Case 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 Court of Appeals for the Seventh Circuit

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

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July 8, 2022

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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

Dayonta McClinton, upon being accused by federal authorities of various crimes, invoked "constitutional protections of surpassing importance," *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), by exercising 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–

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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 have consented to this filing.

11 (1995) (citation omitted). Specifically, McClinton opted to proceed to trial after having been indicted on two distinct sets of crimes: the robbery of a CVS pharmacy and the subsequent murder of another robber involved in that pharmacy robbery. At trial, a unanimous jury convicted McClinton of the two CVS robbery charges he faced and acquitted him of the two murder charges he faced.

Prior to McClinton's sentencing on the CVS robbery convictions, the Probation Office prepared a presentencing report that calculated his applicable Guidelines sentencing range at 57-71 months of imprisonment. But federal prosecutors, eager to see McClinton punished for murder notwithstanding his acquittal on those charges, argued to the Probation Office that it must calculate the Guidelines range based on a Guidelines cross-reference relying on jury-rejected facts regarding the murder. A revised presentence report, incorporating the jury-rejected facts that McClinton was a murderer, recalculated McClinton's recommended sentence under the Guidelines to be life without the possibility of parole.

At sentencing, prosecutors and the judge relied heavily on the recalculated Guidelines range of life that was based on jury-rejected facts. Stressing the high Guidelines range, prosecutors emphasized that they sought a sentence of only 324 months. After rejecting McClinton's claim that his Guidelines range should not be dramatically enhanced by jury-rejected facts, the sentencing judge stressed that he was granting a "downward variance" by imposing a sentence of 228 months.

This case thus raises the oft-recurring issue of whether the Constitution and federal sentencing law limits reliance on jury-rejected facts for dramatic Guidelines enhancements and impositions of lengthy prison terms. As McClinton's petition demonstrates, guidance from this Court has repeatedly been sought on this enduring question and resolution of this issue is overdue.

This Court 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 the Guidelines and a judge rely on jury-rejected facts to significantly increase a sentence, the jury trial "promise" becomes empty and this "vital" protection against the government becomes illusory.

Problematically, many lower 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 Fifth and Sixth Amendment 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.

As McClinton's petition makes clear, 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 and the protections of the Fifth and Sixth Amendments. After a trial resulted in jury acquittals on the most serious charges against McClinton, prosecutors urged and the judge embraced factual determinations that directly contradicted those of the jury, and those findings elevated the Guidelines benchmark from roughly five years to life in prison. That dramatic sentence enhancement based on jury-rejected facts provided the foundation for prosecutors to recommend a near 30-year term and for a judge to impose a near 20-year prison term. This kind of use of acquitted conduct at sentencing has long garnered ample criticism for eviscerating a jury's fundamental role, and it is time for this Court to clarify that the Constitution and federal sentencing law 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 Dayonta McClinton of the most serious charges brought against him by federal 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, federal prosecutors at sentencing asserted that Guidelines calculations 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 Guidelines sentencing enhancements based on alleged offense "facts" which were expressly rejected by the jury verdict, the district judge embraced the jury-rejected allegations that McClinton was involved in greater criminality. In so doing, the sentencing judge calculated McClinton to have a Guidelines range of life, the exact same range he would have faced if convicted of all charges. The people's role in determining the truth of the prosecutors' accusations was ignored; McClinton's jury acquittal on major charges was rendered entirely irrelevant to the calculated Guidelines range of life and 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 case concerns a uniquely serious and dangerous erosion of Fifth and Sixth Amendment substance because the Guidelines range was dramatically enhanced by facts clearly rejected by the jury. 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 Guidelines ranges are calculated based on facts never contested by a jury and cases such as the one here in which Guidelines ranges are calculated to be dramatically higher based on facts expressly rejected by a jury. When a federal judge significantly enhances a prison sentence based expressly on allegations indisputably rejected by a jury verdict of not guilty, the jury trial right is nullified.

I. As Members of this Court and Lower Courts Recognize, the Historic Rights and Protections of Jury Trials are Gravely Undermined by Sentences Enhanced 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 about the importance of "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), ring disturbingly hollow for McClinton and other defendants when, after being vindicated by jury verdicts of not guilty, prosecutors will still be permitted to seek, and judges will still be permitted to calculate, enhanced Guidelines ranges based on the very same criminal allegations the jury expressly rejected. Acquittals, in these cases, 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 allegation the jury unanimously rejected. McClinton and other defendants subject to sentences enhanced by acquitted conduct are left to wonder just what kind of "bulwark" or "safeguard" the Fifth and Sixth Amendments truly provide when prosecutors and judges can effectively disregard jury findings at sentencing. Indeed, McClinton 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 federal judges, after jury acquittals, may still find defendants "guilty *enough*" for a massive increase in 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. In 2008, 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.), and then later called it "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). Tellingly, then-Judge Kavanaugh suggested the Supreme Court might see fit to "fix" this problem because there were "good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness." *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 when based on acquitted conduct. In his view, the *Jones* case was "a particularly appealing case" for review "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).

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. Martinez, 769 Fed. App'x. 12, 17 (2d Cir. 2019) (Pooler, J., concurring) (stating that the district court's practice of using 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 under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment."); *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. Both *Booker* and the clear import of the Sixth Amendment prohibit such a result."). 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"). And the court below in this case noted that McClinton's challenge to acquitted conduct enhancements "has garnered increasing support among many circuit court judges and Supreme Court Justices, who in dissenting and concurring opinions, have questioned the fairness and constitutionality of

allowing courts to factor acquitted conduct into sentencing calculations." *United States v. McClinton,* 23 F.4th 732, 735 (7th Cir. 2022).

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 with regard to authorized *and* unauthorized conduct." (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—in a way that is inconsistent with the tenor of the recent case law."); *Ibanga*, 454 F. Supp. 2d at 539 (Kelley, J.) ("Punishing defendant Ibanga for his acquitted conduct would have contravened the statutory goal of furthering respect for the law and would have resulted in unjust punishment for the offense for which he was convicted."); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1028 (D. Neb. 2005) (Bataillon, J.) ("[T]he court finds that it can never be 'reasonable' to base any significant increase in a defendant's sentence on facts that have not been proved beyond a reasonable doubt."); *United States v. Carvajal*, 2005 U.S. Dist. LEXIS 3076, at *10–11 (S.D.N.Y. Feb. 17, 2005) (Hellerstein, J.) ("I decline[] to accept the Government's argument that, nonwithstanding the jury's verdict that Carvajal was not guilty of actually distributing crack, I should nevertheless consider that the acts necessary for completing the substantive crime were proved by a preponderance of the evidence.").

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) (relying on New Jersey Constitution to hold "that 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, which are often grounded in both 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 and render jury trials "a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 307.

As these opinions show, 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.*, 567 U.S. at 350, the Constitution and reasonableness review must place some limits on

judicial reliance on jury-rejected facts in federal sentencings.

II. This Case Provides an Effective Setting to Review Constitutionally Problematic Sentencing Practices.

The Court in *Booker* found unconstitutional under the Fifth and Sixth Amendments a federal sentencing system in which jury-free judicial fact-finding determined the mandatory Guidelines sentencing range. In an effort to remedy an unconstitutional circumvention of traditional trial rights, the *Booker* Court adopted a remedy making the Guidelines advisory and providing for reasonableness review of sentences upon appeal. *See* 543 U.S. at 264. In so doing, *Booker* reaffirmed this Court's earlier holding in *Apprendi* that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence *exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict* must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id*. (emphasis added).

This Court has since clarified the functioning of the *Booker* remedy in a series of follow-up rulings that have detailed and reiterated the Guidelines' central and foundational role in all federal sentencing proceedings: (1) a district court must begin all sentencing proceedings by calculating the applicable Guidelines range and then use this range as "the starting point and the initial benchmark" for its sentencing decision-making, *Gall v. United States*, 552 U.S. 38, 49 (2007); (2) any major departure from the Guidelines needs to "be supported by a more significant justification than a minor one," *id*. at 50;

(3) any "[f]ailure to calculate the correct Guidelines range constitutes procedural error," *Peugh v. United States*, 569 U.S. 530, 537 (2013); and (4) on appeal, a within-Guidelines sentence may be presumed reasonable. *Rita v. United States*, 551 U.S. 338, 347 (2007). As such, the Guidelines, though advisory, still carry "force as the framework for sentencing." *Peugh*, 569 U.S. at 542.

McClinton's case not only illustrates the real consequences Guidelines calculations still have on a defendant's sentence, but also how judicial fact-finding regarding jury-rejected facts can still drive sentencing outcomes. Without fact-finding based on the jury-rejected acquitted conduct, McClinton's advisory Guidelines range would have been 57-71 months. Because roughly 98% of all sentences in the federal system are imposed within or below the calculated range,[2] it is highly unlikely the sentencing judge in this case would have even contemplated sentencing McClinton to even a decade of imprisonment absent consideration of another Guidelines range dramatically inflated by jury-rejected judicial findings.

Moreover, due to the fundamental role that the Guidelines range still plays in reasonableness review, in order to sentence McClinton to 228 months absent the calculation of a higher Guidelines range based on acquitted conduct, the district judge would have had to identify considerable aggravating individual

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[2] *See* U.S. Sentencing Commission, 2021 Sourcebook of Federal Sentencing Statistics, Table 29 (2021) (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf)

circumstances to justify such a high sentence. But, by finding and relying on alleged "facts" that the jury expressly rejected, the judge here calculated a Guidelines range of life. As a result, the 228-month, below-Guidelines sentence not only could appear presumptively reasonable on appeal, *see, e.g.*, *United States v. v. Fitzpatrick*, 32 F.4th 644, 651 (7th Cir. 2022) (explaining the "presumption of reasonableness also extends to below-Guidelines sentences"), but it also surely let the sentencing judge feel as though he was sentencing leniently even though his sentence was roughly four times as long as the Guidelines range absent acquitted-conduct enhancements. In other words, judicial fact-finding on acquitted conduct allowed the district judge, functionally and formally, to impose a much higher sentence and one that likely would not have even been considered at sentencing and likely would have been deemed unreasonable on appeal.

Put another way, the judicial fact-finding here to apply an aggravating cross-reference under the Guidelines was indisputably and fundamentally "essential to the punishment imposed." *Cf. Alleyne*, 570 U.S. at 109-10 (Thomas, J., plurality op.) (describing "a well-established practice of . . . submitting to the jury, every fact that was a basis for imposing or increasing punishment"); *id.* at 125 (Roberts, C.J., dissenting) (explaining a standard for which facts must be found by a jury). Under a proper application of *Apprendi* and its progeny, this process of enhanced sentencing based on jury-rejected facts is constitutionally unsound and violates the Fifth and Sixth Amendments.

One potential means to "give intelligible content to the right of a jury trial" in this setting, *Blakely*, 542 U.S. at 305–06, would be to reverse the sentence below as unreasonable because of its undue reliance on acquitted conduct to *greatly* enhance the applicable Guidelines range and thereby serve as the only given justification for a much longer sentence. *See generally Huerta-Rodriguez*, 355 F. Supp. 2d at 1028 ("[T]he court finds that it can never be 'reasonable' to base any significant increase in a defendant's sentence on facts that have not been proved beyond a reasonable doubt."). There may be cases in which minor judicial reliance on acquitted conduct—perhaps as the basis for a discretionary decision to sentence at the top of a proper Guideline range—would be "reasonable" because it does not pose a real "threat to the jury's domain" or an "erosion of the jury's traditional role." *Oregon v. Ice*, 555 U.S. 160, 169–70 (2009). But, as in the case at bar—when judicial reliance on jury-rejected facts massively increases the Guidelines range and serves as the clear and only stated basis for a highly elevated sentence—the sentence should be deemed "unreasonable" because it is so much higher than what jury-found facts support. In other words, reasonableness review might be one means to check and limit acquitted-conduct sentence enhancements to 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. Doing so would honor the "core concerns animating the jury and burden-of-proof requirements," such as the importance of "guard[ing] against a spirit of oppression and tyranny on the party of rulers," and

establishing a "great bulwark of our civil and political liberties." *Apprendi*, 530 U.S. at 477, 490 n.16.

III. By Empowering Prosecutors and Impacting All Indictments and Pleas, Acquitted Conduct Sentencing Impacts the Operation of the Entire Federal Justice System.

Allowing significant acquitted-conduct Guidelines enhancements 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 McClinton'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 severely 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. It 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, then pursue those charges throughout trial without fear of any

consequences when seeking later to make out their case to a sentencing judge. They can overcharge defendants 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 allege and pursue every possible statutory 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 Guidelines enhancements requires competent federal 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 Guidelines range 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#) (noting that "analysis of trial data suggests that even defendants with strong cases and good chances of acquittal at trial are choosing to plead because of the enormous sentencing benefit of doing so compared to the sentencing risks they face should they lose at trial").

Second, as criminal cases proceed to trial, prosecutors can continue to pursue any and every possible charge, knowing still that 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. The very fact that a defendant has been arrested, charged, and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of those crimes." *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 and luxury 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 was true in this case, prosecutors can persistently tell judges (and the authors of a presentence report) that they are duty-bound to 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. This practice diminishes the fairness of a criminal justice system in many respects and affords the Government two bites at the apple. *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."). And it "undermines the defendant's fundamental interest in verdict finality, exposing the defendant to a second mini-trial on conduct underlying the count of acquittal in contravention of principles underlying the Fifth and Sixth Amendments." 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); *see also generally Shinn v. Martinez-Ramirez*, 595 U.S. ___, 142 S. Ct. 1718, ___ (2022) (emphasizing "the 'essential' need to promote the finality of state convictions").

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, who are called on to put their lives on hold and serve on significant criminal cases, 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.[3]

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

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[3] 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).

Respectfully submitted,

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July 8, 2022