here:

- "The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity." *Id.* § 19-2515(9)(e) (the "HAC aggravator").

- "By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life." *Id.* § 19-2515(9)(f) (the "utter disregard aggravator").
- "The murder was committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem and the defendant killed, intended a killing, or acted with reckless indifference to human life." *Id.* § 19-2515(9)(g) (the "felony-murder aggravator").
- "The defendant, by his conduct * * * has exhibited a propensity to commit murder which will probably constitute a continuing threat to society." *Id.* § 19-2515(9)(i) (the "propensity aggravator").

C. Statement of facts

Petitioner was convicted in Idaho state court of first-degree murder, first-degree kidnapping, and rape. See App., *infra*, 3a. He was automatically eligible for the death penalty under Idaho's capital-sentencing scheme as a consequence of his felony-murder conviction. The jury then sentenced petitioner to death, finding the four aggravating circumstances described above. App., *infra*, 48a-49a.

On appeal, petitioner contended, among other things, that (1) the HAC, utter disregard, and propensity aggravators are unconstitutionally vague; and (2) Idaho's felony-murder aggravator does not fulfill the constitutional narrowing requirement for defend-

ants who, like petitioner, are convicted of felony murder. The Supreme Court of Idaho rejected each of petitioner's contentions. App., *infra*, 49a-57a.[1]

First, regarding the HAC aggravator, the court below recognized that this Court has held that similar language—referring to conduct that was "especially heinous, atrocious, or cruel"—fails to give a sentencing jury constitutionally sufficient guidance. App., *infra*, 50a-51a (citing *Maynard*). The Idaho Supreme Court also acknowledged that the Eighth Circuit has held that the term "exceptional depravity," applied to narrow the HAC aggravator, is itself vague and facially unconstitutional. *Ibid*. (citing *Moore* v. *Clarke*, 904 F.2d 1226, 1229 (8th Cir. 1990)). Nevertheless, the court below noted that it had upheld the constitutionality of the HAC aggravator after the decision in *Moore* and declined to revisit that holding, finding it immaterial that Idaho law had since been modified to give juries rather than judges the principal role in capital sentencing. *Id*. at 51a-52a.

Second, the Idaho court similarly rejected the vagueness challenges to the utter disregard and propensity aggravators. It noted that this Court had upheld Idaho's utter disregard aggravator in *Arave* when the provision was applied by a judge and "decline[d] to revisit these issues" despite Idaho's switch from judge to jury sentencing. App., *infra*, 52a-53a. The court likewise rejected the argument that "[t]he advent of jury sentencing" "alter[s] the constitutional

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[1] On appeal, the Idaho Supreme Court consolidated petitioner's direct and post-conviction challenges to his conviction and sentence, which advanced numerous evidentiary and legal contentions. App., *infra*, 3a. This petition addresses only capital sentencing issues raised on direct appeal.

vagueness analysis" as applied to the propensity aggravator because "[j]uries are capable of differentiating a person predisposed to killing from a person who happens to kill in a fit of passion." *Id*. at 54a.

Finally, the Idaho court held that the felony-murder aggravator sufficiently narrows the class of persons subject to the death penalty. Although the court recognized that a capital sentencing regime must "genuinely narrow the class of persons eligible for the death penalty" and also must "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder" (App, *infra*, 55a (quoting *Lowenfield*, 484 U.S. at 244)), it found that requirement satisfied here by Idaho's felony-murder aggravator because that provision "applies only to those murders which are committed in perpetration of 'arson, rape, robbery, burglary, kidnapping or mayhem.' This language may apply to many murders, but it certainly does not apply to *every* first-degree murder—which is all the narrowing required." *Id.* at 57a. In reaching this conclusion, the court rejected as "unavailing" the contrary holding of the Nevada Supreme Court in *McConnell* v. *State*, 102 P.3d 606, 624 (Nev. 2004).

Justice Kidwell dissented, "find[ing] the aggravators and limiting construction unconstitutionally vague under the Eighth Amendment." App., *infra*, 175a.[2] He explained that "the [Idaho HAC] limiting construction is no less vague than the one struck down in *Maynard*." *Id*. at 178a-79a. And rejecting the Idaho Supreme Court's holding that the HAC aggravator is

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[2] Invoking state-law grounds, Justice Horton separately dissented from affirmance of the death penalty. App., *infra*, 166-174a.

rendered constitutional by the addition of the "exceptional depravity" qualifier, Justice Kidwell "respectfully suggest[ed] that this is just word salad. Vague words remain vague when more vague words are added." *Id*. at 175a. He found the same defect in the utter disregard aggravator, which contains no "language [that] could guide any sentencer, or limit the class eligible to receive the death penalty." *Id*. at 179a.

In addition, Justice Kidwell reasoned that "[t]he majority's approach understate[d] the magnitude of the transition from the judge as a sentencer, to the jury as a sentencer." App., *infra*, 179a. As he explained, because "[m]any jury members have not been involved in sentencing before, and are unfamiliar with the law and its implications," "jurors need specific and detailed guidance on which murderers should receive the death penalty as opposed to only life in prison. The aggravators in Idaho do not provide such guidance, and result in the arbitrary, capricious and unconstitutional imposition of the death penalty." *Id*. at 180a (citing *Gregg*, 428 U.S. at 192).

REASONS FOR GRANTING THE PETITION

Imposition of the death penalty by lay jurors is permissible only if the State provides clear and intelligible guidance on the governing standards, and does so in a manner that separates defendants warranting capital punishment from the much larger number of murder defendants who do not. As this case demonstrates, Idaho fails to do that; instead of the necessary clarity, the State presents jurors with "word salad," starting with "[v]ague words" to which "more vague words are added." App., *infra*, 175a.

It is perhaps not surprising that the decision below upholding this deeply flawed regime disregards a

ruling of this Court and conflicts with the decisions of other state and federal courts. Because the Idaho Supreme Court's decision leaves in place an unconstitutional sentence of death, maintains insupportable jury instructions that will infect future capital sentencing in Idaho, and more broadly exacerbates uncertainty about the rules governing a vitally important area of the law, this Court should grant review.

I. IDAHO'S AGGRAVATING CIRCUMSTANCES ARE UNCONSTITUTIONALLY VAGUE.

At the outset, Idaho uses unconstitutionally vague aggravating factors, which leads to arbitrary and capricious imposition of the death penalty. Aggravating factors must provide the sentencer with a "principled means * * * to distinguish those that receive[] the [death] penalty from those that d[o] not." *Maynard* v. *Cartwright*, 486 U.S. 356, 362 (1988). Yet Idaho's HAC, utter disregard, and propensity aggravators fail to "channel the sentencer's discretion by clear and objective standards." *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980) (internal quotation marks omitted). They are therefore unconstitutional.

A. The Idaho Supreme Court's holding on the HAC aggravator directly contravenes this Court's decision in *Maynard* v. *Cartwright*.

In *Maynard*, this Court struck down as unconstitutionally vague an Oklahoma HAC aggravator that was, in relevant part, indistinguishable from Idaho's. The Idaho HAC aggravator asks whether "[t]he murder was especially heinous, atrocious or cruel, manifesting exceptional depravity." Idaho Code § 19-2525(e). Oklahoma's HAC aggravator similarly ap-

plied to defendants who committed murder in an "especially heinous, atrocious, or cruel" manner. Okla. Stat. tit. 21, § 701.12.

The Court in *Maynard* unanimously found that Oklahoma's use of the limiting word "especially" to condition "heinous, atrocious or cruel" failed to bring Oklahoma's HAC aggravator within constitutional bounds. As the Court explained, the suggestion "that the addition of the word 'especially' somehow guides the jury's discretion, even if the term 'heinous' does not, is untenable." *Maynard*, 486 U.S. at 364. Thus, "[t]o say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means." *Ibid.* The Court added: "[A]n ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" *Ibid.*; *see also Godfrey*, 446 U.S. at 428-29 (finding Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating factor unconstitutionally vague for similar reasons).

Despite conceding that the text of Idaho's HAC aggravator "tracks some of the language in the Oklahoma statute condemned by *Maynard*," the court below upheld Idaho's HAC aggravator because Idaho adds the limiting phrase "manifesting exceptional depravity." App., *infra*, 50a-52a. To support this conclusion, the Idaho court relied on its prior ruling in *State* v. *Osborn*, 631 P.2d 187, 200 (Idaho 1981), which held that "the *key word* [in interpreting the limiting construction] is 'exceptional.'" *Ibid.* (emphasis added). See App., *infra*, 51a-52a.

Surely, however, there is no meaningful difference between "exceptional" and "especially," the latter of

which this Court found insufficient to render Oklahoma's HAC aggravator constitutional; just as the Court said of "especially," "[a]n ordinary person could honestly believe that every unjustified, intentional taking of human life" exhibits *exceptional* depravity. *Maynard*, 486 U.S. at 364. The words have substantially similar meanings—in fact, one is defined in terms of the other. "Especially" means "in a special way: particularly, notably, *exceptionally*." *Webster's Third New International Dictionary* 776 (1993) (emphasis added); see also 5 *Oxford English Dictionary* 394-395 (2d ed. 1989), (defining "especially" as "in an especial manner" and defining "especial" as, *inter alia*, "of feelings, qualities, or attributes: *exceptional* in degree") (emphasis added). And "exceptional" is defined as "[o]f the nature of or forming an exception: out of the ordinary course, unusual, *special*" (5 *Oxford English Dictionary* 498-499 (emphasis added)), with "special" defined in the lead definition as "exceptional in character, quality or degree." *Id.* at 149; see also *Webster's Third New International Dictionary* 791 (defining "exceptional" as "forming an exception * * * : being out of the ordinary: uncommon, rare" or "better than average : superior"). If there is any distinction here, it is not of constitutional magnitude. For its part, the Idaho Supreme Court made no attempt at all to differentiate the terms.

Because both words simply indicate something "more than just 'heinous,'" they fail to provide jurors with "principled means" to impose the death penalty. *Maynard*, 486 U.S. at 362, 364. The Idaho Supreme Court was therefore wrong to rely on "exceptional" as the "key word" to bring Idaho's HAC aggravator within constitutional bounds.

B. The Idaho Supreme Court rejected the Eighth Circuit's holding that the "exceptional depravity" limiting construction of the HAC aggravator is constitutionally inadequate.

Moreover, as the court below expressly recognized, its holding conflicts with the Eighth Circuit's decision in *Moore* v. *Clarke*. The Eighth Circuit there struck down the "exceptional depravity" component of Nebraska's HAC aggravator as unconstitutionally vague. 904 F.2d 1226, 1228-1231 (8th Cir. 1990). Contrary to the Idaho Supreme Court's reasoning, the Eighth Circuit concluded that the limiting effect offered by Nebraska's use of the word "exceptional" did *not* provide sufficiently "objective criteria for applying the statute" to "salvage [the] facially-vague" component of the aggravator under *Maynard*. *Id.* at 1229. Specifically, the Eighth Circuit found that "[t]he phrase 'exceptional,' which modifies 'depravity' in the challenged statute, is * * * unhelpful to a sentencing body seeking objective standards to guide its discretion. 'Exceptional' carries vagueness and subjectivity to the same extent as 'especially,' a standard rejected by the Supreme Court." *Id.* at 1230.

Here, again, the Idaho Supreme Court made no suggestion that there is any distinction between the Nebraska statute invalidated in *Moore* and the Idaho HAC aggravator. Instead, the court below simply observed that the HAC aggravator "was determined constitutional by th[e] [Idaho Supreme] Court *after Moore* was decided." App., *infra*, 51a. But all this shows is

that the conflict in the lower courts is intractable—making review by this Court essential.[3]

C. The shift to jury sentencing in capital cases calls into question the adequacy of the HAC narrowing construction.

The error committed by the court below in disregarding this Court's decision in *Maynard* and departing from the Eighth Circuit's approach in *Moore* was greatly compounded by the Idaho court's express refusal to take any account of how the "shift from judge to jury sentencing" magnifies the damage caused by vague aggravators. App., *infra*, 50a-51a. As Justice

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[3] The court below also observed that the Ninth Circuit approved Idaho's HAC limiting instruction in *Leavitt* v. *Arave*, 383 F.3d 809, 835-37 (9th Cir. 2004). See App., *infra*, 51a. But this suggestion is, in the context of this case, highly misleading. The limiting instruction approved in *Leavitt* and recited by the court below in its decision (see App., *infra*, 50a) was *not* the instruction actually given in this case; the *Leavitt* instruction was considerably more elaborate and precise, asking, among other things, whether the defendant's offense was a "conscienceless or pitiless crime which [wa]s unnecessarily torturous to the victim." 383 F.3d at 835-86 (citation and internal quotation marks omitted). Compare App., *infra*, 201a-202a (HAC instruction given in this case).

In fact, the instruction at issue in *Leavitt* does not appear in Idaho's pattern HAC jury instruction (see https://isc.idaho.gov-/main/criminal-jury-instructions, instruction 1713) and, as this case illustrates, is not given in Idaho as a matter of course. And needless to say, even if the "conscienceless or pitiless" and "unnecessarily torturous" instruction is constitutional—a proposition that itself is in doubt, as the instruction has been held unconstitutional by the California Supreme Court (see *State* v. *Superior Court*, 647 P.2d 76, 78 (Cal. 1982))—a limiting instruction that was not given to the jury hearing petitioner's case necessarily cannot save the constitutionality of his death sentence. Cf. *Moore*, 904 F.2d at 1231 (when sentencing panel "did not have the benefit" of a narrowing construction, "the State should not be permitted to rely on it now").

Kidwell recognized in dissent below, "the general lack of experience juries have with regard to sentencing" means that "jurors need specific and detailed guidance on which murderers should receive the death penalty," a reality that requires courts to "revisit, and possibly overrule, prior decisions" that addressed judge-based sentencing regimes. App., *infra*, 180a-181a.

That insight was correct: Aggravators and limiting constructions once found constitutionally permissible under a *judicial* capital sentencing scheme no longer necessarily comport with the Eighth Amendment in a *jury-based* sentencing system. Yet in upholding Idaho's HAC aggravator, the Idaho Supreme Court relied on decisions where the aggravators in question were applied by judges, not juries. Thus, the Idaho precedents invoked below relied on *Proffitt* v. *Florida*, which upheld the Florida HAC aggravator's "conscienceless and pitiless" narrowing construction. App., *infra*, 51a-52a. The *Proffitt* court, however, grounded its decision in Florida's *judicial* sentencing scheme. 428 U.S. at 251-252 (noting that "in Florida the sentence is determined by the trial judge rather than by the jury" and "a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases").

In fact, the Court has repeatedly recognized and relied on fundamental differences between judges and juries in evaluating the constitutionality of capital sentencing aggravators. For example, in *Walton* v. *Arizona*, the Court premised its decision to uphold Arizona's HAC aggravator on that State's *judicial* sentencing scheme. 497 U.S. at 653 ("[T]he logic of

[*Maynard* and *Godfrey*] has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions."); see also *Arave*, 507 U.S. at 471 ("Where * * * the sentencer is a judge rather than a jury, the federal court must presume that the judge knew and applied any existing narrowing construction.").

This distinction turns on the very different qualifications and backgrounds of juries on the one hand and judges on the other. Empirical evidence demonstrates that juries in capital sentencing cases often fail to understand their instructions and, unlike judges, tend to "fall back on their own prior knowledge" to interpret those instructions. James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1169 (1995); see, *e.g.*, William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 963 (2006). Perhaps even more problematic, absent adequate guidance, jurors simply lack the experience necessary to make the comparative judgments that are *required* in sentencing. A lay juror can have no sense of how a particular crime—which will be viewed by that juror in isolation—compares to other death-eligible offenses. But having that knowledge is key to any objective and measured application of the death penalty: "[A] trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants." *Proffitt*, 428 U.S. at 259 n.10.

These considerations apply with full force here. As Justice Kidwell noted below, "[m]any jury members have not been involved in sentencing before, and are unfamiliar with the law and its implications." App., *infra*, 180a. But "[t]he aggravators in Idaho do not provide" the "specific and detailed guidance" these jurors need—and the "result [is] the arbitrary, capricious and unconstitutional imposition of the death penalty." *Ibid*.[4] This Court should not countenance that error.

D. The "utter disregard" and "propensity" aggravators also are unconstitutionally vague.

Two of the other aggravating circumstances relied upon below suffer from some of the same constitutional defects as does the HAC aggravator. The Idaho Supreme Court rejected vagueness challenges to the "utter disregard" and "propensity" aggravators. But neither aggravator offers sufficient guidance in a regime where juries, rather than judges, are the decision-makers.

1. When this Court upheld Idaho's "utter disregard" aggravator against a vagueness challenge in *Arave*, the decision was expressly premised on the *judicial* sentencing scheme then used in the State. The Court noted that "the question [of the aggravator's constitutionality] is close" (507 U.S. at 475), but held

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[4] Thus, an Idaho jury is instructed that the HAC aggravator is satisfied only "where the actual commission of the first-degree murder was accompanied by such additional acts as to set the crime apart from the norm of first-degree murders." App., *infra*, 201a. But jurors, as opposed to judges, cannot be expected to be aware of "the norm of first-degree murders."

that "[w]here, as in Idaho, the sentencer is a judge rather than a jury, the federal court must presume that the judge knew and applied any existing narrowing construction." *Id.* at 471.

The logic underpinning *Arave*, however, does not hold in Idaho's current jury-based sentencing regime. The narrowing construction adopted below defines "utter disregard for human life" as "acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, *i.e.*, the cold-blooded, pitiless slayer." *Osborn*, 631 P.2d at 201. In *Arave*, this Court "acknowledge[d] that * * * the word 'pitiless,' standing alone, might not narrow the class of defendants eligible for the death penalty," as even "[a] sentencing judge might conclude that every first-degree murderer is 'pitiless.'" 507 U.S. at 475. Thus, the Court found "cold-blooded" to be the critical term in Idaho's "utter disregard" limiting construction. *Id.* at 475-76.

And although the term "cold-blooded" may have provided *sentencing judges* with constitutionally adequate guidance, it fails to offer an "ordinary person" (*Maynard*, 486 U.S. at 363-364) a "clear and objective standard" by which to impose the death penalty. *Godfrey*, 446 U.S. at 128. The *Arave* Court found that, "[g]iven the statutory scheme * * * a sentencing judge reasonably could find that not all Idaho capital defendants are 'cold-blooded,'" specifically "because [that judge could identify] some within the broad class of first-degree murderers [who] *do* exhibit feeling." 507 U.S. at 475-476. This reasoning turns on the status of judges as informed and repeat players, with knowledge both of the "statutory scheme" and of how that scheme applies (and has been applied in the past)

to the range of first-degree murderers. Juries, in contrast, cannot be "presume[d to] * * * kn[o]w and appl[y]" prior case law. *Arave*, 507 U.S. at 471. Without the experience and knowledge of a trial judge, juries lack the capacity to identify the subset of first-degree murderers who committed "cold-blooded" crimes in a way that both (1) adequately narrows and (2) is objective and "rationally reviewable," as the Eighth Amendment requires. *Id*. at 475-476.

The ordinary use of the term "cold-blooded" reinforces this point. "In everyday parlance, the term 'cold-blooded' *routinely* is used to describe killings" that are not "without emotion." *Arave*, 507 U.S. at 482–483 (Blackmun J., dissenting). Within a nine-week period prior to the *Arave* decision, for example, the label "cold-blooded" was applied to numerous murders that "occurred with 'feelings' of one kind or another." *Id.* at 483-484. Thus, although the "utter disregard" aggravator and its narrowing construction may have provided sufficient guidance to a sentencing judge, it leaves juries—which will rely on the meaning of words as used in "everyday parlance"—with unchanneled discretion to make arbitrary and capricious decisions. It therefore is unconstitutionally vague. See *Moore*, 904 F.2d at 1230 ("the phrase 'so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life' offers little, if any, objective guidance").

2. Much the same problem infects the propensity aggravator. The ordinary juror is unlikely to have a clear sense of what it means to have a "propensity" to commit murder; after all, *anyone* who commits murder could be thought to have more than the ordinary

propensity to kill. And although Idaho's jury instruction states that use of this aggravator "cannot be based solely upon the fact that [jurors] found the defendant guilty of murder," it also instructs that the aggravator may be found when the defendant acted with "less than the normal amount of provocation"—an instruction that is sure to puzzle jurors who are unfamiliar with the "normal amount of provocation" that leads to murder. App., *infra*, 203a. This is, again, a circumstance where the distinction between a judge and a juror is of constitutional dimension. The court below erred in writing off that distinction as immaterial.

II. IDAHO'S FELONY-MURDER AGGRAVATOR DOES NOT SUFFICIENTLY NARROW THE CLASS OF DEFENDANTS WHO ARE SENTENCED TO DEATH.

Review is warranted for a second reason. It is fundamental that, to adequately guide jury discretion in capital cases, sentencing-phase aggravators "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983). But although the Court has repeatedly articulated this standard, it has never defined precisely what constitutes constitutionally adequate "narrowing." This uncertainty has led to confusion and conflict among state courts of last resort and federal courts of appeals about when commission of a felony in conjunction with a murder permissibly may serve as an aggravator. Some state courts (including the Idaho Supreme Court) have held that the narrowing requirement is met so long as an aggravator does not apply to literally *all* first-degree murders.

Others, in contrast, have struck down States' use of felony-murder aggravators for failing to adequately narrow the class of defendants eligible for the death penalty.

Idaho is on the wrong side of this conflict. Its felony-murder aggravator has no actual narrowing effect for capital defendants convicted of felony murder. Perversely, the slight difference in language between the definitions of felony murder at the guilt and sentencing stages serves principally to eliminate small numbers of the *most* blameworthy defendants from death eligibility. Thus, Idaho's felony-murder aggravator fails to satisfy the narrowing requirement that reserves the death penalty "for 'the worst of the worst.'" *Kansas* v. *Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting).

A. State supreme courts are divided on the constitutionality of felony-murder aggravators.

At the outset, there is no denying that there is a clear, acknowledged, and well-defined conflict between state courts of last resort regarding the content of the narrowing requirement. The court below held that the narrowing requirement is met if there is *one* defendant who would not automatically be rendered death-eligible by the aggravator. Conversely, the Nevada Supreme Court has held that narrowing must be more than theoretical. Thus, Idaho and Nevada, which have nearly identical statutory schemes, directly disagree about the application of federal constitutional protections—as the court below appeared to recognize when it acknowledged, but rejected as "unavailing," the Nevada Supreme Court's holding that

"a felony-murder aggravator could not be used to qualify a murderer for the death sentence where the murderer had been convicted on a felony murder theory because [such an aggravator] 'fail[ed] to genuinely narrow the death eligibility of felony murderers and reasonably justify imposing death on all to whom it applies.'" App., *infra*, 55a-56a (quoting *McConnell* v. *State*, 102 P.3d 606, 624 (Nev. 2004)). Other courts have aligned themselves on one side or the other of this conflict. This Court should resolve the disagreement.

1. The conflict between the Idaho and Nevada Supreme Courts is a product of confusion over the meaning of the narrowing requirement.

a. The Idaho Supreme Court's opinion in this case is in direct conflict with *McConnell*, where the Nevada Supreme Court held that Nevada's felony-murder aggravating factor violated the Constitution. 102 P.3d at 624. Nevada's death penalty scheme was similar to Idaho's across every relevant dimension. In both States, "all felony murder is first-degree murder" and "all first-degree murder is potentially capital murder." *McConnell*, 102 P.3d at 622; see also Idaho Code §§ 18-4003(d), 19-2515(1). Both States employed a felony-murder aggravator that listed a subset of the felonies included in their respective definitions of felony murder.[5] Notably, four of the five felonies listed in each

[5] Idaho's first-degree murder felony predicates are committing or attempting to commit aggravated battery on a child under twelve years of age, arson, rape, robbery, burglary, kidnapping or mayhem, acts of terrorism, and the use of a weapon of mass destruction, biological weapon, or chemical weapon. Idaho Code § 18-4003(d). Idaho's felony-murder aggravator includes all but three

State's aggravator were identical.[6] Nevada's scheme, however, provided some narrowing that Idaho's does not: it restricted death-eligible kidnappings and arsons to those of the first degree. See *McConnell*, 102 P.3d at 622. Further, both Idaho and Nevada imposed a higher *mens rea* standard in their aggravators than in their felony-murder statutes. See *McConnell*, 102 P.3d at 623 ("the felony aggravator applies only to cases where the defendant 'killed or attempted to kill' * * * or 'knew or had reason to know that life would be taken or lethal force used'"). Compare Idaho Code § 18-4003(d) (no intent requirement), with § 19-2515(9)(g) (defendant must have "killed, intended a killing, or acted with reckless indifference to human life"). But Nevada's statutory scheme narrowed *more* than Idaho's: Idaho includes cases in which the defendant acted with reckless indifference to human life; Nevada did not.

Unlike the Idaho Supreme Court, however, the Nevada court acknowledged that State's capital murder statute was "much broader" than the statute upheld in *Lowenfield* v. *Phelps*, 484 U.S. 231 (1998). *McConnell*, 102 P.3d at 622. Accordingly, the Nevada

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of these crimes, listing arson, rape, robbery, burglary, and kidnapping or mayhem. Idaho Code § 19-2515(9)(g). In Nevada, first-degree felony murder could be based on sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of fourteen years, or child abuse. *McConnell*, 102 P.3d at 622. And Nevada's felony-murder aggravating circumstance covered all but four of those felonies, listing robbery, burglary, invasion of the home, and first-degree kidnapping and arson. *Ibid.*

[6] Both states listed kidnapping, arson, robbery, and burglary. Idaho includes rape as its fifth, whereas Nevada includes invasion of the home. See note 5, *supra*.

court held that "Nevada's definition of felony murder d[id] not afford constitutional narrowing," meaning that Nevada's "capital sentencing scheme [had to] narrow death eligibility in the penalty phase by the jury's finding of aggravating circumstances." *Ibid.* And the Nevada Supreme Court held that its State's felony-murder aggravator failed adequately to accomplish that purpose. *Id.* at 623-624.

b. These courts disagreed both on the application of the narrowing requirement to nearly identical statutory schemes and on the nature of the narrowing requirement itself. The Idaho Supreme Court held that the Eighth Amendment requires only that an aggravator apply to fewer than *literally "every* first-degree murder." App., *infra*, 57a. The Nevada Supreme Court came to the opposite conclusion: "[T]he narrowing capacity" of an aggravator must be more than "largely theoretical." *McConnell*, 102 P.3d at 623. The Nevada Supreme Court first rejected the argument that the shorter list of eligible felonies in the penalty-phase aggravator than in the provision creating the felony-murder crime satisfied the narrowing requirement, as the felonies common to both lists are those most likely to result in death. *Ibid.* The Nevada Supreme Court further held that the addition of the *mens rea* requirement to the felony murder aggravator failed to accomplish the required narrowing, as it "[did] little more than state the minimum constitutional requirement to impose death for felony murder." *Ibid* (citing *Enmund* v. *Florida*, 458 U.S. 782 (1982)). The court concluded that, "although the felony aggravator * * * can theoretically eliminate death eligibility in a few cases of felony murder, the practical effect is so slight that the felony aggravator fails to genuinely narrow the death eligibility of felony murderers." *Id.* at 624.

The holding below cannot be reconciled with that reasoning.

2. Other state supreme courts are divided on the narrowing requirement as applied to felony-murder aggravators.

Other state courts of last resort also have weighed in on this question. Several have taken an intermediate position between Nevada and Idaho, holding that, when felony murder is the *only* basis for a murder conviction, felony-murder aggravators may not serve as the foundation for the imposition of the death penalty. See, *e.g.*, *State* v. *Middlebrooks*, 840 S.W.2d 317, 346 (Tenn. 1992) (superseded by statute) ("[W]hen the defendant is convicted of first-degree murder solely on the basis of felony murder, the [felony-murder] aggravating circumstance * * * does not narrow the class of death eligible murderers sufficiently"); *Engberg* v. *Meyer*, 820 P.2d 70, 92 (Wyo. 1991); *State* v. *Cherry*, 257 S.E.2d 551, 568 (N.C. 1979).

These courts have recognized that defendants convicted of felony murder have at least one aggravator that automatically applies to them. Thus, "the possibility that a defendant convicted of a felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death." *Cherry*, 257 S.E.2d at 568. But "[a] simple felony murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated, and deliberate murder." *Middlebrooks*, 840 S.W.2d at 345. Use of a felony-murder aggravator in this situation therefore does not qualitatively narrow by guiding sentencers to the most blameworthy defendants; to the contrary, it does just the opposite.

In contrast, several other state and federal courts have held that overlapping felony-murder provisions may apply at both the guilt and the sentencing phases. See *Deputy* v. *Taylor*, 19 F.3d 1485, 1500-1502 (3d Cir. 1994) (upholding Delaware's statute, which requires consideration of a felony at both the guilt and sentencing stages); *Johnson* v. *Dugger*, 932 F.2d 1360, 1368-1370 (11th Cir. 1991) (same as to Florida); *Perry* v. *Lockhart*, 871 F.2d 1384, 1392-1393 (8th Cir. 1989) (*Lowenfield* required the court to overrule a prior holding that Arkansas's double counting was unconstitutional); *Ballenger* v. *State*, 667 So. 2d 1242, 1260-1261 (Miss. 1995) (approach similar to Idaho); *Ferguson* v. *State*, 642 A.2d 772, 780-781 (Del. 1994) (same).

B. The Idaho Supreme Court's felony-murder holding is inconsistent with this Court's precedent.

1. The need for review is especially acute because the Idaho Supreme Court's approach to the narrowing requirement not only conflicts with the holdings of other courts, but is wrong. Because Idaho has chosen to define its class of death-eligible defendants broadly at the guilt phase, it must comply with the Eighth Amendment's narrowing requirement through the use of sentencing-phase aggravating factors. In rejecting petitioner's challenge to the constitutionality of Idaho's felony-murder aggravator, however, the Idaho Supreme Court seemed to hold that the constitutionally required narrowing permissibly occurred at the *guilt* phase: "the 'narrowing function' required by the U.S. Constitution was performed by the legislature in limiting the class of murderers eligible for the death penalty in Idaho Code sections 18-4003 and 18-4004." App., *infra*, 55a (citing *State* v. *Wood*, 967 P.2d 702, 716-717 (Idaho 1998)).

That holding was incorrect. In *Loving* v. *United States*, this Court held that "aggravating factors are necessary to the constitutional validity of the military capital punishment scheme as now enacted." 517 U.S. 748, 755 (1996). Although the scheme in question permitted only premeditated murder and felony murder to be punished by death, the Court held that "[t]he statute's selection of the two types of murder for the death penalty * * * does not narrow the death-eligible class in a way consistent with our cases." *Id.* at 756. Idaho's broader capital punishment scheme makes *all* first-degree murders eligible for death (Idaho Code § 19-2515(1)), and its definition of first-degree murder includes both premeditated and felony murders. Idaho Code § 18-4003(a), (d). Idaho's death-eligibility scheme therefore is, by definition, at least as broad as that considered in *Loving*. Accordingly, *Loving* makes clear that Idaho's sentencing-phase aggravators must perform the constitutional narrowing function. Insofar as Idaho's narrowing as to felony murder is thought to occur at the guilt phase, the State's scheme is inconsistent with Eighth Amendment standards.

2. In any event, even Idaho is thought to narrow *both* "in the definition of the crime" *and* through application of "the aggravating circumstance," as the court below also appeared to suggest (App., infra, 56a), the narrowing standard applied by the Idaho Supreme Court in this case was incorrect as a matter of law. In rejecting petitioner's challenge, the court below held that the only constitutional narrowing requirement is that an aggravator not apply to *literally every* first-degree felony murder. App., *infra*, 57a. That holding eviscerates the narrowing requirement and is plainly inconsistent with this Court's precedent.

This Court has stressed that "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of *genuinely* narrowing the class of death-eligible persons and thereby channeling the jury's discretion." *Lowenfield*, 484 U.S. at 244 (emphasis added). The Idaho Supreme Court's test for determining whether an aggravator sufficiently narrows is inconsistent with this standard. The simple fact that an aggravator does not *definitionally* apply to all murders does not mean that it adequately guides jurors in their selection of the most culpable defendants, absent an objective and articulable reason to believe that the aggravator "reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant*, 462 U.S. at 874.. In fact, the Idaho Supreme Court's test says *nothing* about an aggravator's suitability as a mechanism for meaningfully separating those who do from those who do not warrant capital punishment.

3. As this Court's decisions suggest, the narrowing requirement for aggravators has both a qualitative and a quantitative component. Qualitatively, the aggravator must "reasonably justify the imposition of a more severe sentence," channeling the jury's discretion by helping it identify the most culpable defendants. *Zant*, 462 U.S. at 877. Quantitatively, the aggravator must *actually* apply to fewer than all death-eligible defendants so as to "*genuinely* narrow the class of persons eligible for the death penalty." *Ibid.* (emphasis added); see also Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1127 (1990); Srikanth Srinivasan, Note, *Capital Sentencing Doctrine and the Weighing-Nonweighing Distinction*, 47 STAN. L. REV. 1347, 1365 n.103 (1995).

Idaho's felony-murder aggravator fails both prongs of the narrowing requirement. Qualitatively, the aggravator does not provide a "principled basis" to "distinguish those who deserve capital punishment from those who do not." *Arave*, 507 U.S. at 474. In fact, it appears to eliminate some of the most culpable defendants convicted of felony murder while retaining the less culpable: Idaho's felony murder aggravator renders automatically eligible for the death penalty all persons convicted of felony murder who committed crimes such as burglary and robbery, but omits terrorists and those who use weapons of mass destruction, biological weapons, or chemical weapons. Compare Idaho Code § 18-4003(d) with Idaho Code § 19-2515(9)(g.

Quantitatively, an aggravating circumstance "may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder." *Tuilaepa*, 512 U.S. at 972. And this Court's precedents do not support the Idaho Supreme Court's broad assertion that, so long as the aggravator "does not apply to *every* first degree murderer," it has accomplished "all the narrowing required." App., *infra*, 57a. See *Godfrey*, 446 U.S. at 428-429 (holding unconstitutional an aggravating circumstance that could apply to "*almost* every murder") (emphasis added). The narrowing principle is not a mechanical numbers game; the requirement that the death penalty apply to only a "subclass" of defendants is designed to ensure that the focus really is placed on those deserving of the most severe punishment. See *McConnell*, P.3d at 623-624. The essentially theoretical narrowing effect of Idaho's felony-murder aggravator fails to satisfy this constitutional requirement.

III. THIS CASE IS AN APPROPRIATE VEHICLE TO RESOLVE THESE IMPORTANT ISSUES.

The need for review is pressing because the questions presented are ones of great significance. Of course, every case involving a sentence of death is inherently important: "[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California* v. *Ramos*, 463 U.S. 992, 998-999 & n.9 (1983). But there is a special need for review of the questions presented here because they arise repeatedly in numerous States, making it essential that the governing rules are clear, applied consistently—and constitutionally adequate.

1. The Court already has recognized the importance of the questions raised in this case by granting review on one of them. In *Tennessee* v. *Middlebrooks,* 507 U.S. 1028 (1993), the Court granted Tennessee's petition for certiorari to resolve the question whether, "[i]n a capital felony murder case, * * * the Eighth Amendment prohibit[s] the sentencer from relying on [the] statutory aggravating circumstance that the murder was committed in the perpetration of a felony." Brief for Pet'r at i, *Tennessee* v. *Middlebrooks*, 510 U.S. 124 (1993) (No. 92-989). The Court held oral argument before dismissing the case as improvidently granted, presumably because the Tennessee Supreme Court's decision—which relied on both the State and the U.S. Constitutions—rested on an independent and adequate state ground. But there is no such jurisdictional obstacle here, making this case a suitable one in which to reach the issue that was not resolved in *Middlebrooks*—an issue that has only grown more pressing with the passage of time, given the development of the conflict between the Nevada

Supreme Court's decision in *McConnell* and the decision below.

2. Moreover, the common use of the felony-murder and HAC aggravators in active death penalty jurisdictions across the United States means that this case raises issues that are critically important not only to petitioner, but also to myriad future capital defendants.

One authoritative study found that over 60% of death-eligible defendants contemporaneously committed the crime of arson, burglary, kidnapping, rape, or robbery—and that commission of robbery *alone* in connection with a homicide made more defendants death-eligible than any other aggravating factor. David McCord, *Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery Be Sufficient to Make a Murderer Eligible for a Death Sentence—An Empirical and Normative Analysis*, 49 SANTA CLARA. L. REV. 1, 1, 32 (2009). And in fourteen States, the definition of death-eligible murder includes a contemporaneous felony that is also listed as an aggravating circumstance.[7] As of April 2018, 69% of the persons under sentence of death in the United

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[7] See Ala. Code §§ 13A-5-40, 13A-5-49; Cal. Penal Code §§ 189, 190.2 (West); Colo. Rev. Stat. §§ 18-3-102, 18-1.3-1201; Fla. Stat. Ann. §§ 782.04, 921.141(6)(d) (West); Ga. Code Ann. §§ 16-5-1, 17-10-30; Idaho Code §§ 18-4003(d), 19-2515(9)(g); Ind. Code Ann. §§ 35-42-1-1, 35-50-2-9(b) (West); La. Stat. Ann. § 14:30 ; La. Code Crim. Proc. Ann. art. 905.4; Miss. Code Ann. §§ 97-3-19(2)(e)-(f), 99-19-101(5)(d); Nev. Rev. Stat. Ann. §§ 200.030(1), 200.033(4) (LexisNexis); N.C. Gen. Stat. §§ 14-17, 15A-2000(e)(5); Ohio Rev. Code Ann. §§ 2903.01, 2929.04(A)(7) (LexisNexis); Tenn. Code Ann. §§ 39-13-202, 39-13-204(i); Wyo. Stat. Ann. §§ 6-2-101(a), 6-2-102(h)(xii).

States were in these fourteen states.[8] Clarity in application of the felony-murder aggravator—a point on which the courts are now in acknowledged conflict—is therefore of pressing importance.

In addition, as of 2018, the federal government and thirteen States used a HAC aggravating factor.[9] Multiple studies have found that this aggravating factor applies to most murder defendants.[10] The jurisdictions with a HAC aggravator account for 71% of the population under sentence of death in the United States.[11] Here, too, clarity is essential—but the lower courts are in disarray.

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[8] See *Death Row USA, Spring 2018 Report*, NAACP LEGAL DEFENSE FUND 37-38 (Apr. 1, 2018), https://www.naacpldf.org/wp-content/uploads/DRUSASpring2018_.pdf. At that time, there were 1,908 persons on death row in these States out of 2,747 total persons across the United States. *Id.* at 38.

[9] 18 U.S.C. § 3592(c)(6); Ala. Code § 13A-5-49(8); Ariz. Rev. Stat. Ann. § 13-751(F)(6); Ark. Code Ann. § 5-4-604(8); Colo. Rev. Stat. § 18-1.3-1201(5)(j); Fla. Stat. Ann. § 921.141(6)(h) (West); Kan. Stat. Ann. § 21-6624(f); La. Code Crim. Proc. Ann. art. 905.4-(A)(7); Neb. Rev. Stat. Ann. § 29-2523(1)(d); N.H. Rev. Stat. Ann. § 630:5(VII)(h); Okla. Stat. tit. 21, § 701.12(4); Tenn. Code Ann. § 39-13-204(i)(5); Utah Code Ann. § 76-5-202(1)(r); Wyo. Stat. Ann. § 6-2-102(h)(vii).

[10] See, e.g., Michael Mello, *Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller*, 13 STETSON L. REV. 523, 551 (1984) (survey of all Florida decisions involving the HAC aggravator concluding that "[a]ll first degree murders meet the [HAC] circumstance except those resulting in instantaneous death not preceded by awareness by the victim and not committed 'execution style.'").

[11] NAACP LEGAL DEFENSE FUND, *supra* note 9, at 37-38. There are 1,939 persons on death row in these jurisdictions out of 2,747 total persons across the United States. *Id.* at 38.

3. Finally, this case is a suitable vehicle for resolution of the questions presented. Invalidation of any of the aggravating factors at issue here would require reversal and reconsideration of the death sentence. "An invalidated sentencing factor * * * will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." *Brown* v. *Sanders*, 546 U.S. 212, 220 (2006) (footnote omitted).

Here, the aggravating circumstances before the jury each contained distinct elements and requirements; "if one of them [is] invalid the jury could not [have] consider[ed] the facts and circumstances relevant to that factor as aggravating in some other capacity." *Sanders*, 546 U.S. at 217. This context is quite different from the one addressed in *Sanders* itself, where the State relied on an "omnibus" aggravating factor that took account of *all* "facts bearing upon the 'circumstances of the crime.'" *Id.* at 224. In this case, in contrast, invalidation of any *one* of the four aggravating factors found in petitioner's case will "render the sentence unconstitutional * * * [because n]one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances" that would have been implicated by the invalid factor. *Id.* at 220.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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