No. 13-1179

# In The Supreme Court of the United States

BRIAN IRVING,
*Petitioner,*

*v.*

FLORIDA,
*Respondent.*

*On Petition for a Writ Of Certiorari to the Florida Fifth District Court of Appeal*

## BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus* Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The centrality of the jury to the Framers cannot be overstated. "[A] paradigmatic image underlying the original Bill of Rights," the "jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights." Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 96-97 (1998).

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

The Founding generation's focus on the jury as a central feature of a system of ordered liberty was strongly rooted in the English common law. Sir William Blackstone, for example, called the jury a "sacred bulwark" of liberty. 4 William Blackstone, Commentaries on the Laws of England 343-44 (1769). To Blackstone, "the most transcendent privilege which any subject can enjoy, or wish for, [is] that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 *id.* at 379.

Just as the Framers' understanding of the importance of the jury was shaped by English common law, so too was their understanding of what a jury should look like. When the Framers drafted the Constitution, "the twelve-person unanimous criminal jury was an institution with a nearly four-hundred-year-old tradition in England," Robert H. Miller, Comment, *Six of One Is Not a Dozen of the Other: A Re-Examination of* Williams v. Florida *and the Size of State Criminal Juries*, 146 U. Pa. L. Rev. 621, 643 (1998), and the jury right the Framers enshrined in the Bill of Rights was thus a right to a jury composed of twelve people. As Justice James Wilson expressed in his 1790-91 *Lectures on Law* while the Sixth Amendment was being debated and ratified by the States, "[t]o the conviction of a crime, the undoubting and the unanimous sentiment of the *twelve* jurors is of indispensable necessity." 2 James Wilson, Works of the Honourable James Wilson 350 (1804) (emphasis added).

In *Williams v. Florida*, 399 U.S. 78 (1970), this Court dismissed that long history as a "historical accident," *id.* at 89, and rejected what it termed the "easy assumption" that "if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution," *id.* at 92. The *Williams* Court was wrong to reject the common law history underlying the Sixth Amendment. As this Court explained in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "the historical foundation for our recognition of [the rights in the Sixth Amendment] extends down centuries into the common law," *id.* at 477, making it appropriate to look to the common law as it existed at the Framing to determine how the Sixth Amendment's guarantee should apply, *id.* at 478-83.

Looking to the common law history, this Court has recently noted that the "longstanding tenets of common-law criminal jurisprudence" that the Sixth Amendment embodies include the rule "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of *twelve* of his equals and neighbors.'" *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis added) (quoting 4 William Blackstone, Commentaries on the Laws of England 343 (1769)). Nonetheless, Petitioner was sentenced to life in prison after being convicted by a jury of just six people. Pet. 4.

This Court should grant *certiorari* and hold what it has repeatedly recognized in dicta: that a

jury today, just like a jury at the time of the Framing, must be composed of twelve people.

## ARGUMENT

### THE COURT SHOULD GRANT REVIEW TO RECOGNIZE THAT THE SIXTH AMENDMENT REQUIRES A TWELVE-MEMBER JURY

#### A. At the Framing, Juries Were Understood To Consist of Twelve People.

The jury has always been "justly dear to the American people," "an object of deep interest and solicitude." *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830). Featured expressly in three of the first ten Amendments to the Constitution, it is "a paradigmatic image underlying the original Bill of Rights," Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 96-97 (1998); *see* U.S. Const. amends. V, VI, VII. Sacrosanct to the Founders, the "jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights." Amar, The Bill of Rights, at 97.

The Founding generation's belief in the jury had its foundation in English common law, which had long recognized the jury as critical to the preservation of liberty. *See, e.g.,* Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 Hofstra L. Rev. 1, 13 (1993) ("By the 1600s, when the thirteen colonies

were founded, jury trial had become one of the great palladiums of English liberty."); Larry T. Bates, *Trial by Jury After* Williams v. Florida, 10 Hamline L. Rev. 53, 53 (1987) ("by the end of the thirteenth century the jury had become an important element in English criminal procedure"). As Sir William Blackstone emphasized, "the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law." 3 William Blackstone, Commentaries On The Laws Of England 379 (1769) ("Blackstone's Commentaries"). To Blackstone, trial by jury was "the most transcendent privilege which any subject can enjoy, or wish for." *Id.*

A defining attribute of the jury as it existed at common law was that it consisted of twelve people. *See* Bates, *Trial by Jury*, at 55 (an "essential characteristic[] of the petit jury at common law [was] the number of persons which comprised the jury—twelve"). As Blackstone explained it, a person could not be "affected either in his property, his liberty, or his person, but by the unanimous consent of *twelve* of his neighbours and equals." *Id.* (emphasis added). Expanding on this, Blackstone later commented that it was important that a trial by jury include "the unanimous suffrage of *twelve* of his equals and neighbours, indifferently chosen, and superior to all suspicion." 4 Blackstone's Commentaries 343 (emphasis added). Other prominent legal thinkers of the time similarly embraced the twelve-member jury. *See, e.g.*, 2 Sir Matthew Hale, The History of the Common Law (1713) (stating that a jury should be composed of "[t]welve, and no less, of such as are indifferent");

Bates, *Trial by Jury*, at 64 ("In 1736 Bacon wrote that the petit jury must consist of twelve 'and can be neither more nor less.'").[2]

The Founders shared this belief that a twelve person jury was implicit in the fundamental right to trial by jury in criminal cases. *See* Pet. 11-13; *see also* Arnold, *Trial by Jury*, at 5 ("it was a scholarly axiom at the time the Bill of Rights was drafted that a jury was composed of twelve. This clearly was the understanding of the Founding Generation"); Bates, *Trial by Jury*, at 65 ("There appears little doubt that in most of the Colonies trial by jury in criminal cases meant a twelve-person jury which delivered a unanimous verdict."). Indeed, "[i]nstructions in no less than six colonial charters (New Hampshire, New York, Pennsylvania, Plymouth Plantation, Virginia, and West Jersey) specified that trial by jury in criminal cases meant trial by a panel of 12 indifferent members of the community reaching a unanimous verdict." Miller, *Six of One*, at 640 n.115.

During the ratification debates, Governor Edmund Randolph questioned the need for a Bill of

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[2] Although the precise origins of the number twelve remain unknown, *see* Arnold, *Trial by Jury*, at 5, there is widespread agreement that the number was well-established prior to the Framing. *See, e.g.*, *id.* at 3 ("For over six hundred years, Western civilization took it for granted that a jury must be composed of twelve persons."); *id.* at 8 ("any variation in number ended during the reign of Edward IV (1461-1483) when the unanimous verdict of twelve unquestionably and invariably became the law of England, absent consent of the parties").

Rights, noting (with respect to the jury right) that "the 3d article provide[s] that the trial of all crimes shall be by jury," and "[t]here is no suspicion that less than twelve jurors will be thought sufficient." 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 467 (Jonathan Elliot ed. 1836). And as the Sixth Amendment was being debated and ratified by the States, Justice James Wilson expressed in his 1790-91 *Lectures on Law* that "[t]o the conviction of a crime, the undoubting and the unanimous sentiment of the *twelve* jurors is of indispensable necessity." 2 James Wilson, Works of the Honourable James Wilson 350 (1804) (emphasis added).

Throughout the 19th century, this Court, state supreme courts, and influential legal thinkers all recognized that "[t]he term *jury* is well understood to be twelve men." *Foote v. Lawrence*, 1 Stew. 483, 483 (Ala. 1828). In *Thompson v. State of Utah*, 170 U.S. 343 (1898), for example, this Court asked whether "the jury referred to in the original constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less," and answered that question in the affirmative. *Id.* at 349; *cf. Baldwin v. New York*, 399 U.S. 117, 122 (1914) (Harlan, J., dissenting) ("before [*Williams*] it would have been unthinkable to suggest that the Sixth Amendment's right to a trial by jury is satisfied by a jury of six"). Similarly, the New Hampshire Supreme Court explained, "The terms 'jury,' and 'trial by jury,' are, and for ages have been well known in the language of the law. They were used

at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense. A jury for the trial of a cause was a body of twelve men . . . ." *Opinion of Justices*, 41 N.H. 550, at *1 (1860); *see Cancemi v. People*, 18 N.Y. 128, 138 (1858) ("It would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury . . . for the court to allow of any number short of a full panel of twelve jurors . . . .").

Finally, Justice Joseph Story embraced this requirement in his 1833 Commentaries on the Constitution. First, he explained that America's forbearers "brought this great privilege [of trial by jury] with them, as their birthright and inheritance, as part of that admirable common law." 2 Joseph Story, Commentaries on the Constitution of the United States, § 1779, at 559 (5th ed. 1891). He then went on to explain that "[a] trial by jury is generally understood to mean . . . , a trial by a jury of *twelve* men, impartially selected, who must unanimously concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional." *Id.* at n.2 (emphasis in original).

Thus, the history of the Sixth Amendment makes clear that the Framers understood a "jury" to consist of twelve people. As the next section demonstrates, that history is the proper place to look to determine the meaning of the Sixth Amendment.

### B. The *Williams* Court Improperly Dismissed the History of the Sixth Amendment in Determining Its Meaning.

In *Williams*, this Court expressly rejected the relevance of the common law to determining the meaning of the Sixth Amendment. Although the Court recognized that "[i]t may well be that the usual expectation was that the jury would consist of 12," 399 U.S. at 98, it concluded that "there is absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury," *id.* at 99.[3] Thus, the Court decided to "turn[] to other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution." *Id.* According to the *Williams* Court, "[t]he relevant inquiry . . .

[3] The Court in *Williams* relied, in part, on the drafting history of the Sixth Amendment, noting that "provisions spelling out such common-law features of the jury as 'unanimity' or 'the accustomed requisites'" that appeared in Madison's original draft were omitted from the final version. 399 U.S. at 93-97. But these deletions reflect simply that the language was unnecessary in light of the well-understood meaning of the term "jury" at common law. *See Baldwin v. New York*, 399 U.S. 117, 123 n.9 (1970) (Harlan, J., dissenting) (noting that "a more likely explanation of the Senate's action is that it was streamlining the Madison version on the assumption that the most prominent features of the jury would be preserved as a matter of course"); Miller, *Six of One*, at 641 n.120. In any event, this Court has made clear that the common law is the appropriate place to look to determine the protections afforded by the Sixth Amendment. *See infra* at 10-11.

must be the function that the particular feature performs and its relation to the purposes of the jury trial." *Id.* This approach to the Sixth Amendment inquiry cannot be reconciled with this Court's more recent Sixth Amendment jurisprudence. As Petitioner notes, "this Court recently has made clear that the Sixth Amendment derives its meaning not from some abstract functional analysis but rather from original understanding of the guarantees contained therein." Pet. 14-15.[4]

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court recognized that "the historical foundation for our recognition of [the rights in the Sixth Amendment] extends down centuries into the common law," *id.* at 477, and it is thus appropriate to look to the common law as it existed at the Framing to determine how the Sixth Amendment's guarantee should apply in the context of sentencing, *see id.* at 478-83. As this Court explained in *Giles v. California*, 128 S. Ct. 2678 (2008), "[i]t is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of

[4] It was also inconsistent with prior decisions of this Court, which recognized that "[t]he language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted." *Ex parte Grossman*, 267 U.S. 87, 108 (1925).

Englishmen." *Id.* at 2692. Thus, in holding that sentencing factors that increase a defendant's sentence must be proven to a jury beyond a reasonable doubt, this Court emphasized that what matters is not "whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice," but rather "the Framers' paradigm for criminal justice." *Blakely*, 542 U.S. at 313; *see Crawford v. Washington*, 541 U.S. 36 (2004) (looking to history to determine the meaning of the Confrontation Clause).

In light of these more recent decisions and the Sixth Amendment's history, the *Williams* Court's conclusion that a criminal jury need not consist of twelve members is plainly wrong. Indeed, in more recent cases, this Court has repeatedly recognized in dicta that the Sixth Amendment's jury trial guarantee includes the right to a twelve-member jury. In *Blakely*, for example, this Court explained that the "longstanding tenets of common-law criminal jurisprudence" that the Sixth Amendment embodies include the rule "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of *twelve* of his equals and neighbors.'" *Blakely*, 542 U.S. at 301 (emphasis added) (quoting 4 William Blackstone, Commentaries on the Laws of England 343 (1769)).

This Court reaffirmed this principle in *Apprendi*, explaining that "the historical foundation for our recognition of these principles extends down centuries into the common law. . . . '[T]o guard against a spirit of oppression and

tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' trial by jury has been understood to require that 'the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of *twelve* of [the defendant's] equals and neighbours' . . . .'" *Apprendi*, 530 U.S. at 477 (emphasis added); *see id.* at 498 (Scalia, J., concurring) (charges must be determined "beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens"); *see also United States v. Booker*, 543 U.S. 220, 238-39 (2005) (same).

Thus, this Court has repeatedly recognized what the Framing history makes clear: the "sacred bulwark of liberty" that the Framers codified in the Sixth Amendment was the jury that existed at common law—a jury of *twelve* of the defendant's "equals and neighbours." *Williams* was a sharp and unjustified departure from the rest of this Court's Sixth Amendment cases. This Court should grant review to protect the "sacred bulwark" of the jury and restore coherence to its Sixth Amendment jurisprudence.

## CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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