No. 14-602

In the Supreme Court of the United States

ALEJANDRO ENRIQUE RAMIREZ UMAÑA, PETITIONER

v.

UNITED STATES OF AMERICA
(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment bars the admission of testimonial hearsay in the sentence-selection phase of a federal capital sentencing in which the jury determines whether or not to impose a capital sentence on a defendant already found statutorily eligible for a death sentence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-84a) is published at 750 F.3d 320.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-84a) was entered on January 28, 2014. A petition for rehearing was denied on August 12, 2014 (Pet. App. 113a-124a). On September 8, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 24, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina,

petitioner was convicted on two counts of capital murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1), two counts of capital murder while using and possessing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and (j)(1), and numerous noncapital crimes. C.A. App. 3697. After penalty-phase proceedings pursuant to the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591-3598, the jury unanimously recommended that petitioner be sentenced to death on each of the four capital counts, and the district court imposed that sentence. C.A. App. 3698. The court of appeals affirmed. Pet. App. 1a-64a.

1. The FDPA provides that when a defendant is convicted of a capital crime and the government seeks the death penalty, the court is to convene a separate sentencing proceeding before the same jury. 18 U.S.C. 3593(b). Evidence at the sentencing hearing "is admissible regardless of its admissibility under" the Federal Rules of Evidence, "except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. 3593(c). The government bears the burden of establishing any aggravating factors beyond a reasonable doubt. *Ibid.* The defendant bears the burden of establishing any mitigating factors by a preponderance of the evidence. *Ibid.*

After the hearing, the jury decides whether the government has established beyond a reasonable doubt at least one of the mental states specified in 18 U.S.C. 3591(a)(2) and at least one of the aggravating factors specifically enumerated in the FDPA. 18 U.S.C. 3593(d). If so, then the defendant is eligible for

the death penalty, and the jury then considers "whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death," and recommends a sentence by unanimous vote. 18 U.S.C. 3593(e).

2. Petitioner is a longtime member of the violent transnational gang known as Mara Salvatrucha or MS-13. Pet. App. 2a-5a. He joined the gang in El Salvador in 2001. He illegally entered the United States in 2004, and then resided in Los Angeles and New York, building up "a substantial reputation" within the gang. *Ibid.* In the fall of 2007, because of petitioner's expertise as a leader of the gang, another MS-13 leader directed petitioner to travel to Charlotte, North Carolina, to resolve infighting among MS-13 cliques. *Id.* at 4a-5a. Once there, petitioner inspected MS-13 members' weapons and instructed them in extortion, selling drugs, and stealing cars. *Ibid.*

Several months after arriving in North Carolina, in December 2007, petitioner and several other MS-13 members went to a restaurant called Las Jarochitas in the town of Greensboro. Pet. App. 5a. At the restaurant, MS-13 members got into an argument with two regular patrons, the brothers Ruben and Manuel Salinas, over the MS-13 members' jukebox selections. *Id.* at 5a-6a. Manuel Salinas tried to resolve the conflict by buying the MS-13 members a bucket of beers, but the gang members rebuffed the gesture—neither drinking nor otherwise acknowledging the offering. *Id.* at 6a.

Ultimately, a waitress asked the MS-13 members to leave the restaurant. Pet. App. 6a. As the gang

members left, however, the group verbally sparred with the brothers. Ruben Salinas told the MS-13 members that he "wasn't scared of them." After a gang member responded that he should not "mess with them" because they were from "MS," Ruben Salinas responded that the gang was "fake to him." *Ibid.*

Petitioner stayed inside the restaurant when other gang members left. Pet. App. 6a. A second gang member, known as "Spider," reentered when he realized that petitioner had stayed behind. *Ibid.* When a waitress tried to pull petitioner to the door, Spider grabbed her and told her not to touch petitioner. *Ibid.* At this point, petitioner pulled his gun and pointed it at the Salinas brothers. *Ibid.* He held the gun sideways, aiming it at the brothers, who remained motionless. *Ibid.* After petitioner and the brothers remained in place for as long as a minute, petitioner fired five shots at the brothers, killing both. *Ibid.* A third person was hit in the shoulder and survived. *Ibid.*

Following the murders, petitioner returned to Charlotte with other MS-13 members, including a gang member who had been serving as a confidential informant to law enforcement agents and whom MS-13 members had contacted for help in getting back to Charlotte. Pet. App. 7a. On the trip back, petitioner told the informant to smell his gun because it still carried the scent of gunpowder from being fired; cocked and uncocked the weapon; and said that he was going to "pee on [his] hands" to get rid of the gunpowder. *Ibid.* Of the third shooting victim, petitioner expressed regret that he did not "kill that son of a bitch." *Ibid.* Petitioner told the men in the car that if

a police officer pulled him over while carrying the weapon, the officer would be on the wrong end of his gun. *Ibid.*

Police arrested petitioner four days after the shooting. Pet. App. 7a. They found the murder weapon in the sofa where petitioner was sitting at the time of his arrest. *Ibid.* Petitioner later told other MS-13 members that the police who arrested him had been "lucky" because he had been "trying to grab for his gun." *Ibid.*

After being arrested for the murders, petitioner continued to direct violence by MS-13, including by instructing fellow gang members to "execute rivals and intimidate potential witnesses against him" in lengthy, explicit letters (written using a code that law enforcement agents successfully cracked). Pet. App. 8a; see Gov't C.A. Br. 28-39.[1]

3. A grand jury returned an indictment charging petitioner with four capital offenses and a number of other crimes. Based on the killings of Ruben and Manuel Salinas, petitioner was charged with two counts of capital murder in aid of racketeering and two counts of capital murder using a firearm during

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[1] Petitioner sought to personally intimidate witnesses, and attempted to smuggle a weapon to court, once the trial began. As testimony at the sentence-selection phase established, during trial petitioner threatened one of the witnesses who testified—flashing gang signs and telling the witness that "your family's going to pay you mother—." Pet. App. 8a. In addition, as the jury also learned during the sentence-selection phase, petitioner attempted to smuggle a four-inch knife to the courthouse by tying the blade, concealed in a paper sheath, to his penis. *Ibid.* The knife was discovered during a U.S. Marshal's Service pat-down immediately before petitioner's being brought to court for the first day of trial. *Ibid*; C.A. App. 3689.

and in relation to a crime of violence. Pet. App. 2a, 9a. Non-capital counts charged petitioner with participating in a racketeering conspiracy that included the premeditated murder of the Salinas brothers; robbery affecting interstate commerce; conspiracy to obstruct justice and tamper with witnesses; witness tampering, and being an alien in possession of a firearm. *Ibid.*; C.A. App. 318-422.[2] The government provided notice of its intent to seek the death penalty on the capital counts. Pet. App. 9a; C.A. App. 154-162. After a trial, a jury convicted petitioner of all counts before it, including the four capital counts relating to the murders of the Salinas brothers. Pet. App. 8a.

The district court then convened a FDPA sentencing proceeding, which it divided into separate eligibility and sentence-selection phases. Pet. App. 9a. The eligibility phase concerned whether petitioner met the statutory requirements for imposition of the death penalty. C.A. App. 2628-2647; see 18 U.S.C. 3591(a), 3592(a), and 3592(c) (requiring that a defendant be at least 18 years old at the time of the murders; have acted intentionally; and that at least one statutory aggravating factor be established). As relevant to that determination, the government alleged two statutory aggravating factors—that the charged murders created a grave risk of death to more than one person and that petitioner had killed or attempted to kill more than one person in a single episode. C.A. App. 2561-2602, 2604, 2626-2627; see 18 U.S.C. 3592(c)(5) and (16). To establish those factors, the government relied on its proof from petitioner's trial, as well as the

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[2] Two additional offenses contained in the indictment were not submitted to the jury: extortion conspiracy and obstruction of justice. Gov't C.A. Br. 6.

testimony of three additional percipient witnesses to either the shooting or its immediate aftermath. See C.A. App. 2574-2602. Petitioner called no witnesses during the eligibility phase. *Id.* at 2602. The jury unanimously found that the eligibility requirements of the FDPA were satisfied beyond a reasonable doubt. Pet. App. 9a; C.A. App. 2628-2647.

The proceedings then turned to the selection phase. Petitioner and the government offered evidence to persuade the jury about the appropriate penalty. Pet. App. 9a-10a. The government called 21 witnesses and offered numerous exhibits, while arguing that four nonstatutory aggravating factors supported a death sentence: (1) that petitioner killed the Salinas brothers to protect and maintain the reputation of MS-13 and to advance his position and reputation within the criminal enterprise; (2) that petitioner caused injury, harm, and loss to the Salinas brothers' family and friends; (3) that petitioner participated in additional violence, including by intentionally killing three men in Los Angeles, California, in 2005; and (4) that petitioner posed a continuing and serious threat to the lives and safety of others, as evidenced by his engaging in a continuing pattern of violence, his allegiance to and membership in MS-13, and his lack of remorse for the killings. *Id.* at 10a; C.A. App. 3484-3486, 3543-3578.

Some of the evidence presented during the sentence-selection phase concerned petitioner's participation in three murders in 2005. The government offered evidence concerning petitioner's role in an MS-13-linked murder in which two men opened fire on four people at a basketball court in Lemon Grove Park in Los Angeles. Pet. App. 4a; C.A. App. 2666-2667.

One of the men was killed, two were injured, and a fourth—Freddie Gonzalez, who had recently had a dispute with an MS-13 gang member—escaped unharmed. Pet. App. 4a. At the sentence-selection phase, the government offered in-court testimony from Gonzalez, who had identified petitioner as the person who shot at him using a photograph line-up—albeit not to a certainty. *Ibid.*; C.A. App. 2874-2902. The government also offered petitioner's own admissions that he drove to the Lemon Grove Park basketball court with an MS-13 member and others just before the shooting—though petitioner claimed that his involvement was limited to driving the shooters there. Pet. App. 4a; see C.A. App. 2675-2676. In addition, the government offered evidence that an MS-13 member, Rene Arevalo, had identified petitioner as having opened fire at the basketball court, in out-of-court statements to police. C.A. App. 2675-2676.

The government also offered evidence that petitioner participated in two murders in an MS-13-related confrontation on Fairfax Avenue in Los Angeles. Pet. App. 4a. The confrontation began when a car of MS-13 members pulled alongside two "taggers," or graffiti artists, in the street. After the taggers flashed gang signs that were perceived as challenges to MS-13, shots were fired, killing the two graffiti artists. *Ibid.* At the sentence-selection phase, as relevant to these murders, the government offered ballistics evidence showing that the gun that fired the shots was also used in the Lemon Grove Park shootings; petitioner's statements admitting he was present on Fairfax Avenue when the shootings occurred, while again denying he had fired the shots; and statements of Arevalo and two other MS-13 members to police that

they saw petitioner fire the fatal shots. Pet. App. 4a, 35a; C.A. App. 2671. Two civilian witnesses, whose statements to police were also elicited at the sentence-selection phase, indicated that the driver of the vehicle —not petitioner—had fired the bullets. C.A. App. 2757, 2775-2776.

The government also called numerous witnesses who gave testimony concerning the other aggravating factors. Witnesses testified concerning petitioner's attempt to bring a concealed knife to the first day of his trial; petitioner's attempts to intimidate a trial witness; petitioner's attempt to recruit another inmate to join MS-13 while incarcerated; and petitioner's involvement in violence and possession of contraband while incarcerated pending trial. The government introduced into evidence letters demonstrating petitioner's attempts to lead gang activities and direct violence by MS-13 while in jail. And Manuel Salinas's wife and daughters testified concerning the impact of petitioner's murders. See C.A. App. 2938-2964.

At the close of the sentence-selection phase, the jury unanimously agreed on a death sentence in accordance with the FDPA's procedures. The jurors first unanimously found beyond a reasonable doubt all four non-statutory aggravating factors alleged by the government. Pet. App. 10a; C.A. App. 3543-3578. The jurors also unanimously found four mitigating factors: that petitioner was raised without his mother; that the murders of the Salinas brothers did not involve substantial planning; that the murders of the Salinas brothers occurred during an emotionally charged argument; and that the murders of the Salinas brothers occurred as a result of petitioner's indoctrination into MS-13. C.A. App. 3573. Nine jurors also found

that petitioner was exposed to violence during the civil war in El Salvador, and a minority of jurors found additional mitigating factors proposed by petitioner.[3] *Ibid.* After weighing the aggravating and mitigating evidence, the jury unanimously agreed that a sentence of death should be imposed as to each count. C.A. App. 3549, 3558, 3567, 3576. The district court imposed that sentence. *Id.* at 3698.

4. a. The court of appeals affirmed. Pet. App. 1a-64a. As relevant here, the court rejected petitioner's claim that the Confrontation Clause of the Sixth Amendment limits the evidence that may be considered at the FDPA selection phase when a jury determines whether a death-eligible defendant should receive a capital sentence. *Id.* at 36a-41a. The court observed that "[c]ourts have long held that the right to confrontation does not apply at sentencing, even in capital cases." *Id.* at 36a. Most notably, the court explained, *Williams* v. *New York*, 337 U.S. 241 (1949), rejected a defendant's challenge to a death sentence on the ground that the sentence was imposed "based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal." Pet. App. 36a-37a (quoting *Williams*, 337 U.S. at 243). This Court in *Williams*, the court of appeals noted, had explained that sentencing is "highly discre-

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[3] Four jurors found that petitioner had grown up in poverty; three jurors found petitioner's childhood marked by factors that impeded moral development; two jurors found petitioner's early life experiences made him more susceptible to gang indoctrination; one juror found petitioner lacked schooling after third grade; and one juror found that the murders of the Salinas brothers did not involve cruel or excessive pain and suffering. C.A. App. 3573.

tionary function." *Id.* at 37a. The court of appeals observed that, in contrast to determinations of guilt or innocence, concerning which the factfinder was constitutionally required to be "'hedged in by strict evidentiary procedural limitations,'" this Court explained that "the sentencing judge should be able to consider 'the fullest information possible concerning the defendant's life and characteristics"—information that "would become 'unavailable'" if sentencing evidence were "restricted to that given in open court by witnesses subject to cross-examination." *Ibid.* (quoting *Williams*, 337 U.S. at 246). The court of appeals concluded that *Williams* "squarely dispose[d]" of petitioner's argument that the confrontation right should apply to capital sentencing. *Ibid.*

The court of appeals rejected petitioner's claim that "intervening case law has eroded *Williams*." Pet. App. 37a. To the contrary, it noted, this Court had "reaffirmed [*Williams*'s] viability" in *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013), by citing *Williams* for the principle that the Sixth Amendment does not govern the "factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.'" Pet. App. 37a-38a (quoting *Alleyne*, 131 S. Ct. at 2161 n.2). The court of appeals found additional support in this Court's capital cases, which held that fair sentencing in such cases required that the jury be permitted "as much information before it as possible when it makes the sentencing decision." *Id.* at 38a (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 204 (1976), and citing *Woodson* v. *North Carolina*, 428 U.S. 280, 303-305 (1976)).

The court of appeals rejected petitioner's argument that the Confrontation Clause must constrain the

evidence in a capital sentencing because facts found by the jury in a sentencing proceeding "alter[] the legally prescribed range" of punishment "in a way that aggravates the penalty." Pet. App. 39a. The court explained that, under the FDPA, "the jury finds the facts necessary to support the imposition of the death penalty in the guilt and eligibility phases of the trial." *Id.* at 40a (emphasis omitted). In contrast, "[d]uring the selection phase, a jury is not legally required to find any facts." *Ibid.* "[W]hile it may do so," the court explained, "such facts are neither necessary nor sufficient to impose the death penalty—they merely guide the jury's discretion in choosing a penalty." *Ibid.*[4]

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[4] The court of appeals also affirmed the district court's determination that the particular hearsay admitted in petitioner's trial bore "sufficient indicia of reliability" to permit its admission under 18 U.S.C. 3593(c), the statutory safeguard requiring evidence in sentencing proceedings to be excluded "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." See Pet. App. 41a-43a. The court noted that "strong evidence," including petitioner's own statements, ballistics evidence, and the in-court testimony of Freddy Gonzalez, corroborated the out-of-court statement of Arevalo concerning the Lemon Grove Park murders. *Id.* at 42a-43a. The same was true of the out-of-court statements concerning the Fairfax Avenue murders. *Id.* at 42a. The out-of-court statements "contained many consistent details, such as the 'make and model of car involved, the presence of crutches, the names of the other participants, the number of victims, and the specific gang signs displayed by the victims.'" *Ibid.* (quoting the district court). And the statements were corroborated by considerable other evidence, including the fact that petitioner "admitted to being at the scene of both crimes," and the absence of any "evidence that anyone else was present at *both* murder sites," and the "undisputed ballistics evidence indicating that the same gun was used for both the Fairfax Street and Lemon Grove Park murders." *Ibid.*

b. Judge Gregory dissented, arguing that the Confrontation Clause precluded the jury from considering unconfronted out-of-court statements to police at the sentence-selection phase of petitioner's case. Pet. App. 65a-84a. He acknowledged that other courts of appeals had uniformly found that the Confrontation Clause did not limit the evidence that could be admitted during the sentence-selection phase of a criminal case, Pet. App. 65a-66a (citing *Muhammad* v. *Secretary, Fla. Dep't of Corr.*, 733 F.3d 1065 (11th Cir. 2013), cert. denied, 134 S. Ct. 893 (2014); *Szabo* v. *Walls*, 313 F.3d 392, 398 (7th Cir. 2002); *United States* v. *Fields*, 483 F.3d 313, 324-338 (5th Cir. 2007), cert. denied, 552 U.S. 1144 (2008)), with the exception of a decision "expressly limit[ed] * * * to psychiatric reports," *id.* at 66a (citing *Proffitt* v. *Wainwright*, 685 F.2d 1227, 1253-1254 (11th Cir. 1982), modified, 706 F.2d 311, cert. denied, 464 U.S. 1002 and 464 U.S. 1003 (1983)).

Judge Gregory explained, however, that he took a different view. Beginning from the principle that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding," Pet. App. 75a (quoting *Crawford* v. *Washington*, 541 U.S. 36, 54 (2004)), Judge Gregory acknowledged that "hearsay testimony was often used" in non-capital sentencings during the Founding period, *id.* at 76a & n.2. But he reasoned that because "a death sentence flowed automatically

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The court further noted that while petitioner attempted "to explain away the significance of the ballistics match by suggesting that MS-13 members sometimes share guns, * * * there was no evidence that [petitioner] himself ever shared his gun." *Ibid.*

from convictions for certain capital felonies" at the Founding, consideration of hearsay testimony at the sentence-selection phase of a capital trial was inappropriate. *Id.* at 75a-76a.

Judge Gregory cited several authorities in support of his view. He first invoked Sir Walter Raleigh's case as exemplifying the mode of trial that the Confrontation Clause sought to ban. Pet. App. 76a-77a. Judge Gregory acknowledged that Raleigh's case involved a conviction based on unconfronted testimony, not the use of hearsay statements at a sentencing, but he argued that "what made that infamous case so odious was the lack of a confrontation right before Raleigh was sentenced to death." *Ibid.*

Judge Gregory also invoked *Ring* v. *Arizona*, 536 U.S. 584 (2002), which held that defendants have a Sixth Amendment right to have a jury find the aggravating factors necessary to make a defendant eligible for a death sentence. Pet. App. 77a-78a. Judge Gregory recognized that *Ring* "does not control here, since this case concerns the introduction of unconfronted testimony in the third stage of FDPA trials"—involving the weighing of evidence to select a sentence—rather than in the phase at which the jury determines whether a defendant is eligible for the death penalty. *Ibid.* But he argued that the sentence-selection phase also involves "factual findings" that may be necessary to the jury's sentencing decision because the jury must ultimately decide that "all the . . . aggravating factors found to exist sufficiently outweigh all the mitigating factors" to justify a sentence of death. *Id.* at 78a (citing 18 U.S.C. 3593(e)). Judge Gregory distinguished *Williams*, on which the majority relied, as "a pre-incorporation, pre-FDPA

case concerning a state death sentence," which he argued "should not be extended to apply to FDPA proceedings on Sixth Amendment grounds." *Id.* at 79a-80a.

5. The court of appeals denied rehearing en banc by an 8-5 vote, with two judges writing opinions to express their views. Pet. App. 113a-124a. Judge Wilkinson, joined by Judge Niemeyer, wrote an opinion concurring in the denial of rehearing en banc. *Id.* at 114a-119a. He agreed that "[t]he trial right to confrontation * * * is not among the constitutional accoutrements of sentencing," and he also emphasized that the court of appeals was not free to disregard this Court's decision in *Williams*. *Id.* at 118a. Judge Gregory, joined by Judge Wynn, dissented from the denial of rehearing en banc, urging this Court to adopt the Confrontation Clause approach advanced in his panel dissent. *Id*. at 119a-124a.

ARGUMENT

Petitioner renews his contention (Pet. 22-31) that the Confrontation Clause barred the jury from considering during the sentence-selection phase of his federal death penalty trial certain out-of-court statements made to police. The court of appeals correctly rejected that argument, and further review is unwarranted.

1. The Confrontation Clause limits the evidence that may be introduced at a criminal trial, but it does not limit the evidence that a judge or jury may consider in exercising sentencing discretion within statutory boundaries. The Confrontation Clause's guarantee "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."

Crawford v. *Washington*, 541 U.S. 36, 54 (2004); see also *id.* at 68 ("Where testimonial evidence is at issue * * * the Sixth Amendment demands what the common law required.").

The common-law confrontation right protected against the use of "testimonial" out-of-court statements *at trial* unless the witness was unavailable to testify and the defendant has had a prior opportunity for cross-examination, *Crawford*, 541 U.S. at 68, but it did not limit the evidence that could be received at sentencing, *Williams* v. *New York,* 337 U.S. 241, 246 (1949). Instead, "both before and since the American colonies became a nation," the sentencing judge has been permitted "wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Ibid.* Courts have thus "treated the rules of evidence applicable to the trial procedure and the sentencing process differently," with "[o]ut-of-court affidavits * * * used frequently" at sentencing. *Id.* at 246 & n.4. In other words, the "right of confrontation at common law" to which the Sixth Amendment "is most naturally read as a reference," *Crawford,* 541 U.S. at 54, has never constrained the information that may be considered in exercising discretion to decide on an appropriate sentence following a conviction.

In *Williams*, this Court rejected a capital defendant's claim that a state court violated his right of confrontation by considering at sentencing evidence of unadjudicated crimes, concerning which the defendant had no opportunity for confrontation or cross-examination. 337 U.S. at 243-244. This Court declined to recognize a confrontation right at sentencing under

the Due Process Clause, on the ground that it went beyond the traditional confrontation protection, *id.* at 246-247, and on the ground that rejecting the "age-old practice of seeking information from out-of-court sources to guide [courts'] judgment toward a more enlightened and just sentence" would also run contrary to contemporary approaches to sentencing, *id.* at 250-251; see also *Williams* v. *Oklahoma*, 358 U.S. 576, 584 (1959).

More recently, this Court has explained that *Williams* establishes that "the Sixth Amendment does not govern" the "factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.'" *Alleyne* v. *United States*, 133 S. Ct. 2151, 2161 n.2 (2013) (quoting *Williams*, 337 U.S. at 246); see also *e.g.*, *Nichols* v. *United States*, 511 U.S. 738, 747 (1994) ("As a general proposition, a sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.") (quoting *United States* v. *Tucker*, 404 U.S. 443, 446 (1972)).

Petitioner asserts (Pet. 25) that *Williams* is inapposite because it addressed a confrontation-related claim under the Due Process Clause, rather than under the Confrontation Clause (which had not yet been held directly enforceable against the States, see *Pointer* v. *Texas*, 380 U.S. 400, 406 (1965)). But petitioner overlooks that *Williams* rejected the defendant's claim under the Due Process Clause principally on the ground that the right he asserted was not safeguarded under the common-law confrontation right

that the Confrontation Clause protects.[5] He also overlooks that this Court has continued to treat *Williams* as setting out the constitutional rule applicable to unconfronted testimony after the incorporation of the Confrontation Clause. See *Alleyne*, 133 S. Ct. at 2161 n.2.

Petitioner also errs in suggesting that *Williams* was wrongly decided. Petitioner contends (Pet. 23) that the Confrontation Clause must bar admission of testimonial out-of-court statements at sentencing because the Clause applies "[i]n all criminal prosecutions," U.S. Const. Amend. VI, and "sentencing is part of a 'criminal prosecution.'" But while the Confrontation Clause undisputedly applies in every prosecution, the scope of its protection takes its measure from the "right of confrontation at common law," see *Crawford*, 541 U.S. at 54—a right that limited testimonial evidence at trial, but not in sentencing. Nor was *Williams* was wrongly decided because "[w]hen the Sixth Amendment was drafted, for a host of felonies, a guilty verdict mandated a death sentence." Pet. 24. That judges historically had *no* discretion in sentencing for certain offenses, as the *Williams* Court understood, see 337 U.S. at 247, says little about the permissible evidentiary framework in cases in which the judge or jury does have sentencing discretion.

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[5] Because a principal ground for the rejection of the confrontation claim in *Williams* was that the claim went beyond the historic contours of the confrontation right (and because *Williams* was decided long before *Ohio* v. *Roberts*, 448 U.S. 56 (1980)), petitioner is mistaken in suggesting (Pet. 25) that *Williams* lacks continuing force because "when *Williams* was decided, the Confrontation Clause was satisfied so long as an out-of-court statement bore 'adequate "indicia of reliability."'" Pet. 25 (quoting *Roberts*, 448 U.S. at 66).

Finally, petitioner is mistaken in suggesting (Pet. 27-29) that the limitation on sentence-selection evidence he seeks is supported by this Court's decisions requiring that a jury find beyond a reasonable doubt "any fact that increases the penalty for a crime beyond the prescribed statutory maximum," Pet. 28 (quoting *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000)), including any fact necessary to make a defendant eligible for the death penalty, Pet. 29 (citing *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002)). As the court of appeals explained, under the FDPA, "the jury finds the facts necessary to support the imposition of the death penalty in the guilt and eligibility phases of the trial." Pet. App. 40a (emphasis omitted). That is, once a jury finds that the government has established beyond a reasonable doubt the defendant's age at the time of the offense, at least one of the mental states specified in 18 U.S.C. 3591(a)(2), and at least one of the aggravating factors specifically enumerated in the FDPA, 18 U.S.C. 3593(d), the "jury is not legally required to find any [additional] facts" to select a death sentence, Pet. App. 40a. The defendant is then statutorily eligible for a death sentence, and the jury's task turns to determining whether that sentence is appropriate. Since any additional factual findings that the jury makes do not "increase[] the penalty * * * beyond the prescribed statutory maximum," *Apprendi*, 530 U.S. at 490, and are not "necessary for imposition of the death penalty," *Ring*, 536 U.S. at 609, such findings do not implicate the Sixth Amendment cases on which petitioner relies.

2. Petitioner's case does not present a conflict warranting this Court's intervention. The decision below is consistent with every decision of a federal court of

appeals addressing application of the Confrontation Clause to capital sentencing proceedings. See *United States* v. *Fields*, 483 F.3d 313, 335 (5th Cir. 2007), (holding that the Confrontation Clause does not limit the introduction of "testimony relevant only to penalty selection in a capital case"), cert. denied, 552 U.S. 1144 (2008); *Muhammad* v. *Secretary, Fla. Dep't of Corrs.*, 733 F.3d 1065, 1074-1075 (2013) (rejecting confrontation claim on the ground that "hearsay is admissible at capital sentencing" proceedings, potentially subject to exception relating to psychiatric reports admitted at sentencing), cert. denied, 134 S. Ct. 893 (2014); see also *Szabo* v. *Walls*, 313 F.3d 392, 398 (7th Cir. 2002) (denying challenge on collateral review because, since "the Supreme Court has held that the Confrontation Clause does not apply to capital sentencing," denial of confrontation claim was not contrary to clearly established law). Several state courts of last resort have also rejected confrontation claims in capital sentencing proceedings. See *Summers* v. *State*, 148 P.3d 778, 779 (Nev. 2006); *State* v. *McGill*, 140 P.3d 930, 941 (Ariz. 2006).

The several state-court decisions limiting evidence in capital proceedings based on the Confrontation Clause do not generate a conflict warranting this Court's intervention. Petitioner invokes several decisions that—in very brief analyses—found violations of the Confrontation Clause from the admission of evidence in proceedings under state death penalty statutes. But none of those decisions found violations based on evidence introduced only after a jury had already found all facts necessary to establish the defendant's eligibility for the death penalty. All but one involved evidence introduced at a sentencing during

which the jury both made findings required to render the defendant eligible for the death penalty and also decided whether to impose a capital sentence. *State* v. *Carr*, 331 P.3d 544, 723-724 (Kan. 2014) (per curiam), cert. granted, No. 14-450 (Mar. 30, 2015);[6] *Pitchford* v. *State*, 45 So. 3d 216, 251-252 (Miss. 2010);[7] *Russeau* v. *State*, 171 S.W.3d 871, 880-881 (Tex. Crim. App. 2005), cert. denied, 548 U.S. 926 and 548 U.S. 927 (2006);[8] *State* v. *Bell*, 603 S.E.2d 93, 116 (N.C. 2004), cert. denied, 544 U.S. 1052 (2005);[9] *Grandison* v. *State*, 670 A.2d 398, 413 (Md. 1995), cert. denied, 519 U.S. 1027

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[6] See Kan. Stat. Ann. § 21-4624(e) (2007) (recodified at Kan. Stat. Ann. § 21-6617 (2011)) (providing that jury must find at least one aggravating factor beyond a reasonable doubt); Pet. App. 519-520, *Kansas* v. *Carr*, No. 14-449 (Oct. 16, 2014) (quoting verdict forms submitted to jury following unitary sentencing proceeding).

[7] See Miss. Code Ann. § 99-19-103 (2006 & Supp. 2014) (providing that jury must find at least one aggravating factor beyond reasonable doubt); Appellee Br., *Pitchford* v. *State*, No. 2006-DP-00441-SCT, 2009 WL 6764870, at *1-*2 (Miss. Aug. 10, 2009) (describing verdict forms in unitary sentencing proceeding).

[8] See Tex. Code Crim. Proc. Ann. art. 37.071, § 2(b)(1) and (g) (West 2006 & Supp. 2014) (providing that jury must find beyond a reasonable doubt "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"); Def. Br., *Russeau* v. *State*, No. 74,466, 2003 WL 23320300, at *158 (Tex. Crim. App. Nov. 21, 2003) (noting that the challenged out-of-court statements were offered "as part of [the State's] case in chief at punishment to support its contention that Appellant would be continuing threat to society").

[9] See N.C. Gen. Stat. § 15A-2000 (2013) (providing that jury must find at least one aggravating factor beyond a reasonable doubt); *Bell*, 603 S.E.2d at 115 (describing unitary "sentencing phase of defendant's trial").

(1996).[10] Proceedings to find aggravating factors necessary for the imposition of a death sentence are the type of proceedings in which the court below indicated the Confrontation Clause would apply, precisely because they involved fact-finding necessary to make the defendant eligible for imposition of the death penalty. Pet. App. 39a-40a. The remaining case, arising under Florida's unusual capital sentencing law, likewise involved evidence offered before either the judge or jury made findings on the existence of an aggravator—as legally necessary for the imposition of the death penalty under Florida law. *Rodgers* v. *State*, 948 So. 2d 655, 663 (Fla. 2006) (per curiam), cert. denied, 552 U.S. 833 (2007).[11]

The limited potential relevance of these cases to the constitutional rules applicable to the selection phase of bifurcated sentencing proceedings under the FDPA is underscored by the limited analysis of those

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[10] See *Grandison*, 670 A.2d at 231-232 (noting that under the since-repealed Maryland capital law, the sentencer "may not even consider the appropriateness of a death sentence unless the State has established, beyond a reasonable doubt, that one or more statutory aggravating circumstances exist"); *id.* at 229-230 (noting court's refusal to bifurcate sentencing proceeding).

[11] See Fla. Stat. Ann. § 921.141 (West Supp. 2015) (permitting jury to recommend death penalty only if it finds aggravating factor and permitting judge to impose death sentence only after making similar finding based on evidence before the jury); see also *Evans* v. *Secretary, Fla. Dep't of Corr.*, 699 F.3d 1249, 1256-1257 (11th Cir. 2012) (describing Florida's capital sentencing approach). In *Hurst* v. *Florida*, cert. granted, No. 14-7505 (Mar. 9, 2015), this Court will consider "[w]hether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring* v. *Arizona*, 536 U.S. 584 (2002)." The question framed by the Court does not embrace Confrontation Clause issues.

decisions. Of the decisions on which petitioner relies, one does not even discuss the Confrontation Clause's applicability at sentencing, but merely applies the Clause without analysis. *Russeau*, 171 S.W.3d at 880-881. Another applies state precedent that traces back to a similarly unreasoned decision. *Bell*, 603 S.E.2d at 116. A third, which concerns proceedings under a repealed statute, does not make clear whether it relies on the Sixth Amendment or on a similar state constitutional provision. *Grandison*, 670 A.2d at 413. A fourth decision provides short prospective guidance in the course of reversing two defendants' sentences on other grounds. *Carr*, 331 P.3d at 723.[12] None of these decisions evidences a developed disagreement concerning the evidentiary rules applicable to sentence-selection proceedings under the FDPA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12] This Court granted review of Eighth Amendment and severance-related questions in *Carr*, but declined Kansas's request that the Court review a question concerning the Confrontation Clause's application in capital sentencing proceedings. Order, *Kansas* v. *Carr*, No. 14-450 (Mar. 30, 2015). This Court denied certiorari concerning the Clause's application in capital sentencing proceedings in *Fields* v. *United States*, 552 U.S. 1144 (2008) (No. 07-6395) and *Dunlap* v. *Idaho*, 135 S. Ct. 355 (2014) (No. 13-1315).