No. 19-7647

IN THE
Supreme Court of the United States

WILLIAM P. CASTILLO,

Petitioner,

v.

NEVADA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE PROMISE OF JUSTICE INITIATIVE IN SUPPORT OF PETITIONER

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4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769).....6, 10, 12

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John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263 (1978) 13

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JOHN M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660–1800 (1986) 10

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INTEREST OF AMICUS CURIAE[1]

The Promise of Justice Initiative ("PJI") is a non-profit law office dedicated to upholding the promises of our constitutional system to protect liberty and ensure dignity. PJI addresses issues concerning fairness in the administration of capital punishment, and has filed briefs in state and supreme courts and this Court on the original role of juries, in fulfilling the promises of our Constitution.

[1] Pursuant to this Court's Rule 37, Amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity other than Amicus made a monetary contribution to the preparation or submission of the brief. Notice was provided timely. Petitioner and Respondent granted consent.

We have researched and written on the role of an original understanding of the Sixth Amendment in capital sentencing, and its inter-relation with the Eighth Amendment. *See* G. Ben Cohen, et al., *A Cold Day in* Apprendi-*Land:* Oregon v. Ice *Brings Unknown Forecast for* Apprendi*'s Continued Vitality in the Capital Sentencing Context*, 3 HARV. L. & POL'Y REV. (Online) (2009); Michael L. Radelet and G. Ben Cohen, *The Decline of the Judicial Override*, 15 ANN. REV. L. SOC. SCI. 539 (2019); G. Ben Cohen and Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV.87 (2008).

The *Promise of Justice Initiative* is committed to realizing the constitutional guarantees enshrined in the Bill of Rights, and re-dedicated to the people by the enactment of the Fourteenth Amendment – to restore what Louis A. Martinet, the great Louisiana Civil Rights leader of the 19th century described as – 'all the rights and privileges that make American citizenship desireable or worth anything.' PJI files this brief today out of concern that that our (the government, the people, all of us) response to violent crime permits the diminution of the rights that we value most.

INTRODUCTION

This case presents another example of the disarray that ensued when courts permitted states to deviate from the constitutional rights originally enshrined. This Court has held that the Sixth Amendment requires a jury find the aggravating circumstance that makes a defendant eligible for the death penalty. *Ring v. Arizona*, 536 U.S. 584 (2002); *McKinney v. Arizona*, 140 S. Ct. 702, 707 (2020). This Court has not confronted whether -- as a matter of the original understanding and purpose of the Sixth Amendment -- the weighing of mitigating and aggravating circumstances, and the determination that death is warranted, be reserved to the jury.[2] *Amicus* files this brief to suggest just that.

At the Founding, the jury was understood to be the appropriate decision-maker in capital sentencing determinations, and *beyond a reasonable doubt* was the appropriate standard for the jury's determination. The Founders enshrined the Sixth Amendment Right to Trial by Jury, ensuring that the most serious punishment was reserved for those instances where a

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[2] The issue was specifically left open in *Ring v. Arizona*, 526 U.S. 584 n.4 (2002) ("Ring's claim is tightly delineated…nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty…He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator."). Amicus accepts Petioner's description of the sentencing scheme in Nevada. Our only disagreement is in the characterization of *Hurst v. Florida* as the 'latest of a long line of cases *expanding* the types of determinations that … must be made by a jury and proved beyond a reasonable doubt." Amicus believes this Court's jurisprudence is restoring the role of the jury rather than expanding it.

jury of the defendant's peers and neighbors determined beyond a reasonable doubt that death was the appropriate punishment.

This recognition was borne from a two-fold appreciation: that the jury was the conscience of the community, and that the burden of proof protected the conscience of the jurors. The Founders could have chosen a different course, permitting judges to make determinations of life or death. However, they recognized that this risked delegitimizing the entire relationship between the government and the governed.[3] Instead of choosing a system that elevated magistrates and judges, our country was founded on the ideal of trial by jury.

Diminution of the jury trial right did not come in outright attack. But rather, it arrived in the advent of new procedures that promised efficiency and even to reduce unfairness in sentencing but have done neither. Confidence in the administration of the justice system – especially in matters of life and death – warrants adherence to the rule adopted at our country's founding: that any finding necessary for the imposition of the death penalty must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.[4]

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[3] See *Schriro v. Summerlin* 542 U.S. 348, 363 124 S. Ct. 2519, 2529 (2004) (Breyer J., *dissenting*) citing *Ring v. Arizona*, 536 U.S. at 612 (Scalia J., *concurring*) (judge sentencing "would undermine "our people's traditional . . . veneration for the protection of the jury in criminal cases.").

[4] This Court has multiple pending petitions which raise the question presented. The petition in *Wood v. Missouri*, No. 19-967, appears to be an excellent vehicle for addressing this question. *Amicus* does not take a position on which case is the most suitable

SUMMARY OF ARGUMENT

The right to trial by jury is "one of the Constitution's most vital protections against arbitrary government," *United States v. Haymond,* 139 S. Ct. 2369, 2373 (2019), and goes hand in hand with the standard of proof beyond a reasonable doubt. *See Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (holding that a constitutionally deficient instruction on the meaning of reasonable doubt can never be harmless and requires automatic reversal, and finding it "self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. . . . the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"); *Apprendi v. New Jersey*, 530 U.S. 466, 477–78 (2000) ("trial by jury has been understood to require that *the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of the [the defendant's] equals and neighbors . . . equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt") (emphasis in original) (internal quotations omitted).

This Court has heretofore not required that capital juries make the determination that death is warranted,[5] nor has it required that that

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vehicle and simply urges the Court to address the confusion amongst the lower courts and restore the guarantee of the Sixth Amendment to the full value it carried at the Founding.

[5] *Harris v. Alabama*, 513 U.S. 504, 115 S. Ct. 1031 (1995).

determination be made beyond a reasonable doubt.[6] But this analysis has been under the Eighth Amendment's Cruel and Unusual Punishment Clause, not under the Sixth Amendment's guarantee of a trial by jury.

This Court should look anew at the manner of determinations made with respect to the moral culpability of capital defendants under the lens of the Sixth Amendment. The historical underpinnings of the right to trial by jury – which included a beyond a reasonable doubt standard – have significant relevance to a citizen facing capital prosecution. At the Founding, the right to a jury in capital cases included the right to have a jury determine that death was warranted. The beyond a reasonable doubt standard was conceived for capital cases specifically, and was meant to apply not merely to the determination of facts, but to the determination of whether the defendant was morally deserving of death.

More than 200 years ago, William Blackstone warned that the true threat to trial by jury would come less from "open attacks," which "none will be so hardy as to make," as from subtle "machinations, which may sap and undermine i[t] by introducing new and arbitrary methods." 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 350 (1769). The Framers disagreed about much, but they did agree with Blackstone's estimation of the jury trial. *See* THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The friends and adversaries of the plan of the convention, if they

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[6] *Kansas v. Carr*, 136 S. Ct. 633 (2016).

agree in nothing else, concur at least in the value they set upon the trial by jury"). The capital sentencing schemes now in place in several states that remove sentencing responsibility from the jury, and permit death sentences to be imposed even when doubt exists as to the defendant's moral desert, would have been an anathema at the Founding. Indeed, a capital sentencing scheme like Nevada's, which removes the jury from its historical place between the defendant and the gallows, constitutes precisely the kind subtle machination of which Blackstone warned.

This diminishment of the jury's significance, like that posed by "removing control over facts determining a statutory sentencing range," would "resonate with the claims of earlier controversies." *Jones v. United States*, 526 U.S. 227, 248 (1999). To restore the jury right to its historical statute, this Court should grant *certiorari* and hold that the Sixth Amendment requires that the determination that death is warranted must be made by a jury beyond a reasonable doubt.

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ARGUMENT

I. At The Founding, Juries Made Sentencing Decisions In Capital Cases.

This Court's recent Sixth Amendment jurisprudence is guided by two principles: history informs the meaning of the Amendment's guarantees, *see, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 42–57 (2004), and the Amendment's guarantees cannot mean less today than they did at the time of the Founding. *See United States v. Haymond*, 139 S. Ct. 2369, 2376

(2019) ("[T]he Constitution's guarantees cannot mean less today than they did the day they were adopted").

In capital cases, juries at the Founding invariably made sentencing decisions, and they were required to make those decisions beyond a reasonable doubt. Judges did not. This suggests that the Framers understood the jury right included the protection that the government would not impose capital punishment without the unanimous determination of twelve citizens, beyond a reasonable doubt, that death was the appropriate punishment. These standards protected both the defendant and the moral integrity of the justice system, the very souls of judges and jurors who served the community. This Court's jurisprudence demands that they receive the same protections today.

In non-capital cases, by contrast, judges at the Founding did determine sentences. Thus, in order to remain true to the original understanding of the jury right, the Court need not extend the right to sentencing determinations in non-capital cases.

A. English Capital Juries Made Sentencing Determinations.

By the reign of George III, English law punished around 150 to 200 crimes with death. THE DEATH PENALTY IN AMERICA 6 (Hugo Adam Bedau ed., 3d ed. 1982). But death was often a more severe punishment than juries would tolerate, and in order to avoid imposing death when they deemed it overly harsh, English juries refused to make factual findings necessary to determine guilt. John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 2012 (2005).

In homicide cases, English juries determined whether defendants would live or die by making determinations relating to 'malice,' the element that distinguished the crime of murder, which was punished by mandatory death, and manslaughter, which was not. *Id.* at 2013. As a practical matter, "the murkiness of the required factual determinations inevitably vested the jury with considerable discretion." Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 Notre Dame L. Rev. 1, 8 (1989). Research by Professor Thomas A. Green indicates that English juries exercised this discretion frequently. *See* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800, 126 (1985) ("The emergence of the distinction between culpable-but-sudden homicide and slaying through malice aforethought simultaneously reduced the number of cases involving judge-jury tension and built into the fact-finding process more room for the kind of discretion juries had always exercised.")

In non-homicide capital cases, English juries also exercised sentencing discretion. In the eighteenth century, English law began to offer alternatives to capital punishment, particularly transportation to the New World for a term of penal solitude, for certain property offenses. JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 58 (2003). For many property crimes, whether the punishment would be death or transportation depended on the value of the stolen property and the circumstances of the crime. Burglary, for instance carried a sentence of death, while mere theft carried a sentence of transportation. *Id.* Grand larceny—the common law crime of the

unlawful taking of personal property valued at more than a shilling—carried a sentence of death, while petty larceny—the unlawful taking of personal property valued at less than a shilling—carried a sentence of whipping. *Id.*

By their findings, English juries in non-homicide capital cases punished defendants whom they found un-deserving of death without acquitting them outright. If an English jury determined that a capital defendant was guilty of the crime charged, and yet deemed death too harsh a sentence, it could convict the defendant of a lesser, non-capital crime by assessing the value of the stolen goods, or else willfully ignoring certain facts. *Id.* Blackstone, in his *Commentaries on the Law of England*, termed this practice "pious perjury." 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 239 (1769). The historical literature has settled on the term "partial verdict" to describe these verdicts that convicted the defendant but reduced the sanction. LANGBEIN, ORIGINS at 58.

The ability to return partial verdicts in England was an essential component of due process. In a study of 171 English cases from the 1750s, Professor John H. Langbein found that juries returned partial verdicts nearly a third of the time. John H. Langbein, *Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 54 (1983). Similarly, in a much larger sample of eighteenth-century English cases, Professor John M. Beattie found that juries returned partial verdicts 7.5% of the time between 1780 and 1802. JOHN M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660–1800, 171–72 (1986). Whether juries returned partial verdicts depended, according to Professor Langbein,

on the seriousness of the offense, and the conduct and character of the accused. LANGBEIN, ORIGINS at 59 ("For a few offenses, like picking pockets, the juries all but invariably downvalued, expressing a social consensus that the capital sanction was virtually never appropriate. At the opposite end of the spectrum were a few property crimes, especially highway robbery and gang-style burglary, that were regarded as so menacing that juries virtually never mitigated the capital sanction.").

Thus, in both homicide and non-homicide capital cases, English juries at the time of the Founding did not merely determine the existence of facts, or even guilt or innocence of the charged crime; they also made assessments of moral culpability and determined the sentence that the defendant deserved, capital or not.

Indeed, assessing moral culpability was the *primary* role of the jury in eighteenth-century English capital cases. According to Professor Langbein's survey of English cases, "Only a small fraction of eighteenth-century criminal trials were genuinely contested inquiries into guilt or innocence. In many cases, perhaps most, the accused had been caught in the act or with the stolen goods or otherwise had no credible defense. To the extent that the trial had a function in such cases beyond formalizing the inevitable conclusion of guilt, it was to decide the sanction." LANGBEIN, ORIGINS at 59. That decision belonged to the jury.

B. American Capital Juries Inherited And Strengthened The Sentencing Role Of English Capital Juries.

The sentencing role of the English jury in capital cases was well known to the Framers at the time that they wrote and enacted the Sixth Amendment. American juries at the time of the Founding, like English juries, often exercised sentencing discretion by refusing to find facts necessary for conviction. *See Woodson v. North Carolina*, 428 U.S. 280, 289–290 (1976) ("Almost from the outset jurors reacted unfavorably to the harshness of mandatory death sentences. The States initially responded to this expression of public dissatisfaction with mandatory statutes by limiting the classes of capital offenses. This reform, however, left unresolved the problem posed by the not infrequent refusal of juries to convict murderers rather than subject them to automatic death sentences."). Blackstone, a source quite familiar to the Framers,[7] had named the practice,[8] and debates in the First Congress reveal that the Framers were acutely aware of the jury's sentencing power: when Congress considered making forgery a capital offense, the principal argument against the legislation was that juries would not convict.[9] John G. Douglass,

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[7] See Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restrain Model*, 76 Minn. L. Rev. 557, 581–82 (1992) (noting that Blackstone's text was in high demand among lawyers in the American colonies during the decades leading up to independence).

[8] The practice of "pious perjury" was documented by Blackstone in his *Commentaries*. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 239 (1769).

[9] 1 Annals of Cong. 1573–74 (Joseph Gales ed., 1834). Although forgery was passed as a capital offense, Act of Apr. 30, 1790, ch. 9, § 14, 1 Stat. 112, 115, nobody in the First Congress—the same

Confronting Death: Sixth Amendment Rights at Capital Sentencing, 105 Colum. L. Rev. 1967, 2014 (2005).

But the power of the American capital jury to determine sentences did not merely mirror that of the English jury. In two respects, rather, it surpassed that of English capital jury.

First, while English judges could essentially direct guilty verdicts, John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 286 (1978), or refuse to accept the jury's not guilty verdict, *id.* at 291–96, acquittals by American juries were unreviewable. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 36–37 (2003).

Second, American juries, unlike English juries, had the power to decide questions of law as well as fact.[10] Early decisions by Supreme Court justices

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Congress that passed the Sixth Amendment—suggested that its efficacy should be enhanced by requiring juries to return special verdicts.

[10] *See* R.J. Farley, *Instructions to Juries*, 42 YALE L.J. 194, 202 (1932) ("In America by the time of the Revolution and for some time thereafter, the power to decide the law in criminal cases seems to have been almost universally accorded the jury. . . ."); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV 582, 590–96 (1939) (citing examples of nineteenth-century cases in which juries were authorized to decide questions of law); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 387–88 (1999) (describing the limits of the English jury's power to decide questions of law). We do not suggest that this Court return to juries the power to decide questions of law. Rather, we suggest that the Court should return to capital defendants the protection that the Sixth Amendment originally conferred, by holding that the choice

illustrate that the power of the jury to decide matters of law applied in capital cases: an American jury could determine that the defendant's alleged conduct did not warrant the capital sanction as a matter of law, even if the evidence clearly showed that the defendant in fact committed the conduct.[11] Thus, while the English jury exercised its sentencing discretion outside of the law[12]—by manipulating its findings of

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between life and death must be made by a jury. Because the law never demands a sentence of death, *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976), juries could exercise this sentencing discretion without contradicting *Sparf v. United States*, 156 U.S. 51 (1895).

[11] For examples of early American juries exercising sentencing power in federal capital cases accordance with their determinations of law, and not merely fact, see *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (Henfield, the defendant, was charged with inciting war with Britain in violation of the law of nations), in which Justice Wilson, speaking for the circuit court, confirmed that while "it is the duty of the court to explain the law to the jury . . . the jury, in a general verdict, must decide both law and fact," 11 F. Cas. at 1119–1121, and *Case of Fries*, 9 F. Cas. 924 (C.C.D. Pa. 1800) (Fries, the defendant, was charged with treason), in which Justice Chase instructed the jury that "It is the duty of the court to state to the jury their opinion of the law arising on the facts; but the jury are to decide . . . both the law and the facts, on their consideration of the whole case," 9 F. Cas. at 930. Despite clear evidence that Henfield had committed the acts with which he was charged, the jury voted to acquit. 11 F. Cas. at 1122. One contemporary newspaper praised the jury for "adding to the security of the rights and liberties of mankind," and, affirming that the jury's verdict was in accordance with the law, argued that it had precedential value: "By this verdict which according to the charge of the court indicates a decision on the law as well as the facts, it is not established that a citizen of the United States may by law enter on board a French Privateer and it is presumable that no other prosecution for this same cause can be sustained." NAT'L GAZETTE (Phila.), Aug. 3, 1793.

[12] *See* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL

fact—American capital juries exercised their sentencing discretion according to the law, which they had the power to interpret.

The American jury's expanded sentencing power shows that at the Founding, the right of capital defendants to be sentenced by a jury was not merely procedural, but substantive. No capital defendant could be sentenced to death unless a jury determined that he deserved death—a determination that the jury was never required to make, and which it could refuse to make without fear of reversal. The right to be sentenced by a jury, then, was a substantive rule prohibiting "criminal punishment for certain primary conduct," *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)—namely, conduct that a jury of the defendant's peers did not deem worthy of punishment by execution.

II. At The Founding, The Beyond A Reasonable Doubt Standard Applied To The Capital Sentencing Determination

The beyond a reasonable doubt standard was conceived for capital cases, and served to protect both the rights of the defendant and the collective rights of the community. While the finding that death is warranted is not strictly factual, that does not mean the standard cannot apply; indeed, the reasonable doubt standard was understood at the Framing to

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JURY 1200–1800, 97 (1985) (describing the practice of manipulating the fact-finding process to prevent the defendant from being executed was "sanction nullification," or an "intermediate form of nullification," as distinct from jury nullification in its "strongest sense," which "occurs when the jury recognizes that a defendant's act is proscribed by the law but acquits because it does not believe the act should be proscribed," *id.* at xviii).

apply specifically to moral determination of whether or not the defendant deserved to die.

A. The Beyond A Reasonable Doubt Standard Was Conceived Specifically For Capital Cases.

The reasonable doubt standard emerged in the eighteenth century as a means of combatting increasing resistance, both in Britain and America, to the application of capital punishment. Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45, 51 (2005). After the American Revolution, English jurors lost the option of transporting the convicted persons to the colonies as a method of punishment. JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 157 (2008). Without the option of transportation, jurors in the 1780s often refused to find guilt in capital cases, believing they themselves faced potential damnation. *Id.* at 187. In response to the reluctance of jurors to impose death, English and American courts began instructing jurors on the reasonable doubt standard in the eighteenth century in order to ease the path to conviction. *Id.* at 3. Indeed, "the early life of the reasonable doubt instruction appears to have been limited solely to capital trials," Steve Sheppard, *The Metamorphoses of Reasonable Doubt*, 78 NOTRE DAME L. REV. 1165, 1195 (2003), where it served as an explicit reminder to Christian juries, fearful of the moral consequences of condemning defendants to death, that they need not find guilt beyond *all* doubt in order to convict. Janet C. Hoeffel, *Death Beyond a Reasonable Doubt*, 70 ARK. L. REV. 267, 277–278 (2017).

B. The Beyond A Reasonable Doubt Standard Originally Applied To The Sentencing Determination.

At the Founding, the reasonable doubt standard applied to moral determinations—specifically, the determination whether a defendant deserved the death penalty—more than factual ones. The eighteenth-century capital trials for which the reasonable doubt standard was designed were not primarily concerned with guilt. Rather, capital trials "were essentially sentencing hearings, where the issue of guilt went largely uncontested and the real question was whether the defendant should die for his crime." Douglass, *Confronting Death*, at 1974. Thus, to jurors reluctant to send the defendant to his death, the critical question was not whether the defendant had done that of which he was accused, but whether he deserved to die for it. Hoeffel, *Death Beyond A Reasonable Doubt*, at 279. It was to that question that the reasonable doubt standard applied. As Professor Whitman finds, "[the standard] was designed to quell fears about the responsibility for judgement, not to resolve factual mysteries." WHITMAN, at 4; *see also* Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX L. REV. 105, 111 (1999) ("[In the late eighteenth and early nineteenth centuries,] [p]roof beyond a reasonable doubt was equated with *moral* certainty") (emphasis added).

C. At The Founding, Juries Did *Not* Regularly Decide Sentences In Non-Capital Cases.

The first criminal legislation passed by the First Congress provides evidence that the Framers distinguished between capital and non-capital cases

in assigning sentencing discretion to juries. That legislation enumerated several capital crimes. Act of Apr. 30, 1790, ch. 9, §§ 1 (treason), 3 (murder), 8 (piracy), 9 (piracy), 10 (accessories), 14 (forgery), 23 (aiding escape of person convicted of any capital crime), 1 Stat. 112, 112–17. For none of those crimes could a judge choose the sentence. *Id. See also* Douglass, *Confronting Death*, at 2017. Rather, a death sentence followed automatically from a conviction, but juries, via their power to interpret the law, could choose to withhold the sentence—even if the facts alleged by the state were clearly proven—if they deemed it unwarranted. Douglass, *Confronting Death*, at 2016. (For evidence that the Framers explicitly contemplated the power of juries to withhold death sentences from defendants they deemed underserving, see 1 Annals of Cong. 1573–74 (Joseph Gales ed., 1834)., *supra* note 4, describing debates in the first Congress about the likelihood that jurors would refuse to impose the death penalty for the capital crime of forgery.) For non-capital crimes, by contrast, the Framers saw fit to remove the sentencing power from the jury. The first federal legislation defined thirteen noncapital offenses for which it provided sentencing ranges of fines and imprisonment. Act of Apr. 30, 1790, ch. 9, §§ 2 (misprision of treason), 5 (rescue of body after execution), 6 (misprision of felony), 7 (manslaughter), 11 (concealing a pirate), 12 (confederacy to become pirates), 13 (maiming), 15 (stealing or falsifying court records), 16 (larceny), 17 (receiving stolen goods), 18 (perjury), 21 (bribery), 22 (obstruction of process). Although the statute did not explicitly identify the sentencing authority in noncapital cases, contemporary practice suggests that the judge was to choose within the authorized range of punishments.

Douglass, *Confronting Death*, at 2017. (Other criminal legislation passed by the First Congress explicitly vested judges with noncapital sentencing discretion. *See* Act of Aug. 4, 1790, ch. 35, § 66, 1 Stat. 175, 175–76 (providing for "fine or imprisonment, or both, in the discretion of the court . . . the fine shall not exceed one thousand dollars, and the term of imprisonment shall not exceed twelve months" in cases of certain customs offenses)). Thus, while American juries in non-capital cases could still choose to acquit defendants despite clear evidence of the facts charged, a defendant convicted of a non-capital offense could not be certain that his sentence would be determined by a jury.

Eighteenth-century English and American authorities provide further evidence that the Framers trusted judges to determine sentences for misdemeanants, but not capital defendants. *See, e.g.*, *State v. Smith*, 2 S.C.L. (2 Bay) 62, 62 (1796) (noting that affidavits in mitigation may be presented to court in advance of sentencing defendant convicted of assault); *Rex v. Sharpness*, (1786) 99 Eng. Rep. 1066, 1066 (K.B.) (allowing prosecutor to read affidavit in aggravation before sentencing defendant to one month imprisonment on conviction for crime of "suffering a prisoner to escape"). While judges were not given the power to choose between life and death, they could choose among sentences that did not "touch life or limb," and they were not required to make that choice beyond a reasonable doubt. Douglass, *Confronting Death* at 2016 ("judges exercised sentencing discretion in choosing among [non-capital] punishments and in fixing terms of imprisonment, and . . . they exercised that discretion in sentencing proceedings that lacked the formality of jury trials").

III. In Order To Ensure That The Sixth Amendment Does Not Provide Less Protection Today Than It Did At The Founding, This Court Should Hold That The Determination Whether A Defendant Lives Or Dies Must Be Made By A Jury Beyond A Reasonable Doubt.

An examination of capital and non-capital sentencing practices at the Founding reveals a distinction: while the Framers envisioned a role for judges in determining sentences in non-capital cases, they did not know a role for judges in determining sentences in capital cases. Choosing between life and death was the sole responsibility of the jury. To help juries make that decision, Courts instructed them that they needed to be certain of the defendant's guilt beyond a reasonable doubt. What that meant, at the Founding, was not just that jurors must not have reasonable doubts about the facts alleged, but also about the defendant's moral blameworthiness. A capital defendant at the Founding could thus be certain that his sentence would be determined by a jury, beyond a reasonable doubt. For non-capital defendants, there was no such guarantee. Instead, the Framers were comfortable entrusting noncapital sentencing to an informal, post-trial sentencing process run by judges.

This distinction suggests that death, even at the time of the Founding, was different. This Court's Eighth and Fifth Amendment jurisprudence recognize that difference today. *See Gardner v. Florida*, 430 U.S. 349, 357 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). But its Sixth Amendment jurisprudence does not. While the Framers refused to entrust the sentencing

determination in capital cases to anyone other than a representative group of the defendant's peers, today we allow judges to make sentencing determinations, even in cases where the jury refused to unanimously impose death.

In excluding capital-case juries from the ultimate choice of life or death, this Court overlooks both the historical purpose of the general verdict and the most celebrated exercise of that power by juries. In England and colonial America, juries stood as a form of popular resistance to unpopular laws. Nowhere was that power more important, and more frequently exercised, than in resisting the imposition of death sentences under an unpopular criminal code. For that reason, at the Founding the right to a jury in a capital case included the right to have the jury make the sentencing decision beyond a reasonable doubt. "Because the Constitution's guarantees cannot mean less today than they did the day they were adopted," *Haymond*, 139 S. Ct. at 2376, it should remain the case today that a jury must find beyond a reasonable doubt that death is deserved.

CONCLUSION

For the reasons set forth herein, *Amic*us respectfully suggest that the Court grant certiorari to recognize the role of the jury in making the findings necessary to the imposition of a death sentence.

Respectfully Submitted,

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