IN THE

UNITED STATES SUPREME COURT

No. 19-6284

JOSE L. CABRERA-COSME,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

S. Ct. RULE 44.1-2. REHEARING

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GROUNDS FOR REHEARING

Petitioner certifies under penalty of perjury that this Rule 44.1-2. is presented in good faith, and not as a dilatory tactic. In addition, the 44 reharing is warranted under intervening circumsta nces of substantial or controlling effect.

Specifically, Petitioner moves this Court to rehear or in alternative stay. the resolution of the petition for writ of certiorari based on the New Legislation "Prohibiting Punishment of Acqui tted Conduct Act of 2019" in conjunction with the Supreme Court's resolution in Asaro v. United States, No. 19-107 (pending certiorari).

Petitioner reiterates that he was sentenced to mandatory life without the possibility of parole, based on the preponderance of the evidence finding of "circumstances that constitute (First Degree .. Murder)" under the §2A1.1 cross reference. After moving to sever his case from his co-defendant's who were then charged with the murders, the U.S. District Court denied that request. petitioner - arguied that the "spill-over" from those murders would prejudice him at trial and sentencing.

Petitioner was not charged with 18 U.S.C. 1111 (First Degree Murder), howevet at sentencing, the court relied solely on the § 2A1.1 as a starting point or benchmark of level 43 yeilding a mandato ry life sentence. Petitioner sought certiorari on whether COA should issue as to the First Circuit's erroneous conclusion that petitioner's due process was not violated based on the district court's .. prepionderance of the evidence findings.

Petitioner appeals to the Court presentening a single question whether the district court viol ated his "due process right to prooof bwyond a .. reasonable doubt" as to the **uncharged** murders that resulted in a mandatory life sentence ? For the .. record, Petitioner submits additional authority - (BRIEF OF THE CATO INSTITUTE AS AMICUS CURIAE .. SUPPORTING PETITIONER ASARO). Att A. That took into consideration United States v. Bell, 808 F.3d 926, 932 (D.C. Cir. 2015)(Millett, J. concurring in the denial of rehearing en banc)(considering uncharged/acquitted conduct as a due process vio lation for sentencing purposes).

There is no panacea for the jury's diminishing role in our criminal justice system; it is a deep,

structural problem that far exceeds the bounds of any one case or doctrine. Burt at least we can do to avoid further discouraging defendants from exercising their right to a jury trial is to ... ensure that juries maintain their historic autho rity to issue acquittals with absolute finality.

Petitioner argues in conjunction. Defendants must be assured that if they are not charged by a federal grand jury process for murder, a judge will not be able to do an end-run around the jury and sentence them based on uncharged conduct.

WHEREFORE, Petitioner moves to Rehear this writ of certiorari, or in alternative stay the case pending the resolution of Asaro and the - "Prohibiting Punishment of Acquitted Conduct Act of 2019."

November 25, 2019

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APPENDIX A

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 CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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September 18, 2019

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Cato's concern in this case is defending the principle of jury independence, including the special sanctity reserved for jury acquittals, and ensuring that the increasing pervasiveness of plea bargaining does not further erode the participation of citizen juries in the criminal justice system, or deprive defendants of the right to subject prosecutions to meaningful adversarial testing.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

Under our Constitution, and within the Anglo-American legal tradition generally, the jury trial is the cornerstone of criminal adjudication. As long as there has been criminal justice in America, the independence of citizen jurors has been understood to be an indispensable structural check on executive, legislative power, and even judicial power. And that independence has always entailed a special solicitude for jury acquittals, which are intended to have "unassailable" finality. *Yeager v. United States*, 557 U.S. 110, 122-23 (2009).

The decision below, upholding the authority of judges to sentence defendants based on acquitted conduct, strikes at the heart of jury independence. It is fundamentally in tension with the understanding of the jury trial in the Anglo-American legal tradition, and at odds with Founding-Era practices regarding jury acquittals specifically. Permitting sentencing based on acquitted conduct not only denies criminal defendants their Sixth Amendment right to a jury trial, but also denies the community their proper role in overseeing the administration of criminal justice. As three members of this Court recently noted, "[t]his has gone on long enough." *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari).

It is especially important to protect the sanctity of jury acquittals now, in light of the near-disappearance of the criminal jury trial generally. Today, jury trials have been all but replaced by plea bargaining as the baseline for criminal adjudication, and there is ample reason to doubt whether the bulk of these pleas are

truly voluntary. If defendants know they may be sentenced based even on acquitted conduct, that massively ratchets up the pressure to accept a plea in any case where the prosecutor charges multiple, related offenses, as even acquittals on the more serious charges are no guarantee against harsh sentencing. Precluding sentences based on acquitted conduct would therefore be a small but vital safeguard against the wholesale erosion of the jury trial itself.

ARGUMENT

I. SENTENCING BASED ON ACQUITTED CONDUCT IS FUNDAMENTALLY INCONSISTENT WITH THE ANGLO-AMERICAN CONCEPTION OF THE INDEPENDENT JURY TRIAL.

The right to a jury trial developed as a "check or control" on executive power—an essential "barrier" between "the liberties of the people and the prerogative of the crown." *Duncan v. Louisiana*, 391 U.S. 145, 151, 156 (1968) (trial by jury is an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"); *see also Jones v. United States*, 526 U.S. 227, 246 (1999) (quoting Blackstone's characterization of "trial by jury as 'the grand bulwark' of English liberties"). Permitting judges to sentence on the basis of acquitted conduct is deeply at odds with this sacred right as it has been understood and applied throughout our legal and constitutional history.

The tradition of independent juries standing as a barrier against unsupported or unjust prosecutions pre-dates the signing of Magna Carta, and likely even

the Norman Conquest. *See* CLAY CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 13 (2d ed. 2014); *see also* LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 51-85 (1852) (discussing this tradition both before and after Magna Carta). In other words, jury independence is as ancient and storied as the Anglo-Saxon legal tradition itself.

A landmark pre-colonial decision on the sanctity of jury acquittals was *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670). Bushell was a member of an English jury that refused to convict William Penn for violating the Conventicle Act, which prohibited religious assemblies of more than five people outside the auspices of the Church of England. *See* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800, at 236-49 (1985). The trial judge essentially ordered the jury to return a guilty verdict and even imprisoned the jurors for contempt when they refused. However, the Court of Common Pleas granted a writ of habeas corpus to Bushell, cementing the authority of a jury to acquit against the wishes of the Crown. *Id.*

This understanding of the jury trial was firmly established in the American colonies as well. One notable case involved John Peter Zenger, who was charged with seditious libel for printing newspapers critical of the royal governor of New York. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871-72 (1994). The jury refused to convict notwithstanding Zenger's factual culpability, thus establishing an early landmark for freedom of the press and jury independence. *Id.* at 873-74. Indeed, "Zenger's trial was not an

aberration; during the pre-Revolutionary period, juries and grand juries all but nullified the law of seditious libel in the colonies." *Id.* America's Founders thus "inherited a well-evolved view of the role of the jury, and both adopted it and adapted it for use in the new Nation." CONRAD, *supra*, at 4.

A corollary of Colonial juries' authority to issue binding acquittals was their awareness of the consequences of a conviction. In an era with a far simpler criminal code, detailed instructions from the judge were often unnecessary to ensure that the jury was properly informed. *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 22–29, 32, 34-35 (1994) ("[J]urors did not even need to rely on a judge's instructions to know the common law of the land . . . ."). Juries were thus able—and expected—to tailor their verdicts to prevent excessive punishment. *See, e.g.*, 4 WILLIAM M. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *342-44 (1769) (juries often found value of stolen goods to be less than twelvepence in order to avoid mandatory death penalty for theft of more valuable goods).

Ultimately, the jury trial was understood not just to be a fair means of deciding guilt or innocence, but also as an independent institution designed to give the community a central role in the administration of criminal justice. "Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" *Thompson v. Utah*, 170 U.S. 343, 349-50 (1898) (quoting J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES

§ 1779). Alexander Hamilton observed that "friends and adversaries of the plan of the [constitutional] convention, if they agree[d] in nothing else, concur[red] at least in the value they set upon the trial by jury; or if there [was] any difference between them it consist[ed] in this: the former regard[ed] it as a valuable safeguard to liberty; the latter represent[ed] it as the very palladium of free government." THE FEDERALIST NO. 83.

Indeed, the community itself has a strong interest, complementary to but separate from that of the individual defendant, in seeing that its verdicts—rendered through a jury process that "the Constitution regards as the most likely to produce a fair result," *Yeager v. United States*, 557 U.S. 110, 122 (2009)—are given great deference. And nowhere is that more true than in the context of a jury *acquittal*, which the Constitution regards as inviolate. *See Burks v. United States*, 437 U.S. 1, 17 (1978); *see also, e.g., Yeager*, 557 U.S. at 123 (extolling the "unassailable" finality of jury acquittal).

When judges sentence on the basis of acquitted conduct, they fundamentally undermine the community's duty and prerogative to oversee the administration of criminal justice. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches," the "jury trial is meant to ensure [the people's] control in the judiciary," and constitutes a "fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 306 (2004). By providing an "opportunity for ordinary citizens to participate in the administration of justice," the jury trial "preserves the democratic element of the law," *Powers v. Ohio*, 499 U.S. 400, 406-07 (1991), and

"places the real direction of society in the hands of the governed," AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 88 (1998) (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293–94 (Phillips Bradley ed. 1945)).

To protect this long tradition of jury independence and popular sovereignty, the Court should grant the petition and reverse the decision below.

II. PROTECTING THE FINALITY OF JURY ACQUITTALS IS ESPECIALLY IMPORTANT IN LIGHT OF THE VANISHINGLY SMALL ROLE THAT JURY TRIALS PLAY IN OUR CRIMINAL JUSTICE SYSTEM.

The jury trial is foundational to the notion of American criminal justice, and it is discussed more extensively in the Constitution than nearly any other subject. Article III states, in mandatory, structural language, that "[t]he Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed." U.S. CONST. art. III, § 2 (emphases added). And the Sixth Amendment not only guarantees the right to a jury trial generally, but lays out in specific detail the form such a trial shall take. *See Faretta v. California*, 422 U.S. 806, 818 (1975) ("The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice . . . .").

Yet despite their intended centrality as the bedrock of our criminal justice system, jury trials are being pushed to the brink of extinction. The proliferation of

plea bargaining, which was completely unknown to the Founders, has transformed the country's robust "system of trials" into a "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (observing that plea bargaining "has swept across the penal landscape and driven our vanquished jury into small pockets of resistance").

The Framers understood that "the jury right [may] be lost not only by gross denial, but by erosion." *Jones*, 526 U.S. at 248. That erosion is nearly complete, as plea bargains now comprise all but a tiny fraction of convictions. *See Lafler*, 566 U.S. at 170 (in 2012, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Suja A. Thomas, *What Happened to the American Jury?*, LITIGATION, Spring 2017, at 25 ("[J]uries today decide only 1-4 percent of criminal cases filed in federal and state court.").

Most troubling, there is ample reason to believe that many criminal defendants—regardless of factual guilt—are effectively *coerced* into taking pleas, simply because the risk of going to trial is too great. *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS, Nov. 20, 2014. In a recent report, the NACDL has extensively documented this "trial penalty"—that is, the "discrepancy between the sentence the prosecutor is willing to offer in exchange for a guilty plea and the sentence that would be imposed after a trial." NAT'L ASS'N OF CRIM. DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 6 (2018).

Although the trial penalty has many complex causes, one of the biggest factors is the unbridled charging discretion of prosecutors in conjunction with severe sentences (especially mandatory minimums). *See id.* 7, 24-38. Given the pressure that prosecutors can bring to bear through charging decisions alone, many defendants decide to waive their right to a jury trial, no matter the merits of their case.

In short, criminal juries have been dramatically marginalized. The result is not only that criminal prosecutions are rarely subjected to the adversarial testing of evidence that our Constitution envisions, but also that citizens are deprived of their prerogative to act as an independent check on the state in the administration of criminal justice. We have, in effect, traded the transparency, accountability, and legitimacy that arises from public jury trials for the simplicity and efficiency of a plea-driven process that would have been both unrecognizable and profoundly objectionable to the Founders. And permitting sentencing based on acquitted conduct will only exacerbate this already-concerning trend.

As one judge recently explained, "factoring acquitted conduct into sentencing decisions imposes almost insurmountable pressure on defendants to forgo their constitutional right to a trial by jury." *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc). Even if a defendant goes to trial and wins on the more serious counts, "a hard-fought partial victory . . . can be rendered practically meaningless when that acquitted conduct nonetheless produces a drastically lengthened sentence." *Id.* The implication of this practice is there-

fore that "[d]efendants will face all the risks of conviction, with no practical upside to acquittal unless they run the board and are absolved of *all* charges." *Id.*

There is no panacea for the jury's diminishing role in our criminal justice system; it is a deep, structural problem that far exceeds the bounds of any one case or doctrine. But the least we can do to avoid further discouraging defendants from exercising their right to a jury trial is to ensure that juries maintain their historic authority to issue acquittals with absolute finality. Defendants must be assured that if they are acquitted of the most serious charges against them, a judge will not be able to do an end-run around the jury and sentence them based on the acquitted conduct.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

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September 18, 2019

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Scott S. Harris
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November 18, 2019

Mr. Jose L. Cabrera-Cosme
Prisoner ID # 30094-069
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Re: Jose L. Cabrera-Cosme
v. United States
No. 19-6284

Dear Mr. Cabrera-Cosme:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk