No. 14-602

IN THE

# Supreme Court of the United States

ALEJANDRO ENRIQUE RAMIREZ UMAÑA,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## BRIEF FOR *AMICUS CURIAE* THE CONSTITUTION PROJECT, IN SUPPORT OF PETITIONER


VIRGINIA E. SLOAN
SARAH TURBERVILLE
MADHURI GREWAL
THE CONSTITUTION PROJECT
1200 18th Street N.W.
Suite 1000
Washington D.C. 20036
(202) 580-6920

BRIAN J. HENNIGAN
*Counsel of Record*
KHALDOUN SHOBAKI
IRELL & MANELLA LLP
1800 Ave. of the Stars
Los Angeles, CA 90067
(310) 277-1010
BHennigan@irell.com

*Counsel for* Amicus Curiae *The Constitution Project*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**TABLE OF AUTHORITIES (Cont'd)**

**TABLE OF AUTHORITIES (Cont'd)**

## INTEREST OF THE *AMICUS CURIAE*[1]

The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education. One of the Project's key areas of focus is the constitutional imperative of procedural fairness and due process in the criminal justice system, and particularly in sentencing. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government.

The Constitution Project regularly files amicus briefs in this Court and other courts in cases, like this one, that implicate its bipartisan positions on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues. The Project has particular expertise, knowledge and interest in the fair administration of the criminal law, consistent with the United States Constitution. In the wake of the Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Project's Sentencing Initiative convened a blue-

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief.

ribbon committee of current and former judges, prosecutors, defense attorneys, scholars, and sentencing experts. The committee published a series of principles and recommendations for sentencing that call for a return to an adversarial approach in fact-finding as a mechanism for more balanced and reliable results. The committee also has decried the use of uncharged or acquitted conduct in criminal sentencing. The Project's work and mission bear directly on the issue of confrontation and proof at sentencing, particularly in capital proceedings. Amicus has filed this brief to highlight the need for the Court to resolve the deepening divide in the courts below that has deprived defendants like the petitioner of their Confrontation Clause rights at capital sentencing.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Absent the intervention of this Court, Alejandro Umaña will be executed following a proceeding in which the government presented hearsay testimony inculpating him in murders for which he had never been tried or convicted. That the death penalty could be imposed using such a procedure would, as this Court observed in *Crawford v. Washington*, "astound[]" the Framers. 541 U.S. 36, 66 (2004).

Yet, here, having convicted Mr. Umaña of shooting and killing two brothers in a restaurant following an argument, federal prosecutors did just that. The cornerstone of the government's case for death was not the circumstances of the charged crime, but rather the commission of these *other*

*alleged* murders—murders the government sought to prove through the hearsay testimony of law enforcement officials who summarized the interrogations of other suspects in those slayings who, in turn, shifted blame onto Mr. Umaña. And because the government waited to introduce this testimony until the so-called death "selection" phase of the sentencing proceeding, the courts below held that Mr. Umaña had no constitutional right to cross-examine or otherwise confront the men who made these accusations. The jury, having heard this deeply prejudicial presentation, sentenced Mr. Umaña to death.

At the time of the Founding, such a procedure could scarcely have been imagined. Trial and sentencing for capital cases were unitary. The accused thus confronted his accusers throughout the proceeding; at no point did this crucial protection fail to apply. Since that time, the capital trial has evolved, consistent with the Court's Eighth Amendment jurisprudence, to separate the determination of guilt from the determination of punishment. But that formality—itself a safeguard against the arbitrary imposition of the death penalty—cannot and does not alter the Sixth Amendment's command that the right to confrontation applies "[i]n all criminal prosecutions." As this case starkly demonstrates, the innovation of a separate "penalty phase" in capital proceedings has not obviated "the principal evil at which the Confrontation Clause was directed"—the "use of *ex parte* examinations against the accused." *Crawford*, 541 U.S. at 50. This Court should grant review to

confirm that testimonial hearsay of precisely the kind *Crawford* condemned cannot be used as a basis to put a defendant to death, and it should grant review to remedy what is an intolerable situation—courts across the country implementing differing understandings of this Court's jurisprudence while the lives of defendants hang in the balance.

## ARGUMENT

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This confrontation right is ancient and deeply ingrained in the fabric of our nation's system of laws—particularly so in the context of capital punishment. Indeed, this Court has even cited the case of Paul the Apostle as an antecedent: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have license to answer for himself concerning the crime laid against him." *Greene v. McElroy*, 360 U.S. 474, 496 n.25 (1959) (quoting Acts 25:16). The right to confrontation is at its apogee in cases, like this one, involving "core testimonial statements" to the police from other suspects in the same crimes of which the defendant is accused. *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

### I. At the Founding, Capital Trial and Sentencing Were a Unitary Proceeding.

The Sixth Amendment's reference to "criminal prosecution" must be understood in the context of jury trial as it existed in England at the time of the

founding and passage of the Bill of Rights. At that time, a verdict of guilty was tantamount in most instances to the rendering of a sentence. "[T]he English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law . . . prescribed a particular sentence for each offense." John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* The Trial Jury in England, France, Germany 1700-1900 at 36 (Antonio Padoa Schioppa, ed., 1987).

Moreover, for many crimes, that sentence was death: "It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than a hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death." 2 William Blackstone, Commentaries *19. In the colonies, the criminal law was similarly bloody, with some variations: most Northern colonies enacted criminal codes that were more lenient as to property crimes and harsher as to crimes against morality, while the Southern colonies simply adopted the laws of England. Stuart Banner, *The Death Penalty: An American History* 6-8 (2002). In all these capital cases, the jury's determination of guilt was also, by definition, the determination of the sentence.

"Executing a fellow human being," however, "was just as momentous in the seventeenth and eighteenth century as it is today." Banner, *The Death Penalty* at 5. Juries accordingly chafed against mandatory death sentences and devised ways to

avoid their imposition. In England, "juries would downcharge or downvalue goods in order to defeat the death penalty (Blackstone's 'pious perjury')." John H. Langbein, *The Origins of Adversary Criminal Trial* 334-35 (2003) (footnote omitted) [hereinafter Langbein, *Origins*]. For example, unemployed weaver Frederick Usop was charged with theft of property worth twenty-eight shillings and put on no defense—but the jury found him guilty of stealing four shillings of goods, thus sparing his life. Langbein, *Origins* at 336 n.396. Judges also reacted to draconian mandatory death sentences by developing broad doctrines—such as the exclusionary rule and the beyond-a-reasonable-doubt standard of proof—that "assured that not only some innocent defendants would be spared, but also many culpable ones." Langbein, *Origins* at 335-336.

These practices were not limited to England. "In the decades surrounding the American Revolution, the practice of juries issuing partial verdicts or downvaluing stolen goods in order to avoid death sentences was widespread[.]" John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 2013 (2005). Indeed, because "[o]nly a small fraction of eighteenth-century criminal trials were genuinely contested inquiries into guilt or innocence[,] . . . to the extent that trial had a function in such cases beyond formalizing the inevitable conclusion of guilt, it was to decide the sanction." Langbein, *Origins* at 59. By exercising their authority to find facts that precluded imposition of the death penalty, these juries were exercising obvious sentencing power,

especially where their choices flew in the face of the evidence presented at trial. As this Court has recognized: "At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict." *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976). The jury's role as capital sentencer was thus clear, even in the context of mandatory penalties, at the time of the Founding. Douglass, *Confronting Death* at 2014.

In fact, the issue of jury nullification for capital offenses was even debated during the passage of the United States' first criminal legislation. *Id*. Yet the First Congress maintained the system of mandatory sentences for capital convictions even while it granted judges sentencing discretion for noncapital offenses. The Act of April 30, 1790 provided for seven crimes with mandatory death penalties, and thirteen non-capital crimes that were subject to fines and or terms of imprisonment. *Id*. at 2017 & nn.286-287. "Most critically, the criminal legislation of the First Congress created no crimes for which a judge might choose between life and death," and indeed "abolished the 'benefit of clergy,' a sentencing practice that English courts sometimes had used to avoid imposing otherwise mandatory death sentences." *Id*. at 2017 n.290. These choices make clear the Founders intended that the capital trial be a unitary proceeding not subject to judicial discretion. "[T]he question of guilt for a capital crime and the question of death remained inseparable. And [the Founders] left both questions to juries in the

context of a trial featuring full adversarial rights." *Id.* at 2018.

This conscious design demonstrates that the Founders understood the Confrontation Clause as an essential bulwark not just against wrongful convictions but against wrongful sentences of death. In a capital prosecution, trial before the jury encompassed sentencing—and thus all proceedings on the path to death were subject to the protections of both the Confrontation Clause and the moral authority of the jury. A capital trial without the right to cross-examination throughout, like Mr. Umaña's, would not have occurred at the Founding.

## II. The Modern Bifurcation of Capital Trials Cannot Diminish Sixth Amendment Rights.

1. Mandatory penalties in capital cases persisted well into the twentieth century. Indeed, it was not until 1957 that California became the first state to bifurcate capital trials into guilt and sentencing phases. *See* Act of Sept. 11, 1957, 1957 Cal. Stat. 1968 (replaced by Cal. Penal Code § 190.1 (1973)). By 1970, only five other states had followed suit. *See McGautha v. California*, 402 U.S. 183, 208 & n.19 (1971) (collecting statutes).

But bifurcation became the norm following *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). That opinion "touched off the biggest flurry of capital punishment legislation the nation had ever seen." Banner, *The Death Penalty* at 267. Specifically, cases like *Gregg v. Georgia*, emphasized that death sentences must be individualized, which requires the sentencer to obtain information about

the defendant's "character and individual circumstances." 428 U.S. 153, 190 (1976). However, "[m]uch of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question." *Id.* at 190. The Court therefore concluded that bifurcation of trial into guilt and sentencing phases was the best way to address this tension while also complying with the Eighth Amendment requirements of *Furman*. *Id.* at 191-192.

*Gregg* sparked a multitude of bifurcated capital trial and sentencing schemes, including the Federal Death Penalty Act, 18 U.S.C. §§ 3591 *et seq*. These sentencing schemes—like those at the Founding—almost universally rely on jury fact finding. *Cf. Ring v. Arizona*, 536 U.S. 584, 608 (2002) ("[T]he superiority of judicial factfinding in capital cases is far from evident. . . . [T]he great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury.").

The very sentencing schemes that were created to comply with the Eighth Amendment, however, have inadvertently led to the deprivation of deep-rooted Sixth Amendment confrontation rights, as the formal separation of guilt from punishment created the potential for unconfronted hearsay to be admitted in capital sentencing proceedings. As petitioner explains (Pet. at 14-22), while the lower courts are in sharp disagreement over this question, some—like the Fourth Circuit below—have

permitted death sentences to be based on such testimonial hearsay on the theory that Sixth Amendment protections do not apply at sentencing.

2. Courts that have denied Sixth Amendment protections during capital sentencing have justified that result by relying on this Court's decision in *Williams v. New York*, 337 U.S. 241 (1949). But modern Sixth Amendment decisions, and historians' current understanding of the Amendment's development, make clear that *Williams* cannot support such a cramped view of the protections the Sixth Amendment provides.

*Williams*, a capital case, was decided under the Due Process Clause, before the Confrontation Clause was incorporated against the States.[2] The trial judge had imposed a death sentence for murder despite a jury recommendation of life imprisonment. 337 U.S. at 242. The Court's opinion does not dwell upon the provenance of the evidence at issue, but Justice Murphy's dissent explains that "the judge exercised his discretion to deprive a man of his life, in reliance on material made available to him in a probation report, consisting almost entirely of evidence that

---

[2] The Confrontation Clause was not made obligatory on the States until 1965. *See Pointer v. Texas*, 380 U.S. 400, 404 (1965) ("It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.")

would have been inadmissible at the trial. . . . Much was incompetent as hearsay. All was damaging, and none was subject to scrutiny by the defendant." 337 U.S. at 253 (Murphy, J., dissenting).

The Court in *Williams* nevertheless upheld the death sentence based on the supposed leeway historically given to judges at sentencing:

> Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

*Id.* at 246 (footnotes omitted). As discussed above, however, this claim about the history of capital trial is demonstrably untrue. In fact, *Williams* relied heavily on *non-capital* cases for its historically inaccurate claims. 337 U.S. at 246 n.5. But non-capital cases have a very different history and featured bifurcated trials and broad judicial discretion in sentencing long before *capital* cases. *See* Douglass, *Confronting Death* at 1977 & n.58 ("In fact, the vast majority of the noted cases are noncapital cases from the nineteenth century, a period during which the historical practice of

mandatory sentences was giving way to discretionary sentences.").

*Williams'* statement that the rules of evidence do not apply at sentencing, *see* Fed. R. Evid. 1101(d)(3) advisory committee's note, also provides no basis for concluding that the Confrontation Clause does not apply. The notion that the rules of evidence are inapplicable at sentencing is, of course, codified in many statutes, including the Federal Death Penalty Act. *See* 18 U.S.C. § 3593(c). But, as *Crawford* made clear, the right to confrontation is no mere rule of evidence. 541 U.S. at 61. It is an inflexible constitutional command: "We do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence[.]" *Id.*

3. In this case, the district court bifurcated the capital sentencing proceeding into so-called "eligibility" and "selection" phases. The crux of the government's case for death was presented at the selection phase, where the government presented hearsay testimony from police officers about three unadjudicated murders that Umaña allegedly committed. This is precisely the type of evidence, presented at the trial of Sir Walter Raleigh, that the Court has described as having "long been thought a paradigmatic confrontation violation." *Crawford*, 541 U.S. at 52. ("Police interrogations bear a striking resemblance to examinations by justices of the peace in England."). Yet, because the government waited to introduce this testimony until the selection phase, the courts below allowed it to be presented to the jury over Mr. Umaña's Sixth Amendment objection.

As the above argument makes clear, however, the formalistic divisions that characterize modern proceedings were anathema to the Founders, and they cannot have constitutional significance where the Confrontation Clause is concerned. Evidence offered during the selection phase is not only of obvious consequence—under the statute, the jury must weigh *all* the aggravating factors, not simply those proven at the eligibility phase, before sentencing a defendant to death, *see* 18 U.S.C. § 3593(e)—but it is also highly factual in nature. Enabling a defendant to face and question his accusers—the "crucible of cross-examination," *Crawford*, 541 U.S. at 61—assures the accuracy of testimony offered and the legitimacy of the ultimate judgment. Indeed, it was the Founders' command that *only* cross-examination provided defendants adequate protection, *see id.* at 66, and they designed capital trials specifically to ensure confrontation applied throughout the entirety of the capital case. The stakes inherent in discarding that design are clear: There can be no serious question in this case given the highly prejudicial nature of the evidence and its extremely dubious origins that the unconfronted testimony resulted in Mr. Umaña being sentenced to death.

## III. The Court Should Grant Certiorari and Restore the Sixth Amendment to its Original Role in Capital Sentencing.

The text and history of the Sixth Amendment make clear that Mr. Umaña cannot face death without also facing his accusers. Yet, federal and

state courts across the country are deeply divided on whether and to what extent this Court's Confrontation Clause jurisprudence applies at capital sentencing. That situation is intolerable and only this Court can remedy it. It should do so in Mr. Umaña's case for several reasons.

First, as mentioned above, there is significant disagreement among state and federal courts on this question. That conflict deprives some capital defendants of their Confrontation Clause rights based simply on the jurisdiction in which they are charged. (Pet. at 14-22). That itself is a wrong that cries out for review. Moreover this division shows no sign of healing itself—and a coalescence is unlikely given that many courts, including the court of appeals below, have determined that they are bound by this Court's decision in *Williams* to decide the question the way that they did. With lower courts bound by *Williams* yet also bound by this Court's Sixth and Eighth Amendment jurisprudence, the only court that can clarify the boundaries of the Confrontation Clause is this one. This Court should thus grant certiorari in order to clarify the scope of *Williams* and to restore procedural uniformity in the administration of the death penalty.

Second, Mr. Umaña's case is an ideal vehicle to address this question. It presents, without complicating procedural or factual issues, an egregious example of the abuse of admitting testimonial hearsay over a defendant's objection . Given the centrality of the prior unadjudicated murders to the government's case for the death penalty, the jury's finding on that question almost

certainly made the difference between life and death for Mr. Umaña. In these circumstances, the Confrontation Clause right cannot turn on whether the government chose to present such evidence in the eligibility or the selection phase of capital sentencing. Yet because the government made a tactical decision to wait until the selection phase to present this factor, the courts below determined that it could be proven through unconfronted testimonial hearsay. This case accordingly provides the Court with the opportunity to clarify that *all* aggravating factors are subject to the Confrontation Clause, as one of "the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 613 (Scalia, J., concurring).

Finally, although the question presented here is of critical importance to the administration of the death penalty, it is a narrow question. The context and facts of this case—like the history and original understanding of the Confrontation Clause—make clear that the issue presented is limited to capital proceedings. Non-capital sentencing had a very different history, in which judicial discretion and flexibility came into play. *See* Douglass, *Confronting Death* at 2016-17**.** The relevance and vitality of *Williams* in the non-capital context are accordingly not implicated here. The Court should take this opportunity to clarify the scope of *Williams* for capital proceedings, realign capital trial rights with the original understanding of the Confrontation Clause, and avoid further imposition of the death

penalty in a manner that provides less protection to the accused than they had at the Founding.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

VIRGINIA E. SLOAN
SARAH TURBERVILLE
MADHURI GREWAL
THE CONSTITUTION PROJECT
1200 18th Street N.W.
Suite 1000
Washington D.C. 20036
(202) 580-6920

BRIAN J. HENNIGAN
*Counsel of Record*
KHALDOUN SHOBAKI
IRELL & MANELLA LLP
1800 Ave. of the Stars
Los Angeles, CA 90067
(310) 277-1010
BHennigan@irell.com

*Counsel for* Amicus Curiae *The Constitution Project*

December 2014