No. 21-1557

IN THE

Supreme Court of the United States

DAYONTA MCCLINTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICI CURIAE* AMERICANS FOR PROSPERITY FOUNDATION, DREAM CORPS JUSTICE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NISKANEN CENTER, RIGHT ON CRIME, THE R STREET INSTITUTE, AND THE SENTENCING PROJECT IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.2, *amici curiae* respectfully submit this brief in support of Petitioner.[1]

INTEREST OF *AMICI CURIAE*

Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF is part of a transpartisan coalition of organizations that advocate for an array of improvements to the criminal justice system that enhance public safety and ensure the protection of constitutional rights. To be clear, AFPF believes what Petitioner did and was convicted of is deserving of punishment. But AFPF also believes the Sixth Amendment jury trial right and related due process requirement that the government must prove, beyond a reasonable doubt, each fact necessary to support a sentence must be honored.

Dream Corps is a 501(c)(3) nonprofit organization committed to closing prison doors and opening doors of opportunity. Our organization works across the

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[1] All parties have consented to the filing of this brief after receiving timely notice. *Amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

United States to reform our criminal justice system at the federal, state, and local level through our "Dream Corps JUSTICE" program. Dream Corps JUSTICE centers directly impacted people, brings together diverse stakeholders, and mobilizes cultural influencers to provide bi-partisan solutions. A number of our members and their families are directly impacted by the issues before this Court, raised in the *amicus* below.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958 and boasts a nationwide membership of many thousands of direct members and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. It is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL has repeatedly filed amicus briefs before this Court on the use of acquitted conduct at sentencing. NACDL's members practice daily in federal criminal courts throughout the country and have long argued that the use of acquitted conduct is an anathema to our jury trial system. That is not only because sentencing on the basis of facts the jury did not find directly contravenes important Fifth and Sixth Amendment rights, but also because it undoes

the hard work of the good citizens on the jury who have fulfilled an important duty to our society. Any of us who have sat on a jury would be appalled to later learn (as some jurors, in fact, are) that our divided findings of acquittal and guilt on separate counts meant nothing at sentencing because our counts of acquittal are linguistically transmogrified into "relevant conduct."

The Niskanen Center works to advance an open society by active engagement with the exchange of ideas, direct engagement in the policymaking process, and through the courts. Niskanen believes the government has a duty to protect people from violence and secure property from theft and destruction; and a corresponding duty to affirm the rule of law and respect due process, including the longstanding principle that the government must prove beyond reasonable doubt every element of a criminal offense before imposing punishment for that offense.

Right on Crime is a national campaign of the Texas Public Policy Foundation, a non-profit, non-partisan research institute whose mission is to promote and defend liberty, personal responsibility, and free enterprise. Right on Crime supports conservative solutions for reducing crime, restoring victims, reforming offenders, and lowering taxpayer costs. It advocates on behalf of criminal sentencing policies that are fair, effective, and consistent with constitutional safeguards.

The R Street Institute is a non-profit, nonpartisan public policy research organization. R Street's mission is to engage in policy research and educational

outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support individual liberty and economic growth.

The Sentencing Project is a national nonprofit organization established in 1986 to engage in public policy research and education on criminal justice reform. The Sentencing Project advocates for effective and humane responses to crime that minimize imprisonment and criminalization of youth and adults by promoting racial, ethnic, economic, and gender justice. Through research, education, advocacy, and participating as an amicus in court cases, The Sentencing Project advances fair and effective sentencing policies.

SUMMARY OF ARGUMENT

Trial courts can and should reverse a jury's guilty verdict when the prosecution fails to adduce sufficient evidence for any rational jury to have reached that decision. And courts can and should vacate guilty verdicts flowing from constitutional violations, in cases where new evidence emerges showing the defendant is actually innocent, and other appropriate cases. Likewise, judge-found facts at sentencing justifying leniency pose no constitutional problem. None of these judicial actions violate the core tenants of our justice system.

But a sentencing judge should not be allowed to functionally overrule a jury's *acquittal* of a criminal defendant and punish him for that same acquitted conduct. Yet all too many criminal defendants who were acquitted of more serious criminal charges but

convicted on one or more lower charges face judges doing just that. How is this constitutionally dubious sentencing practice possible? Put simply, many lower courts have mistakenly overread this Court's per curiam decision in *Watts* to permit sentencing judges to do what *Apprendi* and its progeny later prohibited; namely, find facts that increase the punishment beyond that authorized by the jury's findings of guilt.

To be sure, at trial, due process requires the prosecution to prove every fact necessary for conviction beyond a reasonable doubt. And if a jury determines the government has not met that high burden with respect to one or more charges, that results in a not-guilty verdict for those charges, even though the jury might reach a guilty verdict on different charges in the same trial.

But when a defendant in these circumstances is sentenced for the charge(s) he or she *was* convicted of, very different rules apply. At that point, under the federal sentencing regime, it is the trial judge—not the jury—who makes factual findings relevant to determining the Guidelines range and what the defendant's sentence should be. At sentencing, the preponderance of the evidence standard applies. That standard, which is a far lower bar than the reasonable doubt standard, is met if the *judge* finds it is more likely than not the conduct occurred. And by statute, "[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 . . . may . . . consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661; *see also* U.S.S.G. § 1B1.3.

Taken together, this means a trial court can find at sentencing—using a lower standard of proof—that the defendant committed alleged conduct a jury just found the defendant not guilty of, and then rely on these factual findings to legally justify increased punishment. In other words, unless the defendant is found not guilty of all charges, the trial judge can dramatically increase the punishment for the charges the defendant *was* convicted of based on alleged conduct the defendant was acquitted of. And, given the extremely broad nature of federal sentencing, this allows acquitted conduct to dramatically increase the term of incarceration.

That is exactly what happened here. Based on the charges Mr. McClinton was convicted of, and facts found by the jury, his offense level was 23, and his Guidelines range would have been 57–71 months. But because the district court included the acquitted conduct in calculating Mr. McClinton's offense level it skyrocketed to level 43 based on the same facts the jury failed to find have been proven, yielding a sentence of 228 months in prison. *See* Pet. 7–9; App. 3a. The district court sentenced him to 228 months by, in essence, overruling the jury's decision.

That counterintuitive result is wrong. Acquitted-conduct sentencing flips the presumption of innocence on its head by allowing judges to functionally overrule unanimous jury acquittals based on judge-found facts using the far lower preponderance standard, gutting the Sixth Amendment's jury-trial right. At a minimum, the Sixth Amendment jury-trial right, coupled with the due process requirement that all facts necessary to legally authorize punishment must be proven beyond a reasonable doubt, should bar

judges from using the same alleged conduct a jury acquitted a defendant of to justify dramatically increasing a defendant's Guidelines range and sentence.

The real-world stakes of this case are high. Acquitted-conduct sentencing contributes to what is known as the "trial penalty" and to the government's ability to coerce guilty pleas. *See generally* National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct. This should not be allowed to stand. And this case presents an ideal vehicle for correcting this injustice. *See* App. 4a–5a ("McClinton's counsel advocated thoroughly by preserving this issue for Supreme Court review.").

ARGUMENT

I. ACQUITTED-CONDUCT SENTENCING CANNOT BE SQUARED WITH THE SIXTH AMENDMENT.

A. The Sixth Amendment Requires Juries Find All Facts Legally Necessary to Justify a Defendant's Sentence.

"It is hard to overemphasize the importance of trial by jury for our revolutionary ancestors who wrote the Declaration of Independence, framed the Constitution, ratified it in state conventions, and explained it in the Federalist Papers." *United States v. White*, 551 F.3d 381, 392 (6th Cir. 2008) (en banc) (Merritt, J., dissenting). *See generally* Vikrant P. Reddy & Jordan Richardson, *Why the Founders*

Cherished the Jury, 31 Fed. Sent. R. 316 (2019). Under the Sixth Amendment, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]" U.S. Const. amend. VI. The jury-trial right is also memorialized in Article III itself: "The Trial of all Crimes . . . shall be by Jury[.]" U.S. Const. Art. III, § 2. This constitutional guarantee is unique because it is "the only one to appear in both the body of the Constitution and the Bill of Rights[.]" *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part, dissenting in part).

The jury-trial "right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (Scalia, J.); *see also Neder*, 527 U.S. at 30 (Scalia, J., concurring in part, dissenting in part) (characterizing jury trial right as "the spinal column of American democracy"). "[T]he institution of the jury was the final check to hold all three branches accountable." Reddy & Richardson, 31 Fed. Sent. R. 316.

"[T]he jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free." *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring). As Alexander Hamilton wrote: "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them it consists in

this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government." Federalist No. 83.

As Justice Scalia explained, the jury trial right "has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring). This means that "[i]f you're charged with a crime, the Sixth Amendment guarantees you the right to a jury trial. From this, it follows the prosecutor must prove to a jury all of the facts *legally necessary* to support your term of incarceration." *Hester v. United States*, 139 S. Ct. 509, 509 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (emphasis added).

"The Sixth Amendment, together with the Fifth Amendment's Due Process Clause, requires that each element of a crime be either admitted by the defendant, or proved to the jury beyond a reasonable doubt." *Jones v. United States*, 574 U.S. 948, 948 (2014) (Scalia, J., joined by Thomas, Ginsburg, JJ., dissenting from denial of certiorari). "Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime," which cannot be found by a judge at sentencing. *Id.*

Instead, "all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring). "[A]ny increase in a defendant's

authorized punishment contingent on the finding of a fact requires a jury and proof beyond a reasonable doubt no matter what the government chooses to call the exercise." *United States v. Haymond*, 139 S. Ct. 2369, 2379 (2019) (cleaned up); *see also Blakely*, 542 U.S. at 306–07 ("The jury could not function as circuit breaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong[.]").

As Justice Thomas has suggested, since "a 'crime' includes every fact that is by law a basis for imposing or increasing punishment," to determine whether the Sixth Amendment bars use of judge-found facts to justify enhanced sentencing, "[o]ne need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element." *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring). And, of course, elements are subject to the Sixth Amendment jury-trial right and must be proven beyond a reasonable doubt. *See also Blakely*, 542 U.S. at 301, 304. That did not happen here.

B. Reliance on Acquitted Conduct to Triple Mr. McClinton's Sentence Violated His Sixth Amendment Rights.

The district court's reliance on conduct a jury acquitted Mr. McClinton of dramatically increased both his Guidelines range and actual sentence. Had the district court sentenced him to 228 months (19 years) when the Guidelines range was set at 57–71 months (less than 6 years)—as it would have been sans the acquitted conduct—the sentence imposed in this case would likely be substantively unreasonable.

See Pet. 28–29. Several factors suggest an upward variance of this magnitude could not be justified under the 18 U.S.C. § 3553(a) factors without reference to the acquitted conduct. *See* Pet. 9, 28–29; *see also* U.S.S.G. § 5H1.1 (age). *See generally Gall v. United States,* 552 U.S. 38, 50 (2007) (the greater the variance, the more compelling the justification must be).

That is because, as Justice Scalia, joined by Justices Ginsburg and Thomas, has explained, "any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It may not be found by a judge." *Jones*, 574 U.S. at 949 (Scalia, J., dissenting from denial of certiorari). Indeed, this case presents the precise situation Justice Scalia warned of in *Rita v. United States*, 551 U.S. 338, 374–75 (2007) (Scalia, J., concurring in part), in which judicial factfinding violates the Sixth Amendment as applied to a particular defendant—regardless whether these judge-found facts related to uncharged or, as here, acquitted conduct.[2] *See id.* at 366 (Stevens, J., joined in part by Ginsburg, J., concurring) ("Such a hypothetical case should be decided if and when it

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[2] "[T]here is a fundamental difference . . . between facts that *must* be found in order for a sentence to be lawful, and facts that individual judges *choose* to make relevant to the exercise of their discretion. The former, but not the latter, must be found by the jury beyond a reasonable doubt[.]" *Rita*, 551 U.S. at 373 (Scalia, J., concurring in part and concurring in the judgment) (cleaned up; emphasis in original).

arises"). That is because "[t]he Constitution prohibits allowing a judge alone to make a finding that raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant."[3] *United States v. Booker*, 543 U.S. 220, 313 (2005) (Thomas, J., dissenting); *see also United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (questioning constitutionality of judge changing defendant's sentence "within the statutorily authorized range based on facts the judge finds without the aid of a jury or the defendant's consent").

"The fact that a jury has not authorized a particular punishment is never more clear than when the jury is asked for, yet specifically withholds, that authorization." *United States v. Mercado*, 474 F.3d 654, 664 (9th Cir. 2007) (Fletcher, J., dissenting). So too here. "After transfer to adult court," a jury found Petitioner guilty of robbing a CVS. App. 2a–3a. But "[t]he jury found him not guilty of the indicted crimes of robbery of [Mr.] Perry [an accomplice] . . . , and causing death while using a firearm during and in relation to the robbery of [Mr.] Perry[.]" App. 3a. Nonetheless, "[a]t sentencing, the district court concluded, using a preponderance of the evidence standard, that [Mr.] McClinton was responsible for [Mr.] Perry's murder. The district court judge therefore enhanced [Mr.] McClinton's offense level from 23 to 43[.]" App. 3a. That was error of

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[3] *Cf. White*, 551 F.3d at 386–87 (Merritt, J., dissenting) ("Because the sentence cannot be upheld as reasonable without accepting as true certain judge-found facts, the sentence represents an as-applied [Sixth Amendment] violation[.]").

constitutional dimension, and it was far from harmless. *Cf. United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring).

"This has gone on long enough." *Jones*, 574 U.S. at 949 (Scalia, J., dissenting from denial of certiorari). For decades now, numerous federal judges have questioned the constitutionality of this sentencing practice. *See, e.g., United States v. Lasley*, 832 F.3d 910, 921 (8th Cir. 2016) (Bright, J., dissenting) (collecting cases); *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc); *White*, 551 F.3d at 386–97 (Merritt, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1348–53 (11th Cir. 2006) (Barkett, J., specially concurring). *Cf.* App. 3a–5a. Indeed, "many individual judges have expressed in concurrences and dissents the strongest concerns, bordering on outrage, about the compatibility of such a practice with the basic principles underlying our system of criminal justice." *United States v. Baylor*, 97 F.3d 542, 549 & n.2 (D.C. Cir. 1996) (Wald, J., specially concurring).

And for good reason:

> Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial. If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a

> reasonable doubt the facts that increase that five-year sentence to, say, a 20-year sentence?

Bell, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc). Permitting "a judge to dramatically increase a defendant's sentence based on jury-acquitted conduct is at war with the fundamental purpose of the Sixth Amendments jury-trial guarantee." *Id.* at 929 (Millett, J., concurring in the denial of rehearing en banc). "There is something fundamentally wrong with such a result." *Baylor*, 97 F.3d at 549 (Wald, J., specially concurring).

II. USE OF ACQUITTED CONDUCT AT SENTENCING GUTS THE PRESUMPTION OF INNOCENCE.

Acquitted-conduct sentencing also flips the presumption of innocence on its head, allowing judges to make factual findings using the preponderance standard to punish defendants for alleged conduct upon which the jury specifically did not find guilt. This does not just "offer the government a second, if smaller, bite at the apple in criminal prosecutions": "When one looks to the practicalities of the criminal justice system, it becomes apparent that the most pernicious effect . . . is its 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." *Faust*, 456 F.3d at 1353 (Barkett, J., specially concurring).

A. The Reasonable Doubt Standard Protects Against Wrongful Punishment.

The "presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895). Due process requires the government must affirmatively "pro[ve] beyond a reasonable doubt . . . every fact necessary to constitute the crime charged." *In re Winship*, 397 U.S. 358, 364 (1970). The reasonable doubt standard "give[s] concrete substance to the presumption of innocence," *id.* at 363—the notion that, as Sir William Blackstone put it, "it is better that ten guilty persons escape than that one innocent suffer." 4 William Blackstone, Commentaries 352 (1769). "The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. at 363 (emphasis added).

It also reflects fundamental societal value judgments enshrined in the Constitution:

> [U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going

> about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with the utmost certainty.

Id. at 363–64. As Justice Harlan famously put it, "the requirement of proof beyond a reasonable doubt in a criminal case is bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372 (Harlan, J., concurring); *see also State v. Melvin*, 258 A.3d 1075, 1092 (N.J. 2021) ("To permit the re-litigation of facts in a criminal case under the lower preponderance . . . standard would render the jury's role in the criminal justice process null[.]"). "The heavy standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free." *Addington v. Texas*, 441 U.S. 418, 428 (1979).

B. Judicial Factfinding Using the Lower Preponderance Standard to Overrule a Jury Acquittal Violates Due Process.

At sentencing, the lower preponderance standard has been deemed to apply to so-called sentencing factors. *See United States v. O'Brien*, 560 U.S. 218, 224 (2010); *see also United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam) ("[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a

preponderance of the evidence.").[4] The preponderance standard merely requires a determination that the evidence as a whole shows that the fact to be proved is more probable than not. "Quantified, the preponderance standard would be 50+% Probable." *United States v. Fatico*, 458 F. Supp. 388, 403 (E.D.N.Y. 1978). In essence, this standard merely requires the factfinder have a degree of confidence marginally greater than he or she would if flipping a coin. "The litigants thus share the risk of error in roughly equal fashion." *Addington*, 441 U.S. at 423. In light of this lax evidentiary standard's propensity to distribute the risk of erroneous fact finding evenly between the parties, it has been deemed entirely appropriate for the resolution of disputes in which "society has a minimal concern with the outcome," such as a "typical civil case involving a monetary dispute between private parties." *Id.*; *see In re Winship*, 397 U.S. at 371–72 (Harlan, J., concurring).

Regardless of which burden of proof is used, "the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions." *In re Winship*, 397 U.S. at 370 (Harlan, J., concurring). Given that factfinders will inevitably make mistakes, the burden of proof will, in criminal cases, "influence the relative frequency" with which errors benefiting the guilty or,

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[4] "*Watts* . . . presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 n.4. *Watts* did not address the Sixth Amendment, *see id.* at 240, or the Due Process Clause. Nonetheless, *Watts* has caused confusion in the lower courts for many years.

conversely, errors leading to the conviction of the innocent occur. *See id.* at 371 (Harlan, J., concurring); *Speiser v. Randall*, 357 U.S. 513, 525–26 (1958) (noting reasonable doubt standard reduces, as to the defendant, margin of error in factfinding). In practice, there is a vast difference between the preponderance standard and the reasonable doubt standard. *See* C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees*?, 35 Vand. L. Rev. 1293, 1322–26 (1982) (outlining the results of surveys on how judges quantify each burden of proof). As Justice Brennan noted in a different context: "Permitting proof by a preponderance of the evidence would necessarily result in the conviction of more defendants who are in fact innocent." *Lego v. Twomey*, 404 U.S. 477, 493 (1972) (dissenting).

As applied to acquitted-conduct sentencing, this commonsense observation means in practical terms that there will be cases where judges are radically increasing defendants' sentences based on conduct they have been found not guilty of and are actually innocent of. *Cf. United States v. Restrepo*, 946 F.2d 654, 675 (9th Cir. 1991) (en banc) (Norris, J., dissenting) (arguing use of preponderance standard at sentencing creates significant prospect of erroneous factfinding). That is the opposite of how our criminal justice system works, and it ignores the very reason why the preponderance standard is not used in criminal cases to adjudicate guilt and innocence. *Cf. id.* at 664 (Pregerson, J., dissenting) ("I cannot believe . . . the Constitution permits the defendant to be deprived of his freedom and imprisoned for years on the strength of the same evidence as would suffice in a civil case." (cleaned up)). Use of the preponderance

standard at sentencing to justify enhanced punishment based on acquitted (or, for that matter, uncharged) conduct is antithetical to fundamental value determinations our society made long ago, as memorialized in the Constitution's guarantee of Due Process. *See In re Winship*, 397 U.S. at 371–72 (Harlan, J., concurring).

The mere fact that a defendant whose exposure to criminal punishment is driven by acquitted conduct has also been convicted of some other criminal offense—which may be unrelated to and far less serious than the acquitted conduct—does not justify either (a) replacing the reasonable doubt standard with the lower preponderance standard, or (b) allowing a judge to effectively overrule a unanimous jury acquittal. *See also Blakely*, 542 U.S. at 306. But that is what happened to Mr. McClinton.

The risk of error should be borne by the government throughout the course of the "criminal prosecution"—which unquestionably includes "actual sentencing proceedings," *see Haymond,* 139 S. Ct. at 2395–96 (Alito, J., dissenting)—and should not suddenly be brought into near equipoise merely because the defendant was convicted of some other offense, which may well be completely unrelated.[5]

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[5] For instance, where a defendant is solely convicted of violating 18 U.S.C. § 1001 (generally 0-5 years imprisonment) and/or 18 U.S.C. § 1519 (0-20 years imprisonment) but acquitted of all other charges relating to the subject of the investigation.

III. USE OF ACQUITTED CONDUCT AT SENTENCING UNDERMINES THE LEGITIMACY OF OUR CRIMINAL JUSTICE SYSTEM.

Not only is acquitted-conduct sentencing plainly unconstitutional, but it is also bad sentencing policy. As Professor Barry Johnson has explained:

> Does this authority reflect sound sentencing policy? Virtually all academic commentators conclude that it does not. The use of acquitted conduct has been characterized as, among other things, "Kafka-esque, repugnant, uniquely malevolent, and pernicious." Others have observed that use of acquitted conduct "makes no sense as a matter of law or logic," and characterized its use as a "perversion of our system of justice," as well as "bizarre" and "reminiscent of Alice in Wonderland."

Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can be Done About It*, 49 Suffolk U. L. Rev. 1, 25 (2016) (citations omitted). At a broad level, that about sums it up. The practical effects of acquitted-conduct sentencing also warrant discussion.

First, use of the low preponderance standard for judge-found facts at sentencing wrongly shifts the risk of erroneous factfinding against the defendant, increasingly the risk the defendant will be punished

for factually innocent conduct.[6] *See also* Eang Ngov, *Judicial Nullification of Juries: The Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235, 279–84 (2009) (arguing jury factfinding tends to be more accurate than judicial factfinding).

Second, acquitted-conduct sentencing increases the trial penalty. *Cf. Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) (recognizing risk of "prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense"). "The real-world consequence of permitting judge-found fact to increase a potential punishment is that prosecutors are vested with a degree of power that would have shocked the Framers." *United States v. Scheiblich*, 346 F. Supp. 3d 1076, 1085 (S.D. Ohio 2018), *rev'd,* 788 F. App'x 305 (6th Cir. 2019). After all, "[t]he right to a trial by jury means little if a sentencing judge can effectively veto the jury's acquittal on one charge and sentence the defendant as though he had been convicted of that

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[6] Judge Barkett has argued that "[w]hen a sentencing judge finds facts that could, in themselves, constitute entirely free-standing offenses under the applicable law . . . the Due Process Clause . . . requires that those facts be proved beyond a reasonable doubt." *Faust*, 456 F.3d at 1352 (Barkett, J., specially concurring). That intuitively makes sense because "[a]ll too often, prosecutors charge individuals with relatively minor crimes, carrying correspondingly short sentences, but then use . . . the Sentencing Guidelines . . . to argue for significantly enhanced terms of imprisonment under the guise of 'relevant conduct'—other crimes that have not been charged (or, if charged, have led to an acquittal)[.]" *United States v. St. Hill*, 768 F.3d 33, 39 (1st Cir. 2014) (Torruella, J., concurring).

charge." *United States v. Jones*, 863 F. Supp. 575, 578 (N.D. Ohio 1994).

"In short, allowing jury-acquitted conduct to increase a defendant's sentence places defendants and their attorneys between a proverbial rock and a hard place: a hard-fought partial victory . . . can be rendered practically meaningless when that acquitted conduct nonetheless produces a drastically lengthened sentence."[7] *Bell*, 808 F.3d at 932 (Millett, J., concurring in denial of rehearing en banc). And "a defendant considering whether to exercise his right to trial knows that, even if he decides to put the prosecution to its proof and is acquitted of certain charged conduct, he may still face an enhancement for that conduct at sentencing." National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, 34 (2018), https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct.

Third, acquitted-conduct sentencing "guts the role of the jury in preserving individual liberty and preventing oppression by the government," for "[a]llowing the government to lock people up for a discrete and identifiable term of imprisonment for criminal charges rejected by a jury is a dagger pointed at the heart of the jury system and limited government." *United States v. Brown*, 892 F.3d 385, 408–09 (D.C. Cir. 2018) (Millett, J., concurring). Relatedly, this practice "also eviscerates the jury's

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[7] That is exactly the case here. *See* Pet. 3–4, 24–25, 30–31; App. 3a.

longstanding power of mitigation, a close relative of the power of jury nullification." *White*, 551 F.3d at 394 (Merritt, J., dissenting). As Justice Kennedy explained in his dissenting opinion in *Watts*, "[a]t the least it ought to be said that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal[.]" *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting); *see also Melvin*, 258 A.3d at 1094 ("Fundamental fairness simply cannot let stand the perverse result of allowing in through the back door at sentencing conduct that the jury rejected at trial."); *People v. Beck*, 939 N.W.2d 213, 227 (Mich. 2019) (Viviano, J., concurring).

Indeed, "[m]any judges and commentators have similarly 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.). For instance, Judge Bright observed: "I wonder what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing." *Canania*, 532 F.3d at 778 (concurring).[8] District courts have put it more plainly: "A layperson would undoubtedly be revolted by the idea that, for example, a person's sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he

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[8] There is reason to think that jurors and defendants do perceive the unfairness of this practice. *See, e.g., Canania,* 532 F.3d at 778 n.4 (Bright, J., concurring) (juror); *Settles,* 530 F.3d at 924 (defendant).

has been acquitted." *United States v. Coleman*, 370 F. Supp. 2d 661, 671 n.14 (S.D. Ohio 2005) (citation omitted). "It cannot be said with a straight face that this shameful practice constitutes just punishment or promotes respect for the law. . . . It is time to call this practice what it is: unconstitutional." *Scheiblich*, 346 F. Supp. 3d at 1085.

The sky will not fall if "[a] judge could not rely on acquitted . . . [or] uncharged conduct to increase a sentence[.]"*Bell*, 808 F.3d at 927–28 (Kavanaugh, J., concurring in the denial of rehearing en banc); *see also id.* at 928 ("At least as a matter of policy, if not also as a matter of constitutional law, I would have little problem with a new federal sentencing regime along those lines."). This Court should end this unconstitutional practice.

CONCLUSION

The Petition "raises a question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system." *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting). This Court should grant Mr. McClinton's Petition.

Respectfully submitted,

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