No. 19-107

IN THE

Supreme Court of the United States

VINCENT ASARO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AND FAMM AS *AMICI CURIAE* SUPPORTING PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. The harms of punishing acquitted conduct reverberate throughout the federal criminal justice system 5

II. Only this Court can address the constitutional and practical harms of acquitted-conduct sentencing 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Gall v. United States,
552 U.S. 38 (2007) 21

Lafler v. Cooper,
566 U.S. 156 (2012) 7

Mistretta v. United States,
488 U.S. 361 (1989) 24

North Carolina v. Alford,
400 U.S. 25 (1970) 10

Peugh v. United States,
569 U.S. 530 (2013) 9-10, 22

United States v. Baylor,
97 F.3d 542 (D.C. Cir. 1996) 15-16

United States v. Bell,
808 F.3d 926 (D.C. Cir. 2015) 7, 8, 9, 20

United States v. Boney,
977 F.2d 624 (D.C. Cir. 1992) 16

United States v. Brika,
487 F.3d 450 (6th Cir. 2007) 21

United States v. Canania,
532 F.3d 764 (8th Cir. 2008) 15

United States v. Casper,
536 F.3d 409 (5th Cir. 2008) 17

United States v. Coleman,
370 F. Supp. 2d 661 15

United States v. Edwards,
427 F. Supp. 2d 17 (D.D.C. 2006) 21

United States v. Faust,
456 F.3d 1342 (11th Cir. 2006) 13, 14, 16

United States v. Frias,
39 F.3d 391 (2d Cir. 1994) 16

United States v. Grayson,
438 U.S. 41, 50 n.10 (1978) 24

United States v. Hamaker,
455 F.3d 1316 (11th Cir. 2006) 21

United States v. Ibanga,
271 F. App'x 298 (4th Cir. 2008) 22

United States v. Ibanga,
454 F. Supp. 2d 532 (E.D. Va. 2006) 16

United States v. Kemp,
732 F. App'x 368 (6th Cir. 2018) 18

United States v. Lombard,
102 F.3d 1 (1st Cir. 1996) 15

United States v. Oti,
872 F.3d 678 (5th Cir. 2017) 18

United States v. Pimental,
367 F. Supp. 2d 143 (D. Mass. 2005) 21

United States v. Santiago,
413 F. Supp. 2d 307 (S.D.N.Y. 2006) 21

United States v. Settles,
530 F.3d 920 (D.C. Cir. 2008) 15, 17

United States v. Vaughn,
430 F.3d 518 (2d Cir. 2005)..... 22

United States v. Villarreal,
725 F. App'x 515 (9th Cir. 2018)..... 17

United States v. Watts,
519 U.S. 148 (1997) 4, 6, 20, 23

Statutory and Sentencing Provisions

18 U.S.C. § 3006A(i)..... 1, 19

18 U.S.C § 3553(a)..... 19

18 U.S.C. § 3661..... 4, 23, 24

U.S.S.G. Ch. 1, Pt. A(1)(4)(a)..... 6

U.S.S.G. § 1B1.3..... 5, 9

U.S.S.G. § 2D1.1(c)(6) 9

U.S.S.G. § 3E1.1..... 9

U.S.S.G. § 5A..... 9

Other Authorities

3 CRIMINAL PRACTICE MANUAL § 93:4 (2018)..... 12

57 Fed. Reg. 62,832 (1992)..... 23

58 Fed. Reg. 67,522 (1993)..... 23

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62 Fed. Reg. 152-01 (1997) 23

American Bar Association, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-1.3 (2016) 14

Amsterdam & Hertz, TRIAL MANUAL 6 FOR THE DEFENSE OF CRIMINAL CASES (6th ed. 2016)..... 12

Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988) 6, 7

Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2011)..... 7, 8

Cipes, *et al.*, CRIMINAL DEFENSE TECHNIQUES § 1A.06 (Rev. Ed. 2018) 11

Federal Sentencing Under 'Advisory' Guidelines: Observations by District Judges, 75 FORDHAM L. REV. 1 (2006) 22

Foster, *Anchoring and the Expert Witness Testimony: Do Countervailing Forces Offset Anchoring Effects of Expert Witness Testimony?* 77 TENN. L. REV. 623 (2010) 14

Gertner, *A Critique of Judge Pryor's Proposals,* 29 FED. SENT. RPTR. 130 (Dec. 2016-Feb. 2017) 16

Johnson, *If At First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153 (1996) 8

Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 SUFFOLK U. L. REV. 1 (2016)..... 21, 24

Kurland, *Providing a Federal Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. DAVIS L. REV. 309 (1993)..... 13

Mauet, *Bench Trials*, Litigation (Summer 2002)..... 11-12

McElhatton, *A $600 drug deal, 40 years in prison*, Washington Times, June 29, 2008..... 16

Newton, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 FED. SENT. RPTR. 68 (1995)..... 23

Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation*, 95 NW. U. L. REV. 133 (2000) 13

Scalia & Garner, *Making Your Case: The Art of Persuading Judges* 31 (2008) 11

The American College of Trial Lawyers Proposed Modification to the Relevant Conduct Provisions of the United States Sentencing Guidelines, AM. CRIM. L. REV. 1463 (2001) 16

Thompson, *The Promise of Gideon: Providing High-Quality Public Defense in America*, 31 QUINNIPIAC L. REV. 713 (2013) 19

Wilkins and Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990) 6

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AND FAMM AS *AMICI CURIAE* SUPPORTING PETITIONER

This brief is submitted on behalf of the National Association of Federal Defenders ("NAFD") and FAMM as amici curiae.[1]

INTEREST OF THE AMICI CURIAE

The NAFD was formed in 1995 to enhance the representation of indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, non-profit, volunteer organization of attorneys working for defender organizations created under the Criminal Justice Act. One of its guiding principles is to promote the interests of justice by appearing as amicus curiae in litigation about issues affecting federal indigent defendants. The NAFD has a particularly strong interest in this case because indigent defendants in federal court are routinely punished—often severely—based on allegations for which a jury has acquitted them. And as detailed below, the proliferation of such unconstitutional punishments casts a shadow throughout federal criminal practice, warping litigation decisions, depleting public confidence in the justice system,

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than amici or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief. Petitioner's letter consenting to the filing of amicus curiae briefs generally has been filed with the Clerk's office. Respondent's consent to the filing of this brief is on file with the author.

and thereby compromising NAFD members' work on behalf of their indigent clients.

Founded in 1991 as Families Against Mandatory Minimums, FAMM is a national, nonprofit, nonpartisan organization with more than 75,000 members. FAMM promotes fair and proportionate sentencing policies and challenges inflexible and excessive penalties required by mandatory sentencing laws. FAMM also works to create a more fair and effective justice system that respects American values of individual accountability and dignity while keeping communities safe. By mobilizing and sharing the stories of prisoners and their families who have been adversely affected by unjust sentences and prison polices, FAMM gives voice to incarcerated individuals, their families, and their communities. FAMM advances its charitable purposes in part through education of the general public, policy advocacy, and through selected amicus filings in important cases.

FAMM has long abhorred the use of acquitted conduct and has repeatedly urged the United States Sentencing Commission, during the annual public comment period, to abandon its use. FAMM believes that the practice undermines citizens' view of our justice system as fair and balanced. Members tell us they cannot understand (and we find it hard to explain) why our sentencing rules direct judges to count conduct that a jury has examined and rejected. The practice is out of step with the modern effort to

make sentencing more rational, just, and cost-effective. It should be eliminated.

SUMMARY OF THE ARGUMENT

1. Although the petition for certiorari forcefully conveys the constitutional stakes, the consequences of punishing acquitted conduct go far beyond derogation of the Sixth Amendment right to jury trial—the practice's distortions pervade the federal criminal justice system. The harmful influence begins during plea negotiations, where the possibility of securing punishment for acquitted conduct encourages charges unlikely to persuade a jury, and pressures defendants to plead guilty because an acquittal might not carry any sentencing upside. The practice likewise constrains trial strategies, forcing defendants to tailor their arguments and evidence to two different factfinders under two different standards of proof. And the damage continues long after a case ends, as the practice's striking inconsistency with popular understanding of the jury-trial right weakens public confidence in the federal criminal system. These results—as members of the NAFD (speaking for attorneys) and FAMM (speaking for clients turned prisoners) can sadly attest—compromise the attorney-client relationship: When the public perceives the criminal justice system as unprincipled and unfair, defendants are more likely to resist advice from the attorneys that the justice system has appointed to represent them.

2. Members of this Court have suggested that district court judges or the U.S. Sentencing

Commission might remedy or mitigate the harms of acquitted-conduct sentencing. But district judges cannot fix the problem for several reasons. To begin with, they have shown little inclination to do so, and those few who have tried have sometimes been rebuked with appellate reversals for perceived infidelity to the United States Sentencing Guidelines' "relevant conduct" rules. The discretion vested in the district bench, moreover, means that the best it can offer is a piecemeal courtroom-by-courtroom solution. And because, under current law, sentencing judges *must* consider acquitted conduct as part of the "starting point" for sentencing, such conduct will continue to exert a profound pull on their sentences regardless whether they forswear reliance on it.

The Sentencing Commission, too, is unlikely to curb sentencing based on acquitted charges. While it repeatedly proposed abolishing the practice in the 1990s, the Commission has not mentioned the issue since this Court's 1997 decision in *United States v. Watts*, 519 U.S. 148 (1997), which featured a concurrence arguing that 18 U.S.C. § 3661 precluded the Commission from moving in a new direction. Two decades of ensuing silence in the face of withering criticism suggests that, rightly or wrongly, the Commission agrees that its hands are tied. Its inaction makes clear that it cannot be counted on to fix this widespread and deeply damaging constitutional violation. This Court's intervention is needed.

ARGUMENT

I. The harms of punishing acquitted conduct reverberate throughout the federal criminal justice system

The pervasive punishment of acquitted conduct in federal courts contaminates every phase of the criminal process. Long before trial or sentencing, it bolsters an already powerful prosecutorial hand, creating incentives for prosecutors to overcharge and for defendants to plead guilty when not otherwise appropriate. Its distortions continue at trial, where it forces defendants to simultaneously argue innocence to different audiences—the jury *and* judge—under different standards of proof. And the damage persists after prosecution ends, as the practice's inconsistency with the jury-trial right saps trust in the criminal justice system. These pathological byproducts—which NAFD members and FAMM constituents must navigate on a regular basis—underscore the importance of granting certiorari and putting a stop to a procedure at odds with the Sixth Amendment.

1. Enhanced prosecutorial power. Although the United States Sentencing Guidelines are silent on the use of acquitted conduct in sentencing, the "Relevant Conduct" provision, U.S.S.G. § 1B1.3, broadly commands sentencing courts to consider a vast array of activity related to the conviction, including "all acts and omissions" of a criminal nature that were committed during or in preparation for the offense, § 1B1.3(a)(1), or as part of the same "course of conduct," § 1B1.3(a)(2),

including consideration of "all harm" resulting from such acts, *id.*; *see generally United States v. Watts*, 519 U.S. 148, 152-53 (1997).

The Relevant Conduct guideline embodies the United States Sentencing Commission's "first inevitable compromise" in balancing the "competing rationales behind a 'real offense' sentencing system and a 'charge offense' system." Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-9 (1988). A pure "real offense" system ties punishment solely to the actual facts of the crime, rather than the count of conviction. But requiring sentencing judges to undertake detailed factual inquiries at sentencing holds potential to produce "unwieldy or procedurally unfair" results. *Id.* at 11. By contrast, a strict "charge offense" system bases punishment solely on the offense for which the defendant was convicted, regardless how he or she committed the crime. But basing punishment on charges alone empowers "prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment." U.S.S.G. Ch. 1, Pt. A(1)(4)(a) (2018).[2]

The Guidelines struck a key "compromise" that "looks to the offense *charged* to secure the 'base

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[2] *See also* Wilkins and Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 499 n.27 (1990) ("[T]he central feature of the guidelines (*i.e.*, Relevant Conduct) ... significantly reduces the impact of prosecutorial charge selection and plea bargaining by ensuring the court will be able to consider the defendant's real offense behavior in imposing a guideline sentence.").

offense level'" and "then modifies that level in light of several 'real' aggravating or mitigating factors" of the real offense, as evaluated under the Guidelines' relevant conduct provision. Breyer, *supra*, at 11-12.

But punishing acquitted conduct reflects the worst of both worlds: It encourages prosecutors to overcharge defendants and coerce guilty pleas while sanctioning problematic judicial fact-finding at sentencing.

Members of this Court have noted the hazard "of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty." *Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting). Prosecutors overcharge in order to raise defendants' sentencing exposure and thereby elicit guilty pleas. *See, e.g.*, Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 83-85 (2011).

Using acquitted conduct to set sentences heightens the temptation of prosecutorial overreach by blunting the downside to the government. If the defendant succumbs to the government's aggressive charges and pleads guilty, the government wins; if he goes to trial and is convicted on those charges, the government still wins; and if he goes to trial and persuades a jury that he is innocent of them, the government *still* wins, so long as it secures conviction on a more easily proved offense and persuades the sentencing judge of his guilt by a preponderance of the evidence. When acquittal of certain counts is just a "speed bump at sentencing,"

United States v. Bell, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc), prosecutors have little to lose by larding an indictment with charges they cannot prove beyond a reasonable doubt. The government has conceded as much, acknowledging that punishing acquitted conduct encourages charges prosecutors would otherwise forgo. *See* Johnson, *If At First You Don't Succeed— Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153, 200 (1996) (discussing Department of Justice's 1993 statement on acquitted conduct to the U.S. Sentencing Commission).

The use of acquitted conduct at sentencing also exerts tremendous pressure for defendants to plead guilty to weak allegations. A defendant's only incentive to reject a plea offer is the prospect that she will obtain a more favorable result if she prevails at trial. *See* Caldwell, *supra*, at 69. But punishing acquitted conduct means defendants often cannot reap the benefits of acquittal. In fact, as a practical matter, it threatens *harsher* outcomes for defendants who secure partial acquittals: They are sentenced as if they admitted guilt on every count, but receive none of sentencing breaks that attend a guilty plea.

Consider two co-defendants, Jack and Jill, charged with one airtight count for a small drug sale, and another weaker count for conspiring to distribute five kilograms of cocaine. *See, e.g.*, *Bell*, 808 F.3d 926. Jack, eager to lock in the Guidelines' rewards for acceptance of responsibility, immediately admits guilt on both counts. The

calculation of his Guidelines sentencing range will begin with the five kilos that the conspiracy allegedly distributed, *see* U.S.S.G. § 1B1.3, producing a base offense level of 28, *see id.*, § 2D1.1(c)(6). But his prompt guilty plea will produce a three-level reduction for acceptance of responsibility, *see id.*, § 3E1.1, yielding an adjusted offense level of 25. Assuming no criminal history, Jack's Guidelines range will be 57-71 months of imprisonment. *See id.*, § 5A.

Jill, by contrast, insists that she is innocent of the conspiracy. She proceeds to trial, secures acquittal on the conspiracy count under the reasonable doubt standard, and is convicted only of the minor drug sale. If at sentencing the court nevertheless finds her responsible for the conspiracy by a preponderance of the evidence, her win will evaporate—the court will hold her culpable for the conspiracy's full drug quantity, *see Bell*, 808 F.3d at 928-29, and assign her the same base offense level as Jack's—28. Unlike Jack, however, she will receive no reduction for accepting responsibility. *See* U.S.S.G. § 3E1.1, cmt. n.2 ("This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial...."). Her guidelines range thus will be higher than Jack's: 78-97 months at least,[3] rather than 57-71. *Id.*, §5A. Assuming the court adheres to that range—as most do, *see Peugh v. United States*, 569 U.S. 530, 543-44

[3] The potential for an even higher sentence arises from the significant risk that at trial cooperating witnesses may testify to other features of the conspiracy that trigger additional Guidelines enhancements.

(2013)—her reward for successfully challenging the government's overreach will be a stiffer sentence.

Faced with these incentives, NAFD members must sometimes explain to clients that it is in their best interest to plead guilty to weak charges. That is the most sensible course when, as in Jill's case, a partial acquittal will do more harm than good. But the resulting conviction turns due process on its head. It is one thing for a defendant who maintains her innocence to plead guilty because she reasonably concludes that a jury could convict her beyond a reasonable doubt at trial. *See North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970). It is another for her to take on the stigma of a conviction, and acquiesce in a harsher punishment, because she worries that a judge will condemn her by a preponderance of the evidence at sentencing.

Calculating sentences using acquitted conduct thus directly undercuts the Guidelines' stated goal of reducing prosecutorial influence over sentencing outcomes. *See* U.S.S.G., Ch. 1. Further, it offends the Sentencing Commission's "key compromise" regarding the proper sentencing system because it introduces a host of inequities that undermine "procedural fairness" throughout the criminal prosecution. Such perverse results are inevitable when courts trivialize jury verdicts and require defendants to instead negotiate pleas in the shadow of judicial factfinding at sentencing.

2. Distorted trial strategies. The harms of acquitted-conduct sentencing continue at trial. In the current regime, defendants must win over two

factfinders, persuading not only the jury to acquit, but also the judge to leave the acquittal undisturbed at sentencing in the event of a split verdict. What is more, they must make their case to jury and judge under different burdens of proof. For defense lawyers, balancing dissimilar audiences and standards compounds the already daunting challenges of defending a federal criminal case. Often, it presents insoluble dilemmas.

a. The need to at once satisfy both lay juries and experienced judges hampers selection of an optimal trial presentation. That is because argument and evidence that resonates with a jury can turn off judges, and vice versa. *See, e.g.*, Scalia & Garner, *Making Your Case: The Art of Persuading Judges* 31 (2008) ("It is often said that a 'jury argument' will not play well to a judge. Indeed, it almost never will."). When that is so, defense lawyers face a Catch-22—they can focus on persuading the jury and lose credibility with the court, or appeal to the court and lose the jury's interest or sympathy. Whatever their decision, they risk their standing with a factfinder that will decide their client's culpability.

Consider three examples:

- Jurors are receptive to acquitting on the basis of sympathetic facts. Cipes, *et al.*, CRIMINAL DEFENSE TECHNIQUES § 1A.06 (Rev. Ed. 2018). But the "emotional arguments and 'war stories' that may be appropriate to make a point before a jury usually turn judges off." Mauet, *Bench*

Trials, Litigation (Summer 2002), at 18-19. Under a system that punishes acquitted conduct, defendants must choose between appeals to juror sympathies that might drain credibility with the court at sentencing, or rhetorical restraint that impresses the court, but not the jury.

- By the same token, judges are often receptive to defense theories "involv[ing] complex issues or invok[ing] a so-called 'technicality.'" 3 CRIMINAL PRACTICE MANUAL § 93:4 (2018). Such theories, however, compromise the defense's hold on jurors, who "tune out quickly when things get tedious." Amsterdam & Hertz, TRIAL MANUAL 6 FOR THE DEFENSE OF CRIMINAL CASES 835 (6th ed. 2016). A defendant considering a dry legal defense accordingly faces a stark tradeoff when he must convince both jury and judge to find him not guilty.
- Similarly, unless her story is "inherently incredible," the defendant's trial testimony can persuade jurors, who generally "expect an innocent person to testify." Amsterdam & Hertz, *supra*, at 834. But it may have the opposite effect on judges, who are less likely to draw adverse inferences from silence, and more likely to be "skeptical of the testimony of the defendant and his or her family and friends." *Id.* at 832. Sometimes that equation flips: If the defendant's

> testimony comes with prejudicial baggage like gang tattoos or prior convictions, the judge is a better audience. *See* Kurland, *Providing a Federal Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. DAVIS L. REV. 309, 337 (1993). In either scenario, an already fraught decision becomes exponentially more difficult because the defendant must simultaneously tailor her case to two disparate audiences, who may receive her testimony very differently.

b. In addition to these difficult choices about evidence, argument, and audience, the punishment of acquitted conduct makes the "implicit and often hopeless demand that in order to avoid punishment for charged conduct, criminal defendants must prove their innocence under two drastically different standards at once." *United States v. Faust*, 456 F.3d 1342, 1353 (11th Cir. 2006) (Barkett, J., dissenting). A defendant who secures a partial acquittal by emphasizing reasonable doubt to a jury may find that his successful theme hamstrings him at sentencing. Judges, like all decision-makers, are apt to be "unduly influenced by the first impression they have (the primacy effect)." Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation*, 95 NW. U. L. REV. 133, 163 (2000). And so a trial judge who consciously or unconsciously infers factual guilt at trial from a defendant's emphasis on reasonable doubt may have trouble putting that judgment aside at sentencing.

Cf. Foster, *Anchoring and the Expert Witness Testimony: Do Countervailing Forces Offset Anchoring Effects of Expert Witness Testimony?* 77 TENN. L. REV. 623, 623 (2010) ("[I]ndividuals facing a complex decision rely on initial reference values as a starting point in making their final assessment.").

When that is so, a "successful effort to escape guilt beyond a reasonable doubt ... actually ... contribute[s] to ... punishment for those acquitted offenses under a lesser standard of proof." *Faust*, 456 F.3d at 1353. And even when emphasizing reasonable doubt at trial is not fatal at sentencing, the need to harmonize the differing standards "compromises defendants' ability to ... tailor an optimal trial strategy, or indeed formulate any minimally satisfying strategy whatsoever." *Id.*

Sentencing courts' consideration of acquitted conduct thus imposes on defense lawyers critical strategic tradeoffs. And NAFD members must routinely navigate such double-binds while representing their indigent clients. *See* American Bar Association, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-1.3 (2016) ("duties of defense counsel ... include ... a duty to continually evaluate the impact that each decision or action may have at later stages, including ... sentencing") (capitalization omitted). The end results are distortions in trial strategy at odds with the Sixth Amendment, which commands that a criminal trial be directed to just one audience—the jury.

3. Diminished public trust in courts. Worse still than those litigation consequences, punishing

defendants for acquitted offenses weakens public confidence in the justice system. Ordinary citizens take for granted that the Constitution gives juries the last word on guilt or innocence—and by extension, on whether a defendant can be punished for any particular allegation. Letting judges shrug off a jury's acquittal and impose the equivalent of conviction makes a mockery of that understanding and undermines faith in the fairness of federal courts.

"Many judges and commentators have ... argued that using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system." *United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (Kavanaugh, J.). Those judicial critics voice concern that the practice "can often invite disrespect for the sentencing process," *United States v. Lombard*, 102 F.3d 1, 5 (1st Cir. 1996) (Boudin, J.), wonder "what the man on the street might say about ... allowing a prosecutor and judge to say that a jury verdict of 'not guilty' ... may not mean a thing," *United States v. Canania*, 532 F.3d 764, 778 (8th Cir. 2008) (Bright, J., concurring), and suggest that a "layperson would undoubtedly be revolted by the idea" of penalizing acquitted conduct. *United States v. Coleman*, 370 F. Supp. 2d 661, 671 (S.D. Ohio 2015), *rev'd on other grounds by United States v. Kaminski*, 501 F.3d 644 (6th Cir. 2007).[4]

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[4] *See also, e.g., United States v. Baylor*, 97 F.3d 542, 551 (D.C. Cir. 1996) (Wald, J., concurring specially) ("this justification could not pass the test of fairness or even common

These judges are right to be concerned. NAFD members and FAMM staff see the stunned reactions of laypeople firsthand when they explain to clients, constituents, and their families that defendants acquitted of a charge can be sentenced as if they were found guilty. For defendants punished in this way, an acquittal is worse than a Pyhrric victory—it is a "cruel and perverse" bait-and-switch by a criminal justice system that touts its procedural fairness. *Faust*, 456 F.3d at 1353; *see United States v. Boney*, 977 F.2d 624, 647 (D.C. Cir. 1992) (noting that justifications for punishing acquitted conduct "might be lost on a person who ... breathes a sigh of

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sense from the vantage point of an ordinary citizen"); *United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring) ("This is jurisprudence reminiscent of *Alice in Wonderland*. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'"); *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) ("most people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they were acquitted"), *rev'd* 271 F. App'x 298 (4th Cir. 2008); Gertner, *A Critique of Judge Pryor's Proposals*, 29 FED. SENT. RPTR. 131, 131 (Dec. 2016-Feb. 2017) ("The fact that the Federal Sentencing Guidelines enabled judges to consider ... acquitted conduct as the basis for an increased sentence shocked scholars and commentators in the United States and abroad."); *The American College of Trial Lawyers Proposed Modification to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1463, 1485 (2001) ("The use of acquitted conduct seriously undermines [respect for the law], as evidenced by the widespread, often visceral, outrage it has generated even among seasoned federal judges."); McElhatton, *A $600 drug deal, 40 years in prison*, Washington Times, June 29, 2008, *available at* https://www.washingtontimes.com/news/2008/jun/29/a-600-drug-deal-40-years-in-prison/ (last visited, Sept. 18, 2019).

relief when the not guilty verdict is announced without realizing that his term of imprisonment may nevertheless be 'increased' if, at sentencing, the court finds him responsible for the same misconduct"). As one client of a Federal Public Defender Organization put it at his sentencing, "I just feel as though ... that's not right. That I should get punished for something that the jury [of] my peers, they found me not guilty." *Settles*, 530 F.3d at 924.

FAMM constituents, including prisoners and affected family members, consistently report that the use of acquitted conduct at sentencing directly contributes to their lack of trust in the criminal justice system. Raul Villarreal, who received a two-level sentencing enhancement based on an obstruction of justice charge for which he was acquitted, feels "devastated and betrayed by the justice system" because of the system's use of acquitted conduct. *See also United States v. Villarreal*, 725 F. App'x 515, 517–18 (9th Cir. 2018) (dismissing argument that the use of acquitted conduct violated Villarreal's Sixth Amendment right to a jury trial). Brian Casper, who received a two-level sentencing enhancement based on a § 924(c) firearms charge for which he was acquitted on both counts, reports that there is "no way to trust a system that allows for someone to be found not guilty to the charge but still receive the same time, or in [his] case more time." *See also United States v. Casper*, 536 F.3d 409, 415 (5th Cir. 2008), *judgment vacated on other grounds*, 556 U.S. 1218 (2009).

Prisoners believe that their right to a jury trial—and their decision to establish their innocence by seeking acquittal by a jury of their peers—proved meaningless because of the sentencing court's use of acquitted conduct. Mr. Villarreal feels that, in proceeding to trial, he "sacrificed everything for believing in something" and that the system effectively declared him "guilty, when [he] was declared 'not guilty' in a public trial by a jury of [his] peers." Davon Kemp, whose base offense level was significantly enhanced by a conspiracy charge for which he was acquitted, believes that the use of acquitted conduct at his sentencing renders the criminal justice system "foul for stripping [him] of [his] right to a jury trial." Mr. Kemp's mother, who attended her son's sentencing hearing and expressed "shock" at the court's use of acquitted conduct, also believes that the use of acquitted conduct rendered her son's jury trial right "worthless." *See also United States v. Kemp*, 732 F. App'x 368, 378 (6th Cir. 2018) (rejecting argument that the Sixth Amendment prevented the district court from relying on acquitted conduct). Elechi Oti, who received a two-level sentencing enhancement based on a firearms-related charge for which she was acquitted, asks "[w]hy did I have a jury if the government was going to usurp their authority and implement their own judgment regardless of the jury's decision"? *See also United States v. Oti*, 872 F.3d 678, 700 n.18 (5th Cir. 2017) (dismissing Oti's challenge to punishment for acquitted conduct as "foreclosed" by *Watts*).

Making the same point, a private practitioner who represents indigent clients in the Central

District of California under the Criminal Justice Act explained his client's disillusioned reaction after being acquitted of participating in a drug conspiracy but sentenced based on the conspiracy's large drug quantity:

> I visited my client often to keep him advised of the sentencing arguments I was making and he followed those arguments closely. He had a tough time understanding how he could be punished for acquitted conduct. What he felt from this whole experience was that the judge did not respect the law and did not respect the jury system. If you think about the [18 U.S.C.] § 3553(a) factors and promoting respect for the law, when people believe the jury system is a sham, it promotes disrespect for the law. My client said, if there are no rules why even try to control your behavior, because they're going to get you anyway.

Such skepticism of the justice system's fairness directly impacts NAFD members' representation of their indigent clients. Federal defenders are paid by the federal court system, *see* 18 U.S.C. § 3006A(i), and must frequently overcome skepticism "about divided loyalties and the depth of commitment to the client's cause." Thompson, *The Promise of Gideon: Providing High-Quality Public Defense in America*, 31 QUINNIPIAC L. REV. 713, 731 (2013). Clients who believe that the federal justice system is arbitrary and hypocritical are less likely to trust their

appointed lawyers, and less likely to credit counsel's advice to plead guilty, go to trial, or take the stand. A practice so discordant with the Sixth Amendment as to elicit visceral outrage from judges, commentators, and laypeople inflicts systemic harms well beyond any one criminal case.

II. Only this Court can address the constitutional and practical harms of acquitted-conduct sentencing

Members of this Court have suggested that district judges and the U.S. Sentencing Commission might recognize the harms of considering acquitted conduct at sentencing and renounce the practice. *See United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) ("[E]ven in the absence of a change in course by the Supreme Court ... federal district judges have power in individual cases to disclaim reliance on acquitted ... conduct."); *United States v. Watts*, 519 U.S. 148, 158-59 (1997) (Breyer, J., concurring) ("Given the role that juries and acquittals play in our system, the Commission could decide to revisit this matter in the future."). But those players have not stepped away from the practice yet, and there is no reason to believe change is around the corner. This Court's intervention is the only realistic fix for a blemish on the Sixth Amendment that persists two decades after *Watts*.

1. The district court bench is not institutionally equipped to bring an end to enhanced penalties for acquitted offenses. One "problem is that the very discretion available to sentencing judges prevents

this from being a comprehensive reform." Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 SUFFOLK U. L. REV. 1, 45 (2016). Decisions rejecting reliance on acquitted conduct remain outliers more cited in the breach. *See, e.g.*, *United States v. Pimental*, 367 F. Supp. 2d 143 (D. Mass. 2005), *disagreed with by, e.g.*, *United States v. Brika*, 487 F.3d 450, 459-60 (6th Cir. 2007), *United States v. Edwards*, 427 F. Supp. 2d 17, 25 (D.D.C. 2006), *and United States v. Santiago*, 413 F. Supp. 2d 307, 314-15 (S.D.N.Y. 2006). But even if they gained wider currency, they would at best constitute a courtroom-by-courtroom solution, in which exposure to massively enhanced sentences would turn on a spin of the judicial assignment wheel.

And even if district judges were in agreement, acquitted conduct would still drive sentencing because the Guidelines mandate its consideration. A correctly calculated Guidelines range is a required "starting point and initial benchmark" for sentencing. *Gall v. United States*, 552 U.S. 38, 49 (2007). When district courts calculate that "initial benchmark," the Guidelines command them to consider *all* relevant conduct. *See United States v. Hamaker*, 455 F.3d 1316, 1336 (11th Cir. 2006). In view of that command and the Guidelines' broad relevant conduct provision, a district court's initial Guidelines calculation must take acquitted conduct into account, if established—notwithstanding reasonable doubt—by a preponderance of reliable information. *See, e.g., United States v. Vaughn*, 430 F.3d 518, 526-27 (2d Cir. 2005). The resulting

calculation typically exerts a powerful pull on the ultimate sentence, regardless of the district judge's views on punishing acquitted conduct. *See Peugh v. United States*, 569 U.S. 530, 541-42 (2013); Remarks of Judge Gerard Lynch, Panel Discussion, *Federal Sentencing Under 'Advisory' Guidelines: Observations by District Judges*, 75 FORDHAM L. REV. 1, 17-18 (2006) ("Whether [judges] like that number or not ... they will still be influenced by that number. That is the psychological fact.").

On top of all that, judges who categorically refuse to consider acquitted conduct risk reversal for insufficiently weighting the Guidelines. *See United States v. Ibanga*, 271 F. App'x 298, 299 (4th Cir. 2008) (not precedential) ("Because it appears that the district court applied a standard that would categorically exclude consideration of acquitted conduct in every case, we vacate Ibanga's sentence and remand for resentencing."); *Vaughn*, 430 F.3d at 526-27 (remanding with directions to "consider all facts relevant to sentencing it determines to have been established by a preponderance ... even those relating to acquitted conduct"). Between that threat of reversal, the pull of the Guidelines, and the diversity and discretion of the trial bench, district courts cannot and will not end this practice.

2. The Sentencing Commission has shown that it is equally unlikely to remedy the problem.

To begin with, although the punishment of acquitted conduct has received more intense criticism than arguably any other part of the Guidelines, *see supra* at 10-11 & n. 3, it has been

more than two decades since the Commission expressed openness to a course correction. In the 1990s, the Commission repeatedly highlighted the sentencing use of acquitted conduct as ripe for revisitation. In 1995, for example, Commission staff examined "ways of ... limiting [consideration of] acquitted conduct to within the guideline range." Newton, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 FED. SENT. RPTR. 68, 69 (1995). A year later, the Commission's priorities included "[d]eveloping options to limit the use of acquitted conduct at sentencing." 61 Fed. Reg. 34,465 (1996). And over that decade, the Commission published multiple proposals to abolish the use of acquitted conduct at sentencing. *See* 62 Fed. Reg. 152-01 (1997); 58 Fed. Reg. 67,522, 67,541 (1993); 57 Fed. Reg. 62,832 (1992). But it never acted on those proposals, for reasons it did not explain.

It has not broached the subject of acquitted conduct in any significant way since 1997. One possible explanation for its silence is Justice Scalia's concurrence that year in *Watts*, which argued that 18 U.S.C. § 3661 forecloses the Commission from abolishing the practice because the statute mandates that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." *See Watts*, 519 U.S. at 158 (Scalia, J., concurring). The NAFD and FAMM respectfully believe Justice Scalia was mistaken—such a literal

reading of § 3661 would negate the very premise of the Guidelines, which "limit the information the sentencing judge considers in various ways." Johnson, *Puzzling Persistence*, *supra*, at 37. Justice Scalia himself noted that Congress, in the Sentencing Reform Act of 1984, "gave the Commission discretion," for example, to determine whether a non-exhaustive list of offender and offense characteristics "'have any relevance,' and should be included among the factors varying the sentence." *Mistretta v. United States*, 488 U.S. 361, 414 (1989) (Scalia, J., dissenting). Section 3661 (like the cognate provision at 21 U.S.C. § 850) is best understood as codifying the holding of *Williams v. New York*, 337 U.S. 241 (1949), that due process does not necessarily require application of either confrontation rights or the rules of evidence at sentencing. *See United States v. Grayson*, 438 U.S. 41, 50, 50 n.10 (1978). But the Commission's abrupt and sustained post-*Watts* silence suggests it may believe § 3661 ties its hands.

Regardless of the Commission's motives, two decades of inaction demonstrate that it cannot be counted on to fix the constitutional and practical harms of sentences based on acquitted offenses. This Court accordingly should grant certiorari to redress those harms and bring an end to a practice irreconcilable with the Sixth Amendment jury right.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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