Aggravating and Mitigating Circumstances:
A Shifting Standard

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From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.¹

Justice Blackmun may have given up on developing a constitutional procedure to remedy the flaws in our capital punishment system, but many of the Justices who remain on the Court have declined to follow suit.² Capital punishment remains a feature of the criminal justice system in a majority of states,³ and debate rages on about its efficacy and constitutionality. However, assuming that capital punishment will endure in many states for some time, it is imperative to ensure more than the mere appearance of fairness.

The Supreme Court may have cause to address one area of the capital punishment system in the coming months that could help ensure the penalty is “reserved for the worst of crimes and limited in its instances of application.”⁴ In Indiana, Kevin Charles Isom has been convicted and sentenced to three death sentences related to three murders committed in 2007.⁵ On appeal, Isom challenged the standard used to weigh aggravating and mitigating circumstances in determining the validity of a death sentence.⁶ Most states which retain the death penalty require a balance of circumstances before such a penalty is

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² See Glossip v. Gross, 135 S. Ct. 2726, 2732–33 (2015) (“Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, ‘[i]t necessarily follows that there must be a [constitutional] means of carrying it out.’”) (quoting Baze v. Rees, 553 U.S. 35, 48 (2008)); see also Matt Ford, How a Victory for the Death Penalty May Hasten Its End, THE ATLANTIC (Jul. 23, 2015), http://www.theatlantic.com/politics/archive/2015/07/death-penalty-kennedy/399419/ (indicating five justices believe the death penalty is constitutional, while at least two do not).


⁶ Isom v. State, 31 N.E.3d 469, 487 (Ind. 2015) (“According to Isom the trial court erred . . . because it did not instruct the jury that it must find that the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt in order to recommend a sentence of death.”).
given. However, the standard for that balancing is not uniform across the country and is unclear in some states.

Isom lost his appeal at the Supreme Court of Indiana. However, a cert petition for Isom v. Indiana is now pending before the Supreme Court of the United States, and a conference will be held in February to determine whether the Court will hear the case. The Court should grant certiorari to settle a circuit split, to provide clarity on the issue, and to ensure that capital punishment is appropriately restricted.

Maybe the most common factor that leads the Court to hear a case is usually rather straightforward: is there a circuit split? In some cases, however, the existence of a circuit split is not easy to determine. In this case, Isom points to varying laws and court cases that demonstrate how different states approach the weighing of aggravating and mitigating circumstances. Indiana, however, contends that states merely have different procedures for making capital sentencing determinations, but that these differences do not represent a division over the application of the relevant case law. While Indiana is, of course, correct that states are not required to use identical procedures for implementing capital punishment, if a state employs a procedure that runs afoul of the Sixth or Eighth Amendments, that would obviously be unconstitutional.

Accordingly, an earlier case, Ring v. Arizona, is likely to play a role in the Court’s decision on whether to hear Isom. In Ring, Justice Scalia wrote a concurrence stating, “the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.” Isom would call the question of whether aggravating circumstances outweigh mitigating circumstances an essential fact in Indiana’s capital punishment procedure; Indiana would disagree.

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7 See, e.g., State v. Rizzo, 266 Conn. 171, 214–16 (2003) (“We first note in this regard that, of the thirty-eight states that impose the death penalty, including Connecticut, twenty-eight states require the sentencing authority to engage in some sort of weighing process.”).
8 Isom Petition for Writ of Certiorari, supra note 5, at 3, 11 (“Legislation in different states provides different standards. Compare, e.g., Ohio Rev. Code Ann. § 2929.03(D)(2) (applying beyond-a-reasonable-doubt standard to weighing determination) with 21 OKLA. ST. ANN. § 701.11 (West, Westlaw through Chapter 399 (End) of the First Session of the 55th Legislature (2015)) (refusing application of a standard of proof to weighing determination) (“Of those States that retain the death penalty, six have statutorily imposed a requirement that death-worthiness be proven beyond a reasonable doubt. A seventh has imposed that standard judicially. The remaining death penalty jurisdictions are a patchwork with no discernible commonality.”).”)
9 Isom, 31 N.E.3d at 487–88 (Ind. 2015) (“We laid whatever uncertainty there may have been regarding this issue to rest in Inman and we decline to revisit the issue here.”).
11 Isom Petition for Writ of Certiorari, supra note 3, at 11–12.
13 U.S. CONST. amend. VI, VIII.
15 Id. at 610.
Ring involved only aggravating circumstances and merely asked whether the existence of aggravating circumstances needed to be proven beyond a reasonable doubt.\(^{16}\) Isom, in contrast, concedes the fact that at least one aggravating circumstance exists.\(^{17}\) Instead, he questions the weighing of that circumstance against other mitigating circumstances, for which no standard of proof has been set.\(^{18}\) Based on the facts of this particular case, it is possible that a change in the level of proof required to weigh circumstances would not have a practical effect for Isom.\(^{19}\) However, clarification on this issue could potentially have a great effect going forward.\(^{20}\)

Furthermore, the Eighth Amendment has been held to limit capital punishment “to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.”\(^{21}\) Isom argues that only half of this requirement is met in states like Indiana where there is no specified burden of proof for a jury to determine that aggravating circumstances have outweighed mitigating circumstances.\(^{22}\) Isom’s argument suggests that without such a standard of proof, it is not certain that only those defendants of extreme culpability will be sentenced to death.

This moral question leads into murky waters. It is not clear what exactly makes a person extremely culpable and therefore deserving of execution. It is also not clear which mitigating circumstances should be considered by a court and to what extent, as evidenced by the Supreme Court’s struggle to determine when a defendant’s upbringing should be considered to mitigate culpability.\(^{23}\) What is clear, however, is that such legal uncertainty both has potential constitutional ramifications and that different state processes may run afoul of the Eighth Amendment. As such, the issue is not merely one of federalism, with each state free to create their own procedure for administering punishment.\(^{24}\) The issue is

\(^{16}\) Id. at 588.

\(^{17}\) Isom Petition for Writ of Certiorari, supra note 5, at 3.

\(^{18}\) Id.

\(^{19}\) Isom was convicted of murdering his family with a twelve gauge shotgun and then firing at police who arrived at the scene. See Isom Respondent’s Brief in Opposition to the Petition, supra note 12, at 1. The statutory aggravating circumstance was multiple victims, the mitigating circumstances included evidence of an impoverished upbringing and a resulting posttraumatic stress disorder. See Isom Petition for Writ of Certiorari, supra note 5, at 5–7. The jury may have found the aggravating circumstance outweighed the mitigating circumstance beyond a reasonable doubt, had it been asked to do so.

\(^{20}\) As well as, potentially, going backward—as pointed out by Indiana. See Isom Respondent’s Brief in Opposition to the Petition, supra note 12, at 3. (“With no serious legal conflict to resolve, there is no reason for the Court to take this case and call into question all death sentences imposed in several states in the last decade.”).


\(^{22}\) Isom Petition for Writ of Certiorari, supra note 5, at 4.

\(^{23}\) See, e.g., Jeffrey L. Kirchmeier, A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice, 83 OR. L. REV. 631, 685 (“Although the Supreme Court has noted that a defendant’s family background may be a mitigating factor, it has not provided a clear explanation for the reasons.”).

\(^{24}\) This is the argument put forth by Indiana. See Isom Respondent’s Brief in Opposition to the Petition, supra note 12, at 5 (“Federalism and comity principles have led the Court to abjure one-size-fits-all death penalty procedures. . . . Under our constitutional system, each state may proscribe different criminal acts and impose different penalties.”).
constitutional, and that is likely problematic.

In light of these constitutional ramifications, the jury right provided by the Eighth Amendment is of crucial importance. According to Justices Stevens and Breyer, this right arises due not to the jury’s proficiency at determining facts but rather their role in expressing the conscience of the community. The jury right found in the Eighth Amendment “better effectuates the jury-right promise of the Sixth Amendment than does the Sixth Amendment itself.” While the Court has given this Eighth Amendment jury right some attention, clear reinforcement would better protect those defendants who do not qualify as extremely culpable. If we are going to continue tinkering with the machinery of death, the Eighth Amendment jury right should be considered a minimum requirement in any capital sentencing proceeding.

In sum, most states that employ the death penalty require three specific findings before such a sentence is implemented. First, a finding of any aggravating factors; second, a finding of any mitigating factors; and finally, a balancing of those aggravating and mitigating factors. That balance either counsels in favor of or against a death sentence.

26 Id.
27 Id.
28 Id. at 531 n. 13, 14 (See Schriro v. Summerlin, 542 U.S. 348, 360 (2004) (Breyer, J., dissenting) (“I believe the Eighth Amendment demands the use of a jury in capital sentencing because a death sentence must reflect a community-based judgment that the sentence constitutes proper retribution.”); Ring v. Arizona, 536 U.S. 584, 614 (2002) (Breyer, J., concurring) (“I believe that jury sentencing in capital cases is mandated by the Eighth Amendment.”); Harris v. Alabama, 513 U.S. 504, 526 (1995) (Stevens, J., dissenting) (“To permit the State to execute a woman in spite of the community’s considered judgment that she should not die is to sever the death penalty from its only legitimate mooring.”); Spaziano v. Florida, 468 U.S. 447, 490 (1984) (Stevens, J., concurring in part and dissenting in part) (explaining that because the state did not persuade a jury of the petitioner’s peers “that death is an appropriate punishment for his offense[.]” the state had “authorized the imposition of disproportionate punishment in violation of the Eighth and Fourteenth Amendments”).
29 See, e.g., State v. Rizzo, 266 Conn. 171, 214 (2003). The Connecticut Supreme Court surveyed other state systems and found:

We first note in this regard that, of the thirty-eight states that impose the death penalty, including Connecticut, twenty-eight states require the sentencing authority to engage in some sort of weighing process. Of those twenty-eight states, six have statutes that expressly incorporate a burden of beyond a reasonable doubt. The manner in which that burden is imposed, however, differs among those states. Two of the states, namely, Ohio and Utah, impose the burden, not on the outcome of the weighing process, but on the level of certitude of the sentencing authority. See, e.g., Ohio Rev. Code Ann. § 2929.03 (D) (1) (West 1997) (“the prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death” [emphasis added]); Utah Code Ann. § 76-3-207 (5) (b) (Sup. 2002) (“the death penalty shall only be imposed if, after considering the totality of the aggravating and mitigating circumstances, the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and is further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances” [emphasis added]). In addition, three of these states, namely, Arkansas, New Jersey and Tennessee, appear to
Such a sentence is often only lawful if the aggravating factors outweigh the mitigating factors.\textsuperscript{30} Scalia, in his concurrence in \textit{Ring}, went on to say “[w]e cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.”\textsuperscript{31} Yet, as many have pointed out, “it is not clear what, if anything, \textit{Ring} demands of the states.”\textsuperscript{32} This legal fog must be addressed by the Court, and \textit{Isom v. Indiana} presents the opportunity to do so.

\textsuperscript{30} See, e.g., People v. Young, 814 P.2d 834, 846-47 (Colo. 1991) (“The Colorado death penalty statute as amended in 1988 mandates imposition of the death penalty when the jury decides that aggravating and mitigating factors are equally balanced. Because we conclude that such a statute does not assure a constitutionally certain and reliable verdict of death under the Colorado Constitution, . . . we discharge the rule.”).

\textsuperscript{31} \textit{Ring}, 536 U.S. at 612.

\textsuperscript{32} Kamin & Marceau, \textit{supra} note 25, at 529.