Case No. 23-5968

In the Supreme Court of the United States

RICHARD LANGSTON, *Petitioner,*
v.
STATE OF CONNECTICUT, *Respondent.*

On Petition for a Writ of Certiorari to the Connecticut Supreme Court

BRIEF OF PROFESSOR DOUGLAS BERMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is a legal scholar who teaches, conducts research, and practices in the fields of criminal law and sentencing in the United States.[1] Professor Berman is the co-author of the casebook *Sentencing Law and Policy: Cases, Statutes and Guidelines* (https://www.aspenpublishing.com/Demleitner-SentencingLawAndPolicy5) and has served as an editor of the *Federal Sentencing Reporter* (https://online.ucpress.edu/fsr) for more than a decade. Professor Berman is also the sole creator and author of the widely-read blog, *Sentencing Law and Policy*, which this Court and numerous lower courts have cited. He has a professional interest in ensuring that federal sentencing law is interpreted and applied in a manner that coherently advances its purposes and is consistent with longstanding constitutional principles and with contemporary function in the criminal law.

SUMMARY OF ARGUMENT

Richard Langston, upon being accused of various crimes, invoked "constitutional protections of surpassing importance," *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), by exercising jury trial rights "designed 'to guard against a spirit of oppression and tyranny on the part of the rulers.'" *United States v. Gaudin*, 515 U.S. 506, 510–11 (1995) (citation

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of this filing.

omitted). Specifically, Langston opted to proceed to trial after having been charged in connection with a robbery and shooting in March 1998. At trial, a jury convicted Langston of robbery in the first degree and criminal possession of a firearm, but acquitted him of assault—the only charge based on the shooting.

During the sentencing proceedings, the state prosecutor, eager to see Langston punished by the state for an assault for which he was acquitted, argued to the sentencing court that it should find, by a preponderance of the evidence, that Langston committed the assault and that his sentence be enhanced based on the alleged assault that had resulted in a jury acquittal. Over Langston's objections, the sentencing court commented at length on the assault for which Langston was acquitted. It commented on the impact the shooting had on the victim, and found that Langston committed the shooting despite the jury's contrary verdict. Based on the court's findings, including acquitted conduct, the court imposed a combined twenty-year sentence.

Earlier this year, five members of this Court engaged in a robust discussion of various "arguments" and "countervailing arguments" concerning the consideration of acquitted conduct at sentencing. *See McClinton v. United States*, 143 S. Ct. 2400, 2406 (2023) (Alito, J., concurring in the denial of certiorari). Those statements rightly noted that the use of acquitted conduct to increase a sentence "raises important questions that go to the fairness and perceived fairness of the criminal justice system." *Id.* at 2401 (Sotomayor, J., statement respecting the denial of certiorari); *see also id.* at 2403 (Kavanaugh J., joined by Justices Gorsuch and Barrett, statement

respecting the denial of certiorari) (stressing that "use of acquitted conduct [at sentencing] raises important questions"). These statements also noted that "better arguments on both sides of the issues may be presented" if and when this Court takes up the constitutionality of the use of acquitted conduct to increase a sentence. *Id.* at 2406 (Alito, J., concurring in the denial of certiorari). This case presents a fitting and timely vehicle for this Court to grant certiorari, receive full briefing, and hear all the arguments on both sides of this important and persistent question regarding the meaning and application of the jury trial right in the Sixth Amendment and the due process right in the Fourteenth Amendment.

This Court, of course, has repeatedly extolled and stressed the importance of a defendant's right to have a jury decide facts essential to punishment: "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government." *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019) (plurality op.); *accord Alleyne v. United States*, 570 U.S. 99, 114 (2013); *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *Apprendi*, 530 U.S. at 477. But when a judge relies on jury-rejected facts to significantly increase a sentence, the jury trial "promise" becomes empty and this "vital" protection against the government becomes illusory.

When this Court denied certiorari in McClinton v. United States, No. 21-1557, earlier this year, Justices Sotomayor, Kavanaugh, Gorsuch, and Barrett, noted that the U.S. Sentencing Commission has been considering possible amendments to the U.S.

Sentencing Guidelines regarding the considering of acquitted conduct in *federal* sentencing. But, of course, action by the Sentencing Commission can impact only federal sentencing practices and it cannot and will not provide any constitutional guidance to state courts that must still regularly address the role of acquitted conduct sentencing in their criminal justice systems—wherein the vast majority of criminal convictions occur. *See McClinton*, 143 S. Ct. at 2404 (Alito, J., concurring in the denial of certiorari) (noting that any action by the Commission "will not affect state courts, and therefore the constitutional issue will remain").

Problematically, many state courts and lower federal courts continue to read this Court's jurisprudence to call for treating acquitted-conduct fact-finding at sentencing as indistinguishable from any other form of fact-finding at sentencing. But if oft-repeated statements about the importance of jury trial rights as a limit on government power are to have any real purchase and enduring meaning, the Court should grant review in this case to articulate limits on judicial authority to dramatically increase a sentence based on jury-rejected facts.

This case provides a particularly stark example of how sentence enhancements based on jury-rejected facts undermine the jury's constitutionally-defined role in our criminal system. After a trial resulted in jury acquittals on the most serious charge against Langston, prosecutors urged and the judge embraced factual determinations that directly contradicted those of the jury, resulting in a higher sentence. It is time for this Court to clarify that the Constitution limits judicial reliance on jury-rejected facts. For

these reasons, the Court should grant Petitioner's petition for a writ of certiorari.

ARGUMENT

After a full and fair trial, the people exercised suffrage in this case by unanimously voting to acquit Richard Langston of the most serious charges brought against him by state officials. But, perhaps displeased that the citizenry here functioned "as [a] circuitbreaker in the State's machinery of justice," *Blakely*, 542 U.S. at 306, state prosecutors at sentencing asserted that the sentence could and should be based on a judicial factual inquisition with no regard given to the jury's verdict. Such disregard of the jury's findings suggests prosecutorial and judicial views of the Sixth Amendment as a mere procedural formality, even though this Court has repeatedly emphasized that the reach and application of jury trial rights should not be driven by "Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance." *Booker v. United States*, 543 U.S. 220, 237 (2005).

Failing to recognize the constitutional problems resulting from sentences based on alleged offense "facts" which were expressly rejected by the jury verdict, the sentencing court embraced the jury-rejected allegations that Langston was involved in greater criminality. In so doing, the sentencing judge imposed on Langston a sentence as though he had been convicted of all charges. The people's role in determining the truth and significance of the prosecutors' accusations was ignored; Langston's jury acquittal on assault was rendered entirely irrelevant to the lengthy prison sentence he received.

When acquittals carry no real sentencing consequences, prosecutors have nothing to lose (and much to gain) from bringing multiple charges even when they might expect the jury to ultimately reject many such charges. The trial, after all, functions then merely as just a first bite at the apple, offering prosecutors a chance to present their case to the jury and then, even if unsuccessful, present it again to the sentencing judge so long as the jury finds the defendant guilty of at least one charge.

This Court has stressed the need "to give intelligible content to the right of [a] jury trial," *Blakely*, 542 U.S. at 305, and that demands differentiating between cases in which sentences are imposed based on facts never contested by a jury and cases such as the one here in which higher sentences are imposed based on facts expressly rejected by a jury.

I. As Members of this Court and Lower Courts Recognize, the Historic Rights and Protections of Jury Trials are Gravely Undermined by Heightened Sentences Imposed Based on Jury-Rejected Facts.

This Court has repeatedly emphasized that the jury-trial right is "clearly intended to protect the accused from oppression by the Government." *Singer v. United States*, 380 U.S. 24, 31 (1965); *see also Williams v. Florida*, 399 U.S. 78, 100 (1970); *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (the jury-trial right "safeguard[s] a person accused of crime against the arbitrary exercise of power by prosecutor or judge"); *Gaudin*, 515 U.S. at 510; *Jones v. United States*, 526 U.S. 227, 244–48 (1999); *Apprendi*, 530

U.S. at 477 (the jury "guard[s] against a spirit of oppression and tyranny on the part of rulers," and acts "as the great bulwark of our civil and political liberties" (citation omitted)); *Blakely*, 542 U.S. at 305–06; *Booker*, 543 U.S. at 237–39; *Alleyne*, 570 U.S. at 114 (noting "the historic role of the jury as an intermediary between the State and criminal defendants"). This Court has long regarded the jury-trial right as an "inestimable safeguard" protecting a defendant "against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). As stressed quite recently, jury trials are "fundamental to the American scheme of justice." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (quoting *Duncan*, 391 U.S. at 148–50).

Yet these oft-repeated proclamations ring disturbingly hollow for Langston and other defendants if and whenever, after being vindicated by jury verdicts of not guilty, prosecutors will still be permitted to seek, and judges will still be permitted to impose, heightened sentences based on the exact same criminal allegations the jury expressly rejected. Acquittals, if given no significance whatsoever at sentencing, are mere formal matters; acquittals in name only with no meaningful consequence or limit on the state's effort to punish based on the very allegations the jury unanimously disavowed. Langston and other defendants subject to sentences enhanced on the basis of acquitted conduct are left to wonder just what kind of "bulwark" or "safeguard" the Sixth Amendments truly provide when prosecutors and judges can effectively disregard jury findings at sentencing. Indeed, Langston and other like

defendants must find jarring that this Court in *Nelson v. Colorado* ruled that after a jury acquittal "Colorado may not presume a person . . . nonetheless guilty *enough* for monetary exactions," 137 S. Ct. 1249, 1256 (2017) (emphasis in original), and yet judges, after jury acquittals, may still find defendants "guilty *enough*" for liberty deprivation in the form of prison time. *Cf. id.* at 1256 n.9 (explaining that the "presumption of innocence unquestionably" constitutes a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental").

Recognizing the fundamental tension between sentence enhancements based on acquitted conduct and giving real meaning to jury trial rights, Justices of this Court and lower court judges have described the practice of increasing sentences based on jury-rejected facts as, among other things, "repugnant," "Kafka-esque," "uniquely malevolent," and "pernicious." *See United States v. Watts*, 519 U.S. 148, 169–70 (1997) (Stevens, J., dissenting); *United States v. Ibanga*, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006) (Kelley, J.); *United States v. Canania*, 532 F.3d 764, 776–77 (8th Cir. 2008) (Bright, J., concurring); *United States v. Papakee*, 573 F.3d 569, 578 (8th Cir. 2009) (Bright, J., concurring); *see also United States v. Mercado*, 474 F.3d 654, 663 (9th Cir. 2007) (Fletcher, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring); *United States v. Safavian*, 461 F. Supp. 2d 76, 83 (D.D.C. 2006) (Friedman, J.); *United States v. Coleman*, 370 F. Supp. 2d 661, 671 (S.D. Ohio 2005) (Marbley, J.); *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005) (Gertner, J.).

Notably, Justice Kavanaugh repeatedly recognized problems with acquitted conduct enhancements while serving as a Circuit Judge. Then-Judge Kavanaugh rightly described reliance on acquitted conduct as "unfair," *United States v. Settles*, 530 F.3d 920, 923–24 (D.C. Cir. 2008) (Kavanaugh, J.); "a dubious infringement of the rights to due process and to a jury trial." *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J. concurring); and suggested the Supreme Court might see fit to "fix" this problem. *United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part).

The late-Justice Scalia, joined by Justices Thomas and Ginsburg, dissented from a denial of certiorari in a case raising this issue in *Jones v. United States*, 574 U.S. 948, 948–49 (2014). Justice Scalia stressed that he found a judge's fact-finding which significantly increased a drug defendant's sentence to be especially concerning "because not only did no jury convict these defendants of the offense the sentencing judge thought them guilty of, but a jury *acquitted* them of that offense." *Id.* (emphasis in original).

And, even in the courts of appeals that have read this Court's precedents to allow use of acquitted conduct to enhance sentences, judges continue to criticize the practice as unconstitutional and unjust. *See e.g.*, *United States v. Tapia*, No. 21-1674, 2023 WL 2942922, at *2 (2d Cir. Apr. 14, 2023) (noting that there exists "a strong case for reconsidering the use of acquitted conduct to determine sentencing"); *United States v. Martinez*, 769 Fed. App'x. 12, 17 (2d Cir. 2019) (Pooler, J., concurring) (stating that the use of

acquitted conduct to enhance a defendant's sentence is "fundamentally unfair" and runs afoul of the Sixth Amendment); *Canania*, 532 F.3d at 776 (Bright, J., concurring) ("[T]he consideration of 'acquitted conduct' to enhance a defendant's sentence is unconstitutional."); *Faust*, 456 F.3d at 1349 (Barkett, J., specially concurring) ("I strongly believe . . . that sentence enhancements based on acquitted conduct are unconstitutional"); *Mercado*, 474 F.3d at 658 (Fletcher, J., dissenting) ("Reliance on acquitted conduct in sentencing diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment."). As aptly noted by Judge Millett of the D.C. Circuit in describing the evisceration of the jury bulwark, "when the central justification the government offers for such an extraordinary increase in the length of imprisonment is the very conduct for which the jury acquitted the defendant, that liberty-protecting bulwark becomes little more than a speed bump at sentencing." *Bell*, 808 F.3d at 929 (Millett, J., concurring); *see also id.* at 927 (Kavanaugh, J., concurring) ("I share Judge Millett's overarching concern about the use of acquitted conduct at sentencing").

Likewise, more than a few district courts have concluded that sentencing based upon conduct for which the defendant was acquitted is unconstitutional. *See, e.g., Coleman*, 370 F. Supp. 2d at 671 (Marbley, J.) ("[T]he jury's central role in the criminal justice system is better served by respecting the jury's findings." (emphasis in original)); *Pimental*, 367 F. Supp. 2d at 152 (Gertner, J.) ("To consider acquitted conduct trivializes 'legal guilt' or 'legal innocence'—which is what a jury decides"); *Ibanga*,

454 F. Supp. 2d at 539 (Kelley, J.) ("Punishing defendant Ibanga for his acquitted conduct would have . . . resulted in unjust punishment"); *United States v. Carvajal*, 2005 U.S. Dist. LEXIS 3076, at *10–11 (S.D.N.Y. Feb. 17, 2005) (Hellerstein, J.) (declining to consider acquitted conduct at sentencing).

Notably, a number of state supreme courts have recognized, both recently and even before this Court's modern *Apprendi* jurisprudence, the serious constitutional problems with enhancing a sentence based on acquitted conduct. *See, e.g.*, *People v. Beck*, 939 N.W.2d 213, 226 (Mich. 2019); *State v. Cote*, 530 A.2d 775 (N.H. 1987) ("We think it disingenuous at best to uphold the presumption of innocence until proven guilty. . . while at the same time punishing a defendant based upon charges in which that presumption has not been overcome."); *State v. Marley*, 364 S.E.2d 133 (N.C. 1988) (concluding that "due process and fundamental fairness precluded the trial court from aggravating defendant's" sentence with acquitted conduct); *see also State v. Melvin*, 258 A.3d 1075, 1078 (N.J. 2021) ("fundamental fairness prohibits courts from subjecting a defendant to enhanced sentencing for conduct as to which a jury found that defendant not guilty"). These rulings, often grounded in rights safeguarded by the Fifth and Fourteenth Amendments' guarantee of due process and the Sixth Amendment's jury trial right, recognize and confront the fundamental problems with allowing prosecutors and judges to nullify jury findings at sentencing.

In this case, the Connecticut Supreme Court noted that many courts have "expressed displeasure

with the practice" of acquitted-conduct sentencing and noted a "push to prohibit the practice." *State v. Langston*, 346 Conn. 605, 630, 636, 294 A.3d 1002, 1017, 1020 (2023). The Connecticut Supreme Court urged "extreme[] caution" in trial courts relying on acquitted conduct during sentencing. *See id.* at 609. Although the court did not "endorse the practice," it rejected Mr. Langston's constitutional challenge based in part on the Supreme Court's historical jurisprudence in the sentencing context. *See id.* at 609; *see generally id.* at 614-23. The Connecticut Supreme Court also observed the "very broad discretion" of its state courts "in imposing any sentence within the statutory limits." *See id.* at 627. But, in practice, this "very broad discretion" to impose any sentence within statutory limits that is common in many state justice systems can serve to make the express use of acquitted conduct to increase a sentence even more constitutionally problematic than in federal sentencing. Under federal sentencing law and practice, the use of Guidelines as a benchmark and the review of sentences for reasonableness can, both formally and practically, sometimes constrain the impact of acquitted conduct at sentencing in many cases. But, because many state systems do not tether the exercise of sentencing discretion within broad statutory ranges to any guidelines or provide a meaningful mechanism for appellate review, decades of imprisonment might often turn on the consideration of acquitted conduct in state sentencing.

The circumstances of this case highlight just one of many situations in which sentencing consideration of acquitted conduct dramatically impacts individual

rights and liberties. And it is time for this Court to directly address and clearly explain that, for the judicial system to demonstrate genuine respect for the "jury's historic role as a bulwark between the State and the accused," *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012), the Constitution places some limits on judicial reliance on jury-rejected facts in sentencings.

II. By Empowering Prosecutors and Influencing All Indictments and Pleas, Acquitted Conduct Sentencing Impacts the Operation of the Entire Justice System.

Allowing the consideration of jury-rejected facts at sentencing undermines our criminal justice system by taking liberty-protecting authority away from the people and giving it back to the state and its agents. From Langston's and similar defendants' perspectives, their jury trials served not as a mechanism to "prevent oppression by the Government," *Duncan*, 391 U.S. at 155, but rather as prosecutors' means to enjoy the first of two distinct chances to convince either of two courtroom decision-makers that a defendant should be punished based on questionable accusations. Not only does this approach degrade a fundamental constitutional right, it also undermines confidence in the entire criminal justice system.

Justice Gorsuch recently provided an effective primer on how our Nation views jury decision-making during oral argument in a case involving one state's efforts to skirt Double Jeopardy issues in the face of a jury acquittal: for "230 years in this . . . country's

history, we have respected acquittals without looking into their substance and without looking into how they fit with other counts and said a jury is a check on judges, it's a check on prosecutors, it's a check on overreach, it's part of our democratic system, and we do not ever talk about whether they make sense to us." Oral Argument Transcript, *McElrath v. Georgia*, Case No. 22-721, 37:11–19. As Justice Gorsuch further put it, "for 230 years . . . a verdict on a count is sacrosanct." *Id.* at 39:16–18. "An acquittal is an acquittal is an acquittal." *Id.* at 40:9–10. But for criminal defendants sentenced on the basis of acquitted conduct, an acquittal is neither "sacrosanct" nor serves as an effective check on judges or prosecutors. Rather, when a sentence can be based on acquitted conduct, a jury trial regarding disputed allegations by the state serves just as a useful dress rehearsal for a prosecutor to seek to show to a judge why the defendant should be punished regardless of the jury verdict on various counts.

Indeed, acquitted-conduct sentencing provides prosecutors with significant benefits (and no obvious costs) from always alleging and pursuing any and every charge at their disposal among "the sprawling scope of most criminal codes." *Blakely*, 542 U.S. at 311. This circumvention of the jury's work enables overzealous prosecutors to run roughshod over the traditional democratic checks of the adversarial criminal process the Framers built into the U.S. Constitution. Prosecutors can brazenly charge any and all offenses for which there is a sliver of evidence, safe in the belief they can renew their allegations for judicial reconsideration as long as the jury finds that the defendant did *something* wrong. This enhances

prosecutorial power at each major stage of a criminal prosecution.

First, at the outset of criminal cases, prosecutors can pursue every possible charge in order to increase plea bargaining leverage because they know there will be no real sentencing consequences even upon a jury acquittal on most charges. *See* Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 Geo. Mason L. Rev. 719, 730 (2020) ("American prosecutors possess a wide array of levers that they can—and routinely do—bring to bear on defendants to persuade them to waive their right to trial and simply plead guilty instead[,] . . . [including] threatening to use uncharged or even acquitted conduct to enhance a defendant's sentence"). Prosecutors are functionally encouraged to over-charge defendants, knowing that if they obtain a conviction on at least one count, they can "ask[] the judge to multiply a defendant's sentence many times over based on conduct for which the defendant was just acquitted." *Bell*, 808 F.3d at 932 (Millett. J, concurring).

Indeed, the prospect of future acquitted-conduct-based sentences requires competent defense attorneys in multi-count cases to inform their clients that securing a jury acquittal on many charges at trial may produce little or no practical sentencing benefit but likely still will preclude the defendant from receiving any sentencing credit for accepting responsibility. It is little wonder plea bargaining now "is the criminal justice system," *Missouri v. Frye*, 566 U.S. 134, 144 (2012), when sentencing rules require defense attorneys to advise clients that pleading guilty even to the most questionable of government

charges may result in a better sentencing outcome than if a jury were to reject those charges at a trial. *See generally An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty,* Human Rights Watch 78-90 (December 5, 2013) (https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead#).

Second, as criminal cases proceed to trial, prosecutors can continue to pursue any and every possible charge, knowing there will be no real sentencing consequences after any jury acquittal. Doing so, even if the evidence supporting many charges may be weak or becomes suspect, enables prosecutors to increase the chances that a jury will be drawn into "making a determination that the defendant at some point did something wrong." *Blakely*, 542 U.S. at 307. The more charges that prosecutors pursue against a defendant at trial, the more likely it becomes that the defendant will be convicted on at least one. That is, "[t]he prosecution's ability to bring multiple charges increases the risk that the defendant will be convicted on one or more of those charges." *Missouri v. Hunter*, 459 U.S. 359, 372 (1983) (Marshall, J. dissenting)*; see also* Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. Rev. 621, 627–28 (2004) ("The 'compromise' and 'decoy' effects predict that when the jury is presented with more than one guilty option, the percentage of defendants found not guilty of both offenses will be lower than the percentage of defendants found not guilty when there is just one charge."). In this arrangement, thanks to acquitted conduct sentencing, the prosecution need

not really prove, beyond a reasonable doubt, "the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 306–07. So long as it secures a conviction on *something*—even if only a relatively minor charge—the prosecution can achieve its intended sentence simply by persuading the judge of the defendant's conduct by a preponderance of the evidence.

Third, as criminal cases reach sentencing, and after having enjoyed the benefit of the jury trial serving as a dress rehearsal, prosecutors can and often will become even more aggressive in the presentation of offense allegations and related accusations. As in this case, prosecutors can persistently tell judges that they should disregard any and all jury acquittals, rather than reflect upon and respect the democratic judgment represented by a jury verdict. Judicial use of acquitted conduct thus permits and prompts prosecutors to directly disregard and immediately undermine the jurors' efforts and to minimize the meaning and value of the citizenry's deliberative process and perspective. *See Canania*, 532 F.3d at 776 (Bright, J., concurring) ("We have a sentencing regime that allows the Government to try its case not once but twice. The first time before a jury; the second before a judge."). This practice "undermines the defendant's fundamental interest in verdict finality, exposing the defendant to a second mini-trial on conduct underlying the count of acquittal." Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. Rev. 153, 180 (1996).

Finally, the allowance of acquitted-conduct-based sentences not only marginalizes the work of one of the criminal justice system's most critical participants—jurors—but it also risks leading jurors to no longer take their work seriously. Jurors are unlikely to be dedicated to their task when observing that their supposedly significant constitutional role in our justice system is regularly undermined at sentencing and their findings ignored without explanation.[2]

As this and similar cases demonstrate, the practice of judges significantly enhancing sentences based on jury-rejected facts "has gone on long

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[2] Take, for instance, the experience of a juror in the trial of Antwaun Ball, who was sentenced to 225 months in prison based on an acquitted-conduct Guidelines range after the jury acquitted him of all but one charge, the Guidelines range for which would have been 57-71 months. *See United States v. Jones*, 744 F.3d 1362 (D.C. Cir. 2014). Upset to learn of the heightened sentence, the juror wrote to the judge to comment that it was a "tragedy that one is asked to serve on a jury, serves, but then finds their work may not be given the credit it deserves," and lamented that the "defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked them to have been found guilty." *See* Jim McElhatton, *A $600 drug deal, 40 years in prison*, The Washington Times (Jun 29, 2008), https://www.washingtontimes.com/news/2008/jun/29/a-600-drug-deal-40-years-in-prison/; Jim McElhatton, *"Juror No. 6" stirs debate on sentencing*, The Washington Times (May 3, 2009) https://www.washingtontimes.com/news/2009/may/3/juror-no-6-questions-rules-of-sentencing/. He detailed the toll of jury service, and the disappointment when the result of that toll falls on deaf ears: "What does it say to our contribution as jurors when we see our verdicts, in my personal view, not given their proper weight." *Canania*, 532 F.3d at 778 n.4 (Bright, J., concurring) (quoting Letter from Juror No. 6, citation omitted).

enough." *Jones*, 574 U.S. at 949. This Court should take up Petitioner's case in order to again ensure that the "right of jury trial [will] be preserved, in a meaningful way guaranteeing that the jury [will] still stand between the individual and the power of the government." *Booker*, 543 U.S. at 237.

CONCLUSION

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

Respectfully submitted,

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