No. 23-

In the Supreme Court of the United States

JAMES EDWIN HOGANSON,

Petitioner,

v.

COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a maximum prison term may be doubled upon a finding of "extraordinary … aggravating circumstances," does the Sixth Amendment require the existence of such circumstances to be submitted to the jury and found beyond a reasonable doubt?

RELATED PROCEEDINGS

Colorado Supreme Court:

Hoganson v. People, No. 22SC950 (May 15, 2023)

Colorado Court of Appeals:

People v. Hoganson, No. 19CA1247 (Nov. 3, 2022)

Arapahoe County (Colo.) District Court:

People v. Hoganson, No. 17CR998 (May 16, 2019)

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PETITION FOR A WRIT OF CERTIORARI

James Edwin Hoganson respectfully petitions for a writ of certiorari to review the judgment of the Colorado Court of Appeals.

OPINIONS BELOW

The opinion of the Colorado Court of Appeals is unpublished. The court's judgment can be found at 2022 WL 16649490. The Colorado Supreme Court's order denying review is unpublished. It can be found at 2023 WL 3479440.

JURISDICTION

The Colorado Supreme Court denied review on May 15, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

Colo. Rev. Stat. § 18-1.3-401(6) provides: "In imposing a sentence to incarceration, the court shall impose a definite sentence which is within the presumptive ranges set forth in subsection (1) of this section unless it concludes that extraordinary mitigating or aggravating circumstances are present, are based on evidence in the record of the sentencing hearing and the presentence report, and support a different sentence which better serves the purposes of this code with respect to sentencing, as set forth in section 18-1-102.5. If the court finds such extraor-

dinary mitigating or aggravating circumstances, it may impose a sentence which is lesser or greater than the presumptive range; except that in no case shall the term of sentence be greater than twice the maximum nor less than one-half the minimum term authorized in the presumptive range for the punishment of the offense."

STATEMENT

This case raises a recurring question that first arose in the wake of *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and on which the state supreme courts remain divided.

Many states have sentencing statutes that increase the punishment where the facts satisfy a specified standard. Colorado is typical: Punishment may be increased if there are "extraordinary … aggravating circumstances." Colo. Rev. Stat. § 18-1.3-401(6). Other states have similar provisions, under which punishment may be increased if the offense was "heinous," if it was committed with "particular cruelty," if the presumptive sentence would be "clearly too lenient," and so on. Whatever the precise wording, these are all mixed questions of law and fact. Each of these sentencing provisions asks whether the facts of the case satisfy the specified standard. If the facts do satisfy the standard, the punishment may be increased.

The state supreme courts have taken two different views as to how the Sixth Amendment, as interpreted in *Blakely* and *Apprendi*, applies to these statutes. Many courts have correctly held that the Sixth Amendment requires the jury to find that the facts

satisfy the standard. But some courts, including the Colorado Supreme Court, have concluded otherwise. These courts have held that the Sixth Amendment allows the judge, not the jury, to find that the facts satisfy the standard.

This case is a perfect vehicle in which to resolve the conflict. James Hoganson was convicted of manslaughter and tampering with evidence. The presumptive sentencing range for manslaughter was two to six years, while the presumptive range for tampering was one year to eighteen months. But the trial court sentenced Hoganson to twelve years for manslaughter and three for tampering, under the provision of Colorado law that allows the maximum sentence to be doubled if "extraordinary … aggravating circumstances" are present. Many states have read *Blakely* and *Apprendi* to require that this kind of question be submitted to the jury. Not Colorado. Despite Hoganson's objection, the jury was never asked to find whether extraordinary aggravating circumstances existed. The court made the finding itself.

The Court should grant certiorari and reverse.

1. Colorado law divides felonies into classes and prescribes a presumptive sentencing range for each class. Colo. Rev. Stat. § 18-1.3-401(1). Manslaughter, a class four felony, carries a presumptive range of two to six years. App. 22a. Tampering with evidence, a class six felony, carries a presumptive range of one year to eighteen months. *Id.*

The trial court is required to impose a sentence within the presumptive range, "unless it concludes that extraordinary mitigating or aggravating cir-

cumstances are present." Colo. Rev. Stat. § 18-1.3-401(6). If the court finds extraordinary mitigating circumstances, it may impose a sentence as short as half the presumptive minimum. *Id.* If the court finds extraordinary aggravating circumstances, it may impose a sentence up to twice the presumptive maximum. *Id.*

2. James Hoganson was charged with first degree murder, but the jury convicted him only of the lesser offenses of manslaughter and tampering with evidence. App. 4a. At sentencing, he filed a motion to declare Colorado's aggravated sentencing provision unconstitutional on the ground that it authorizes the court, rather than the jury, to impose a sentence greater than the presumptive maximum based on the presence of extraordinary aggravating circumstances. *Id.* at 17a-18a. The trial court denied the motion. *Id.* at 18a.

The trial court sentenced Hoganson to twice the presumptive maximum on each charge, based on the court's finding of extraordinary aggravating circumstances. *Id.* at 18a-21a. The court determined that each conviction was an extraordinary aggravating circumstance for the other. For the manslaughter charge, the extraordinary aggravating circumstance was that Hoganson had tampered with the evidence. *Id.* at 20a-21a. For the tampering charge, the extraordinary aggravating circumstance was that Hoganson had committed manslaughter. *Id.* at 21a. The trial court sentenced Hoganson to twelve years for manslaughter (twice the presumptive maximum of six years) and three years for tampering (twice the presumptive maximum of eighteen months). *Id.*

The court had the discretion to impose these doubled sentences concurrently or consecutively. It imposed them consecutively. *Id.* at 4a. Although the jury acquitted Hoganson of murder and convicted him only of manslaughter, an offense with a presumptive maximum sentence of only six years, the total sentence imposed by the trial court thus amounted to fifteen years.

3. The Colorado Court of Appeals affirmed. *Id.* at 2a-33a.

The court recognized that under *Blakely* and *Apprendi*, "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." *Id.* at 23a (citations and internal quotation marks omitted). But the court noted, accurately, that the state supreme court "has repeatedly rejected" the argument that *Blakely* and *Apprendi* require the existence of aggravating circumstances to be found by the jury. *Id.* at 25a. Under state supreme court precedent, the court explained, "it does not violate *Blakely* for a trial judge to reach the legal conclusion that facts in the sentencing record constitute extraordinary aggravating circumstances, so long as the court's conclusion is supported by at least one *Blakely*-compliant or *Blakely*-exempt fact." *Id.* at 25a-26a (citing *Mountjoy v. People*, 430 P.3d 389 (Colo. 2018), and *Lopez v. People*, 113 P.3d 713 (Colo. 2005)).

The Court of Appeals concluded that the trial court's findings of aggravated circumstances were adequately supported by "*Blakely*-compliant" facts—

that is, by facts found by the jury. The fact that Hoganson tampered with the evidence had been found by the jury, the court explained, because the jury convicted him of tampering. App. 24a. The fact that Hoganson committed manslaughter had likewise been found by the jury when the jury convicted him of that offense. *Id.* Although the jury was never asked to find whether these facts constituted extraordinary aggravating circumstances, the Court of Appeals held that the trial court's "analysis rendered the sentence constitutionally sound." *Id.*

Hoganson sought review in the Colorado Supreme Court. He asked the court to overrule *Mountjoy* and *Lopez*, the decisions relied upon by the Court of Appeals, because they conflict with this Court's precedents. But the Colorado Supreme Court denied review. *Id.* at 34a.

REASONS FOR GRANTING THE WRIT

"'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.'" *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). In *Blakely*, the Court clarified that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional facts." 542 U.S. at 303-04.

This rule is simple to apply where a sentence is enhanced by the finding of a historical fact, such as the fact that the defendant was motivated by bigotry, as in *Apprendi*. Colorado's sentencing statutes,

like those of other states, list several historical facts that authorize longer sentences (none of which apply to this case). Colo. Rev. Stat. § 18-1.3-401(8). There is no doubt that these historical facts must be found by the jury.

But how does the rule of *Blakely* and *Apprendi* apply to sentence enhancements that are mixed questions of law and fact, such as the presence of "extraordinary aggravating circumstances"? This is where the state supreme courts have divided.

Of the courts that have addressed the issue, most have decided that these enhancements must also be found by the jury. If a statute authorizes a longer sentence where there are "aggravating circumstances," for example, in these states it is the jury that must determine whether the historical facts of the case constitute aggravating circumstances. If a statute authorizes a longer sentence for offenses that are "heinous," it is the jury that must assess whether the historical facts of the case amount to heinousness. Under *Blakely* and *Apprendi*, these states treat mixed questions of law and fact the same way they treat historical facts, as questions that must be submitted to the jury.

Colorado is one of only two states that have taken the opposite view. In these states, mixed questions of law and fact are for the court, not the jury. If a statute authorizes a longer sentence where there are "extraordinary aggravating circumstances," for example, it is the judge's role to determine whether the historical facts found by the jury constitute extraordinary aggravating circumstances. If a statute authorizes a longer sentence where an offense was committed with "particular cruelty," it is the judge

who decides whether the historical facts found by the jury amount to particular cruelty. Under *Blakely* and *Apprendi*, these states treat mixed questions of law and fact the same way they treat pure legal questions, as issues for the court to decide.

The Court should grant certiorari to confirm that the majority view is the correct one. The Sixth Amendment requires a mixed question of law and fact to be decided by the jury if the answer to the question will increase the defendant's punishment.

I. The state supreme courts are divided as to how the rule of *Blakely* and *Apprendi* applies to mixed questions of law and fact.

Soon after *Blakely*, the state supreme courts split over how to apply its holding to mixed questions of law and fact. The split still exists today.

Most state supreme courts to address the issue have held that under *Blakely* and *Apprendi*, mixed questions of law and fact must be submitted to the jury. That is, where a sentence can be lengthened if the facts satisfy a statutory standard, the jury must find that the facts satisfy the standard.

New Mexico, for example, has a sentencing statute like Colorado's, under which the presumptive sentence can be shortened or lengthened if there are "mitigating or aggravating circumstances." *State v. Frawley*, 172 P.3d 144, 146 (N.M. 2007). The statute formerly provided that the court should determine whether any such circumstances exist, *id.*, but the New Mexico Supreme Court held that this provision violated the Sixth Amendment as interpreted in *Blakely* and *Apprendi*. "We have no choice but to

conclude that Frawley's sentence was altered upwards in contravention of the Sixth Amendment," the court determined. *Id.* at 152. The state legislature subsequently amended the statute so that now the jury, rather than the court, determines whether aggravating circumstances exist. N.M. Stat. § 31-18-15.1(B) ("When the determination of guilt or innocence for the underlying offense is made by a jury, the original trial jury shall determine whether aggravating circumstances exist.").

Indiana also had a statute under which the presumptive sentence could be lengthened or shortened if the court found aggravating or mitigating circumstances. *Smylie v. State*, 823 N.E.2d 679, 682 (Ind. 2005). The Indiana Supreme Court held this provision unconstitutional in light of *Blakely*. "It is apparent that Indiana's sentencing system runs afoul of the Sixth Amendment," the court concluded, "because it mandates both a fixed term and permits judicial discretion in finding aggravating or mitigating circumstances to deviate from the fixed term." *Id.* at 685.[1]

Vermont had a similar statute, with a presumptive sentence that could be increased if the court found aggravating circumstances. *State v. Provost*, 896 A.2d 55, 63 (Vt. 2005). The Vermont Supreme Court held that this provision violated the Sixth

[1] In *Morgan v. State*, 829 N.E.2d 12, 17 (Ind. 2005), the court found an exception to this rule for just one of the statute's aggravating circumstances—whether prior punishments had failed to rehabilitate the defendant—on the ground that this aggravator is not a fact in itself but is rather a description of "the moral or penal weight of actual facts."

Amendment as interpreted in *Blakely* and *Apprendi*. *Id.* at 64.

Many other state supreme courts have likewise concluded that *Blakely* and *Apprendi* require sentence enhancements that are mixed questions of law and fact to be submitted to juries. In these states, the Sixth Amendment is understood to mean that the jury, not the court, must decide whether the specified standard is satisfied.

In Connecticut, a defendant's punishment could be increased where "the court is of the opinion that such person's history and character and the nature and circumstances of such person's criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest." *State v. Bell*, 931 A.2d 198, 227 (Conn. 2007) (italics removed). The Connecticut Supreme Court held this provision unconstitutional because "it does not provide that a defendant is entitled to have the jury" make the required finding. *Id.* at 235. The court remedied the constitutional violation by excising the words "the court is of the opinion" from the statute, so that in future cases "the jury shall make the determination, beyond a reasonable doubt, whether … extended incarceration will best serve the public interest." *Id.* at 236.

In Hawaii, the punishment could be increased where the defendant's "criminal actions are so extensive that a sentence of imprisonment for an extended term is necessary for the protection of the public." *State v. Maugaotega*, 168 P.3d 562, 566 (Haw. 2007). The Hawaii Supreme Court held this provision unconstitutional because it requires "the sentencing court, rather than the trier of fact, to

make an additional necessity finding" that lengthens the defendant's sentence. *Id.* at 576. The court concluded that "Maugaotega's extended term sentences imposed by the circuit court violated his sixth amendment right to a jury trial." *Id.* at 577. *See also Kaua v. Frank*, 436 F.3d 1057, 1062 (9th Cir. 2006) (reaching the same conclusion about Hawaii's sentencing statute under the deferential habeas standard of review). The state legislature subsequently amended the statute so that now all such sentence enhancements are submitted to the jury, which must find them beyond a reasonable doubt. Haw. Rev. Stat. § 706-662.

In Maine, punishment could be increased if the defendant's conduct was "among the most heinous crimes." *State v. Schofield*, 895 A.2d 927, 929 (Me. 2005). The Maine Supreme Court held that this provision "cannot be constitutionally applied without affording the defendant an opportunity to have the fact-finder of her choice, judge or jury, determine whether, beyond a reasonable doubt, the crime was among the most heinous offenses." *Id.* at 933. The court explained that in *Blakely* and *Apprendi*, "the Supreme Court has specifically held that, in the absence of a knowing waiver, the Constitution requires juries to make these determinations when it results in an enhancement beyond a specified maximum." *Id.*

In New Jersey, punishment could be increased where the offense "was committed in an especially heinous, cruel, or depraved manner." *State v. Abdullah*, 878 A.2d 746, 749 (N.J. 2005). The New Jersey Supreme Court held that "[i]n light of *Blakely*, … only a jury finding of that fact would justify increasing

a sentence above the presumptive." *Id.* at 751. The court accordingly remanded for resentencing, because the court, not the jury, had made the determination that the offense was committed in an especially heinous, cruel, or depraved manner. *Id.*

In Ohio, the court could increase the punishment of "offenders who committed the worst forms of the offense" and "offenders who pose the greatest likelihood of committing future crimes." *State v. Foster*, 845 N.E.2d 470, 490 (Ohio 2006), *abrogated in part on other grounds*, *Oregon v. Ice*, 555 U.S. 160 (2009). The Ohio Supreme Court held this provision, along with other similar provisions, unconstitutional because "[i]t does not comply with *Blakely*." *Id.* The court cured the constitutional error by severing the part of the statute that directed the court rather than the jury to make these determinations. *Id.* at 497-98.

In Washington, punishment could be increased if the court found that the presumptive sentence would be "clearly too lenient." *State v. Hughes*, 110 P.3d 192, 201 (Wash. 2005), *abrogated in part on other grounds*, *Washington v. Recuenco*, 548 U.S. 212 (2006). The Washington Supreme Court held this provision unconstitutional because "*Blakely* did not authorize such additional judicial fact finding. The too lenient conclusion is one that must be made by the jury." *Id.* at 202. The court concluded that the question whether the presumptive sentence was too lenient "is a factual determination that *cannot* be made by the trial court following *Blakely*." *Id.* at 203.

These cases all involved the application of *Blakely* and *Apprendi* to mixed questions of law and fact. In each case, a presumptive sentence could be length-

ened if the facts of the case satisfied a specified statutory standard. And in each case, the state supreme court held that the question whether the facts satisfied the standard was a question that had to be submitted to the jury.

We have found only two state supreme courts that take the opposite view—the supreme courts of Colorado and Minnesota.

In *Lopez v. People*, 113 P.3d 713 (Colo. 2005), and *Mountjoy v. People*, 430 P.3d 389 (Colo. 2018), the Colorado Supreme Court departed from the consensus of the other state supreme courts. In *Lopez*, the court held that whether a fact constitutes "extraordinary aggravating circumstances" is a question for the trial court, not for the jury. *Lopez*, 113 P.3d at 730. In *Lopez*, the fact was that the defendant had prior convictions. The trial court had determined that these prior convictions constituted extraordinary aggravating circumstances. The Colorado Supreme Court reasoned that "[u]nder the *Apprendi-Blakely* rule, this determination could properly rest on the prior conviction facts. The legal judgment that these facts are extraordinary aggravating circumstances … is within the trial judge's discretion." *Id.*

The Colorado Supreme Court reaffirmed this conclusion in *Mountjoy*. Mountjoy was convicted of manslaughter, illegal use of a firearm, and tampering with evidence. 430 P.3d at 391. The trial court doubled his sentence after finding that his use of a weapon and tampering with evidence constituted extraordinary aggravating circumstances. *Id.* The Colorado Supreme Court affirmed. "Each of Mountjoy's aggravated sentences is constitutionally sound because each is based on at least one *Blakely*-

compliant fact," the court reasoned. *Id.* at 395. The facts that Mountjoy had used a weapon and had tampered with evidence were "*Blakely*-compliant because the jury necessarily found them beyond a reasonable doubt when it found Mountjoy guilty of the other two offenses." *Id.* The court concluded that this Court's precedents "only require that aggravating facts be found by a jury beyond a reasonable doubt," *id.* at 396, but that the jury need not also find that these facts satisfy the standard of extraordinary aggravating circumstances.

The Colorado Supreme Court's view on this issue is so clear that the state court of appeals decided our case in an unpublished opinion. The state supreme court declined our request to grant review to reconsider *Lopez* and *Mountjoy*. App. 34a.

The Minnesota Supreme Court has reached the same conclusion. In Minnesota, a sentence can be increased where the victim was treated with "particular cruelty." *State v. Rourke*, 773 N.W.2d 913, 920 (Minn. 2009). The Minnesota Supreme Court rejected the argument that this aggravator must be submitted to the jury under *Blakely* and *Apprendi*. *Id.* "Although the rule announced in *Blakely* now requires that the facts of the case be found by a jury," the court explained, "it does not require us to abandon our view that the particular cruelty aggravating factor is a reason explaining why the *facts* of the case provide the district court a substantial and compelling basis" to increase a sentence. *Id.* at 920-21. So long as the jury finds the historical facts underlying a determination of particular cruelty, "the question of whether those additional facts provide the district court a reason to depart does not involve a factual

determination and, therefore, need not be submitted to a jury." *Id.* at 921.

These Colorado and Minnesota cases would have come out differently in the states that interpret *Blakely* and *Apprendi* to require mixed questions of law and fact to be submitted to the jury. This conflict is unlikely to be resolved without this Court's intervention.

In the years after *Blakely*, this Court has granted certiorari to resolve several similar lower court conflicts over how *Blakely* and *Apprendi* apply in various recurring situations. *See United States v. Booker*, 543 U.S. 220 (2005); *Washington v. Recuenco*, 548 U.S. 212 (2006); *Cunningham v. California*, 549 U.S. 270 (2007); *Oregon v. Ice*, 555 U.S. 160 (2009); *Southern Union Co. v. United States*, 567 U.S. 343 (2012); *Alleyne v. United States*, 570 U.S. 99 (2013); *United States v. Haymond*, 139 S. Ct. 2369 (2019). The Court should grant certiorari in this case for the same reason.

II. The decision below is wrong.

Certiorari is also warranted because the Colorado and Minnesota Supreme Courts are mistaken. Where the answer to a mixed question of law and fact can increase a criminal punishment, the question must be submitted to a jury and found beyond a reasonable doubt.

In *Blakely* itself, the sentence enhancer was a mixed question of law and fact—whether the defendant acted with "deliberate cruelty." 542 U.S. at 303. Likewise, in *Cunningham*, the sentence enhancers were mixed questions of law and fact, including "the particular vulnerability of [the] victim"

and whether the defendant's conduct "indicated a serious danger to the community." 549 U.S. at 275. In *Ring v. Arizona*, 536 U.S. 584, 595 (2002), one of the sentence enhancers was a mixed question of law and fact—whether the offense was committed "in an especially heinous, cruel or depraved manner." In all these cases, the Court held that these were determinations for the jury.

Indeed, the Court could hardly have held otherwise. In criminal cases, mixed questions of law and fact have traditionally been resolved by juries. *United States v. Gaudin*, 515 U.S. 506, 512 (1995). Whether a false statement was "material," for example, is a mixed question of law and fact, just like whether an offense was committed with "aggravating circumstances." In *Gaudin*, the Court held that the Sixth Amendment requires materiality to be submitted to the jury and found beyond a reasonable doubt. *Id.* at 522-23.

The Colorado Supreme Court has rejected the relevance of this principle on the theory that "*Gaudin* is about proof of guilt" rather than sentencing. *Mountjoy*, 430 P.3d at 394. But this Court has repeatedly explained that under the Sixth Amendment it makes no difference whether a finding is labeled as a sentencing enhancement or an element of the offense. Either way, if it increases the punishment, it is for the jury. *See Southern Union*, 567 U.S. at 358-59 ("*Apprendi* and its progeny have uniformly rejected [the argument] that in determining the maximum punishment for an offense, there is a constitutionally significant difference between a fact that is an 'element' of the offense and one that is a 'sentencing factor.'"); *Ring*, 536 U.S. at 605 ("[T]he characterization

of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury."). As Justice Scalia put it rather more memorably, "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." *Id.* at 610 (Scalia, J., concurring).

The Colorado Supreme Court further erred in considering *Gaudin* as a single decision about materiality rather than as just one instance of our constitutional tradition, under which, in criminal cases, mixed questions generally—not just about materiality—are determined by juries. *Gaudin* includes a lengthy discussion of this tradition dating all the way back to the trial of Aaron Burr. 515 U.S. at 511-18. The rule of *Blakely* and *Apprendi* "is rooted in longstanding common-law practice," *Cunningham*, 549 U.S. at 281, a practice that includes the jury's traditional role in deciding mixed questions of law and fact in criminal cases.

III. This is an important issue, and this case is a good vehicle for resolving it.

This issue is important because it affects an enormous number of criminal defendants. Colorado's trial courts often lengthen sentences based on aggravating circumstances. (There is no way to know exactly how often, but experienced defense counsel in Colorado report that it is very common.) And if,

contrary to our view, the Colorado Supreme Court is right and the other state supreme courts are wrong, that will be important news in all the other states that have interpreted *Blakely* and *Apprendi* to require these decisions to be made by juries.

This case is an excellent vehicle for resolving the conflict. James Hoganson is serving a fifteen-year sentence, but if the Colorado courts properly applied *Blakely* and *Apprendi*, his maximum sentence would be only seven and a half years. There are no other issues cluttering up this case. It is as clean a vehicle for addressing the question presented as the Court could possibly see.

A few years ago, the Court denied certiorari on a similar question in *Mountjoy v. Colorado*, No. 18-952 (cert. denied Apr. 29, 2019). But the certiorari petition in *Mountjoy* did not apprise the Court of the conflict among state supreme courts on this issue. The denial of certiorari in *Mountjoy* thus does not counsel in favor of a similar outcome here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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