No. 13- ___

IN THE

Supreme Court of the United States

TIMOTHY ALAN DUNLAP,

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

Sara Thomas
Shannon Romero
STATE APPELLATE PUBLIC DEFENDER'S OFFICE
3050 N. Lake Harbor Ln.
Suite 100
Boise, ID 83703

Donald B. Ayer
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001

Jeffrey L. Fisher
Counsel of Record
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

CAPITAL CASE

QUESTION PRESENTED

Whether the Confrontation Clause applies to evidence offered by the prosecution to prove statutory aggravating circumstances that establish a defendant's eligibility for the death penalty.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Alan Dunlap respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Idaho.

OPINIONS BELOW

The opinion of the Supreme Court of Idaho (Pet. App. 1a) is reported at 313 P.3d 1. The order of the Supreme Court of Idaho denying rehearing (Pet. App. 91a) is unpublished.

JURISDICTION

The Supreme Court of Idaho denied rehearing on November 29, 2013. Pet. App. 91a. On February 21, 2014, Justice Kennedy extended the time for the filing of a petition for a writ of certiorari to April 28, 2014. *See* No. 13A848. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment of the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

INTRODUCTION

This Court has recognized that a defendant's right to confront the witnesses against him at a criminal trial is a "fundamental right." *Pointer v. Texas*, 380 U.S. 400, 403 (1965). This Court has also held that aggravating circumstances necessary to render a defendant eligible for the death penalty "operate as 'the functional equivalent of an element of a greater offense.'" *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)). It follows from these precepts that the right of confrontation should apply to evidence introduced to establish eligibility for the death penalty.

There is, however, a substantial split of authority among state and federal courts that have considered the question. A majority of those courts have held that the Confrontation Clause applies to evidence offered to prove aggravating factors necessary to impose the death penalty. But a substantial minority of courts, including the Supreme Court of Idaho in this case, have concluded otherwise. Given the extent of the split, the fundamental character of the rights at stake, and the fact that the proper resolution of the issue turns on the interpretation of several of this Court's decisions, this question calls for the Court's immediate attention.

STATEMENT OF THE CASE

A. Background Law

Since this Court's decision in *Gregg v. Georgia*, 428 U.S. 153 (1976), the death penalty has been constitutionally permissible only when imposed after proceedings that include both an "eligibility decision

and [a] selection decision" that meet specific requirements. *Tuilaepa v. California*, 512 U.S. 967, 971 (1994).

The eligibility determination in a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty," *Zant v. Stephens*, 462 U.S. 862, 877 (1983) – a process that usually involves "convict[ing] the defendant of murder and find[ing] [at least] one 'aggravating circumstance.'" *Tuilaepa*, 512 U.S. at 972. Proof beyond a reasonable doubt of a statutory aggravating circumstance therefore "play[s] a constitutionally necessary function" of establishing death penalty eligibility. *Zant*, 462 U.S. at 878.

Once eligibility is established, whether to select the death sentence must be an "individualized determination [made] on the basis of the character of the individual and the circumstances of the crime." *Zant*, 462 U.S. at 879 (emphasis omitted).

B. Procedural History

1. On October 16, 1991, petitioner Timothy Dunlap robbed a bank in Soda Springs, Idaho. In the course of the robbery, petitioner shot and killed a teller. He fled the scene, but subsequently surrendered to police officers. *State v. Dunlap* (*Dunlap I*), 873 P.2d 784, 785 (Idaho 1993), *cert. denied*, 510 U.S. 1171 (1994).

During questioning in a squad car immediately following his arrest, petitioner confessed to the bank robbery and shooting, along with his involvement in

an extensive series of criminal acts, most of which turned out to have never occurred. Supreme Court of Idaho Case No. 32773, Tr. Vol. 5, p.121-22, 141-48.[1]

Upon arrival at the Soda Springs Police Department stationhouse, several police officers and an FBI agent further questioned petitioner for several hours. State's Ex. 18(b) at 4, 202. Again, petitioner confessed to a wide variety of mostly fictional crimes he claimed to have committed with two accomplices.

After this initial stationhouse interrogation, petitioner met with David Doten, Chief of Mental Health Services at the Bonneville County Jail. During an interview that lasted from 11:00 p.m. until 2:00 the next morning, petitioner gave a "rather detailed account" of his crimes (including the invented crimes). State's Ex. 43 at 2. Mr. Doten later submitted a report of this interview – including petitioner's descriptions of his crimes, Doten's conclusions concerning petitioner's mental state, and his observations about petitioner's demeanor – to Chief Blynn Wilcox of the Soda Springs Police Department.

Petitioner was interviewed a third time the next day by Chief Wilcox. At that interview, petitioner acknowledged his personal responsibility for an unrelated murder in Ohio and admitted that portions

---

[1] All subsequent citations to the trial transcript and exhibits are to the record in Supreme Court of Idaho Case No. 32773.

of his prior statement, including his references to accomplices, were untrue. State's Ex. 19(b) at 28.

2. On December 30, 1991, petitioner pled guilty to first-degree felony murder and use of a firearm in the commission of a murder, both arising out of the Soda Springs bank robbery. He did not, however, admit that he had a specific intent to kill. *Dunlap I*, 873 P.2d at 785. The plea agreement permitted the State to seek the death penalty, which it did in a subsequent sentencing proceeding. At a hearing to determine both death eligibility and sentence selection, the judge found that petitioner was eligible for the death penalty and sentenced him to death. *Id.* at 786.

While the case was pending on petition for post-conviction relief, the State conceded that a confidential mental health evaluation had been improperly shared with the prosecution and the court during petitioner's original sentencing proceeding. Press Release, Office of the Att'y Gen., State of Idaho, Jury Sentences Timothy Dunlap to Death (Feb. 23, 2006).[2] As a result, the trial court ordered resentencing, which occurred in 2006.

Under Idaho law at that time, as now, a defendant's eligibility for the death penalty had to be established by proving one or more statutory aggravating circumstances. Idaho Code § 19-2515.[3]

---

[2] *Available at* http://www.ag.idaho.gov/media/newsReleases/2006/nr_02232006.html.

[3] Because Idaho does not have a capital murder charge, but only a broad first-degree murder charge to which a death sentence does not automatically attach, eligibility for the death

Pursuant to this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), a jury must determine the existence of any such aggravating factors beyond a reasonable doubt. *Id.* at 609; *see also Dunlap v. State* (*Dunlap III*), 106 P.3d 376, 392 (Idaho 2004) (ordering resentencing before a jury), *cert. denied*, 546 U.S. 979 (2005). Evidence offered to prove those circumstances, along with all other evidence relating to the selection of an appropriate penalty, is submitted to a jury in a single proceeding. Idaho Code § 19-2515.

The State charged three aggravating circumstances. The two that survived appellate review[4] alleged that:

> (1) by the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life (the utter disregard aggravator); and
>
> . . . .
>
> (3) the defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society (the propensity aggravator).

Pet. App. 5a-6a.

As part of its proof bearing on these statutory aggravating circumstances, the State introduced into

---

penalty is always determined in a sentencing proceeding that follows a first-degree murder conviction. *See* Idaho Code §§ 18-4003, 19-2515.

[4] A third aggravator, alleging specific intent to cause death, was invalidated on appeal. Pet. App. 22a, 24a n.3.

evidence Mr. Doten's report of his interview with petitioner the night of the robbery and shooting. Tr. Vol. 11, p.110. In addition to recounting petitioner's statements about various fictional and actual criminal events, including the bank robbery and murder that occurred in Soda Springs, Mr. Doten's report asserted that petitioner:

- "was totally affectless throughout the interview," State's Ex. 43 at 1;
- showed no "remorse of any kind," *id.*;
- spoke in a "matter of fact manner with no emotion, guilt, or remorse exhibited," *id.* at 3;
- "exhibited a sense of pride in talking about his criminal activities," *id.* at 1;
- said that he shot the teller after she gave him the money "as a diversion to escape," *id.* at 3;
- "would smile while talking of each killing," *id.*

Mr. Doten did not take the stand, and petitioner did not have (nor had he ever previously had) an opportunity to cross-examine him.[5]

The State referenced Mr. Doten's report during direct examination of its own expert witness, who stated that he was "much more interested in Mr. Doten's evaluation, his interview for example, than I am at mine," because of its proximity to the crime. Tr. Vol. 11, p.166. The prosecutor also relied on Mr. Doten's report during his closing argument,

---

[5] The State did not allege that Doten was unavailable to testify. In an interview conducted in 2008, Doten told the public defender's office that he lived in Idaho Falls, Idaho, which is about a two-hour drive from Soda Springs.

reminding the jury that the report "[s]aid that [petitioner] spoke with pride about his crime . . . [and] [d]id not exhibit emotion, guilt, or remorse, and was showing manipulative techniques." *Id.* Vol. 12, p.78-79.

At the conclusion of the proceeding, the jury found that the State proved both of the relevant aggravating circumstances beyond a reasonable doubt. Pet. App. 5a-6a. The jury further "found that all the mitigating evidence, weighed against each aggravator, was not sufficiently compelling to make imposition of the death penalty unjust." *Id.* 6a. Accordingly, the trial court judge sentenced petitioner to death. *Id.*

3. Following his sentencing, petitioner filed a direct appeal to the Supreme Court of Idaho alleging several errors in the sentencing proceeding, including the Confrontation Clause issue presented here. Pet. App. 7a-9a.[6]

The Supreme Court of Idaho found five errors on direct appeal. It ruled, however, that none of them required reversal: three were harmless error, and the other two were invited error. Pet. App. 22a, 24a, 38a, 58a-59a. The court found no error with regard to denial of the right of confrontation as to Mr. Doten's

---

[6] Petitioner simultaneously sought review of the trial court's summary dismissal of his petition for post-conviction relief, which he filed after the resentencing proceeding. In Idaho capital proceedings, a defendant's appeal from denial of post-conviction relief is consolidated with his direct appeal for review by the Supreme Court of Idaho. Idaho Code § 19-2719.

report and ultimately affirmed petitioner's death sentence on direct appeal. *Id.* 55a-57a, 90a.

Prior to discussing petitioner's Confrontation Clause claim relating to Mr. Doten's report, the court rejected petitioner's claim that *Ring* requires "aggravators . . . to be treated like elements of a separate crime." Pet. App. 48a. The court stated that it had already rejected this interpretation of *Ring* and quoted its own prior decision:

> *Ring* did not elevate those statutory aggravating circumstances into elements of a crime . . . [it] merely held that a state cannot impose the death penalty unless its sentencing procedures have the jury, not the judge, determine the existence of a statutory aggravator.

Id. 48a-49a (quoting *Porter v. State*, 102 P.3d 1099, 1103 (Idaho 2004)).[7]

With regard to the Confrontation Clause claim based on Mr. Doten's report,[8] the Supreme Court of Idaho first quoted its prior decision in *Sivak v. State*, 731 P.2d 192 (Idaho 1986), stating that the U.S.

---

[7] The court made this statement in rejecting petitioner's assertion that the Idaho Rules of Evidence should have been applied at his sentencing hearing. Pet. App. 48a.

[8] Petitioner is no longer pursuing a separate Confrontation Clause challenge to the Brooks report, a psychological evaluation prepared five months after Mr. Doten's report. State's Ex. 44 at 1. The Supreme Court of Idaho ruled that the Brooks report's admission was invited error. Pet. App. 59a. There was never any allegation, however, that the admission of Mr. Doten's report constituted invited error.

Constitution "does not require that a capital defendant be afforded the opportunity to confront and cross-examine live witnesses in his sentencing proceedings." Pet. App. 55a (quoting *Sivak*, 731 P.2d at 211) (internal quotation marks omitted). The court observed that *Sivak*'s holding was based in part on "modern penological policies, which favor sentencing based on the maximum amount of information about the defendant." *Id.* 55a-56a (quoting *Sivak*, 731 P.2d at 211 (citing *Williams v. New York*, 337 U.S. 241, 246-50 (1949))).

The court then noted that this Court recently stated in *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006), that the Confrontation Clause applies to "prosecutions." Pet. App. 56a. But the Idaho Supreme Court questioned "whether the sentencing phase in a capital case is a 'prosecution,'" and went on to remark that this Court has recently reaffirmed "the principle that all the information available to a sentencer should be considered." *Id.* (citing *Pepper v. United States*, 131 S. Ct. 1229, 1240 (2011)).

Explaining that it had "carefully examined case law from [its] sister states and the federal courts on this important issue," the court opined that "the most persuasive analysis" on the question came from *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007). Pet. App. 56a. The Supreme Court of Idaho then quoted the *Fields* court's statement that "the Confrontation Clause is inapplicable to the presentation of testimony relevant only to the sentencing authority's selection decision." *Id.* 57a (quoting *Fields*, 483 F.3d at 337) (internal quotation marks omitted).

The court concluded by holding "that the admission of [Mr. Doten's report] did not violate Dunlap's Sixth Amendment rights," Pet. App. 57a, and later reiterated categorically that "the Confrontation Clause does not apply in sentencing proceedings."[9] *Id.* 71a.

REASONS FOR GRANTING THE WRIT

I. State High Courts And Federal Courts Of Appeals Are Sharply Divided Over Whether The Confrontation Clause Applies To Evidence Used To Prove Eligibility For The Death Penalty

Thirty-two states and the United States have criminal laws that authorize imposition of the death penalty.[10] In numerous decisions since 1976, this Court has defined procedural rules required by the Constitution when this ultimate sanction is to be imposed. In recent years, though, a substantial split of authority has developed regarding the applicability of the Confrontation Clause to capital sentencing proceedings – more specifically, whether the right of confrontation applies to evidence that is offered by the prosecution to establish eligibility for the death penalty. Courts responsible for over half of the

---

[9] Because the court below ruled that admission of Mr. Doten's report was not error, it did not reach the question of whether any such error would have been harmless. *See* Pet. App. 18a-19a, 57a.

[10] *States With and Without the Death Penalty*, Death Penalty Info. Center, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Apr. 25, 2014).

executions since 1976 have weighed in,[11] but the split of authority has only deepened.

1. The majority of courts to have addressed the issue have recognized that the Confrontation Clause applies to evidence "used to establish an aggravating factor" necessary to make the defendant eligible for the death penalty. *State v. McGill*, 140 P.3d 930, 942 (Ariz. 2006) (emphasis omitted), *cert. denied*, 549 U.S. 1324 (2007).

A total of six state high courts have adopted this position. Five of these courts have gone on to find Confrontation Clause violations in the cases before them. *State v. Robinson*, 796 P.2d 853, 861-62 (Ariz. 1990), *cert. denied*, 498 U.S. 1110 (1991);[12] *Rodgers v. State*, 948 So. 2d 655, 663-65 (Fla. 2006), *cert. denied*, 552 U.S. 833 (2007);[13] *Pitchford v. State*, 45 So. 3d 216, 251, 252 & n.100 (Miss. 2010), *cert. denied*, 131 S. Ct. 2098 (2011);[14] *State v. Bell*, 603 S.E.2d 93, 115-16 (N.C. 2004), *cert. denied*, 544 U.S. 1052 (2005); *Russeau v. State*, 171 S.W.3d 871, 880-81 (Tex. Crim.

---

[11] *See Number of Executions by State and Region*, Death Penalty Info. Center, http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (last visited Apr. 25, 2014).

[12] *Robinson*'s logic has been reaffirmed in *McGill*, 140 P.3d at 942, and *State v. Greenway*, 823 P.2d 22, 28 n.1 (Ariz. 1991).

[13] On this point, *Rodgers* relied on *Rodriguez v. State*, 753 So. 2d 29, 43 (Fla.), *cert. denied*, 531 U.S. 859 (2000), which was also cited approvingly in *Braddy v. State*, 111 So. 3d 810, 859-60 (Fla. 2012), *cert. denied*, 134 S. Ct. 275 (2013).

[14] *Pitchford* relied on the Mississippi Supreme Court's earlier decision in *Lanier v. State*, 533 So. 2d 473, 488 (Miss. 1988), on this point.

App. 2005), *cert. denied*, 548 U.S. 926 (2006), 548 U.S. 927 (2006).[15] In one other case recognizing that the right of confrontation "extends to the sentencing phase of a capital trial," a court found no violation of that requirement on the facts before it. *Grandison v. State*, 670 A.2d 398, 413 (Md. 1995), *cert. denied*, 519 U.S. 1027 (1996).[16]

In addition, while holding that the Confrontation Clause does not apply to selection evidence, the Fourth Circuit recently suggested that the right does apply during "the guilt and *eligibility* phases of trial," which it said involve "constitutionally significant factual findings." *United States v. Umaña*, 2014 WL 1613886, at *20 (4th Cir. Apr. 23, 2014) (emphasis in original) (internal quotation marks omitted). The opinions of a number of federal district courts have also articulated this view.[17]

2. At the same time, at least three state supreme courts have repeatedly taken the minority position that the Confrontation Clause's protections do not

---

[15] *Russeau* has been cited approvingly on this point in *Jackson v. State*, 2010 WL 114409, at *5 (Tex. Crim. App. Jan. 13, 2010), *cert. denied*, 131 S. Ct. 82 (2010), and *Smith v. Texas*, 297 S.W.3d 260, 276 (Tex. Crim. App. 2009), *cert. denied*, 559 U.S. 975 (2010).

[16] Maryland abolished its death penalty in 2013.

[17] *See, e.g.*, *United States v. Concepcion Sablan*, 555 F. Supp. 2d 1205, 1222 (D. Colo. 2007); *United States v. Mills*, 446 F. Supp. 2d 1115, 1135 (C.D. Cal. 2006); *United States v. Bodkins*, 2005 WL 1118158, at *4-5 (W.D. Va. May 11, 2005); *United States v. Jordan*, 357 F. Supp. 2d 889, 903-04 (E.D. Va. 2005).

apply in death penalty sentencing proceedings, including to evidence of aggravating factors necessary to establish eligibility for the death penalty. Additionally, one other state high court and two federal appellate courts have made statements in harmony with that view.

In *Summers v. State*, 148 P.3d 778 (Nev. 2006), the Supreme Court of Nevada held that the Confrontation Clause does not "apply to evidence admitted at a capital penalty hearing." *Id.* at 783. There, the judge overseeing the defendant's death penalty hearing admitted over 800 pages of documents about the defendant's criminal history to prove eligibility for the death penalty. *Id.* at 780. Stating that it was "[g]uid[ed]" by this Court's decision in *Williams v. New York*, 337 U.S. 241 (1949), the state supreme court noted that "most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination." *Summers*, 148 P.3d at 782 (quoting *Williams*, 337 U.S. at 250) (internal quotation marks omitted). The court then held that there was no confrontation right with regard to these documents.

Three justices dissented, contending that, based on "the trend in the Supreme Court's decisions over the last four decades and its specific holdings in *Ring* and *Crawford*, . . . the Sixth Amendment right to confrontation applies to evidence presented during the eligibility phase of a capital penalty hearing." *Summers*, 148 P.3d at 787 (Rose, C.J., concurring in part and dissenting in part). The majority acknowledged these arguments, but concluded that

"[a]bsent controlling authority . . . extending the proscriptions of the Confrontation Clause . . . to capital penalty hearings in Nevada, we are not persuaded to . . . extend to capital defendants confrontation rights." *Id.* at 783 (majority opinion).[18]

Similarly, in *People v. Banks*, 934 N.E.2d 435 (Ill. 2010), *cert. denied*, 131 S. Ct. 899 (2011), the Supreme Court of Illinois invoked this Court's decision in *Williams* in ruling that "the [C]onfrontation [C]lause does not apply to the aggravation/mitigation phase of a capital sentencing hearing." *Id.* at 462.[19]

Finally, in the present case, after surveying a wide variety of authorities, including *Williams*, the Supreme Court of Idaho adhered to its own precedent, which had held that "a capital defendant [need not] be afforded the opportunity to confront and cross-examine live witnesses in his sentencing proceedings." Pet. App. 55a (quoting *Sivak v. State*, 731 P.2d 192, 211 (Idaho 1986)); *see also id.* 71a

---

[18] Despite the widening split, the Nevada Supreme Court has repeatedly reaffirmed the *Summers* rule with little, if any, discussion. *See Mendoza v. State*, 2012 WL 1922666, at *8-9 (Nev. May 23, 2012), *cert. denied*, 133 S. Ct. 951 (2013); *Maestas v. State*, 275 P.3d 74, 86 n.14 (Nev.), *cert. denied*, 133 S. Ct. 275 (2012); *Chappell v. State*, 281 P.3d 1160, at *6 (Nev. 2009) (unpublished table decision), *cert. denied*, 559 U.S. 1110 (2010); *Browning v. State*, 188 P.3d 60, 74 (Nev. 2008), *cert. denied*, 556 U.S. 1134 (2009); *Thomas v. State*, 148 P.3d 727, 732 (Nev. 2006), *cert. denied*, 552 U.S. 1140 (2008).

[19] *Banks* was cited approvingly on this point in *People v. Adkins*, 940 N.E.2d 11, 48 (Ill. 2010), *cert. denied*, 131 S. Ct. 2115 (2011). Illinois abolished its death penalty in 2011.

("[T]he Confrontation Clause does not apply in sentencing proceedings.").[20]

Several federal appellate courts have also strongly suggested that they would not extend confrontation rights to death eligibility evidence. Most influential of these cases has been the Seventh Circuit's decision in *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002), where the court stated that the Confrontation Clause "applies through the finding of guilt, but not to sentencing, even when that sentence is the death penalty," and cited *Williams* in support of that conclusion. Even though the sentencing hearing in *Szabo* occurred before *Ring* and the defendant challenged only selection evidence, *id.* at 399, at least fifteen decisions since *Ring* was decided – including *Summers*, *Banks*, and *McGill* – have cited *Szabo* for this unqualified proposition.[21] The Eleventh Circuit also has expressed agreement with this conclusion as to all evidence except psychiatric reports.[22]

---

[20] Additionally, in *State v. Stephenson*, 195 S.W.3d 574 (Tenn. 2006), the Supreme Court of Tennessee stated in dicta that "the various circuit courts of appeal have repeatedly . . . held" that "the Sixth Amendment right to confrontation does not apply at sentencing." *Id.* at 590.

[21] *See, e.g.*, *United States v. Fields*, 483 F.3d 313, 328 n.11 (5th Cir. 2007); *United States v. Brown*, 441 F.3d 1330, 1361 n.12 (11th Cir. 2006); *McGill*, 140 P.3d at 942 n.7; *Banks*, 934 N.E.2d at 461; *Stephenson*, 195 S.W.3d at 590 & n.11.

[22] The Eleventh Circuit initially recognized a right to confrontation at capital sentencing proceedings, but added that "[o]ur decision that the right of cross-examination of adverse witnesses is extended to capital sentencing proceedings is

3. Courts on both sides of this conflict have recognized that "[t]here is a split of authority on the issue." *Banks*, 934 N.E.2d at 461; *see also United States v. Brown*, 441 F.3d 1330, 1361 n.12 (11th Cir. 2006) ("Our view is, however, far from universally accepted."); *United States v. Fields*, 483 F.3d 313, 363 (5th Cir. 2007) (Benavides, J., dissenting in part) ("The persuasive authorities, and our Sister Circuits in particular, are divided on the issue *sub judice*."); *United States v. Mills*, 446 F. Supp. 2d 1115, 1128 (C.D. Cal. 2006) ("[T]here is a great deal of disagreement over whether and to what extent *Williams* still controls [the application of the Confrontation Clause to capital eligibility proceedings.]"); *Pitchford*, 45 So. 3d at 251-52 ("While we are aware of federal authority that the Sixth Amendment does not apply at sentencing proceedings, this Court's precedent holds otherwise." (footnote omitted)); *State v. Maestas*, 299 P.3d 892, 974 (Utah 2012) (noting "that other courts that have

---

necessarily limited to the facts of the case before us, involving psychiatric reports." *Proffitt v. Wainwright*, 706 F.2d 311, 311-12 (11th Cir. 1983), *modifying* 685 F.2d 1227 (1982). More recently, the Eleventh Circuit rejected a challenge to testimony regarding the contents of two witnesses' sworn statements, stating that "hearsay is admissible at capital sentencing and that a defendant's rights under the Confrontation Clause are not violated if the defendant has an opportunity to rebut the hearsay." *Muhammad v. Sec'y, Fla. Dep't of Corr.*, 733 F.3d 1065, 1076 (11th Cir. 2013). Though the anti-retroactivity rules of *Teague v. Lane*, 489 U.S. 288 (1989), and *Schriro v. Summerlin*, 542 U.S. 348 (2004), precluded the Eleventh Circuit from considering *Ring* in its constitutional analysis, the Eleventh Circuit never said as much.

addressed this issue have reached conflicting results," but not deciding the issue itself), *cert. denied*, 133 S. Ct. 1634 (2013). One court has even proclaimed that on the issue of whether "the Confrontation Clause applies in capital sentencing proceedings . . . . the legal landscape is a quagmire." *Muhammad v. Tucker*, 905 F. Supp. 2d 1281, 1296 (S.D. Fla. 2012), *rev'd sub nom. Muhammad v. Sec'y, Fla. Dep't of Corr.*, 733 F.3d 1065 (11th Cir. 2013).

Moreover, there is no sign that the split will resolve itself. The Supreme Court of Nevada has insisted that it will not extend confrontation rights to sentencing "[a]bsent controlling authority overruling *Williams* and extending the proscriptions of the Confrontation Clause . . . to capital penalty hearings." *Summers*, 148 P.3d at 783. As is apparent from the pattern of states following their own precedents, *see supra* notes 12-15, 18-19, states have been willing to "overturn [their] long-standing precedent[s] only for a compelling reason," *McGill*, 140 P.3d at 942. There appears to be no movement towards resolution of the conflict. This Court should take this opportunity to resolve the issue.

II. The Confrontation Clause Applies To Evidence Offered To Prove Eligibility For The Death Penalty, Just As It Does To Prosecution Evidence Offered To Establish The Elements Of Any Criminal Offense

1. This Court's extensive death penalty jurisprudence demands that constitutional procedural protections applicable at trial be similarly available at death eligibility proceedings. "Given the gravity of the decision to be made" in a capital case,

the government must "observe fundamental constitutional guarantees." *Estelle v. Smith*, 451 U.S. 454, 463 (1981). Thus, this Court has held that "the [capital] sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). And in a series of cases, this Court has applied to capital sentencing the protection against double jeopardy,[23] the privilege against self-incrimination,[24] the right to an impartial jury,[25] and the right to the effective assistance of counsel.[26]

What is more, this Court has already extended the Sixth Amendment's jury-trial guarantee to factual findings in sentencing proceedings like the one at issue here. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The Court explained that an "increase beyond the maximum authorized statutory sentence . . . is the functional equivalent of an element of a greater offense." *Id.* at 494 n.19. Because a criminal defendant is entitled to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt," *United States v. Gaudin*, 515 U.S. 506, 510 (1995), the Sixth

---

[23] *Bullington v. Missouri*, 451 U.S. 430, 446 (1981).

[24] *Estelle*, 451 U.S. at 462-63.

[25] *Morgan v. Illinois*, 504 U.S. 719, 728-29 (1992).

[26] *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984).

Amendment required that New Jersey prove the existence of its statutory enhancements to a jury.

Two years later, in *Ring v. Arizona*, 536 U.S. 584 (2002), the Court extended its *Apprendi* protections to death eligibility determinations. In *Ring*, a judge, following Arizona's procedure, had made a factual finding that several of Arizona's statutory aggravating factors existed, rendering the defendant eligible for the death penalty. *Id.* at 592-95.

This Court reversed, stating that because "Arizona's enumerated aggravating factors operate[d] as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment require[d] that they be found by a jury." *Ring*, 536 U.S. at 609 (citation omitted) (quoting *Apprendi*, 530 U.S. at 494 n.19).

2. There is no reason the Sixth Amendment's Confrontation Clause should not be similarly extended to the eligibility phase of death penalty proceedings. This conclusion is demonstrated most clearly by the fact that the death penalty eligibility determination can be made either by "narrow[ing] the definition of capital offenses," thereby determining eligibility at the guilt phase, or by proving "aggravating circumstances at the penalty phase." *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988). When the government positions the jury's death eligibility determination in the guilt phase – by creating a "capital murder" offense, for example – defendants are necessarily afforded the full range of Sixth Amendment trial rights, including the right to confrontation. Those Sixth Amendment protections should not become inapplicable when the government

shifts the eligibility determination to a sentencing proceeding.

Just as it makes no difference to "the jury-trial guarantee of the Sixth Amendment" whether statutory aggravators are called "elements of the offense, sentencing factors, or Mary Jane," *Ring*, 536 U.S. at 610 (Scalia, J., concurring), the Confrontation Clause's applicability should not turn on whether death eligibility is determined at trial or at a separate sentencing proceeding. The Sixth Amendment's jury-trial guarantee attaches to the determination of the "functional equivalent" of elements of a crime; so too should its confrontation right. *Id.* at 609 (majority opinion) (quoting *Apprendi*, 530 U.S. at 494 n.19).

This conclusion is not at odds with this Court's decision in *Williams v. New York*, 337 U.S. 241 (1949).[27] After *Apprendi* and *Ring*, *Williams* cannot be taken to suggest that death *eligibility* can be established with unconfronted evidence. In a capital sentencing proceeding like petitioner's, death is not an "appropriate sentence" within the meaning of *Williams*, 337 U.S. at 247, until the existence of a statutory aggravating factor has been found by a jury beyond a reasonable doubt. *Williams* counsels consideration of extensive information to aid a sentencer in selecting the "type and extent of punishment" within "fixed statutory or constitutional limits." *Id.* But it does not mean that the facts

---

[27] *Williams* was decided prior to the Confrontation Clause's incorporation against the states in 1965. *See Pointer v. Texas*, 380 U.S. 400, 403 (1965).

necessary to fix those limits are not subject to the protections of confrontation in open court. This Court need not unsettle *Williams* to protect core Sixth Amendment rights.

3. Even apart from the formal logic of the *Apprendi/Ring* rule, this Court's Confrontation Clause jurisprudence makes clear that confrontation rights should apply to evidence offered to prove death eligibility. The Confrontation Clause is one of the rights that the Sixth Amendment guarantees to defendants "in all criminal prosecutions." U.S. Const. amend. VI. It applies when the government seeks to prove elements of a crime at trial and mandates that defendants be afforded the opportunity to confront and challenge evidence offered against them. *See Pointer v. Texas*, 380 U.S. 400 (1965); *see also Crawford v. Washington*, 541 U.S. 36 (2004).

The Confrontation Clause reflects the "common-law tradition . . . of live testimony in court subject to adversarial testing." *Crawford*, 541 U.S. at 43. It compels a witness to "stand face to face with the jury" so that it may judge "whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). The "Clause's ultimate goal is to ensure reliability of evidence" by subjecting it to "testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. This Court has called this procedure the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 Wigmore, Evidence § 1367 (3d ed. 1940)) (internal quotation marks omitted).

Indeed, the Court has gone so far as to say that "due process protections," including the "right to confront witnesses," are available at proceedings at

which a "sentence may be imposed based upon a 'new finding of fact.'" *Bullington v. Missouri*, 451 U.S. 430, 446 (1981) (quoting *Specht v. Patterson*, 386 U.S. 605, 608 (1967)). Yet the Idaho Supreme Court and others continue to resist this conclusion. There is no basis in law to do so.

III. This Court Should Resolve This Question Presented Here and Now

1. The conflict in the lower courts over the applicability of the Confrontation Clause to evidence offered to establish death eligibility is a matter of great consequence to the rights of defendants against whom the death penalty is sought.

This Court has recognized that the Confrontation Clause ensures that "evidence against a criminal defendant [is] subject[ed] . . . to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). In the death penalty context, the Confrontation Clause's truth-distilling function is even more important, as there is a need for "a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

The resolution of this question is also a matter of substantial importance for the administration of the death penalty. Like this Court, lower courts expend enormous resources on capital cases. Clarification of the substantive constitutional rules governing capital sentencing proceedings is essential not just to protect defendants' rights, but also to conserve judicial and administrative resources. Just as this Court has taken up the application of other provisions of the

Sixth Amendment to capital sentencing proceedings, *see, e.g.*, *Ring v. Arizona*, 536 U.S. 584 (2002); *Morgan v. Illinois*, 504 U.S. 719 (1992); *Strickland v. Washington*, 466 U.S. 668 (1984), it is important that the Court address this issue.

2. Furthermore, this case is a suitable vehicle to decide the issue. Because this case comes to this Court on direct appeal from a state supreme court ruling affirming a defendant's death sentence, it is unencumbered by the complexities that typically accompany capital cases on federal habeas review.

Additionally, in this case, the court's failure to recognize petitioner's Confrontation Clause rights substantially limited his ability to refute evidence that was plainly relevant to each of the statutory aggravators. At petitioner's capital sentencing proceeding, the State made repeated and extensive use of David Doten's report, discussing its contents at length with two witnesses and in closing arguments. *See supra* at 7-8. The State entered the report into evidence, Tr. Vol. 11, p.168, called it "relevant" during closing arguments, *id.* Vol. 12, p.78, and reminded the jury that the report was "in evidence" for their review, *id.* And the State's expert described Mr. Doten's observations as "crucial," saying that he was "much more interested in Mr. Doten's evaluation . . . than I am at mine." *Id.* Vol. 11, p.166.[28]

---

[28] The Supreme Court of Idaho itself noted that "each of the three aggravators was supported by the entirety of the evidence." Pet. App. 23a-24a.

Because the report was relevant to the statutory aggravators, and because those statutory aggravators were functional equivalents of elements of a charged offense, petitioner should have been extended the same Sixth Amendment protections that attach at a criminal trial.

CONCLUSION

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

Respectfully submitted,

Sara Thomas
Shannon Romero
STATE APPELLATE PUBLIC DEFENDER'S OFFICE
3050 N. Lake Harbor Ln.
Suite 100
Boise, ID 83703

Donald B. Ayer
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001

Jeffrey L. Fisher
Counsel of Record
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

April 28, 2014