No. _____

In The

Supreme Court of the United States

THOMAS J. CAPANO,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Delaware

PETITION FOR WRIT OF CERTIORARI

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defendant acted "intentionally" and was therefore guilty of capital murder, but held that such evidence did not entitle Petitioner to "lesser included offense" instructions, unless there was also evidence of a less *culpable* state of mind, i.e., that the defendant acted either "recklessly" or with "criminal negligence." The question presented here is whether such "reasonable doubt" evidence satisfies *Beck*'s "basis in the evidence" requirement. Also presented is the subsidiary question whether the requirement imposed by the Delaware Supreme Court that a defendant must present evidence to negate the "state of mind" alleged by the State, in order to have the jury instructed on lesser included offenses, unconstitutionally shifts the burden of proving the defendant's state of mind to the defendant. See, *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows.

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(2) The Delaware Superior Court's Sentencing Decision is *State of Delaware v. Thomas J. Capano,* 1999 Del. Super. LEXIS 541, Del. Super., No. 9711006198, Lee, J., (March 16, 1999), which is unpublished (Appendix B).

(3) The Delaware Superior Court's decision denying defendant's motion to vacate his death sentence is *State of Delaware v. Thomas J. Capano,* 1999 Del. Super. LEXIS 324, Del. Super., No. 9711006198, Lee, J., (September 1, 1999), which is unpublished (Appendix C).

JURISDICTION

The date of the final decision on the merits in this case by the Supreme Court of Delaware was August 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI: 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 defense.

United States Constitution, Amendment XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Delaware Code, Title 11, Section 636: The full text of this statute is set forth in Appendix D.

Delaware Code, Title 11, Section 4209: The full text of this statute is set forth in Appendix E.

STATEMENT OF THE CASE

1. Overview of the Case

The Petitioner, Thomas J. Capano ("Capano") was indicted on a single charge of capital First Degree Murder arising from the death of Anne Marie Fahey ("Fahey"). The "guilt phase" of Capano's trial commenced on October 6, 1998 and concluded on January 17, 1999 with a verdict of the jury that Capano was guilty of First Degree Murder. The case then proceeded to the "penalty hearing" phase, which lasted an additional five days. (Appendix A, p. A-3). In this case, the State alleged only one "statutory aggravating circumstance" – that "the murder was premeditated and the result of substantial planning." (Appendix B, p. B-8). In the penalty hearing, the jury voted 11 to 1 that the State had established the alleged statutory aggravating circumstance, and voted 10 to 2 that the aggravating circumstances outweighed the mitigating circumstances. (Appendix A, p. A-215). At sentencing, on March 16, 1999, the trial judge found that the State had established the existence of the above statutory aggravating circumstance beyond a reasonable doubt. (Appendix B, p. B-18). The trial judge also found that the aggravating circumstances outweighed the mitigating circumstances. The trial court therefore sentenced Capano to death. (Appendix B, pp. B-21-B-24). On August 10, 2001, Capano's conviction and death sentence were

affirmed by the Supreme Court of Delaware. (Appendix A). What follows in this subsection is a summary of the underlying facts which led to Capano's indictment and trial, including an overview of the State's theory of the case and the defense case. Additional facts necessary to the arguments relied on for allowance of the Writ are set forth in the Argument sections which follow. The final subsection specifies the stage of the proceedings in the state courts below where the federal questions sought to be reviewed were first raised. See, Supreme Court Rule 14.1(g)(i).

(a) The Parties

Anne Marie Fahey was the scheduling secretary for Delaware Governor Thomas Carper. She was last seen alive on Thursday, June 27, 1996, when she went to dinner with Capano in Philadelphia. Her family reported her missing on June 30, 1996. Capano was a prominent Delaware attorney and managing partner at the Wilmington office of a major Philadelphia based law firm. Capano was estranged from his wife and is the father of four daughters. Capano also has three brothers, Louis Capano, Jr., Gerard "Gerry" Capano and Joseph Capano, and one sister. In July 1996, the FBI and a federal grand jury in Delaware began a kidnaping investigation into Fahey's disappearance. On August 5, 1996, Capano was formally notified that he was a "target" of that investigation. (Appendix A, pp. A-11-A-12); See, *State v. Capano*, 1998 Del. Super. LEXIS, 377, *1-*2, Del. Super., Lee, J. (September 21, 1998).

Ultimately, two of Capano's brothers, Louis and Gerry, as well as Deborah McIntyre ("McIntyre"), a mistress of Thomas Capano, became ensnared in the investigation into Fahey's disappearance. In October 1997, Gerry's home was raided by federal agents, who found weapons and illegal drugs. In November 1997, Gerry and Louis entered into plea agreements with the federal government and agreed to cooperate with the investigation.

They both provided investigators with critical information that led to Capano's arrest and subsequent indictment. After Capano was charged with Fahey's murder, McIntyre likewise agreed to cooperate with the authorities in exchange for an agreement not to be charged with perjury. (Appendix A, p. A-12).

(b) The State's Theory of the Case

The State charged Capano with First Degree Murder even though Fahey's body was never found and even though the State was unable to establish how Fahey had died. (Appendix A, p. A-11; A-119-A-120). The Indictment alleged only that Capano had "intentionally caused the death of Anne Marie Fahey." See, 11 *Del.C.* §636(a)(1) (Appendix D). With no direct or physical evidence to support its allegation that Capano had intentionally caused Fahey's death, the State constructed a wholly circumstantial theory of the case, which rested on three broad categories of evidence: (a) evidence of an alleged "motive;" (b) evidence of an alleged "plan;" and, (c) evidence of "consciousness of guilt." (Appendix A, p. A-12).

Evidence of Motive

The State's "motive" evidence consisted entirely of hearsay statements Fahey recorded in her diary and those she allegedly made to her family, friends and psychotherapists. Fahey began dating Capano in March 1994. She kept this relationship, or at least its intimate nature, hidden from most of her friends and her family. Fahey also suffered from a serious eating disorder, for which she was being treated by several psychotherapists, from whom she also hid her relationship with Capano. In September 1995, Fahey was introduced to Michael Scanlan. Fahey's friends and family claimed, that after a rocky beginning, she fell in love with Scanlan. Although Capano knew about Fahey's eating disorder, and was actively trying to get her help, Fahey hid her disorder

from Scanlan. Fahey was also terribly afraid that Scanlan would learn of her relationship with Capano, a married man, and kept that affair a secret from him as well. The State's witnesses testified that, after Fahey began dating Scanlan, she attempted to break off her relationship with Capano, who became very upset and pursued her relentlessly. An entry in Fahey's diary dated April 7, 1996, which the State relied upon as a pivotal piece of evidence reflecting Fahey's feelings towards Capano during this period, Fahey wrote, "I have finally brought closure to Tom Capano . . . what a controlling, manipulative, insecure jealous maniac." (Appendix A, pp. A-12-A-13). According to the State's theory of the case, Capano's reaction to Fahey's attempts to end the romantic relationship was to plan her death.

Evidence of Planning and Premeditation

Because the State had no evidence that would even circumstantially establish Capano's state of mind on the night Fahey disappeared, it set out to prove that Capano had planned Fahey's murder well before that night. Here, the State's key witnesses were Capano's brother, Gerry Capano and Deborah McIntyre. According to Gerry, in February 1996, Thomas told his brothers, Gerry and Joseph, that he was being threatened by unidentified extortionists. Capano borrowed $8,000 from Gerry, which he repaid a few days later. Some time after that, Gerry gave Thomas a handgun, which was returned to Gerry by May of that year. (Appendix A, p. A-14). Gerry also testified that sometime between February and May 1996, Thomas asked Gerry if he could borrow his boat if he ever had to "do something" to the people who were extorting him. (Appendix A, p. A-53). McIntyre, who was Capano's mistress for some seventeen years, testified that in May 1996, Capano drove her to Miller's Gun Center where, at his request, she purchased a handgun while he waited outside in the car. According to McIntyre, she never saw the gun again. (Appendix A, pp. A-57-A-58). The State

also presented evidence that in April 1996, Capano had purchased a 162-quart marine cooler. In early 1996, Capano had also purchased a lock and a length of chain that he subsequently used to secure the cooler containing Fahey's body. A cooler just like the one purchased by Capano eventually was used to dispose of Fahey's body in the Atlantic Ocean. (Appendix A, p. A-14); (Appendix A, p. A-56).

Evidence of Consciousness of Guilt

This final category of evidence, which was largely undisputed by the defendant himself, related to steps taken by Capano to dispose of physical evidence that might link him to Fahey's disappearance. (Appendix A, pp. A-58-A-60). This evidence also included Gerry's testimony about the disposal of Fahey's body in the Atlantic Ocean on June 28, 1996, and removing a bloodstained loveseat and rug from Capano's house and placing it in a dumpster at a nearby construction site operated by his brother Louis. (Appendix A, pp. A-15-A-16). On June 29, 1996, Capano bought a new rug for his great room. Louis testified that, on June 30, 1996, Thomas told him that Fahey had slit her wrists at his home, staining the loveseat, but that she was okay. Thomas asked Louis to make sure that the dumpsters were emptied the next day because he had disposed of the loveseat and some of Fahey's personal belongings in the dumpster. In a search of Capano's house on July 31, 1996, investigators discovered small spots of blood on a wall in Capano's great room. The spots were compared with a sample of Fahey's blood by DNA testing and were found to be a likely match. (Appendix A, pp. A-16-A-17).

The Defense Case

The defense case was that Fahey's death was the result of an accidental shooting that had occurred in the great room of his house on June 27, 1996. According to Capano, who testified in his own defense at trial, after he

and Fahey left the Panorama Restaurant in Philadelphia, they decided to go to Capano's house to watch TV, arriving shortly after 10:00 p.m. Sometime after they arrived, with Fahey still at his house, Capano had a phone conversation with McIntyre, who frequently came to his house and would sometimes spend the night. Capano told McIntyre that she should not come over to his house that night. Sometime after the phone call, Capano and Fahey were seated on a love seat in Capano's great room when Capano heard a noise, looked up, and saw McIntyre standing in the kitchen. McIntyre appeared to be angry and yelled, "Who's this?" According to Capano, McIntyre was holding a gun at her side and was saying that she was going to kill herself. As McIntyre began to raise her left arm, which was holding the gun, Capano grabbed her arm and the gun went off, striking Fahey behind her right ear and killing her instantly. Capano testified that he and McIntyre attempted to perform CPR on Fahey and then realized she could not be saved. (Appendix A, pp. A-17-A-18); (Appendix A, p. A-123).

2. **Stage of Proceedings Where Questions Presented for Review Were Raised**

   (a) **Entitlement to Jury Instructions on Lesser Included Offenses**

During the prayer conference held prior to closing arguments, the defense requested that the court instruct the jury on lesser included offenses to First Degree Murder. The defense asserted that United States Supreme Court decisions, which emphasized that the jury should not be forced to choose between the extremes of First Degree Murder and an outright acquittal, guaranteed Capano the right to instructions on lesser included offenses under the Due Process Clause. The defense also pointed out that the State's evidence that the killing was "intentional" was entirely circumstantial and argued that there was other evidence in the record which contradicted the State's theory of the case and from which a

rational juror would have a reasonable doubt that the killing was intentional. Finally, the defense noted, a rational juror could also conclude that Capano acted "recklessly" or with "criminal negligence" in reaching out for McIntyre's arm, which would support a verdict of Murder Second Degree, Manslaughter, or Criminally Negligent Homicide. (Appendix F, pp. F-5-F-11). The trial court denied the defense's request. The trial court noted that the State's theory, which equated evidence of prior planning and the subsequent coverup of Fahey's death with intent, produced "some evidence of intent, but there isn't any evidence of recklessness or negligence in this case." (Appendix F, pp. F-11-F-12). Accordingly, the trial court charged the jury only on the elements of murder first degree. The same contentions set forth above were renewed and rejected in Capano's direct appeal to the Delaware Supreme Court. (Appendix A, pp. A-124-127).

(b) **Validity of Death Penalty Statute Under *Apprendi v. New Jersey***

The decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) was handed down while Capano's direct appeal was still pending in the Delaware Supreme Court. However, even prior to the *Apprendi* decision, the defense had filed a post-trial motion to vacate Capano's death sentence based on the jury's non-unanimous vote of 11 to 1 on the question whether the State had established the sole statutory aggravating circumstance that "the murder was premeditated and the result of substantial planning." That motion was denied by the trial Court. (Appendix C). After the *Apprendi* decision was handed down, Capano raised the claim, in his then pending appeal in the Delaware Supreme Court, that Delaware's death penalty statute, 11 *Del.C.* §4209 (Appendix E), was unconstitutional under *Apprendi*. That claim was rejected by the Delaware Supreme Court. (Appendix A, pp. A-209-A-215).

REASONS FOR GRANTING THE WRIT

I. DELAWARE'S STATUTORY SCHEME FOR THE IMPOSITION OF THE DEATH PENALTY FOLLOWING A CONVICTION FOR FIRST DEGREE MURDER VIOLATES THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS INTERPRETED BY THIS COURT'S DECISION IN *APPRENDI v. NEW JERSEY*, 530 U.S. 466 (2000).

1. The Delaware Death Penalty Statute

The current version of Delaware's death penalty law, 11 *Del.C.* §4209 (Appendix E), was enacted on November 1, 1991. Under that statutory scheme, not all convictions of first-degree murder expose a defendant to a possible sentence of death. See, 11 *Del.C.* §636(b) ("Murder in the first degree . . . shall be punished as provided in §4209") (Appendix D).[1] In a case where the State does seek the death penalty and the defendant is convicted of First Degree Murder by a jury, the case proceeds to a penalty hearing. 11 Del.C. §4209(c). The penalty hearing itself is a two-step process in which the jury functions in an advisory capacity only. See, 11 *Del.C.* §4209(d) and (e); (Appendix A, p. A-177) ("Under Delaware law, the function of the jury in the penalty phase is solely advisory");[2] *Dawson v. State*, Del. Supr., 673 A.2d 1186, 1196, *cert. denied*, 519 U.S. 844 (1996) (jury recommendation on death penalty issues is merely an advisory verdict). In the penalty hearing, the advisory jury is asked to consider and

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[1] The possible punishments under §4209 are death by lethal injection or life imprisonment without possibility of parole.

[2] In characterizing the role of the penalty-phase jury in this very case, the Delaware Supreme Court noted, that, in reaching its advisory verdict, a jury is "require[d] to resolve **factual** disputes." (Appendix A, p. A-207 (emphasis added)).

vote on two questions: First, whether, "beyond a reasonable doubt,"[3] "the evidence shows . . . the existence of at least 1 [statutory] aggravating circumstance . . . "[4] Second, the jury considers whether, by a preponderance of the evidence, "the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist." See, 11 *Del.C.* §4209(c)(3)a. The jury then reports to the Court "its final vote by the number of affirmative votes and negative votes on each question." 11 *Del.C.* §4209(c)(3)b. The matter then reverts to the sentencing judge, who must also find the existence of a statutory aggravating circumstance, beyond a reasonable doubt, as a predicate to the imposition of a sentence of death. The sentencing judge, however, as noted above, is not required to accept the jury's advisory verdict. 11 *Del.C.* §4209(d) and (e). Finally, if a death sentence is imposed by the sentencing judge, the court "shall set forth in writing its findings upon which the sentence of death is based." 11 *Del.C.* §4209(d)(3). See, Appendix A, pp. A-215-216.

In this case, as previously noted, the only statutory aggravating circumstance alleged by the State was that "the murder was premeditated and the result of substantial planning." See, 11 *Del.C.* §4209(e)(1)(u) (Appendix B, p. B-8). The jury voted 11 to 1 that this statutory aggravating circumstance had been established beyond a reasonable doubt. (Appendix A, p. A-216). In sentencing Capano to death, the sentencing judge independently found that this statutory aggravating circumstance had been established beyond a reasonable doubt and also found that the aggravating circumstances outweighed the mitigating circumstances. (Appendix B, p. B-16-B-24).

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[3] Under Delaware law, the requirement of "proof beyond a reasonable doubt" means a unanimous verdict by a jury. See, *Claudio v. State*, Del. Supr., 585 A.2d 1278, 1296-1297 (1991).

[4] There are 22 statutory aggravating circumstances listed in the Delaware Criminal Code. 11 *Del.C.* §4209(e).

2. This Court's Decision in *Apprendi*

This case presents the question of whether the Sixth Amendment's right to a jury determination "of facts that expose the defendant to a greater punishment than that authorized by the jury's guilty verdict," *Apprendi*, 530 U.S. at 494, applies as well to defendants who might be exposed to a possible death sentence under Delaware's capital punishment scheme outlined above. The Supreme Court of Delaware held that it does not, explaining that Delaware's capital punishment scheme – in which the jury's role in the fact-finding process, which itself is a statutory prerequisite to the imposition of a death sentence, is wholly advisory – remained constitutional despite this Court's decision in *Apprendi*. (Appendix A, pp. A-211-A-215).

In *Apprendi*, this Court found that the New Jersey "hate crime" law violated the Sixth Amendment's jury trial provision and the Due Process Clause. In that case, the defendant pled guilty to possession of a firearm for an unlawful purpose, which carried a penalty range of 5 to 10 years in jail. Under a separate statute, described by the New Jersey Supreme Court as a "hate crime" law, an "extended term" of imprisonment between 10 and 20 years could be imposed if the trial judge found, by a preponderance of the evidence, that "the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion . . . " *Id.* at 486-487. This Court held New Jersey's statutory scheme unconstitutional under the Sixth and Fourteenth Amendments. In so holding, the Court stated:

> Other than the fact of a prior conviction, **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.** With that exception, we endorse the statement of the rule set forth in the concurring opinions in [*Jones v.*

> *United States*, 526 U.S. 227, 143 L.Ed.2d 311, 199 S.Ct. 1215 (1999)]: "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Id. 530 U.S. at 490

* * *

> [I]t does not matter whether the required finding is characterized [as an "element" of the offense or a "sentencing factor"] . . . The relevant inquiry is not one of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?

Id. 530 U.S. at 494 (emphasis added).

3. Did *Apprendi* Invalidate Delaware's Death Penalty Statute?

In upholding the sentence of death imposed in this case, the Supreme Court of Delaware repeatedly noted that this Court, in *Apprendi*, had left this Court's decision in *Walton v. Arizona*, 497 U.S. 639 (1990) intact. (Appendix A, p. A-208; A-211). This Petition, therefore, squarely presents a question that was not resolved in *Apprendi* itself: Did *Apprendi* invalidate state capital sentencing schemes, such as Delaware's, where the jury's verdict as to the existence of a statutory aggravating circumstance has no binding effect on a sentencing judge?[5] The final

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[5] Delaware's capital sentencing scheme is not unique. In Alabama (Ala. Code Ann. §13A-5-46(e) (West 2001), Florida (West's F.S.A. §921.141), and Indiana (West's A.I.C. §35-50-2-9), the jury's determination as to the existence of a statutory

paragraphs of the majority opinion in *Apprendi* attempted to answer that question by discussing *Walton v. Arizona*, 497 U.S. 639 (1990). In *Walton*, this Court upheld an *Apprendi*-type challenge to the constitutionality of Arizona's death penalty statute.[6] The Court rejected the defendant's argument that the Constitution required that the jury, and not the judge, make the factual determination of the existence or non-existence of a statutory aggravating factor. *Id.* 497 U.S. at 648 ("the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by a jury"). In *Apprendi*, pointing to *Walton*, Justice Stevens attempted to dismiss any argument that the rule announced in

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aggravating circumstance that makes a defendant eligible for the death penalty is not binding on the sentencing judge. In Arizona (A.R.S. §13-703), Colorado (West's C.R.S.A. §16-11-103), Idaho (I.C. §19-2515), Montana (MCA §46-18-301) and Nebraska (Neb.Rev.St. §29-2520), the jury plays no role at all. The entire sentencing process, including the mandatory finding of statutory aggravating circumstances is left entirely to the judge, or in the case of Colorado, to a panel of judges. Conversely, all of the remaining death penalty jurisdictions require that the determination of statutory aggravating factors be proved beyond a reasonable doubt to a jury, whose verdict is binding on the sentencing judge.

[6] Under Arizona law, if a defendant is convicted by a jury of first-degree murder, the court conducts a separate sentencing hearing to determine whether the defendant should receive the death penalty or life imprisonment. Ariz. Rev. Stat. Ann. §13-703(B) (1989). The Arizona statute then directs the judge to "impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in [the statute] and there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. §13-703(E). See, *Walton*, 497 U.S. at 643-644. Parenthetically, the Delaware Supreme Court characterized the Arizona statute at issue in *Walton* as "similar to the Delaware procedure under section 4209." (Appendix A, p. A-208 n.507).

Apprendi applied to findings of "aggravating circumstances" employed in state capital sentencing schemes. To support his contention that the holding in *Apprendi* did not apply to the determination of aggravating circumstances used in state capital sentencing schemes, Justice Stevens cited a footnote from the dissenting opinion in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998):

> Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.

Apprendi, 530 U.S. at 497 (quoting *Almendarez-Torres*, 523 U.S. at 257 n.2 (Scalia, J., dissenting).

Justice Stevens' view that *Apprendi* did not invalidate Arizona's capital sentencing scheme, upheld in *Walton*, was not endorsed by a majority of the Justices of this Court. The four dissenters in *Apprendi* all agreed that the majority's "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict" rule was in direct conflict with *Walton*:

> The distinction of *Walton* offered by the Court today is baffling to say the least . . . A defendant convicted of first degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty . . . If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today.

Id. 530 U.S. at 538 (O'Connor, J., dissenting). Justice Thomas, who joined in the majority opinion, wrote in a separate concurring opinion that the question whether

Walton is still good law after *Apprendi* is "a question for another day." *Id.* 530 U.S. at 522-523 (Thomas, J., concurring).[7] Thus, at least five members of this Court have expressed their doubts about the viability of *Walton* in light of *Apprendi*.[8]

4. *Apprendi* Invalidated Delaware's Death Penalty Statute

The application of *Apprendi* to Delaware's capital sentencing statute turns on the requirement in *Apprendi* that the fact to be established must **"expose the defendant to a greater punishment than that authorized by the jury's guilty verdict"** *Id.* 530 U.S. at 494. (emphasis added). Delaware's death penalty statute violates *Apprendi* because it is structured in much the same way as the New Jersey "hate crime" law that was invalidated in *Apprendi*. Under the Delaware statute, there is a predicate factual determination – the existence or non-existence of a statutory aggravating circumstance – which must be made before a defendant is even exposed to the possibility of a death sentence. In other words, in the same way the New Jersey "hate crime" law "upped the ante" in terms of punishment for a defendant who is convicted of an underlying offense, the Delaware death penalty statute similarly increases the possible punishment for a defendant who has been convicted of First Degree Murder. A sentence of death may be imposed only where first-

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[7] Ironically, Justice Stevens himself has also expressed the view that *Walton* should be reconsidered "in due course" in light of the constitutional principles announced in *Jones v. United States*, 526 U.S. 227 (1999) and subsequently reaffirmed in *Apprendi*. See, *Jones*, 526 U.S. at 253 (Stevens, J. concurring)

[8] The Delaware Supreme Court was in error when it stated that "a **majority** of the Court [in *Apprendi*] concluded that the holding in *Apprendi* did not disturb the line of decisions approving of death penalty statutes like that in Delaware." (Appendix A, p. A-205) (emphasis added).

degree murder is committed under factual circumstances that constitute one of Delaware's statutory aggravating circumstances. The jury's verdict that Capano was guilty of First Degree Murder did not establish the statutory aggravating circumstance that the murder was "premeditated and the result of substantial planning."[9] Completing the analogy, in *Apprendi*, the New Jersey "hate crime" law violated Due Process because the legislature removed the factual determination whether a crime was also a "hate crime" from the jury and gave it to the judge. *Id.* 530 U.S. at 490. Likewise, the Delaware death penalty statute violates Due Process because the Delaware legislature gave the judge the final and conclusive say as to the existence of a statutory aggravating circumstance, while the jury was relegated to an advisory role. The validity of that conclusion is supported by Justice Scalia's concurring opinion in *Apprendi*, which emphasized that the determination of "the facts that determine the . . . sentence to which the defendant is exposed" is part of the Constitution's guarantee of the right to trial by a jury:

> What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury does guarantee if, as they assert, it does not guarantee – what it has been assumed to guarantee throughout our history – **the right to have a jury determine those facts that determine the maximum sentence.**

Id. 530 U.S. at 498-499 (Scalia, J., concurring) (emphasis added). No matter what the jury did in this case, if the trial judge had not made the factual finding, beyond a reasonable doubt, that the murder in this case was carried

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[9] Some statutory aggravating circumstances can be established by the jury's verdict that a defendant is guilty of First Degree Murder. For example, a defendant can commit First Degree Murder by committing "felony murder." See, 11 *Del.C.* §636(a)(2). Felony murder is also a statutory aggravating circumstance. See, 11 *Del.C.* §4209(e)(1)(j).

out after substantial planning and premeditation, a sentence of death could not have been imposed.

5. Why the Writ Should Issue

This Petition for Writ of Certiorari squarely presents the question whether Delaware's death penalty statute is controlled by *Apprendi* or by *Walton*. This Court's jurisprudence has repeatedly emphasized that "death is different." See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). This distinction between capital and non-capital cases usually runs in the direction of greater procedural protection for capital defendants. Conversely, if *Walton* survives after *Apprendi*, the result is that capital defendants will have less procedural protection than *Apprendi* provides to non-capital defendants. As noted above, in *Apprendi* itself, the Justices of this Court appear to be evenly divided on that very issue, with one Justice (Justice Thomas) demurring. Thus, the continued validity of *Walton*, and therefore, death penalty statutes like Delaware's statute, in light of *Apprendi*, is very much an open question.

A number of State and federal courts have echoed Justice O'Connor's dissent in *Apprendi*, noting the irreconcilability of *Walton* and *Apprendi*, but concluded they were bound to follow *Walton* until this Court revisits it. See, *United States v. Promise*, 255 F.3d 150, 159-60 (4th Cir. 2001) (*en banc*) (characterizing the continued authority of *Walton* in light of *Apprendi* as "perplexing, if not 'baffling' " and a "conundrum") (quoting *Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting)); *Hoffman v. Arave*, 236 F.3d 523, 542 (9th Cir. 2001), *petition for cert. filed*, 69 U.S.L.W. 3763 (U.S. May 23, 2001) (No. 00-1775) (noting that *Apprendi* "may raise some doubt about *Walton*"); *People v. Kaczmarek*, 741 N.E.2d 1131, 1142 (Ill. App. 2000) ("while it appears *Apprendi* extends greater constitutional protections to noncapital, rather than capital defendants, the Court has endorsed this precise principle, and we are in no position to secondguess that decision here"); *Mills*

v. Moore, 786 So.2d 532, 537 (Fla.), *cert. denied*, 121 S. Ct. 1752 (2001) ("Because *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either"). Indeed, one federal circuit judge found this irreconcilability so intolerable that he refused to consider *Walton* authoritative, reasoning that the *Apprendi* Court failed to articulate a "majority position about the continued viability of *Walton*." *Hoffman*, 236 F.3d at 547 (Pregerson, J., concurring separately). Quite recently, in *Ring v. Arizona*, 25 P.3d 1139 (Ariz. Sup. Ct. 2001), *Petition for Writ of Certiorari* filed September 18, 2001 (No. 01-488), the Arizona Supreme Court took the view that *Apprendi* seemed to have overruled *Walton* but that the Court was powerless to give effect to that conclusion until this Court so stated. *Id.* 25 P.3d at 1152. On September 10, 2001, in *State v. Barker*,[10] a trial judge in Indiana, relying on *Apprendi*, invalidated that State's death-penalty scheme. The case is now pending before the Indiana Supreme Court. It is true, as well, that every member of this Court has either authored or joined opinions that state or suggest that *Walton*'s holding is undermined by this Court's more recent decisions,[11] suggest that *Walton* should be reconsidered in light of the principles articulated in these decisions,[12] or note that *Walton* was based on the

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[10] No. 49G05-9308-CF-09544 (Marion Ind. Superior Court, Hawkins, J. September 10, 2001).

[11] *Apprendi*, 530 U.S. at 538 (O'Connor, J., joined by Rehnquist, C.J., Kennedy, and Breyer, JJ., dissenting) ("If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today"); *Jones*, 526 U.S. at 272 (Kennedy, J., joined by Rehnquist, C.J., O'Connor, and Breyer, JJ., dissenting) (stating that the constitutional rule identified in *Jones* and subsequently adopted in *Apprendi* cast doubt on the continued viability of *Walton*, and noting that *Walton* was "a better candidate" than *Jones* itself for the application of that rule).

[12] See *Apprendi*, 530 U.S. at 523 (Thomas, J., concurring) (stating that *Walton*'s continued viability in light of the

rationale that Arizona's capital sentencing statute does not authorize the judge to make findings of fact that increase the maximum sentence to which a defendant is exposed.[13]

There can be no doubt that the question presented here, which goes to the constitutionality of the capital sentencing schemes currently in place in nine States,[14] is one of substantial public importance. It is plain that the continued viability of *Walton* is in grave doubt, and that this doubt will persist and intensify until this Court re-examines that decision. Such doubts about the viability of one of this Court's precedents might be tolerable if it pertained to a relatively unimportant question, or one as to which a prompt resolution was not necessary, but the question presented here emphatically does not fall into those categories. The question at issue here implicates constitutional protections that this Court has characterized as "of surpassing importance." *Apprendi*, 530 U.S. at 476. Indeed, it involves the precise issue that this Court identified as "of importance generally in the administration of the death penalty" when it decided to grant certiorari in *Walton* itself. *Walton*, 497 U.S. at 647. Nor can it

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constitutional mandate recognized by Justice Thomas in joining the *Apprendi* majority was "a question for another day"); *Jones*, 526 U.S. at 253 (Stevens, J., concurring) (stating that *Walton* should be reconsidered "in due course" in light of the constitutional principles identified in *Jones* and subsequently adopted in *Apprendi*).

[13] *Jones*, 526 U.S. at 251 (opinion for the Court authored by Souter, J., and joined by Stevens, Scalia, Thomas, and Ginsburg, JJ.) (to distinguish *Walton*, majority undertakes a "careful reading of *Walton*'s rationale," finding that the *Walton* majority "characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available").

[14] See Footnote No. 5, *infra*.

be suggested that any purpose would be served by deferring consideration of the question squarely presented here for a future Term, since the question whether *Walton* should be overruled cannot "percolate" in, or become the subject of conflicts among State and federal courts that are duty-bound to apply *Walton* until this Court overrules it. See, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (state and inferior federal courts must continue to "leav[e] to this Court the prerogative of overruling its own decisions"). *Walton* must and should be re-examined promptly, and the present case is an appropriate vehicle for this reexamination to be undertaken. As long as *Walton* remains unexamined by this Court, every death sentence imposed, and every death sentence carried out, pursuant to the capital sentencing schemes of Delaware, the eight other States enumerated above, and any other States that may determine to implement similar schemes, will be under a heavy cloud of constitutional doubt. During this period of uncertainty, all of the State and federal legislatures will be deprived of crucial guidance in determining whether and how to modify their capital sentencing statutes. See, Margery M. Koosed, *Averting Mistaken Executions By Adopting The Model Penal Code's Exclusion Of Death In The Presence Of Lingering Doubt*, 21 N. Ill. U. L. Rev. 41, 101 (2001) (noting that a "period of uncertainty" will endure until the Court revisits *Walton*). Unless *Walton* is reexamined, an irrational disjunction between the constitutional legitimacy of judge-made factual findings affecting the length of defendant's **imprisonment**, as compared to the legitimacy of such findings affecting the decision to impose a sentence of **death**, will continue to persist. State and federal courts will be burdened as well, in that they will continue to face the daunting tasks of trying to reconcile fundamentally irreconcilable decisions, and of trying to discern principled and coherent boundaries between the spheres in which each of these precedents should govern. See, *Promise*, 255 F.3d at 160 ("It is for the Supreme Court . . . to resolve this conundrum"); *Hoffman*,

236 F.3d at 542-47 (panel split with regard to continued viability of *Walton*); *Ring*, 25 P.3d at 1152 (*Apprendi* appears to have overruled *Walton*, but Arizona Supreme Court remained bound by *Walton*).

Like the statute struck down in *Apprendi*, Delaware's capital sentencing scheme provides that the maximum penalty to which a criminal defendant is exposed may be increased on the basis of factual findings made unilaterally by a judge after conviction by a jury. Indeed, in light of the Court's opinion, the primary distinction remaining between *Apprendi* and the instant case is that in *Apprendi* the Sixth Amendment issue pertained to a ten-year increase in the defendant's potential prison sentence, whereas here the Sixth Amendment question is literally one of life or death. If anything, the "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge" that underlies the Sixth Amendment's jury trial right is more pronounced, not less so, when the judge's factual findings determine whether the defendant will live or die. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). For these reasons, and in light of the confusion, uncertainty, and unfairness that the continued authority of *Walton* creates, we ask the Court to take this opportunity to reconsider *Walton* in light of the important constitutional principles announced in *Apprendi v. New Jersey*.[15]

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[15] Petitioner's counsel are aware of one other pending petition for certiorari presenting this question. See Petition for Certiorari in *Ring v. Arizona*, No. 01-488 (filed September 18, 2001).

II. A DEFENDANT IN A CAPITAL MURDER CASE IS ENTITLED, UNDER THE DUE PROCESS CLAUSE, TO HAVE THE JURY INSTRUCTED ON LESSER INCLUDED OFFENSES WHERE THE STATE'S EVIDENCE CONCERNING THE DEFENDANT'S STATE OF MIND RAISED A REASONABLE DOUBT THAT HE WAS GUILTY OF CAPITAL MURDER

1. Entitlement to Jury Instructions on Lesser Included Offenses under the Due Process Clause

In capital cases, a state court's refusal to give the jury the "third option" of convicting the defendant on a lesser included offense may violate the Fourteenth Amendment's Due Process Clause. In *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 2389, 65 L. Ed. 2d 392 (1980), the court held:

> For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. Such a risk cannot be tolerated in a case in which the defendant's life is at stake.

Since *Beck*, this Court has explained its holding in several decisions which raised *Beck* issues. In *Hopper v. Evans*, 456 U.S. 605, 609, 72 L. Ed. 2d 367, 102 S. Ct. 2049 (1982), the Court upheld a conviction under the same Alabama law that was at issue in *Beck* because, under the facts of that case, there was no evidence to support a lesser included instruction. *Id.* at 612-613. The Court reiterated that lesser included instructions were only mandated when supported by the evidence. *Id.* at 611. In *Spaziano v. Florida*, 468 U.S. 447, 455-456, 82 L. Ed. 2d 340, 104 S. Ct. 3154 (1984), the Court explained that the

emphasis in *Beck* was on the reliability of the guilt determination, as opposed to the sentencing consequences of a guilty verdict:

> The Court in *Beck* recognized that the jury's role in the criminal process is essentially unreviewable and not always rational. **The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free.** In *Beck*, the Court found that risk unacceptable and inconsistent with the reliability this Court has demanded in capital proceedings. **The goal of the *Beck* rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence** (emphasis added).

See also, *Schad v. Arizona*, 501 U.S. 624, 646, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) ("our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all").[16]

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[16] Under the sentencing scheme at issue in *Beck* (and under Delaware's sentencing scheme), the trial judge retained discretion to decline to impose the death penalty, even though the jury had convicted the defendant of capital murder. *Beck*, 447 U.S. at 632 n.7 (Under Alabama's death penalty scheme, "it is the judge and not the jury who does the actual sentencing"). Thus, *Beck* is applicable in jurisdictions, like Delaware, which allow for sentencing discretion after a finding of guilt of capital murder. *Beck* itself was such a case.

2. The Delaware Supreme Court's Ruling

In this case, Capano was charged with First Degree Murder based on the allegation in the Indictment that he had "intentionally caused the death of Anne Marie Fahey." See, 11 *Del.C.* §636(a)(1) (Appendix D). Under Delaware law, the distinction between First Degree Murder and the lesser included offenses of Second Degree Murder, Manslaughter and Criminally Negligent Homicide concerns the "state of mind" of the defendant. (Appendix A. p. A-112). See. *Duonnolo v. State.* Del. Supr.. 387 A.2d 194, 195-197 (1987). Also, under state law, "a defendant is **entitled** to an instruction on a lesser included offense if the evidence would permit a jury rationally to acquit him of the greater offense and to convict him of the lesser." *Sluter v. State,* Del. Supr., 606 A.2d 1334, 1338 (1992) (emphasis in original). See, 11 *Del. C.* §206(c) [17]

In this case, the Delaware Supreme Court conducted a *de novo* review of the evidence and concluded that "there is no rational basis in the evidence to support a charge on any of the lesser included offenses advanced by Capano." (Appendix A, p. A-113; A-118-A-122). Building on that conclusion, the Court then rejected Capano's argument that he was entitled to have the jury instructed on lesser included offenses under *Beck* and its progeny: "Capano's [*Beck*] argument fails because the right to a lesser included offense instruction depends on there being a rational evidentiary basis for that instruction." (Appendix A, p. A-125). The Court pointed to *Hopper v. Evans, supra,* and reiterated that it had already concluded that there was "no rational basis in the evidence" that

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[17] 11 *Del.C.* §206(c) provides that the trial court is "not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense."

would have entitled Capano to instructions on lesser included offenses. (Appendix A, pp. A-126-A-127).

3. Why the Court Should Grant the Writ

Beck and its progeny clearly established the requirement that entitlement to jury instructions on lesser included offenses to capital murder depended on the existence of evidence to support a lesser included instruction. The question at issue here is what kind of evidence will serve to satisfy *Beck*'s "supported by the evidence" requirement? Specifically, is a defendant entitled to lesser offense instructions under *Beck* where the evidence, in its entirety, is sufficient to create reasonable doubt that the defendant acted "intentionally," but does not necessarily establish any lesser state of mind? This question is important because it serves to implement the Due Process safeguard established in *Beck*: that giving the jury the "third option" of convicting the defendant of a non-capital homicide offense serves to enhance the reliability of the jury's guilt phase verdict. Otherwise, state courts can freely avoid *Beck* claims by holding, as did the Delaware Supreme Court, that evidence which serves only to create reasonable doubt that the defendant is guilty of capital murder "does not count" as evidence that would entitle the defendant to lesser offense instructions under *Beck*. This question has not previously been addressed in the Court's *Beck* jurisprudence.

In this case, as discussed herein, the Delaware Supreme Court acknowledged that there was substantial evidence in the record that rebutted or contradicted nearly all of the circumstantial evidence that the State had relied on to establish motive and planning – evidence that was indispensable to a finding of "intentional" murder. See, Appendix A, pp. A-18-A-19. Additional evidence in the record, not cited by the Delaware Supreme Court, also served to rebut the State's theory of the case. On June 12, 1996, two weeks before she died, Fahey became ill at work and passed out. She called Capano,

who picked her up and gave her a ride home. (Appendix F, p. F-1). Furthermore, the jury was not required to believe Gerry's testimony. On cross-examination, the jury heard about Gerry's hostile conversation with his mother shortly after the Proof Positive Hearing, where he admitted he would "make [things] up as I go along" to "keep Tommy [in jail] for life." (Appendix F, p. F-2). The jury was also entitled to reject MacIntyre's trial testimony – a story that she proffered only after receiving immunity from prosecution for statement she had made to federal investigators and a federal grand jury. (Appendix A, p. A-157). At trial, MacIntyre testified that in May 1996, Capano persuaded her to buy a handgun for him, which she immediately gave to Capano and never saw again. (Appendix A, pp. A-57-A-58). Prior to the trial, however, MacIntyre had told investigators a completely different story. She stated that she had purchased a small handgun "a few years ago" for self-defense, but had subsequently taken it apart and thrown it away. She also denied that Capano was with her when she bought the gun or that she had ever given it to him. (Appendix F, p. F-13-F-15). Lastly, while the "consciousness of guilt" evidence strongly suggested that Capano was guilty of something, it does not follow that the only possible inference that a jury could draw was that the "something" was intentional murder. Capano explained that he did not call "911" because of a "selfish" desire to protect himself and to protect MacIntyre. (Appendix A, p. A-18). He testified that it was his desire to keep the accidental death a secret, and not to cover up an intentional homicide, that motivated his subsequent conduct. (Appendix F, p. F-3). It is certainly possible that a jury could have accepted Capano's explanation for what he did after the shooting without necessarily accepting his account of the shooting itself. Namely, that a wealthy, politically connected and respected lawyer had made a panic-driven decision rather than have to explain how Fahey died in the living room of his house – and concluded that Capano's motive

in covering up Fahey's death was to conceal his involvement in a homicide – not necessarily a homicide that was caused by an intentional act.

The Delaware Supreme Court also acknowledged that the above evidence, which served to contradict or rebut the State's theory of the case, was sufficient, if accepted by the jury, to raise a reasonable doubt as to whether Capano "planned" to kill Fahey and then carried out that plan by "intentionally" killing her. (Appendix A, p. A-119) ("If the jury rejected the State's planning evidence, concluding, for example, that the cooler and gun purchases were unrelated to Fahey, it could have returned a verdict acquitting the defendant"). What the Delaware Supreme Court refused to recognize, however, was that this same "reasonable doubt" evidence also served to establish Capano's entitlement to lesser offense instructions under *Beck*.

In rejecting Capano's *Beck* claim, the Delaware Supreme Court held that Capano's "reasonable doubt" evidence simply "didn't count" when it came to entitlement to lesser included offenses under *Beck*. Although the Delaware Supreme Court conceded that "apart from the accident defense offered in Capano's testimony,[18] there is no evidence concerning the **manner** of Fahey's death," (Appendix A, p. A-119), the Court nevertheless characterized as "pure speculation" any scenario other than the one proffered by the State that might bear on Capano's state of mind on the night that Fahey died:

> The possibility that Capano killed Fahey by an act that was reckless, criminally negligent or under the influence of extreme emotional disturbance is based entirely on speculation. Although there is evidence of the disposal of Fahey's

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[18] The Delaware Supreme Court rejected the State's argument that Capano's testimony – that Fahey died as a result of an "accidental" shooting by the hand of MacIntyre – precluded any entitlement to instructions on lesser included offenses under state law. (Appendix A, pp. A-114-A-117).

> body, the parties concede that apart from the accident defense offered in Capano's testimony, there is no evidence concerning the **manner** of Fahey's death. Her body was not recovered and neither was any murder weapon.

(Appendix A, p. A-119) (emphasis in original).

The Delaware Supreme Court reasoned that, to be entitled to lesser offense instructions, Capano had the burden to offer evidence of some alternate scenario for the homicide that suggested a "reckless" or "criminally negligent" state of mind. Merely offering evidence that went only to create a reasonable doubt that the murder was "intentional," was not enough:

> If the State's planning evidence and Capano's accident defense are rejected, it is **possible** that Capano killed Fahey in some kind of jealous rage, or some other reckless or negligent act. But these possibilities are only speculative. They are not supported by any rational basis in the evidence.

(Appendix A, p. A-120) (emphasis in original).

The court then went on to equate the possibility that Capano acted either "recklessly" or with "criminal negligence" with the statutory "affirmative defense" that Capano had acted "under the influence of extreme emotional distress":

> Capano contends that a jury could have decided that Capano killed Fahey after "an argument that raged out of control," a theory that seems to suggest that Capano acted under the influence of extreme emotional disturbance and is guilty of manslaughter. This possibility is said by the defense to be supported by evidence concerning the troubled romantic relationship between Capano and Fahey. Even assuming evidentiary support for this theory, the applicable Delaware

> statute[19] places the burden on the defendant to prove that he acted "under the influence of extreme emotional distress" and "that there is a reasonable excuse or explanation for the existence of the extreme emotional distress."

(Appendix A, p. A-120).[20]

The statement by the Delaware Supreme Court that the jury should have acquitted Capano if they rejected the State's motive and planning evidence, (Appendix A, p. A-119), ignores the very concerns expressed by this Court in *Beck* itself. This case presents the paradigm *Beck* scenario. In fact, there is a substantial ground to believe that at least one juror voted to convict Capano of first degree murder even though that juror did not believe that the State had established Capano's guilt of that offense beyond a reasonable doubt. Consider what happened in the penalty phase of this case. There, the only statutory aggravating circumstance relied upon by the State was that the murder was "premeditated and the result of substantial planning." 11 *Del.C.* §4209(e)(1)(u). (Appendix B, p. B-8). In the penalty phase, to prove this statutory aggravating circumstance, the State told the jury that it was relying on the very same circumstantial evidence of motive, planning and consciousness of guilt that it had relied on in the guilt phase to prove "intentional" murder. (Appendix F, p. F-12). Unlike the guilt phase verdict, however, the jury's vote on the question whether the State had proved this statutory aggravating circumstance beyond a reasonable doubt was 11 to 1. (Appendix B, p.

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[19] See, 11 *Del.C.* §641.

[20] Parenthetically, the court's holding that evidence which serves to negate an element of the charged offense, i.e. that the defendant acted "intentionally," does not entitle the defendant to lesser offense instructions, unless there is also evidence that the defendant acted either "recklessly" or with "criminal negligence," appears to unconstitutionally shift the burden of proving the defendant's state of mind to the defendant. See, *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

B-15). These inconsistent verdicts demonstrate that the concerns expressed in *Beck* about the reliability of the conviction decision are real. The penalty phase verdict shows that one member of the jury was not convinced beyond a reasonable doubt that Capano "planned" to kill Fahey. Yet, when faced with the all or nothing choice of either convicting Capano of intentional murder – based on the very same evidence of "planning" – or setting him free, that same juror opted to convict. These inconsistent verdicts suggest that at least one juror was not convinced beyond a reasonable doubt that Capano was guilty of "intentionally" killing Fahey, but voted to convict Capano of First Degree Murder because he (or she) believed, in the words of *Beck*, that Capano was "guilty of a serious, violent offense"and deserved to be punished for it, when the only other option was to set him free.

CONCLUSION

For the reasons and upon the authorities set forth herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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