

No. 23-831

IN THE
Supreme Court of the United States

CONSTANCE EILEEN CASWELL,
Petitioner,

v.

COLORADO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

**BRIEF FOR NATIONAL ASSOCIATION FOR
PUBLIC DEFENSE AS AMICUS CURIAE
IN SUPPORT OF PETITIONER**

EMILY HUGHES
NATIONAL ASSOCIATION
FOR PUBLIC DEFENSE
7310 Ritchie Highway
Suite 200 #1091
Glen Burnie, MD 21061

NOAH A. LEVINE
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
noah.levine@wilmerhale.com

MICHAEL S. CRAFTS
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

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INTERESTS OF AMICUS CURIAE

The National Association for Public Defense (NAPD) is an organization of more than 25,000 practitioners and experts in public defense that span fifty states and three U.S. territories.¹ Formed in 2013, NAPD works to ensure that criminal defendants can fully exercise their Constitutional right to counsel,

¹ No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amicus' intent to file this brief at least 10 days prior to its due date.

which this Court recognized as “fundamental and essential” to fair trials more than sixty years ago. *See Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). NAPD does so by (among other things) advocating for changes in law and policy related to public defense, training public defenders on criminal-law practice and procedure, and improving the systems through which public defense is delivered.

The right to counsel that NAPD helps to deliver is inextricably tied to other Constitutional rights of criminal defendants. Those rights include the Sixth Amendment’s guarantee of a trial by jury. NAPD and its members, who represent indigent defendants at trial throughout the country, observe the impact of this Court’s decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), on a daily basis. That decision diluted the right to a trial by jury by allowing judges to find the fact of a prior conviction by a preponderance of the evidence, even when that fact is an element of the charged offense. The impact of that decision is most severe in cases where the prior conviction elevates a later offense from a misdemeanor to a felony. As a result, NAPD has an interest in safeguarding a defendant’s right to a trial by jury on all elements of the charged offense.

SUMMARY OF ARGUMENT

The Sixth Amendment guarantees criminal defendants the right to a trial by jury. *See* U.S. Const. amend. VI. That right, which has been incorporated against the States under the Fourteenth Amendment, is “fundamental to the American scheme of justice.” *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)). The Petition presents important questions concerning the scope of that

fundamental right when prior convictions are used in subsequent prosecutions.

Questions concerning whether to enact recidivism provisions—criminal laws that subject defendants to more serious charges and penalties based on prior convictions—are reserved for legislatures. Yet questions concerning the scope of the Sixth Amendment right to a trial by jury are ones for this Court. And the Petition raises questions concerning not the policy wisdom of recidivism provisions but instead the Constitutional safeguards afforded to defendants who face enhanced charges or sentences based on such provisions. These questions are important for two primary reasons.

First, state and federal law regularly use a defendant's prior convictions in later criminal cases against them. They do so by (among other ways) enhancing misdemeanors to felonies based solely on a defendant's prior misdemeanor convictions. Statutes providing for such enhancements are commonplace in criminal codes. And even where criminal codes do not formally enhance charges, they often nonetheless increase the potential (or mandatory) penalties a defendant faces due to a prior conviction. The prevalence of charge enhancements and increased penalties based on the fact of a prior conviction in state and federal criminal codes makes plain the importance of the questions the Petition raises.

Second, when a misdemeanor charge is enhanced to a felony and the defendant is then convicted of that felony, the consequences of that conviction are grave. After a felony conviction, the most immediate consequence is that an individual is eligible for—and typically receives—a more severe sentence. But the consequences go well beyond that. Individuals who have been convicted of a felony are exposed to greater criminal

liability by way of statutes that criminalize conduct only when done by felons. And they suffer consequences outside of the criminal-justice system in key areas of their lives—like housing, employment, public benefits, and civic participation. The life-changing consequences for individuals who are convicted of felonies due to prior misdemeanors further heighten the importance of the questions presented in this case.

ARGUMENT

I. STATE AND FEDERAL LAW OFTEN USE PRIOR MISDEMEANOR CONVICTIONS TO ENHANCE CHARGES AND INCREASE PENALTIES

State and federal law use a defendant’s prior misdemeanor convictions to increase the charge and penalties he or she faces in subsequent criminal prosecutions, including by (1) enhancing the level of charge that a defendant faces, such as from a misdemeanor to a felony, and (2) increasing the sentence that a defendant receives or is eligible to receive upon conviction. In both cases, the result is the same in jurisdictions that follow Colorado’s approach: Defendants face more serious charges and penalties based on a fact—namely, a prior conviction—that is found only by a judge by a preponderance of the evidence.

A. Enhanced Charges

Caswell was found guilty of cruelty to animals under Colorado law. Pet. App. 8a. That crime is typically considered a “class 1 misdemeanor.” *See* Colo. Rev. Stat. § 18-9-202(2)(a). When a defendant previously has been convicted of the same crime, however, a subsequent offense is considered a more serious crime—namely, a “class 6 felony.” *See id.* § 18-9-202(2)(b)(I). That enhanced charge is not merely a nominal change in

classification; instead, it exposes the defendant to a higher presumptive sentencing range, to imprisonment in state penitentiary rather than county jail, and to a period of a mandatory parole. *Compare id.* § 18-1.3-401(1)(a)(V)(A) (presumptive felony sentences), *with id.* § 18-1.3-501(1)(a) (presumptive misdemeanor sentences).

Colorado's cruelty-to-animals statute is not unique. Indeed, it is standard fare in state and federal criminal codes to criminalize the first offense at one offense level (like a misdemeanor) and a subsequent offense at a higher offense level (like a felony).

Take, for example, Kansas. Kansas sides with Colorado in the growing divide among federal and state courts regarding whether a prior misdemeanor conviction that increases a subsequent offense to a felony is an element of the offense that a jury must find. *See* Pet. 15-16. Its highest court has held that the fact of a prior conviction—even one that changes the classification of an offense from a misdemeanor to a felony—does not need to be found by a jury. *See State v. Kendall*, 58 P.3d 660, 667-668 (Kan. 2002). That holding operates to great effect in trial courts in the State because Kansas' statutory code is replete with provisions that classify criminal offenses based solely on the number of prior convictions for the same offense.

Driving under the influence—the charge at issue in *Kendall*—is one example. *See* Kan. Stat. Ann. § 8-1567(b)(1) (driving under the influence ranges from a “class B, nonperson misdemeanor” (first conviction) to a “severity level 6, nonperson felony” (fourth or subsequent conviction)). But it is not alone. Kansas also enhances the charges of driving with a suspended or revoked license, *see id.* § 8-262(a)(1), transmitting a visual

depiction of a child, *see id.* § 21-5611(c), and fleeing from a police officer, *see id.* § 8-1568(c)(1), among other charges, from misdemeanors to felonies based on prior convictions. And for these crimes, it enhances them not based on conduct underlying the charged offense but instead solely based on an earlier conviction.

In this regard, Kansas is a prototypical jurisdiction in the United States. States routinely increase charges—including from misdemeanors to felonies—that defendants face based on past convictions alone. And these charge enhancements are not limited to a particular type of crime (like DUIs); instead, they appear across state criminal codes, increasing the charges for crimes related to (among other things) motor vehicles,²

² *See, e.g.*, Ky. Rev. Stat. Ann. § 189A.090 (operating with suspended license: class B misdemeanor (first offense) to class D felony (third or subsequent offense within 10 years)); Mich. Comp. Laws § 257.625(7) (operating under the influence: misdemeanor (first offense) to felony (second offense within 7 years or third or subsequent offense)); Mo. Rev. Stat. §§ 577.012(3), 577.023 (operating with excessive blood alcohol content: misdemeanor (first offense) to class B felony (“habitual offender”)); N.H. Rev. Stat. Ann. § 265-A:18(I)(a)(1), (IV)(c) (operating under the influence: class B misdemeanor (first offense) to felony (fourth or subsequent offense)); Okla. Stat. tit. 47, § 11-902(C)(1), (2) (operating under the influence: misdemeanor (first offense) to felony (subsequent offense within 10 years)); S.D. Codified Laws § 32-23-2, -4 (operating under the influence: class 1 misdemeanor (first offense) to class 6 felony (third offense)); W. Va. Code § 17C-5-2(e), (m) (operating under the influence: misdemeanor (first offense) to felony (third or subsequent offense)).

drugs,³ larceny and shoplifting,⁴ possession of weapons,⁵ prostitution,⁶ and child endangerment.⁷

³ *See, e.g.*, N.C. Gen. Stat. § 90-95(e)(3) (distributing controlled substances: class 1 misdemeanor (first offense) to class 1 felony (subsequent offense)); Ohio Rev. Code Ann. § 3719.99(C) (drug records and labeling: first-degree misdemeanor (first offense) to fifth-degree felony (subsequent offense)); S.C. Code Ann. § 44-53-395(B) (issuing blank prescription: misdemeanor (first offense) to felony (subsequent offense)); Tenn. Code Ann. § 39-17-418(c)(1), (e) (possessing heroin: class A misdemeanor (first offense) to class E felony (third or subsequent offense)); Utah Code Ann. § 58-37-8(1)(b)(iii) (distributing Schedule V controlled substance: class A misdemeanor (first offense) to third-degree felony (subsequent offense)); Va. Code Ann. § 18.2-258.2 (assisting in unlawfully procuring prescription drugs: class 1 misdemeanor (first offense) to class 6 felony (subsequent offense)).

⁴ *See, e.g.*, Alaska Stat. § 11.46.220(c)(1), (2) (concealment of merchandise valued between \$250 and \$750: class A misdemeanor (first offense) to class C felony (third or subsequent offense)); Ga. Code Ann. § 16-8-14(b)(1) (shoplifting: misdemeanor (first offense) to felony (fourth or subsequent offense)); 720 Ill. Comp. Stat. 5/16-1(b) (property theft: class A misdemeanor (first offense) to class 4 felony (subsequent offense)); Mich. Comp. Laws § 750.535(3)(b), (4)(a) (receiving stolen property value between \$200 and \$1,000: misdemeanor (first offense) to felony (subsequent offense)); Miss. Code Ann. § 97-23-93(5), (6) (shoplifting: misdemeanor (first offense) to felony (third or subsequent offense)); N.H. Rev. Stat. Ann. § 637:11(II)(b) (theft of property or services: class A misdemeanor (first offense) to class B felony (third or subsequent offense)); Or. Rev. Stat. § 165.065(3) (negotiating bad check: class A misdemeanor (first offense) to class C felony (subsequent offense within 5 years)); 18 Pa. Cons. Stat. § 3929(b) (retail theft: summary offense (first offense) to third-degree felony (third or subsequent offense)); Tex. Penal Code Ann. § 31.03(e) (theft of property less than \$2,500: misdemeanor (first offense) to felony (third or subsequent offense)).

⁵ *See, e.g.*, Ga. Code Ann. § 16-11-126(h) (unlawful carrying of a weapon: misdemeanor (first offense) to felony (second offense within 5 years or subsequent offense)); 720 Ill. Comp. Stat. 5/24-1(b) (unlawful use of weapons: class A misdemeanor (first offense) to class 3 felony (subsequent offense)); Ind. Code § 35-47-2-1.5(e)

Federal law takes the same tack. It increases many criminal charges from misdemeanors to felonies based solely on prior convictions too. As Petitioner points out, “one of the most commonly charged crimes—improper entry into the United States—includes a misdemeanor-to-felony recidivism provision.” Pet. 33 (citing 8 U.S.C. § 1325(a)). So do many others. For example:

- 21 U.S.C. § 844 (possession of a controlled substance): An individual may be imprisoned “not more than 1 year” for a first offense but “not more than 2 years” for a second offense and “not more than 3 years” for a third or subsequent offense. *See* 21 U.S.C. § 844(a).⁸

(unlawful carrying of handgun: class A misdemeanor (first offense) to level 5 felony (subsequent offense)); Nev. Rev. Stat. § 202.350(2)(a) (manufacturing dangerous weapons: gross misdemeanor (first offense) to category D felony (subsequent offense)); Ohio Rev. Code Ann. § 2923.12(F)(4) (unlawfully carrying concealed weapons: first-degree misdemeanor (first offense) to fifth-degree felony (subsequent offense)).

⁶ *See, e.g.*, Ind. Code § 35-45-4-3(a) (patronizing a prostitute: class A misdemeanor (first offense) to level 6 felony (third and subsequent convictions)); Mich. Comp. Laws § 750.451(1), (3) (soliciting a prostitute: misdemeanor (first offense) to felony (third or subsequent offense)).

⁷ *See, e.g.*, Ga. Code Ann. § 16-5-70(e) (cruelty to children in the third degree: misdemeanor (first offense) to felony (third or subsequent offense)); 720 Ill. Comp. Stat. 5/12C-5(a) (endangering the life or health of a child: class A misdemeanor (first offense) to class 3 felony (second or subsequent offense)); Wyo. Stat. Ann. § 6-4-403(c) (endangering children: misdemeanor (first offense) to felony (subsequent offense)).

⁸ Under federal law, offenses punishable by imprisonment for more than one year are typically considered felonies; offenses punishable by imprisonment for one year or less are typically considered misdemeanors. *See* 18 U.S.C. § 3559(a).

- 18 U.S.C. § 248 (freedom of access to reproductive-health clinics): An individual may be imprisoned “not more than one year” for a first offense but “not more than 3 years” for a second or subsequent offense. *See* 18 U.S.C. § 248(b).
- 18 U.S.C. § 1028 (fraud related to identification documents): An individual may be imprisoned “not more than one year” for certain violations but “not more than 20 years” if the offense is committed “after a prior conviction under this section becomes final[.]” *See* 18 U.S.C. § 1028(b)(3), (6).
- 18 U.S.C. § 1365 (tampering with consumer products): An individual may be imprisoned “not more than 1 year” for “inserting any writing” into a consumer product but “not more than 3 years” if he or she does so “after a prior conviction under this section becomes final[.]” *See* 18 U.S.C. § 1365(f)(1), (2).
- 18 U.S.C. § 1864 (hazardous devices on federal lands): An individual may be imprisoned “not more than one year” for certain violations but “not more than 20 years” if he or she commits the violation “after one or more prior convictions[.]” *See* 18 U.S.C. § 1864(b)(5), (c).

Each of these offenses, like those in many States, transforms a misdemeanor charge into a felony charge—a change with drastic consequences for defendants who are ultimately convicted, *see* below Part II—without consideration of the conduct underlying that charge. The wisdom of such enhancements in state and federal criminal codes is a decision for legislators. But their prevalence warrants a decision by this Court fully protecting a defendant’s Constitutional right to a trial by jury on all elements of an offense, including the fact of a prior conviction.

B. Increased Penalties

State and federal criminal codes use prior convictions in another way: They increase the sentence that a defendant may (or must) receive upon conviction of a later offense. Even where criminal laws do not formally increase the charge against a defendant, they often nonetheless increase the punishment to which a defendant is exposed upon conviction.

In doing so, such laws have much of the same effect as the provisions discussed above. They subject defendants to harsher penalties based on a fact—a prior conviction—unrelated to the conduct underlying the offense with which they are charged. That effect makes such facts ones that this Court has explained must be found by a jury: “[A] fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed.” *Alleyne v. United States*, 570 U.S. 99, 107-108 (2013) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10 (2000)). Yet in jurisdictions that follow Colorado’s approach, those facts do not need to be found by juries beyond a reasonable doubt.

Louisiana is one of those jurisdictions. *See* Pet. 16-17. Like Colorado and Kansas, its highest court has held that the fact of a prior conviction that increases the maximum sentence for a subsequent offense may be found by a judge rather than by a jury. *See State v. Jefferson*, 26 So. 3d 112, 122 (La. 2009). And it is common for its criminal code to use prior convictions in that way, even without formally enhancing the charge from a misdemeanor to a felony. For example, an individual convicted of theft of property valued at less than \$1,000 faces a maximum term of imprisonment of six months. *See* La. Stat. Ann. § 14-67(B)(4). But if that individual has been convicted

of theft on at least two previous occasions, he or she faces a maximum term of imprisonment of two years—a four-fold increase. *See id.* The prescribed punishment in Louisiana for driving under the influence works similarly: With each new conviction, a defendant faces an increasing minimum and maximum sentence. *See id.* § 14-98 (offense); *id.* §§ 14-98.1-4 (penalties).

Sentencing frameworks like that—where statutorily prescribed punishments increase based on prior convictions alone—are common across the United States. Connecticut doubles the maximum allowable sentence for distributing certain controlled substances for an offender’s second or subsequent offenses. *See* Conn. Gen. Stat. § 21a-277(a)(2). Kentucky increases the mandatory minimum and statutory maximum (among other potential components of a sentence) with each additional conviction for driving under the influence within a ten-year period. *See* Ky. Rev. Stat. Ann. § 189A.010(5). And Montana does the same for convictions related to domestic abuse. *See* Mont. Code. Ann. § 45-5-206. Indeed, “prior convictions are taken into account by all U.S. sentencing systems[.]” Frase et al., Robina Institute of Criminal Law and Criminal Justice, *Criminal History Enhancements Sourcebook* 7 (2015).

Provisions like these typify sentencing schemes across the country that allow (and in some cases require) more severe sentences for charges based on prior convictions. And in places that follow Colorado’s approach, defendants face such sentences without a jury finding the fact of the prior conviction beyond a reasonable doubt.

II. FELONY CONVICTIONS BASED ON PRIOR MISDEMEANORS HAVE A SEVERE IMPACT ON DEFENDANTS

An individual convicted of a felony faces serious and life-changing consequences, including (1) longer sentences for the enhanced offense; (2) exposure to crimes that apply only to individuals previously convicted of felonies; and (3) collateral consequences unrelated to crimes and sentencing, such as those related to voting, employment, and public benefits. The scope and seriousness of these consequences demand that the government be required to prove all elements of felony offenses—including the fact of a prior conviction—to a jury beyond a reasonable doubt.

A. Longer Sentences

The most immediate consequence that a defendant convicted of a felony faces is his or her sentence. Conviction of a felony allows for (and in some cases mandates) lengthy terms of imprisonment, which are often coupled with other components of a sentence like probation. By virtue of being found guilty of a charge enhanced to a felony based only on a prior conviction, a defendant faces—and usually receives—harsher penalties than he or she would have received for the same conduct the first time facing that charge.

Consider again enhanced DUI charges in Kansas. In that State, a first-time DUI offender faces no mandatory jail time and a statutory maximum of six months' imprisonment. *See* Kan. Stat. Ann. § 8-1567(b)(1)(A). With each subsequent DUI conviction, the mandatory minimum and statutory maximum that a defendant faces increases. *See id.* § 8-1567(b)(1)(A)-(E). And when the charge transforms from a misdemeanor to a felony, the potential sentence jumps significantly: The maximum term of imprisonment for a misdemeanor DUI is one

year. *See id.* § 8-1567(b)(1)(B), (C). Yet the recommended term of imprisonment for a felony DUI is 17 to 46 months. *See id.* § 8-1567(b)(1)(D), (E) (felony DUIs); *id.* § 21-6804(a) (sentencing grid for non-drug felony crimes).

Most jurisdictions use similar sentencing schemes, drastically increasing the minimum or maximum sentences (or both) that a defendant faces when moving from a misdemeanor to a felony. Most commonly, States limit incarceration for misdemeanors to one year. *See* Nat'l Conf. of State Legislators, *Misdemeanor Sentencing Trends*, <https://www.ncsl.org/civil-and-criminal-justice/misdemeanor-sentencing-trends> (updated Jan. 29, 2019). Indeed, only five states have misdemeanors that are punishable by more than one year of imprisonment. *See* Mitchell, *Examining Offense Classification Schemes*, at 5 (July 3, 2021), <https://nmsc.unm.edu/criminal-code-update/resources/offense-classification-report-15july2021.pdf>. By contrast, for most jurisdictions, the terms of imprisonment for felonies start at one year, and for many, they can go as long as life sentences. *See* Ohio Criminal Sentencing Comm'n, *50 State Sentencing Summary* (Oct. 19, 2015), <https://www.supremecourt.ohio.gov/docs/Boards/Sentencing/resources/general/50StSentencingSummary.pdf> (collecting misdemeanor and felony penalty information by State).

B. Greater Criminal Exposure

The impact of a felony conviction does not end when the individual's sentence ends. It continues to affect their life in many ways long after their incarceration or probation ends. Indeed, for many individuals, it affects their life indefinitely. One of those long-lasting consequences is greater criminal exposure. Federal and state laws make certain conduct criminal only when it is done

by an individual who was previously convicted of a felony. As a result, an individual's status as a felon—including an individual who holds that status only following a conviction under a misdemeanor-to-felony enhancement provision—subjects that individual to increased criminal restrictions and, as a result, places them at risk for future prosecution.

Felon-in-possession gun laws are a leading example. These laws prohibit individuals who have previously been convicted of a felony from possessing a firearm. *See* Fish, *The Paradox of Criminal History*, 42 *Cardozo L. Rev.* 1373, 1384 & n.35 (2021) (“[T]he federal government and a number of states criminalize weapons possession by people with certain prior convictions[.]”). A felony conviction “transform[s] possession of a firearm from a legal activity—indeed an activity afforded constitutional protection—to an illegal one.” Kelly, *The Power of the Prior Conviction*, 97 *N.Y.U. L. Rev.* 902, 904-905 (2022) (footnote omitted).

The federal felon-in-possession statute serves as a model. It provides the following:

It shall be unlawful for any person ... who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ... [to] possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(1). To be prosecuted under that statute, an individual does not need to have been sentenced to more than a year in prison; it is enough that he or she was convicted of a crime where such a sentence was possible. *See, e.g., Baginski v. Lynch*, 229 F. Supp. 3d 48, 53

(D.D.C. 2017) (“Thus, for purposes of section 922(g)(1), courts look solely to the maximum possible punishment in determining whether a defendant’s predicate conviction was for ‘a crime punishable by imprisonment for a term exceeding one year.’”).

Prior convictions in both state and federal courts qualify. *See* 18 U.S.C. § 922(g)(1) (“convicted in *any* court” (emphasis added)); *see, e.g., United States v. Kerr*, 737 F.3d 33, 39 (4th Cir. 2013) (affirming section 922(g)(1) conviction based on prior convictions in state court). When that conviction was in state court, the State’s classification of the offense—as either a misdemeanor or a felony—matters. The statute exempts prior convictions for state offenses that are classified as misdemeanors and punishable by a term of imprisonment of no more than two years. *See* 18 U.S.C. § 921(a)(20)(B) (“The term ‘crime punishable by imprisonment for a term exceeding one year’ does not include ... any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.”). That exemption raises the stakes of charge enhancements. If a charge is enhanced from a misdemeanor to a felony based on a prior misdemeanor conviction, a conviction on that charge now falls outside the scope of the misdemeanor exception in the felon-in-possession statute.

Most States have felon-in-possession laws too. Thirty-seven States criminalize possession of firearms by individuals who have felony convictions. *See Which States Prohibit People With Felony Convictions From Having Firearms?*, Everytown for Gun Safety Support Fund, <https://everytownresearch.org/rankings/law/felony-prohibitor/> (updated Jan. 4, 2024) (collecting state statutes). The vast majority of States do so indefinitely, prohibiting individuals convicted of felonies from ever

possessing a firearm. *See id.* When paired with their federal counterpart, these statutes further increase the criminal exposure that individuals convicted of felonies later face. And that exposure is not theoretical. Approximately 8,000 individuals were convicted under the federal statute alone in 2022. *See* U.S. Sentencing Comm’n, *QuickFacts: 18 U.S.C. § 922(g) Firearms Offenses*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY22.pdf (visited Mar. 2, 2024).

Given the later criminal exposure that individuals convicted of felonies may—and in fact do—face, it is critical that defendants charged with felonies based on the fact of prior misdemeanor convictions are afforded the full protection of their right to a trial by jury on all elements of the offense.

C. Other Collateral Consequences

The consequences that an individual faces after a felony conviction are not cabined to the criminal-justice system in the form of more severe sentences or greater criminal exposure; they extend throughout an individual’s life and diminish their ability to participate in civil society. For example, many States prohibit felons from voting.⁹ They also prohibit felons from serving on juries.¹⁰ They limit employment options for felons.¹¹ And

⁹ *See, e.g.*, Ariz. Rev. Stat. Ann. § 16-101; Iowa Code § 48A.6; Va. Code Ann. § 24.2-101; Wyo. Const. art. VI, § 6.

¹⁰ *See, e.g.*, Ind. Code § 33-28-5-18(b)(5); N.C. Gen. Stat. § 9-3; Okla. Stat. tit. 38, § 28(C)(7).

¹¹ *See, e.g.*, Tex. Lab. Code Ann. § 101.109(2) (felons prohibited from serving as a labor-union officer or labor organizer); S.D. Admin. R. 55:10:04:01 (felons prohibited from appointment to a law-

they exclude them from receiving certain public benefits.¹² Federal law limits the rights of felons in many of the same ways.¹³

Indeed, the collateral consequences of felony convictions are sweeping. The National Inventory of Collateral Consequences of Conviction (NICCC) is an online, searchable database that “identifies and categorizes the statutes and regulations that impose collateral consequences [of criminal convictions] in all 50 states, the federal system, and the District of Columbia, the Virgin Islands, and Puerto Rico.” NICCC, *About the NICCC*, <https://niccc.nationalreentryresourcecenter.org/node/127> (visited Mar. 2, 2024).¹⁴ That database identifies more than 40,000 consequences of convictions in statutes and regulations of States and territories, and it identifies another approximately 1,000 such consequences in federal statutes and regulations. See NICCC, *Collateral Consequences Inventory*, <https://niccc.nationalreentry>

enforcement position); 4 N.C. Admin. Code 15.0122(2) (felons prohibited from working as pilots).

¹² See, e.g., Okla. Stat. tit. 70, § 17-116.2D (felons prohibited from receiving certain state retirement benefits); Wash. Admin. Code § 388-400-0005(6)(a) (certain felons prohibited from receiving Temporary Assistance for Needy Families benefits).

¹³ See, e.g., 28 U.S.C. § 1865(b)(5) (felons prohibited from serving on federal juries unless their “civil rights” have been “restored”); 12 C.F.R. § 336.4(a)(1) (felons prohibited from working for Federal Deposit Insurance Corporation); 7 C.F.R. § 273.11(s) (certain felons not eligible for benefits from Supplemental Nutrition Assistance Program).

¹⁴ NICCC is part of the National Reentry Resource Center, which is a project funded by the Department of Justice and Bureau of Justice Assistance. See NICCC, *About the NICCC*, <https://niccc.nationalreentryresourcecenter.org/node/127> (visited Mar. 2, 2024).

resourcecenter.org/consequences (visited Mar. 2, 2024) (for state consequences, search without narrowing parameters; for federal consequences, check “Include Federal Consequences,” and then search without further narrowing parameters). Those consequences are grouped across more than a dozen categories such as “Employment & volunteering,” “Government loans & grants,” “Political & civil participation,” and “Housing & residency.” *See id.*

The volume and diversity of these collateral consequences demonstrate the long reach of a felony conviction. These consequences further underscore the importance of requiring the prosecution to prove prior convictions that transform a crime into a felony to a jury beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

EMILY HUGHES
NATIONAL ASSOCIATION
FOR PUBLIC DEFENSE
7310 Ritchie Highway
Suite 200 #1091
Glen Burnie, MD 21061

NOAH A. LEVINE
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
noah.levine@wilmerhale.com

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MICHAEL S. CRAFTS
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

MARCH 2024