No. 14-8194

IN THE
Supreme Court of the United States

COURTNEY LOCKHART,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for Writ of Certiorari
To The Alabama Court of Criminal Appeals

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF BLACK VETERANS, SWORDS TO PLOWSHARES, VETERANS DEFENSE PROJECT, AND THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the trial court's use of judicial override to sentence Mr. Lockhart to death violates his Sixth Amendment rights, where Mr. Lockhart was not death-eligible until the trial court both made specific, additional factual findings and found that the aggravating factors outweigh the mitigating circumstances.

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici* are the National Association for Black Veterans, the Veterans Defense Project, Swords to Plowshares, and The Constitution Project. The *amici* are united in their belief that Alabama's death penalty regime unconstitutionally usurps the jury's fact-finding role. This case represents a particularly egregious example of that interference. Iraq War veteran Courtney Lockhart is facing a death sentence after a jury of his peers voted unanimously to spare his life upon consideration of his military service and resulting mental health issues. The amici believe that executing Mr. Lockhart would be a glaring violation of the Sixth Amendment.

The National Association for Black Veterans is a membership organization with members and chapters throughout the United States and Puerto Rico that provides services and advocacy on behalf of incarcerated veterans and veterans suffering from mental health issues as a result of their military service. The Veterans Defense Project is a nonprofit organization that promotes the effective and vigorous defense of veterans in the criminal justice system. Swords to Plowshares is a community-based, nonprofit organization providing health and legal services to low-income and homeless veterans.

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the *amicus curiae* and their counsel made any such monetary contribution.

Swords to Plowshares represents veterans both in their service-connected disability claims before the Department of Veterans Affairs, many of which are for Post Traumatic Stress Disorder, and in seeking discharge upgrades before the Department of Defense.

The Constitution Project is a nonpartisan organization that promotes and defends constitutional safeguards by bringing together legal and policy experts from across the political spectrum to promote consensus-based solutions to pressing constitutional issues. The Constitution Project regularly files amicus briefs in this Court and other courts in cases, like this one, that implicate its positions on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues.

Beginning in 2000, the Project convened a blue-ribbon committee on the death penalty, which includes supporters and opponents of capital punishment, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others with extensive and varied experience in the criminal justice system. Although this committee does not take a position on the death penalty, it has voiced concerns about the constitutionality of judicial override as it is practiced in Alabama in two comprehensive reports on capital punishment, the most recent of which was issued in 2014. *See* The Constitution Project, Irreversible Error: Recommended Reforms for Preventing and Correcting Errors in the Administration of Capital Punishment at 23-34 (2014). The Committee is concerned that, as currently administered, the death

penalty lacks adequate procedural safeguards and other assurances of fundamental fairness and one of the most egregious practices, in the Committee's view, is the ability of a "single government official" to override a jury's unanimous determination that a defendant should receive a sentence less than death.

SUMMARY OF ARGUMENT

This Court has not minced words: The right to findings by jury is a "constitutional protection[] of surpassing importance." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). The Court thus held in *Apprendi*—a holding it has reiterated time and time again—that any "finding based on a mere preponderance of the evidence [that] authorizes an increase in the maximum punishment" must be made by juries, not judges. *Id.* at 495. The framers of our Constitution and "founders of the American Republic were not prepared" to empower the very government they distrusted to mete out punishment as *it* saw fit; rather, they insisted that defendants face no more punishment than "the unanimous vote of 12 of [their] fellow citizens" authorized. *Id.* at 498 (Scalia, J., concurring). That requirement "has never been efficient; but it has always been free." *Id.*

Mr. Lockhart's sentence violates this core constitutional protection in two clear ways. *First*, Alabama judges can override jury-determined life sentences only if they judicially find sufficient facts to support the override—a remarkably clear-cut *Apprendi* violation. If a trial court's factual findings are insufficient to support a death sentence, the Alabama Supreme Court will reverse and order entry of life without parole. *See, e.g.*, *Ex parte Tomlin*, 909 So. 2d 283 (Ala. 2003) (reversing for insufficient fact-

findings). Alabama trial courts are further empowered to make these findings "based upon information known only to the trial court and not to the jury, when such information can properly be used to undermine a mitigating circumstance." *Carroll v. State*, 852 So. 2d 833, 836 (Ala. 2002). Mr. Lockhart's sentencing judge thus made nearly twenty pages of judicial fact-findings—seven based on facts not known to the jury—and concluded that "had the jury been aware of the additional facts known to the Court, their sentencing recommendation would likely have differed." Pet. App. A at 26-27. Those findings were "necessary for imposition of the death penalty" and thus violated the Sixth Amendment. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

Second, individuals are eligible for the death penalty under Alabama law *only* if the "aggravating factors . . . outweigh the mitigating circumstances." Ala. Code § 13A-5-46(e)(3). Here, the jury unanimously found that they do not. That should have been the end of the matter, since imposing any greater punishment required the judge to make a contrary finding. After all, "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." *Ring*, 536 U.S. at 610 (Scalia, J., concurring).

The Sixth Amendment's original meaning confirms the unconstitutionality of empowering judges to find that the "aggravating factors . . .

outweigh the mitigating circumstances." Ala. Code § 13A-5-46(e)(3). While this Court generally articulates the constitutional line as being between "legal" rulings (for the judge) and "factual" findings (for the jury), history makes clear that the line is *really* between legal rulings and everything else. "[A] crime consists of the whole of 'the wrong upon which the punishment is based.'" *Apprendi*, 530 U.S. at 510 (Thomas, J., concurring) (quoting 1 J. Bishop, Law of Criminal Procedure § 84, at 53 (2d ed. 1872)). Properly understood, the Sixth Amendment requires that juries make *all* findings—moral, circumstantial, factual, whatever—that authorize an increased sentence. Founding-era juries thus routinely made findings indistinguishable from the quasi-moral judgment Alabama law requires, such as finding that a defendant possessed "a wicked, depraved and malignant heart." Blackstone, 4 *Commentaries* at 479.

Permitting judges to unilaterally impose death sentences over a jury's contrary findings flouts the Sixth Amendment's basic rationale. It is difficult to imagine a more flagrant constitutional violation than "a single employee of the State," *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring), imposing the ultimate punishment on a person whom a jury has unanimously found ineligible for that punishment. The Sixth Amendment "has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." *Id.* at 499. Here, Mr. Lockhart's jury unanimously found that the mitigating circumstances outweighed the aggravating ones, and thus never made him eligible for the death penalty. The Sixth Amendment, both

in letter and in spirit, makes that "unanimous vote of 12 of [his] fellow citizens" the last word. *Id.* at 498 (emphasis omitted).

This Court should grant the Petition.

ARGUMENT

I. The Trial Court Violated The Sixth Amendment By Sentencing Mr. Lockhart To Death Based On Judicially-Found Facts.

Mr. Lockhart's death sentence violates the Sixth Amendment because it could not have been imposed absent judge-made factual findings. As this Court has repeatedly explained, the Sixth Amendment precludes judges from making any "finding" that "authorizes an increase in the maximum punishment," other than the fact of a prior conviction. *Apprendi*, 530 U.S. at 495. "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here)," a defendant's Sixth Amendment rights are violated where "the jury's verdict alone does not authorize the sentence." *Blakely v. Washington*, 542 U.S. 296, 305 (2004); *see also, e.g.*, *Cunningham v. California*, 549 U.S. 270, 288 (2007) ("Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, the [determinate sentencing law] violates *Apprendi*'s bright-line rule." (internal citations omitted)).

The Alabama Supreme Court's decision in *Carroll*—and the state legal rule it established—conflicts directly with these decisions. There, the court held that Alabama trial courts must support

judicially-imposed death sentences with sufficient additional fact-findings to overcome a jury's recommendation of life imprisonment, which is treated as an additional "mitigating circumstance." 852 So. 2d at 836-37. Trial courts make those findings partly "based upon information known only to the trial court and not to the jury, when such information can properly be used to undermine a mitigating circumstance." *Id.* And pursuant to this rule, Alabama's appellate courts vacate death sentences that are not supported by sufficient factual findings. *See, e.g.*, *id.*; *Ex parte Tomlin*, 909 So. 2d at 287; *Jackson v. State*, No. CR-07-1208, 2010 WL 5130867, at *110 (Ala. Crim. App. Dec. 17, 2010) (vacating death sentence because override order "fails to adequately set out specific reasons for giving the jury's recommendation the weight that it gave it"). This means, in other words, that Alabama defendants are not eligible for the death penalty until the trial judge makes sufficient findings of fact to support it.[2]

Consistent with this requirement, the trial court below overrode the jury's decision based on "the

[2] *See also, e.g.*, *Doster v. State*, 72 So. 3d 50, 120 (Ala. Crim. App. 2010) ("The circuit court's conclusions and findings negated the application of the mitigating circumstances."); *Shanklin v. State*, No. CR-11-1441, 2014 WL 7236978, at *57 (Ala. Crim. App. Dec. 19, 2014) (affirming override partly on the basis of judge finding that the jury, "although very cooperative, diligent, and attentive throughout the trial, were unable to carry out their sworn legal obligation during sentencing"); *McMillan v. State*, 139 So. 3d 184, 269 (Ala. Crim. App. 2010) ("The trial court's findings concerning *the existence and* weighing of these circumstances are supported by the record." (emphasis added)).

amount and severity of the facts known to the Court but unknown to the jury." Pet. App. A at 27. The court's findings spanned seven pages and included findings that Mr. Lockhart committed five robberies near the time of the victim's death, that Mr. Lockhart minimized his military disciplinary record at trial, and that "the information in the pre-sentence investigation [was] reliable." The court even stated its "belie[f] that had the jury been aware of the additional facts known to the Court, their sentencing recommendation would likely have differed." *Id.* at 26. Because these factual findings were necessary predicates for Mr. Lockhart's death sentence, the Sixth Amendment required that the jury—not the trial court—find them.

The Court should grant the Petition and make clear that the Sixth Amendment forbids this death-by-judicial-factfinding regime. And in doing so, the Court should adopt the Question Presented as written in this brief—making clear that it encompasses the *general* compliance of Mr. Lockhart's death sentence with the Sixth Amendment. Although *amici* believe that Petitioner's third Question Presented fairly includes this issue, the Court's adoption of the Question Presented in this brief will ensure that the merits briefs fully address this issue and will thus facilitate this Court's review.

II. The Trial Court Violated The Sixth Amendment By Sentencing Mr. Lockhart To Death Based On A Judicial Finding That The Aggravating Factors Outweigh The Mitigating Circumstances.

The trial court further violated Mr. Lockhart's Sixth Amendment rights by judicially finding that the aggravating factors outweigh the mitigating circumstances—an Alabama-state-law prerequisite to the death penalty. Alabama's rationale for permitting this judicial finding is that weighing aggravating and mitigating circumstances is a "moral or legal judgment" that does not expose a defendant to a greater sentence. *Lockhart v. State*, No. CR-10-0854, 2013 WL 4710485 at *72-73 (Ala. Crim. App. Aug. 30, 2013). But there is no "moral judgment" exception to the Sixth Amendment. Indeed, the original meaning of the Sixth Amendment confirms that this sort of finding was "understood as within the domain of the jury by those who framed the Bill of Rights." *Oregon v. Ice*, 555 U.S. 160, 168 (2009) (internal quotation marks omitted). At the time of the founding, juries were the exclusive arbiters of moral judgments indistinguishable from the judgment at the heart of Ala. Code § 13A-5-48. For these reasons, too, Mr. Lockhart's sentence violated the Sixth Amendment.

A. Mr. Lockhart's Sentence Depends Upon Judicial Findings In Violation Of The Sixth Amendment.

Defendants are eligible for the death penalty in Alabama only upon a finding that the aggravating circumstances outweigh the mitigating ones. It is wrong to say, as the appellate court did below, that

"the jury's verdict at the guilt phase established the existence of an aggravating circumstance . . . thereby making Lockhart eligible for the death penalty." *Lockhart*, 2013 WL 4710485, at *74. The existence of an aggravating factor does *not* make someone death-eligible. To the contrary, a convicted defendant is death-eligible under Alabama law *only* upon a finding that the aggravating factors outweigh the mitigating ones. *See also Waldrop v. State*, 859 So. 2d 1181, 1188-90 (Ala. 2002)

As outlined in Mr. Lockhart's Petition, *see* Pet. at 24-25, Alabama law states that a defendant cannot be sentenced to death unless "one or more aggravating circumstances . . . exist" *and* these factors "outweigh the mitigating circumstances." Ala. Code § 13A-5-46(e)(3). If the mitigating circumstances outweigh the aggravating circumstances, the sentence "shall" be life imprisonment without parole. *Id.* § 13A-5-46(e)(2). Here, Mr. Lockhart's jury unanimously found that mitigating circumstances, including his military service and resulting mental health issues, outweighed the aggravating ones. Pet. App. A at 26. Thus, "[b]ased solely on the jury's verdict . . . the maximum punishment [Mr. Lockhart] could have received was life imprisonment." *Ring*, 536 U.S. at 597.

Pursuant to Alabama law, Mr. Lockhart's sentencing judge overrode the jury's unanimous finding and imposed the death penalty. That decision violated the Sixth Amendment because the judge's reweighing of the aggravating and mitigating circumstances was a "finding" that "authorize[d] an increase in the maximum punishment." *Apprendi*,

530 U.S. at 495. As this Court has explained, "there is a fundamental difference, one underpinning our entire *Apprendi* jurisprudence, between facts that *must* be found in order for a sentence to be lawful, and facts that individual judges *choose* to make relevant to the exercise of their discretion." *Rita v. United States*, 551 U.S. 338, 373 (2007) (Scalia, J., concurring in part). "The former, but not the latter, must be found by the jury beyond a reasonable doubt in order to give intelligible content to the right of jury trial." *Id.* (internal quotation marks omitted).

B. There Is No Sixth-Amendment Exception For "Weighing" Factors.

Alabama's Supreme Court has attempted to reconcile its judicial-override laws with this Court's Sixth Amendment jurisprudence by holding that "the weighing process is not a factual determination or an element of an offense; instead, it is a moral or legal judgment." *Waldrop*, 859 So. 2d at 1189. Therefore, the Alabama Supreme Court has reasoned, "*Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and the mitigating circumstances." *Id.* at 1190 (internal quotation marks omitted). This reasoning is wrong.

There is no exception to the Sixth Amendment for so-called moral judgments. To the contrary, "the relevant inquiry is one not 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?" *Apprendi*, 530 U.S. at 494. How the State labels a particular finding is not controlling, and its "characterization of a fact or circumstance . . . is not determinative of the question

who decides, judge or jury." *Ring*, 536 U.S. at 605 (internal quotation marks omitted).

In *Apprendi*, and in the many cases since, this Court has drawn a bright-line rule in which *all* findings that enhance punishment—whether denoted by the State as a fact, circumstance, element, sentencing factor, or enhancement—are within the exclusive purview of the jury. *See, e.g.*, *Ring*, 536 U.S. at 610 (Scalia, J., concurring). Put another way, the Sixth Amendment precludes judges from making any "finding" that "authorizes an increase in the maximum punishment," other than the fact of a prior conviction. *Apprendi*, 530 U.S. at 495. This structure creates a "strict division of authority between judge and jury," *Blakeley*, 542 U.S. at 313, wherein the judge makes all legal rulings and the juries make all findings that increase the maximum potential sentence, regardless of how those findings are labeled. *Ring*, 536 U.S. 584.

The Alabama courts have turned this regime on its head, creating a presumption that *the judge* will make all findings that increase the maximum punishment which are not specifically reserved to the jury—precisely the opposite presumption from this Court's cases. Thus, in its decision below, the Alabama Court of Appeals reasoned that the jury right applies only to findings that fall within the narrow categories of a "factual determination" or an "element of the offense." *Lockhart*, 2013 WL 4710485 at *72. That conflicts with this Court's decisions, which hold that "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." *Blakely*, 542 U.S. at 308. All

findings that raise the maximum penalty, which are not rulings on the law, are thus reserved to the jury.

It is clear, moreover, that weighing aggravating and mitigating circumstances is not a legal ruling. To the contrary, it is a classic jury finding, which is, no doubt, *why Alabama has the jury make it in the first place*. Ala. Code § 13A-5-46(e). The State obviously does not ask jurors what they think the law should be, or poll the penalty-phase jury on whether murder ought to be illegal. That is because juries have no place in deciding what the law should be, but have the central role in deciding what maximum punishment the facts permit.

The Alabama courts have also reasoned that weighing circumstances falls outside the Sixth Amendment because specific findings on aggravating and mitigating circumstances are "facts susceptible to proof under a reasonable doubt or preponderance standard," whereas "the relative weight is not." *Lockhart*, 2013 WL 4710485 at *73. But that distinction makes no difference, particularly in light of Alabama's entire regime. Alabama law requires judges to base their weight finding on specific, judicially found facts. Courts are statutorily obligated to enter specific findings about statutory and non-statutory aggravating and mitigating factors, Ala. Code § 13A-5-47(d), and, as noted above, must make detailed findings whenever they choose to override a jury's life sentence, *see, e.g.*, *Carroll*, 852 So. 2d at 836. In other words, even aside from re-weighing the circumstances, Alabama judges cannot impose the death penalty "without finding some facts to support it." *Blakely*, 542 U.S. at 305 n.8.

Nor does it matter that Alabama describes the aggravating and mitigating factors as a means to guide "the sentencer's discretion in a structured way after guilt has been fixed." *Lockhart*, 2013 WL 4710485 at *73 (internal quotation marks omitted). This Court rejected a nearly identical argument in *Cunningham*, 549 U.S. 270. There, California argued that its sentencing system complied with *Apprendi* because it "afforded the sentencing judge the discretion to decide, with the guidance of rules and statutes, whether the facts of the case and the history of the defendant justify the higher sentence." *Id.* at 289-90 (internal quotation marks omitted). This Court disagreed, explaining that "broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions." *Id.* at 290. These determinations, even if they "take[] into account a theoretically limitless set of facts," *Lockhart*, 2013 WL 4710485 at *72, must be found by a jury when they expose a defendant to a higher sentence.

C. The Original Meaning Of The Sixth Amendment Confirms That Alabama's Override Statute Is Unconstitutional.

The original meaning of the Sixth Amendment confirms that the trial court's findings were "understood as within the domain of the jury by those who framed the Bill of Rights." *Ice*, 555 U.S. at 168 (internal quotation marks omitted). It would have been unthinkable to the framers that the government could divest juries of their exclusive power to make all findings necessary to support the

punishment imposed by simply relabeling those findings as "factors" or calling them hybrid moral-legal judgments. The Sixth Amendment protects our liberty in substance, not in form. *Apprendi*, 530 U.S. at 494. And in substance, the finding that aggravating circumstances outweigh mitigating ones is indistinguishable from findings the framers believed were in the exclusive province of juries. And as this Court has explained: "[T]he scope of the constitutional jury right must be informed by the historical role of the jury at common law." *Ice*, 555 U.S. at 170.

1. The Sixth Amendment Originally Required Juries To Make All Non-Legal Determinations.

The Sixth Amendment adopted as a constitutional matter the "common-law ideal of limited state power accomplished by strict division of authority between judge and jury." *Blakeley*, 542 U.S. at 313. It thus required juries to make all non-legal determinations essential to imposing a heightened sentence. As Justice Thomas has explained—citing "[a]n 1872 treatise by one of the leading authorities of the era in criminal law and procedure"—crimes for purposes of the Sixth Amendment "consist of those 'acts to which the law affixes punishment.'" *Apprendi*, 530 U.S. at 510 (Thomas, J., concurring) (quoting 1 J. Bishop, Law of Criminal Procedure 51 (2d ed. 1872)). In other words, "a crime consists of the whole of 'the wrong upon which the punishment is based.'" *Id.* (quoting Bishop § 84, at 53). Under this structure, "the jury and not the court are to find the facts, and the court and not the jury is to give the rule of law." James

Bradley Thayer, *Law & Fact in Jury Trials*, 4 Harv. L. Rev. 147, 150 (1890).

Chief Justice Vaughan's decision in the *Case of the Imprisonment of Edward Bushell*, 6 Howell's State Trials 999, 1010, 124 Eng. Rep. 1006 (1670) ("*Bushell's Case*"), illustrates this division between judge (law) and jury (everything else). *Bushell's Case* began when a judge fined jurors who had acquitted William Penn and William Meade of two charges, on the ground that the jury's decision was contrary to the evidence and the law. Welsh S. White, *Fact-Finding & The Death Penalty*, 65 Notre Dame L. Rev. 1, 9 n.62 (1989). When one of the jurors, Edward Bushell, refused to pay the fine, the judge imprisoned him, and Bushell filed a writ of habeas corpus raising the "issue of whether the jury could be punished for exercising its authority to acquit in the face of the evidence." *Id.* In holding that the jury had authority to find facts without interference from the judge, *Bushell's Case* "became a landmark in expanding the province of the jury." John H. Langbein, *The Criminal Trial Before The Lawyers*, 45 U. Chi. L. Rev. 263, 298 (1978).

Chief Justice Vaughan's decision "was justified entirely on the basis that the jurors have sole authority to determine the facts." *Fact-Finding & The Death Penalty*, at 9 n.62 (citing *Bushell's Case*, 124 Eng. Rep. at 1012); *see also United States ex rel. Toth v. Quarles*, 350 U.S. 11, 19 n.13 (1955). The decision explains that it would not be "intelligible" to assert that the jury acquitted a defendant "in matter of law," because "no evidence ever was, or can be given to a jury of what is law, or not." *Bushell's Case*, 124 Eng. Rep. at 1010. Likewise, judges

cannot find facts, for, "if the Judge, from the evidence, shall by his own judgment first resolve upon any trial what the fact is, . . . what either necessary or convenient use can be fancied of juries, or to continue tryals by them at all?" *Id.*

Building on this decision, Blackstone "concluded that whatever reforms were undertaken regarding sanctions for common law felonies, the jury would have to retain its traditional fact-finding power because 'in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the Crown, in suits between the king and the subject, than in disputes between one individual and another.'" *Fact-Finding & The Death Penalty*, at 10 (quoting Blackstone). Blackstone also reiterated the division between law and everything else: "The principles and axioms of law . . . should be deposited in the breasts of the judges . . . . But in settling and adjusting a question of fact . . . a competent number of sensible and upright jurymen . . . will be found the best investigators of truth and the surest guardians of public justice." Blackstone, 3 *Commentaries* at 380.

"By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned." *Ring*, 536 U.S. at 599 (quoting White, *Fact-Finding & The Death Penalty* at 10-11). It is likewise evident from contemporary sources that the Founders relied upon and incorporated these common law principles. For example, in the first draft of the Bill of Rights presented to Congress, Madison specifically stated: "nor shall any fact triable by jury, according to the course of common law, be otherwise reexaminable than may consist

with the principles of common law." *See* Madison Resolution (June 8, 1789). And in ratifying the Constitution, the State of New York's delegates noted that "the trial by jury in the extent that it obtains by the Common law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate." Ratification of the Constitution by the State of New York; *see also* Northwest Ordinance ("The inhabitants of the said territory shall always be entitled to . . . trial by jury . . . according to the course of the common law."). The division of roles for judge and jury is thus clear and longstanding.

2. The Sixth Amendment Originally Reserved Moral Judgments And Weighing Evidence To Juries.

While this Court and others have typically described the constitutional line as being between determinations of "law" (for judges) and findings of "fact" (for juries), the historical materials make clear that the line is *really* between law and all other findings. Alabama's death penalty regime conflicts with the Sixth Amendment by reserving the "moral judgment" of weighing aggravating and mitigating circumstances to judges. That gets it backwards—at the time of the founding, juries were the exclusive arbiters of moral judgments indistinguishable from the moral judgment at the heart of Ala. Code § 13A-5-48. Founding-era juries thus had the exclusive power to decide whether crimes involved things like "wickedness," "heinousness," or "depravity."

For example, when juries at common law determined whether a "killing [was] committed with malice aforethought, to make the crime of murder,"

they were instructed to consider whether the defendant possessed "a wicked, depraved and malignant heart" or had "un disposition a faire un male chose" (a disposition to do a bad thing). Blackstone, 4 *Commentaries* at 479. This "mysterious but critical factor that distinguished murder and manslaughter" was evident in "such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent upon mischief," as described by Sir Michael Foster. *See* Samuel H. Pillsbury, *Crimes of Indifference*, 49 Rutgers L. Rev. 105, 116 (1996) (quoting 3 James Fitzjames Stephen, *A History of the Criminal Law of England* 74 (William S. Hein & Co. 1993) (1983)). In short, "[e]arly English and American courts defined depraved-heart murder in terms of moral character, much as they did with other common law offenses." *Id.* at 117; *see also Commonwealth v. Drum*, 58 Pa. 9, 15 (1868) (depraved-heart murder defined as "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty"). These findings are no different than the weighing that takes place at Alabama's capital sentencing hearings.

Moreover, the fact that sentencing in death penalty cases involves questions of mercy makes no difference. As Justice Cardozo explained, juries were historically given the choice to invoke mercy, even if not expressly allowed by statute. In determining whether a murder was premeditated, for example, there exists "a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy." B. Cardozo, *Law &*

Literature & Other Essays & Addresses 99-100 (1931).

Put simply, common-law juries were entrusted to make difficult determinations that often turned on intangible or moral aspects of a case. *Ring*, 536 U.S. at 599 ("Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind" (internal quotation marks omitted)). The findings reserved to juries were "not limited to what is tangible, or visible, or in any way the object of sense;" rather, they included "things invisible, mere thoughts, intentions, fancies of the mind, propositions, when conceived of as existing or being true, are conceived of as facts." *Law & Fact in Jury Trials*, at 152. Juries were empowered to invoke "a process of reasoning, of inference and judgment" on all findings, as it was "the office of jurors to adjudge upon their evidence concerning matter of fact, and thereupon to give their verdict, and not to leave matter of evidence to the court to adjudge which does not belong to them." *Id.* at 150 (internal quotation marks omitted); *see also Bushell's Case*, 124 Eng. Rep. at 1009 ("But a jury-man swears to what he can infer and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after."). In short, members of the founding generation would have been aghast at the thought of judges substituting their "moral" judgments for those of juries.

III. The Petition Presents An Important And Recurring Legal Issue That Warrants This Court's Review.

It has been two decades since this Court last reviewed Alabama's death penalty regime. Over those twenty years, there has been a sea-change in this Court's understanding and application of the Sixth Amendment and the right to trial-by-jury. Those decisions cast serious doubt on this Court's last look at Alabama's sentencing system. And it is clear that there is a very serious question whether that system—which empowers judges to unilaterally impose death sentences on individuals that juries have voted to spare—violates the Sixth Amendment as this Court now understands it.

The Court last considered Alabama's death penalty regime in *Harris v. Alabama*, 513 U.S. 504 (1995). There, the Court upheld Alabama's practice on the basis that "the Eighth Amendment does not require [Alabama] to define the weight the sentencing judge must accord an advisory jury verdict." *Id.* at 512. The Court did not consider whether Alabama's judicial-override provisions violate the Sixth Amendment. In fact, this Court has not considered whether *any* judicial override scheme violates the Sixth Amendment since decisions in the 1980s that are incompatible with the Court's subsequent *Apprendi* jurisprudence. *See Hildwin v. Florida*, 490 U.S. 638, 639-40 (1989) (per curiam); *Spaziano v. Florida*, 468 U.S. 447, 464 (1984).

Not only that, but Alabama's authorization for this procedure conflicts with decisions by the supreme courts of Colorado and Missouri, both of which have recognized that similar systems violate

the Sixth Amendment. *Woldt v. State*, 64 P.3d 256, 266-67 (Colo. 2003) (en banc); *State v. Whitfield*, 107 S.W.3d 253, 264 (Mo. 2003) (en banc). That is, of course, a well-established basis for granting certiorari. *See* Sup. Ct. R. 10(b) (certiorari is appropriate when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort"). Courts in Florida and Delaware also have the power to apply a judicial override, but no judge in either state has successfully exercised it since 1998. *See Woodward v. Alabama*, 134 S. Ct. 405, 408 (2013) (Sotomayor, J., dissenting from denial of certiorari).

Alabama thus stands alone in consistently employing judicial override to negate juries' findings that the facts do not permit the death penalty. In the past decade, nearly thirty percent of death row inmates in Alabama were sentenced to death via judicial override, and more than one hundred inmates now sit on death row because of its use. *Id.* at 415-16 (listing 21 individuals sentenced to death as a result of a life-to-death judicial override from 2005 up through 2012); *Alabama Inmates Currently on Death Row*, Ala. Dept. of Corrections, http://www.doc.state.al.us/DeathRow.aspx (listing 73 individuals placed on death row since 2005); Equal Justice Initiative, *Judge Override in Alabama* (Dec. 16, 2013). This issue is thus frequently recurring, in addition to being exceptionally important.

Finally, the trial court's override of Mr. Lockhart's jury-imposed life sentence is particularly exceptional given the jury's careful consideration of Mr. Lockhart's military service and

the psychological impact of his intense combat experience. Combat service and related mental illness are widely recognized as relevant in criminal sentencing. Indeed, some states *require* special sentencing hearings for convicted veterans who may be suffering from service-related mental illness. *See* Cal. Penal Code Ann. § 1170.9(a); Minn. Stat. § 609.115, Subd. 10.

This Court recently recognized as much, holding that, where defense counsel failed to present a combat-veteran defendant's combat experience and related mental trauma as a mitigating factor, "it was objectively unreasonable" for the Florida Supreme Court and the Eleventh Circuit "to conclude there was no reasonable probability the sentence would have been different" had the sentencing judge and jury heard this evidence. *Porter v. McCollum*, 558 U.S. 30, 31 (2009) (per curiam). The Court explained that "[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did" and that "relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter." *Id.* at 43-44. The jury here honored that "long tradition" by considering Mr. Lockhart's combat experience and related trauma and selecting a life sentence rather than the death penalty.

The framers respected the right of every criminal defendant to have a panel of fellow citizens make similar determinations. This Court should grant

Mr. Lockhart's Petition and reiterate that basic point.

CONCLUSION

The Order sentencing Mr. Lockhart exemplifies the "spectacle of a man's going to his death because *a judge*" made the findings that authorize the death penalty. *Ring*, 536 U.S. at 612 (Scalia, J., concurring). This Court cannot "preserve [its] veneration for the protection of the jury in criminal cases if [it] render[s itself] callous to the need for that protection by regularly imposing the death penalty without it." *Id.* For the reasons stated above and by the Petitioner, the Court should grant the Petition.

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