

No. 25-1086

In the Supreme Court of the United States

KEITH PHARMS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

**On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Eleventh Circuit**

**BRIEF OF LAW PROFESSORS DOUGLAS
BERMAN, VALERIE HANS, AND ABBE SMITH
AS *AMICI CURIAE* IN SUPPORT OF
PETITIONER**

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INTEREST OF AMICI CURIAE¹

Amici are legal scholars who teach, conduct research, and practice in the fields of criminal law and sentencing in the United States. Professor Douglas Berman is the co-author of the casebook *Sentencing Law and Policy: Cases, Statutes, and Guidelines* (5th ed. 2022) and has served as an editor of the *Federal Sentencing Reporter* for more than a quarter century. 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. Professor Abbe Smith has authored numerous works, including *Guilty People* (Rutgers University Press, 2020) and *Case of a Lifetime: A Criminal Defense Lawyer's Story* (Palgrave MacMillan, 2008), and has served on the American Board of Criminal Lawyers since 2010. Professor Valerie Hans is one of the nation's leading authorities on the jury system, and has authored or edited 10 books and over 150 research articles, including *Juries, Lay Judges, and Mixed Courts: A Global Perspective* (2021) and *American Juries: The Verdict* (2007).

Amici have 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.

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

SUMMARY OF ARGUMENT

Keith Pharms, 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 (1995). Specifically, Pharms opted to proceed to trial after having been indicted on crimes related to a car theft that involved a shooting. The jury convicted Pharms of the car theft and use of a firearm during a crime of violence under § 924(c) (subjecting him to a 5-year mandatory minimum sentence), but expressly found in a special verdict that Pharms did not discharge the firearm (foreclosing the 10-year statutory minimum of § 924(c)(1)(A)(iii) for discharging a firearm during a crime of violence). But federal prosecutors, eager to see Pharms punished for discharging the weapon notwithstanding the jury’s clear and unmistakable determination, argued at sentencing for an upward variance based on its view of the case that the jury plainly rejected. Relying on the different burden of proof traditionally applied at sentencing, the district court decided that Pharms shot the weapon, and varied upward from the 63-78 month Guidelines range, plus 60 months for the § 924(c) conviction, to impose a total sentence of 192 months of imprisonment, effectively imposing the exact same sentence Pharms would have received if the jury had convicted him of the more serious charge making a 10-year statutory minimum applicable.

This case thus raises the oft-recurring issue of whether the Constitution places any limits on judicial

fact-finding at sentencing relating to jury-rejected facts or so-called “acquitted conduct.”

Several members of this Court flagged concerns with acquitted conduct sentencing just three years ago. *See McClinton v. United States*, 600 U.S. ___, 143 S. Ct. 2400 (2023). This Court denied certiorari in *McClinton*, with Members of this Court suggesting that it was “appropriate” to await then on-going work by the U.S. Sentencing Commission concerning the use of acquitted conduct in federal sentencing. *Id.* at 2403 (Kavanaugh J., joined by Justices Gorsuch and Barrett, statement respecting the denial of certiorari). Justices at that time stressed the range of constitutional issues raised by various sentencing practices that risk undermining Fifth and Sixth Amendment commands. *See id.* at 2402 (Sotomayor, J., statement respecting the denial of certiorari) (discussing “concerns about procedural fairness and accuracy when the State gets a second bite at the apple”); *see id.* at 2404 n.1 (Alito, J., concurring in the denial of certiorari) (contending “there is no relevant difference for [constitutional] purposes between acquitted conduct and uncharged conduct”).

In 2024, the Sentencing Commission amended the Guidelines’ relevant conduct rules to formally exclude from the Guidelines calculation only “conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishe[d], in whole or in part, the instant offense of conviction.” U.S.S.G. App. C, Amend. 826 (Nov. 1, 2024); U.S.S.G. § 1B1.3(c). As written, the Guidelines still leave unclear exactly when and how jury acquittals will limit judicial enhancement of Guideline sentencing ranges, and it is quite clear that

judges are still permitted (and perhaps statutorily obligated) to rely upon acquitted conduct when exercising their statutory sentencing discretion under 18 U.S.C. § 3553(a). That is precisely what occurred here, with the district court imposing a sentence roughly five years above the Guidelines range for the charges on which the jury returned convictions.

Of course, the U.S. Sentencing Commission's work revising the Guidelines, and even proposals in Congress to amend federal sentencing statutes, do not and cannot define the constitutional guardrails that must apply to the sentencing of criminal defendants in state courts. Only this Court can provide nationwide constitutional guidance regarding how the Fifth and Sixth Amendments impact the consideration of acquitted or dismissed conduct in sentencing for all criminal justice systems. See *McClinton*, 143 S. Ct. at 2403 (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").

Understandably, many state courts and lower federal courts continue to read this Court's past jurisprudence to call for treating judicial fact-finding on acquitted conduct at sentencing as indistinguishable from any other form of judicial fact-finding at sentencing. But if oft-repeated statements about the importance of Fifth and Sixth Amendment rights as a limit on government power are to have real purchase—and if the text, history and traditions embraced by the Founders of our Nation are to be given enduring meaning—the Court should grant review in this case to articulate sound limits on

judicial authority to increase a sentence based on facts the jury clearly rejected.

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*, 588 U.S. 634, 637 (2019) (plurality op.); *accord Erlinger v. United States*, 602 U.S. 821 (2024); *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 directly and expressly relies on facts a jury clearly rejected to increase a sentence, the jury trial “promise” becomes empty and this “vital” protection against the government becomes illusory.

This case² presents a timely vehicle for this Court to grant certiorari, receive full briefing, and hear arguments regarding important and persistent questions that arise in many cases. The original meaning and proper application of the jury trial right in the Sixth Amendment and the due process right in the Fifth and Fourteenth Amendments with respect to judicial punishment increases based on acquitted conduct should be directly addressed.

² *Amici* also filed a brief in support of the petition in *Ghanem v. United States*, Case No. 25-970, which remains pending. *Amici* posit that the two cases, raising different facets of the same fundamental Fifth and Sixth Amendment concerns, each present timely vehicles for resolving the scope of how judges may rely on facts related to charges a jury expressly rejected or that were dismissed by prosecutors without securing a valid conviction.

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

ARGUMENT

After a full and fair trial, the people exercised suffrage in this case by unanimously voting in a special verdict that Pharms did not discharge a firearm during the car theft for which he was convicted. This should have relieved Pharms from facing a 10-year mandatory minimum sentence imposed for a conviction based on discharging a firearm during a crime of violence under § 924(c). 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 requested an upward variance based on a judicial factual inquisition regarding its allegation that Pharms discharged the firearm—notwithstanding the uncontested reality that this fact had been expressly rejected by the jury. Rather than respecting that the Constitution places “the jury at the heart of our criminal justice system,” *Erlinger*, 602 U.S. at 831, federal prosecutors encouraged the district court to sentence Pharms in exactly the same way as if he had been convicted of having discharged the firearm. The district court embraced the prosecution’s view that the jury verdict was irrelevant when sentencing Pharms to 192 months of imprisonment, effectively imposing the exact same sentence Pharms would have received if the jury had convicted him of the more serious charge making a 10-year statutory minimum applicable.

Such blatant disregard of the jury's role and work in the United States' criminal justice system is inconsistent with the text of the Constitution and the traditions the Framers championed. The sentencing process in this case suggests prosecutorial and judicial views of the Fifth and Sixth Amendments 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." *United States v. Booker*, 543 U.S. 220, 237 (2005); *see also Erlinger*, 602 U.S. at 832 (stressing that Fifth and Sixth Amendment "principles represent not procedural formalities but fundamental reservations of power to the American people" (cleaned up)).

Despite the constitutional issues presented by upward sentencing variances based on conduct expressly rejected by the jury, the district judge relied upon jury-rejected facts to impose a sentence on Pharms that was roughly five years longer than the Guidelines range for his conviction. The people's role in determining the truth of the prosecutors' accusations was ignored; the jury's factual findings were nullified by the judge through his sentencing decision-making.

When jury 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. Under such practices, the sentencing becomes a trial, and the trial becomes just a convenient dress rehearsal for prosecutors. Any sentencing rules that permit substantive circumvention of the jury trial right enables overzealous prosecutors to run roughshod over the traditional democratic checks of the adversarial criminal process that the Framers built into the U.S. Constitution. See *Erlinger*, 602 U.S. at 832 (stressing how the jury trial right seeks to “mitigate the risk of prosecutorial overreach and misconduct, including the pursuit of ‘pretended offenses’ and ‘arbitrary convictions’” (quoting *The Federalist* No. 83, p. 499 (C. Rossiter ed. 1961))).

I. As Justices and Judges Recognize, the Historic Rights and Protections of Jury Trials are Gravely Undermined when Sentences are Enhanced After Acquittal.

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 described 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 recently, jury trials are “fundamental to the American scheme of justice.” *Ramos v. Louisiana*, 590 U.S. 83, 93 (2020) (quoting *Duncan*, 391 U.S. at 148–50). As “the framers appreciated,” the jury safeguards are “anchor[s] essential to prevent a slide back toward regimes like the vice-admiralty courts [the Framers] so despised.” *Erlinger*, 602 U.S. at 832 (quoting Letter from T. Jefferson to T. Paine (July 11, 1789), reprinted in 15 Papers of Thomas Jefferson 266, 269 (J. Boyd ed. 1958)).

Yet 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 Pharms and other defendants when, after being vindicated by jury findings, prosecutors are still permitted to seek, and judges are still permitted to impose, increased sentences based on the very same allegations the jury rejected. Convictions, in these cases, are only formal matters; there is no limit on the state’s effort to punish based on allegations a jury rejected. Pharms and other defendants subject to sentences enhanced by jury-rejected facts are left to wonder just what kind of “bulwark” or “safeguard” the Fifth and Sixth Amendments truly provide if and when prosecutors

and judges can entirely disregard jury findings. When prosecutors are empowered to pursue procedural loopholes in the operation of our criminal justice system, they are emboldened to view constitutional rights as mere tripwires to be avoided whenever and however possible.

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, 170 (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, 777 (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 “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 that 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).

This case, too, is “a particularly appealing case” for review. Here a jury expressly and unanimously rejected the prosecution’s allegation that Pharms discharged a firearm; the district judge followed the prosecution’s recommendation to disregard the jury’s conclusion and sentenced Pharms as though he were the shooter. Pharms was not afforded the protections guaranteed by the Fifth and Fourteenth Amendments, but was sentenced above what was reasonable given the verdicts returned by the jury.

Judge-found and jury-rejected facts significantly enhanced the amount of prison time imposed on Pharms; his punishment was not the result of a sound sentencing process based on the results of a jury trial involving Pharms's peers as the Constitution guarantees.

II. This Case Is Yet Another Example of Constitutionally Problematic Sentencing Based on Judge-Found Facts.

Pharms' case demonstrates clearly how judicial fact-finding can still drive sentencing outcomes that are not supported by sound jury verdicts even after the Sentencing Commission's recent amendment to the Guidelines. The district judge expressly based a significant upward variance on facts that the jury clearly rejected. Critically, the sentencing below made clear that the judge's fact-finding that Pharms discharged the firearm, contradicting the jury's conclusion, was "essential to the punishment imposed." 1 J. Bishop, *Criminal Procedure* 50 (2d ed. 1872); *cf. Alleyne*, 570 U.S. at 109–10 (Thomas, J., plurality op.) (describing the significance of "a well-established practice of . . . submitting to the jury, every fact that was a basis for imposing or increasing punishment").

Though the U.S. Sentencing Commission has now amended the Guidelines to exclude acquitted conduct from being considered in Guidelines calculations in some circumstances, there are still many defendants like Pharms serving longer, constitutionally-suspect sentences based on judge-found facts related to acquitted conduct. *See, e.g., United States v. Touray*, 151 F.4th 1317 (11th Cir. 2025) (upholding sentence

based on acquitted conduct based on the pre-amendment Guidelines); *United States v. Sharkey*, 131 F.4th 621, 623 (8th Cir. 2025) (holding that the sentencing court was not required “to apply proposed amendments to the Sentencing Guidelines that would prohibit consideration of acquitted conduct”). Moreover, judges have noted the various situations in which the new Guidelines amendment does not preclude a sentence lengthened based on acquitted conduct, whether in consideration of the statutory § 3553(a) factors or in consideration of conduct that underlies both acquitted and convicted offenses. *See, e.g., United States v. Jacques*, No. 08-CR-00577 (NCM), 2025 WL 2466994, at *2–3 (E.D.N.Y. Aug. 27, 2025) (where defendant was acquitted of importing and possessing five kilograms or more of cocaine but convicted only of 500 grams or more, sentencing court held it could still sentence based on large quantity because “the same conduct underlies both a convicted and acquitted offense”); *United States v. Spivak*, No. 1:21-CR-491-1, 2025 WL 1167185, at *3 (N.D. Ohio Apr. 22, 2025) (holding that, notwithstanding Guidelines amendment, “when calculating the guideline range, a court may consider any evidence of the total loss within the scope of the conspiracy, even if a jury acquitted a defendant of some conduct accounting for some specific losses”); *United States v. Brooks*, No. CR JKB-18-0408, 2024 WL 4803406, at *3 (D. Md. Nov. 15, 2024) (“while Amendment 826 prohibits the consideration of acquitted conduct in determining the Guidelines range, nothing in Amendment 826 precludes the Court’s consideration of conduct in assessing the § 3553(a) factors”).

The Guidelines amendment thus has not resolved the constitutional problems with sentencing based on acquitted conduct. Despite the U.S. Sentencing Commission's sound effort to address one problematic aspect of acquitted-conduct sentencing, this Court will continue to receive petitions from federal and state defendants asserting their constitutional rights were violated by judicial sentencing based on judge-found facts related to charges for which a defendant was acquitted. It is time for this Court to take up these issues, and Pharms's case provides a fitting and timely opportunity to do so.

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

Allowing significant sentencing increases based on acquitted conduct undermines the Framers' vision of American criminal justice values by taking liberty-protecting authority away from the people and giving it to the state and its agents. *See Blakley*, 542 U.S. at 306 ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.") From Pharms's and similar defendants' perspectives, the jury trial right does not "prevent oppression by the Government," *Duncan*, 391 U.S. at 155, but is rather a mere formality that can be disregarded if the prosecutors manage to convince another government agent to punish a defendant for acquitted conduct. When a sentence can be based on conduct the jury expressly rejected, a jury trial

regarding disputed allegations serves merely as a dress rehearsal for a prosecutor to show a judge why an individual should be punished regardless of the jury verdict. Not only does allowing acquitted-conduct sentencing degrade a fundamental constitutional right, it also undermines confidence in the entire criminal justice system.

Indeed, acquitted conduct sentencing provides prosecutors with significant benefits (and no obvious costs) by allowing them to allege and pursue any and every charge at their disposal among “the sprawling scope of most criminal codes,” and to pursue the presentation of all manner of allegations without real concern for legal or procedural trial rules intended to prevent illegal and wrongful convictions. *Blakely*, 542 U.S. at 311. Even a wholly inadequate charge rejected by a jury (or a completely invalid conviction successfully challenged on appeal) will provide a criminal defendant no relief from prosecutorial overreach if sentencing doctrines pay no heed to jury verdicts. The opportunity to circumvent a jury’s work enables overzealous prosecutors to run roughshod over the traditional democratic checks of the adversarial and law-based 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 later seeking to make their case to a sentencing judge. 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 or appellate reversal of 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 and even have little concern for legally or factually suspect charges, 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” *United States v. Bell*, 808 F.3d 926, 932 (2015) (Millett, J, concurring).

Indeed, the prospect of future sentences based on acquitted conduct 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 sentencing benefit, but likely 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) (emphasis in original), 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

trial. *See generally* Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, Human Rights Watch, 78–90 (Dec. 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, at criminal trials, prosecutors can continue to pursue any and every possible charge, and try their case without regard for procedural or legal safeguards, knowing that acquittals (or even vacatur on appeal) carry no real sentencing consequences. Doing so, even if the evidence supporting many charges may be weak or becomes legally 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. In this arrangement, thanks to acquitted-conduct sentencing, the prosecution does not really need to 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, prosecutors can and often will become even more

aggressive in the presentation of offense allegations and related accusations. Prosecutors can persistently tell judges (and the authors of a presentence report) that they must disregard any and all jury acquittals rather than reflect upon and respect the democratic judgment and legal norms. 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.”). This reality “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).

Finally, the allowance of sentences based on conduct rejected by a jury 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 for public service to advance justice, are unlikely to be dedicated to their task when their supposedly significant constitutional role in our system is regularly undermined at sentencing.³

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

As this and similar cases demonstrate, the practice of judges significantly increasing sentences based on judge-found and jury-rejected facts “has gone on long enough.” *Jones v. United States*, 574 U.S. 948, 949 (2014) (Scalia, J., dissenting, joined by Thomas, J., and Ginsburg, J.). *Amici* believes this Court should grant certiorari in 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.

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* (June 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).

CONCLUSION

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

Respectfully submitted,

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