

No. 25-970

In the Supreme Court of the United States

RAMI GHANEM,
Petitioner,
v.
UNITED STATES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**MOTION FOR LEAVE TO FILE THE BRIEF
AND BRIEF OF NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS AMICUS
CURIAE IN SUPPORT OF PETITIONER**

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**UNOPPOSED MOTION FOR LEAVE TO FILE
THE AMICUS BRIEF**

Amicus National Association of Criminal Defense Lawyers moves this Court pursuant to Rule 21 for leave to file the attached brief as amicus curiae. S.Ct.R. 37 provides that all parties must receive notice of the intent of amicus curiae to file a brief in support of a petition 10 days before the due date. Amicus provided the requisite notice to all counsel on March 13, 2026, 7 days before the due date.

All parties consented in writing to amicus curiae filing a brief in support of the petition, despite the belated notice under S.Ct.R. 37. The brief of amicus curiae will assist this Court in considering the Petition for reasons explained herein. Accordingly, because all parties consent and none will be prejudiced, amicus curiae requests leave to file the attached brief.

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INTEREST OF AMICUS CURIAE¹

Founded in 1958, the National Association of Criminal Defense Lawyers (NACDL) is a nonprofit, voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes and misconduct. It has a nationwide membership of many thousands of direct members and up to 40,000 affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. It is dedicated to advancing the proper, efficient, and fair administration of justice. It files many amicus briefs each year in this Court and in other federal and State courts around the country on a broad range of issues of importance to criminal defendants, criminal defense lawyers, and the criminal justice system.

NACDL has a substantial institutional interest in safeguarding the Sixth Amendment right to trial by jury and ensuring that deprivations of liberty occur in a manner consistent with the Fifth Amendment. To that end, it has extensively documented the ways in which the trial penalty pressures defendants to forgo the jury right, including in a landmark 2018 report. *See* NACDL, *The Trial Penalty: The Sixth Amendment*

¹ No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae, its members, or its counsel made a monetary contribution to it. Amicus gave the Government seven days' notice of its intent to file the instant amicus brief, and the Government consented to filing, notwithstanding the 10-day notice requirement set forth in S.Ct.R. 37.2.

Right to Trial on the Verge of Extinction and How to Save It (2018) (*The Trial Penalty*). This case directly implicates those concerns. As explained below, the rule permitting courts to dramatically increase sentences based on uncharged, dismissed, and acquitted conduct furnishes prosecutors with a potent means of inducing defendants to surrender their jury-trial right. That form of trial penalty is especially corrosive because it allows prosecutors to credibly threaten severe punishment based on facts found only by a judge, under a mere preponderance standard, and on the basis of evidence that would never be admissible at trial. NACDL submits this brief to explain how this practice has helped displace the jury trial with a plea-driven system largely insulated from meaningful adversarial testing or public scrutiny, and thus in deep tension with the constitutional structure the Framers ordained.

SUMMARY OF ARGUMENT

This Court's Sixth Amendment jurisprudence has repeatedly extolled the right to trial by jury. It has characterized that right as fundamental to our scheme of justice, a bulwark against government tyranny, and an essential check on the judiciary. And it has repeatedly urged vigilance against the gradual erosion of that right.

Yet the criminal jury trial has largely vanished. Today, more than 97% of federal convictions are secured pursuant to guilty pleas. The reason for this decline is straightforward: the trial penalty. Prosecutors possess an arsenal of tools they can use to penalize defendants who avail themselves of their jury right. Of those tools, one of the most pernicious—and

constitutionally problematic—is the ability to threaten dramatic sentencing increases based on uncharged, acquitted, and dismissed conduct.

The trial penalty in this context results from the confluence of three factors. *First*, according to the prevailing view in the circuits, the only Sixth Amendment restriction on using uncharged, dismissed, and acquitted conduct at sentencing is that the ultimate sentence fall within the offense of conviction’s statutory range. But the ranges for many commonly charged crimes meet or exceed 20 years, which means that the potential trial penalty a prosecutor can threaten at sentencing is often measured in years or decades. The parade of horrors writes itself. A prosecutor might, for example, charge the sale of a single oxycodone pill in violation of 21 U.S.C. §841(b)(1)(C) and then threaten to seek the statutory maximum (20 years) on the ground that the defendant participated in a broader, uncharged drug conspiracy. *Second*, the procedural protections afforded defendants at trial largely vanish at sentencing. The government need establish sentencing facts only by a preponderance of the evidence, and it may do so through evidence that would be inadmissible before a jury. Thus, not only is the threatened penalty severe—prosecutors face comparatively few impediments to making good on their threat. *Third*, prosecutors largely control which incriminating facts reach the sentencing court in the first place. That control gives them powerful leverage to extract pleas in exchange for favorable factual stipulations or promises not to seek enhancements.

Given those realities, many defendants rationally conclude that the price of insisting on a jury trial is simply too high. The pressure is especially acute in

multi-count cases where anything less than complete acquittal is a pyrrhic victory. Under the current regime, a defendant who is acquitted of murder but convicted of a small-scale drug conspiracy may still be punished for the killing of which the jury found him innocent—and if the statutory maximum for the drug charge is life, he may be sentenced to life even if his Guidelines range would otherwise have been a short term of years. A defendant who gets the murder charge dismissed is in a similar, if not worse, position, since the court can treat the dismissed murder charge as “relevant conduct” and factor it directly into the Guidelines range. The result is that defendants who lack complete certainty that they can secure an acquittal on all charges face overwhelming pressure to plead guilty to every charge—even those that are legally defective or factually weak—in exchange for a promise of leniency at sentencing.

The corrosive effects of this practice reverberate throughout the criminal justice system. Prosecutors may overcharge when it suits them, knowing that even if the charge gets dismissed or results in acquittal, they will get a second bite at the apple at sentencing. Or they may withhold a charge and introduce the misconduct for the first time at sentencing, where the defendant has no confrontation rights and far fewer tools with which to rebut the accusation.

The problem, in short, is not merely that the use of uncharged, dismissed, and acquitted conduct to impose otherwise substantively unreasonable sentences runs afoul of the Fifth and Sixth Amendments. It is that the practice systematically pressures defendants not to invoke those protections in the first place, thereby contributing to the dismantling of the

constitutional system the Framers envisioned. This Court should grant the petition and put an end to this practice once and for all.

ARGUMENT

- I. **The Use of Uncharged, Dismissed, and Acquitted Conduct To Increase a Defendant’s Authorized Sentence Impermissibly Burdens the Sixth Amendment Right to Trial by Jury**
 - A. **The Trial Penalty Has Driven Criminal Jury Trials to the Brink of Extinction**

This Court’s jurisprudence has repeatedly emphasized the central importance of the jury trial in our constitutional structure. The Sixth Amendment’s trial guarantee, the Court has explained, “is fundamental to the American scheme of justice.” *Ramos v. Louisiana*, 590 U.S. 83, 93 (2020). It “guard[s] against a spirit of oppression and tyranny on the part of rulers,” *United States v. Gaudin*, 515 U.S. 506, 510-511 (1995) (quotation marks omitted), “preserve[s] the people’s authority over its judicial functions,” *United States v. Haymond*, 588 U.S. 634, 641 (2019), and acts as a bulwark “against arbitrary law enforcement.” *Codispoti v. Pennsylvania*, 418 U.S. 506, 515-16 (1974).

The Framers considered the jury trial to be “the heart and lungs of liberty” and took great pains to ensure that the assault on that right that took place during British rule would “not happen again.” *Erlinger v. United States*, 602 U.S. 821, 829 (2024) (internal quotation marks omitted). The Framers understood,

however, that “the jury right could be lost not only by gross denial, but by erosion.” *Jones v. United States*, 526 U.S. 227, 247-48 (1999); *Erlinger*, 602 U.S. at 844, n.5 (2024).

That fear has come to pass. Today, a vanishingly small percentage of criminal defendants exercise their right to a jury trial. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (noting that 97% and 94% of federal and state convictions, respectively, result from guilty pleas).² Thus, in the vast majority of cases, a criminal defendant’s fate is not determined by a jury of his peers, as the Framers intended, but by “horse trading between prosecutor and defense counsel.” *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (internal quotation marks omitted; cleaned up). For nearly a century after the founding, plea bargaining was rare at best. Now, however, it is not merely “some adjunct to the criminal justice system; it is the criminal justice system.” *Ibid.* As one scholar put it: “Our criminal justice system is a system of pleas. Few who know it well think that it is working.” Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 Colum. L. Rev. 1304, 1388 (2018).

The primary culprit behind the disappearance of the criminal jury trial is the so-called trial penalty, which results from the often chasmic disparity between the sentence a defendant is offered in exchange for a plea and the sentence a defendant risks if he or she goes to trial and loses. *See generally The Trial Penalty*. Defendants are often presented with a

² Those numbers have not meaningfully changed in the last 14 years. See U.S.S.C. 2024 Sourcebook - Table 11, Guilty Pleas and Trials in Each Circuit and District.

Hobson’s choice: plead guilty and guarantee a lighter sentence or force the government to its proof at trial and risk additional years, or even decades, of incarceration. Faced with those options—which are often presented by an overworked defense attorney, before he or she has had the opportunity to investigate the charges—many defendants make a “rational choice” to plead guilty to crimes they did not commit. American Bar Association, *Plea Bargain Task Force Report* at 17 (Feb 2023); Jed S. Rakoff, *Why Do Innocent People Plead Guilty*, N.Y. Rev. of Books, Nov. 20, 2014.

To be sure, some degree of coercion in the plea-bargaining process is inevitable; and this Court has blessed some prosecutorial practices that effectively penalize defendants who insist on trial. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (permitting prosecutor to threaten to bring additional charges if the defendant rebuffed plea offer). But allowing courts to dramatically increase a defendant’s sentence based on judge-found facts gives prosecutors a uniquely powerful weapon with which to bludgeon defendants into pleading guilty.

B. Permitting Courts to Use Uncharged, Dismissed, and Acquitted Conduct to Increase the Defendant’s Authorized Punishment Dramatically Magnifies the Trial Penalty

1. To understand why the existing regime supercharges the trial penalty, one must begin with the magnitude of the penalty prosecutors can credibly threaten.

According to the uniform view among the circuits, the Sixth Amendment and Due Process Clause permit

a court to enhance a sentence based on uncharged, dismissed, and acquitted conduct so long as the final sentence remains within the range authorized by the offense of conviction. *See, e.g., United States v. Lucas*, 101 F.4th 1158, 1163 (9th Cir. 2024); *United States v. Grier*, 475 F.3d 556, 573 (3d Cir. 2007) (Rendell, J., concurring). But for most defendants, that is cold comfort since the statutory ranges attached to many commonly charged crimes span decades. *See, e.g.,* 21 U.S.C. §841(b)(1)(A) (10 years to life for certain drug offenses); 18 U.S.C. §1014 (30-year maximum for false statement made in loan applications); 18 U.S.C. §§1341, 1343 (20-year maximum for mail and wire fraud; 30-year maximum if the offense affects a financial institution); 18 U.S.C. §1344 (30-year maximum for bank fraud); 18 U.S.C. §1348 (25-year maximum for securities fraud); 18 U.S.C. §1519 (20-year maximum for obstruction of federal investigations).

Moreover, not only are courts permitted to consider uncharged, dismissed, and acquitted conduct when fashioning a sentence, they are *required* to do so. Section 1B1.3’s “relevant conduct” provision broadly directs sentencing courts to consider, among other things, “all acts and omissions” committed during, in preparation for, or in the course of attempting to avoid detection for the offense of conviction, U.S.S.G. §1B1.3(a)(1); acts undertaken as part of the same “course of conduct,” *id.* §1B1.3(a)(2); “all harm” resulting from those acts and omissions, *id.* §1B1.3(a)(3); and all harm that was the object of those acts and omissions. *Ibid.*; *see generally United States v. Watts*, 519 U.S. 148, 152–53 (1997). And while courts are no longer permitted to treat acquitted conduct as “relevant conduct” for purposes of calculating the

Guidelines range, *see* U.S.S.G. §1B1.3(c), they must consider such conduct when evaluating the §3553(a) factors and deciding whether a variance is appropriate. *United States v. Texidor*, 164 F.4th 248 (3d Cir. 2026); *United States v. Ware*, 141 F.4th 970, 974 n.2 (8th Cir. 2025); U.S.S.G. §1B1.4 (“In determining the sentence to impose . . . the court may consider, *without limitation*, any information concerning the . . . conduct of the defendant, unless otherwise prohibited by law.”) (emphasis added); *see also United States v. Ibang*, 271 F.App’x 298 (4th Cir. 2008) (vacating sentence where trial court “applied a standard that would categorically exclude consideration of acquitted conduct in every case”).

The breadth of the “relevant conduct” rule, coupled with sprawling statutory sentencing ranges, gives prosecutors the power to threaten defendants with years- or decades-long trial penalties based on uncharged or dismissed conduct. For example, the government might charge a low-level drug offense under 21 U.S.C. §841(b)(1)(C) whose Guidelines range without enhancements would be 0 to 6 months, *see, e.g.*, U.S.S.G. §§2D1.1(c)(17), 5A, but then argue at sentencing for a Guidelines range of 240 months (the statutory maximum) based on an uncharged murder. Or the government might charge a homebuyer with lying about their primary residence on a mortgage application in violation of 18 U.S.C. §1014—an offense which, assuming no loss to the bank,³ would yield a Guidelines range of 0 to 6 months, *see* U.S.S.G.

³ Most federal fraud statutes do not have a monetary loss element or threshold. *See Nijhawan v. Holder*, 557 U.S. 29, 39 (2009).

§§2B1.1(a)(1), 5A—and then *seek* the 30-year statutory maximum by establishing at sentencing that the defendant used the home purchase to launder money from an uncharged Ponzi scheme.⁴ Or prosecutors might charge a defendant under 18 U.S.C. §1519 for destroying a single email—an offense which, without enhancements, would yield a Guidelines range of 15 to 21 months, *see* U.S.S.G. §§2J1.2(a), 5A—and then persuade the court to increase the Guidelines range to 240 (the statutory maximum) months on the theory that the defendant was concealing his role in an uncharged securities-fraud scheme.⁵

Prosecutors may deploy acquitted conduct to similar effect. They can charge a defendant with unlawful firearm possession, *see* 18 U.S.C. §§922(g), 924(a)(8) (15-year maximum) and murder, and then, even if the jury acquits on the murder charge, ask the sentencing court to impose the 15-year statutory maximum under §3553(a) based on the very homicide the jury refused

⁴ The court could arrive at a Guidelines range of 360 months by adding the following: 7 levels for the base offense and 22 levels for over \$25 million in losses, U.S.S.G. §2B1.1(b)(1)(L), 4 levels for playing a leadership role in the Ponzi scheme, *id.* §3B1.1(a), 4 levels for the number of victims, *id.* §2B1.1(b)(2)(B), 4 levels for vulnerable victims, *id.* §3A1.1(b)(1), (b)(2), and 2 levels for sophisticated means. *Id.* §2B1.1(b)(10)(C). The Guidelines range for the total offense level, 43, is life, which is capped at the 30-year statutory maximum for a §1014 offense.

⁵ The court could arrive at this range if it assessed 30 levels under the accessory-after-the-fact provision, U.S.S.G. §§2J1.2(c), 2X3.1(a)(3), 4 levels for playing a leadership role, *id.* §3B1.1(a), 2 levels for abuse of a position of trust or use of a special skill, *id.* §3B1.3, and 4 levels for vulnerable victims. *Id.* §3A1.1(b)(1), (b)(2). The resulting Guidelines range of 292 to 365 months would then be capped at the 20-year statutory maximum.

to attribute to the defendant. *See Blakely v. Washington*, 542 U.S. 296, 306 (2004) (noting the absurdity of a rule that would allow a judge to “sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene.”).

2. The magnitude of the potential trial penalty is only half the story. Defendants deciding whether to insist on a jury trial must consider not only the severity of the threatened penalty, but the likelihood that the government can make good on the threat. Given the near-total absence of procedural protections at sentencing, that likelihood is often intolerably high.

At trial, the government must persuade a unanimous jury of the defendant’s peers—selected through procedures designed to minimize bias, *see J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)—that the defendant committed every element of the offense beyond a reasonable doubt. *Cage v. Louisiana*, 498 U.S. 39 (1990). And it must do so within a dense framework of procedural protections, including the Confrontation Clause, the Federal Rules of Evidence, and the discovery obligations imposed by Fed.R.Crim.P. 16.

Those protections largely disappear at sentencing—and with them the safeguards that guard against erroneous deprivations of liberty. This Court has described the requirement of proof beyond a reasonable doubt as the “prime instrument for reducing the risk of convictions resting on factual error.” *In re Winship*, 397 U.S. 358, 363 (1970). Yet, at sentencing, that protection gives way to a preponderance-of-the-evidence standard, under which the government and the defendant “share the risk of error in roughly equal

fashion.” *Addington v. Texas*, 441 U.S. 418, 423 (1979). Thus, to increase the length of incarceration, the court need only find that the relevant facts are “more likely than not” true. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 329 (2007). And that remains the case even when the facts amount to entirely freestanding offenses, *United States v. Faust*, 456 F.3d 1342, 1352 (11th Cir. 2006) (Barkett, J., specially concurring), and even where the finding has “an extremely disproportionate effect on the sentence.” *United States v. Lucas*, 101 F.4th 1158, 1162 (9th Cir. 2024); *United States v. Fisher*, 502 F.3d 293 (3d Cir. 2007) (overruling prior precedent requiring clear-and-convincing evidence to impose a 360-month sentence on a defendant whose Guidelines range was 27 to 33 months).

Other safeguards fall away at sentencing. The Confrontation Clause—which this Court has described as “the greatest legal engine ever invented for the discovery of truth,” *California v. Green*, 399 U.S. 149, 158 (1970) (internal quotation marks omitted)—does not apply. *See, e.g., United States v. Robinson*, 482 F.3d 244, 246 (3d Cir. 2007). Nor do the Federal Rules of Evidence. Fed.R.Evid. 1101(d)(3). Indeed, federal law expressly provides that “[n]o limitation ... be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence,” 18 U.S.C. §3661—a dictate that has “led the courts and the rules’ drafters to favor the completeness of information presented at sentencing over its accuracy.” *United States v. Hamad*, 495 F.3d 241, 246 (6th Cir. 2007).

Instead, sentencing courts may consider virtually any relevant information so long as it has “some *minimal* indicium of reliability.” *United States v. Galvan*, 949 F.2d 777, 784 (5th Cir. 1991) (emphasis added); *United States v. Robinson*, 482 F.3d 244, 246 (3d Cir. 2007). Courts have repeatedly described this standard as a “low hurdle.” *United States v. Cook*, 550 F.3d 1292, 1296 (10th Cir. 2008); *United States v. Greene*, 71 F.3d 232, 235 (6th Cir. 1995). And because district courts’ reliability determinations are reviewed only for clear error, they are rarely overturned on appeal. *United States v. Brewster*, 116 F.4th 1051, 1060 (9th Cir. 2024); *United States v. Grier*, 475 F.3d 556, 569 (3d Cir. 2007).

As a result, courts may drastically increase a defendant’s sentence based on evidence that would be plainly inadmissible at trial, including evidence in the form of uncorroborated and double hearsay, unauthenticated evidence, and statements from unidentified confidential informants. *United States v. Wise*, 976 F.2d 393, 402 (8th Cir. 1992); *United States v. Shackelford*, 462 F.3d 794, 795 (8th Cir. 2006); *United States v. Borjas*, 402 F.App’x 21, 22 (5th Cir. 2010); *United States v. Armstrong*, 920 F.3d 395, 398 (6th Cir. 2019). As the Seventh Circuit has explained, a sentencing court is even “entitled to credit testimony that is totally uncorroborated and comes from an admitted liar, convicted felon, [or a] large scale drug-dealing, paid government informant.” *United States v. Berthiaume*, 233 F.3d 1000, 1003 (7th Cir. 2000). A sentencing court may likewise consider evidence that would otherwise fail an inquiry under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). See *United States v. Hogue*, 998 F.3d 745, 752 (7th Cir.

2021); *see generally* Maneka Sinha, *Junk Science at Sentencing*, 89 Geo. Wash. L. Rev. 52 (2021) (explaining how the inapplicability of Rule 702 leads to the consideration of unreliable scientific evidence at sentencing).

To make matters worse, the law simultaneously saddles defendants with the burden of furnishing evidence that the government or probation office’s sentencing evidence is unreliable, *see, e.g., United States v. Mays*, 593 F.3d 603, 608 (7th Cir. 2010), but sharply limits defendants’ ability to obtain the materials they need to make that showing. Fed.R.Crim.P. 16’s guarantee that a defendant may “inspect and copy” items “material to preparing the defense” does not extend to information sought solely for sentencing. *United States v. Pirosko*, 787 F.3d 358, 368 (6th Cir. 2015); *United States v. Neal*, 611 F.3d 399, 401 (7th Cir. 2010). And although Rule 32, 18 U.S.C. §3552, and the Guidelines require disclosure of the Presentence Report, they do not require automatic disclosure of the materials underlying the Report’s assertions.⁶ Indeed, “[n]owhere in the legal system are litigants forced to face such potentially severe consequences as a criminal defendant at sentencing without any right to disclosure of the information and evidence against them.” Richard Smith-Monahan, *Unfinished Business: The Changes Necessary to Make Guidelines Sentencing Fair*, 12 Fed. Sent. R. 219 (Jan/Feb 2000).

3. Allowing courts to impose dramatic sentencing increases based on judge-found facts under lax

⁶ The Jencks Act applies at sentencing, but only requires the disclosure of statements by testifying witnesses after the witness has testified. 18 U.S.C. §3500(b).

procedures gives prosecutors extraordinary leverage in plea negotiations. That is because prosecutors often control which incriminating facts reach the sentencing court in the first place—and with that gate-keeping power comes the ability to withhold, narrow, or stipulate away sentence-determinative facts in exchange for an agreement to plead guilty.

In theory, sentencing courts are supposed to possess all information relevant to the sentence. Presentence Reports are meant to reflect an independent inquiry into the defendant’s conduct and background, and prosecutors are expected to disclose facts bearing on the proper sentence. *The Trial Penalty* at 26; Fed.R.Crim.P. 32(d)(2)(G) (requiring the Presentence Report to include “any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a)”). In practice, however, prosecutors and defendants routinely haggle during plea negotiations over which facts will be transmitted to the probation office or presented before the court. *See, e.g.*, Melissa Hamilton, *McSentencing: Mass Federal Sentencing and the Law of Unintended Consequences*, 35 *Cardozo L. Rev.* 2199, 2235-36 (2014) (noting that the Sentencing Guidelines have “spawned a whole different breed of fact bargaining” by allowing courts to consider “aggravating or mitigating circumstances—*i.e.*, facts—that prosecutors can trade in the plea bargaining process”); Sonja B. Starr & M. Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 *Yale L.J.* 2, 12 (2013) (“[E]ven though DOJ has long directed prosecutors not to bargain over these facts, many studies have documented the persistence of fact-bargaining.”)

Thus, prosecutors might induce a plea by promising not to alert the court to evidence of criminal conduct that would elevate the defendant's Guidelines range or adversely implicate the §3553(a) factors, *see* Russell M. Gold, Carissa Byrne Hessick, F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U.L. Rev. 1607, 1618 (2017), or by promising not to share damaging information with the probation officer preparing the defendant's Presentence Report. And even if it is not possible to conceal a fact from a court, prosecutors may induce a guilty plea by offering to include a stipulation in the plea agreement as to loss amount, drug quantity, or other enhancement; or by promising to recommend a particular sentence or agreeing that a particular sentencing factor does not apply. Fed.R.Crim.P. 11(c)(1)(B) & (C); *see also* Mary Patrice Brown & Steven E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 Am. Crim. L. Rev. 1063 (2006) (noting that both judges and the probation office tend to defer to party stipulations).

4. To *see* how these dynamics play out in practice, consider the following examples.

Use of Uncharged Conduct. Imagine that prosecutors charge two co-defendants, A and B, with one count of mortgage fraud resulting in \$15,000 in losses. During plea negotiations, prosecutors intimate that they possess information that A and B participated in a broader mortgage fraud conspiracy that caused \$70 million in losses. Knowing that the information is not sufficient to obtain a conviction, prosecutors make the following offer: In exchange for a quick guilty plea, the government will stipulate that the total loss amount for the defendants' fraudulent conduct totaled \$15,000.

If, however, defendants go to trial and are convicted, prosecutors tell A and B that they will ask the court to consider evidence of the uncharged fraud conspiracy as “relevant conduct” when calculating the Guidelines.

Eager to lock in the lower loss amount and secure a three-level reduction for acceptance of responsibility, A agrees to plead guilty. Based on the government’s stipulations, his adjusted offense level would be 6, *see* U.S.S.G. §§2B1.1(a)(1) (base level 7), (b)(1)(B) (2 levels for \$15,000 loss), 3E1.1 (3-level reduction for acceptance of responsibility), and assuming no other adjustments, his Guidelines range would be 0 to 6 months imprisonment. *See id.* §5A.

B, however, insists that she is innocent of any wrongdoing. She and her lawyer do the following calculation: If B goes to trial and loses, she will forfeit the 3-level reduction for acceptance of responsibility. U.S.S.G. §3E1.1, cmt. n. 2. But if the court credited only the government’s evidence that her conduct caused \$15,000 in losses, her Guidelines range would be 4 to 10 months. *See id.* §§2B1.1(a)(1) (base level 7), (b)(1)(B) (2 levels for \$15,000 loss), 5A. Under these circumstances, the “penalty” for exercising her trial right is four months—a risk that B is willing to take to prove her innocence. But if she gets convicted and the sentencing court finds by a preponderance that B participated in the broader mortgage fraud conspiracy, her Guidelines range would balloon from 4 to 10 months to 108 to 135 months. *See* U.S.S.G. §§2B1.1(a)(1) (base level 7), 2B1.1(b)(1)(M) (24 points for loss in excess of \$65 million). In other words, the trial penalty is now approximately a *decade* imprisonment.

Few defendants in B's shoes would be willing to risk ten years of incarceration when the alternative is a guilty plea with a likely probationary sentence; and no responsible defense attorney would advise B to go to trial absent complete certitude that they could secure a full acquittal. The rational decision under these circumstances is to plead guilty—even if B is innocent.

Use of Acquitted Conduct. The same coercive dynamic is present when courts are permitted to use acquitted conduct to increase a defendant's sentence. Suppose this time that prosecutors charge A and B with one count of mortgage fraud that caused no loss and a second, far weaker count of conspiracy to commit mortgage fraud that caused \$70 million in losses. The government makes the following offer: If the defendant pleads guilty to both counts, the government will stipulate that the defendants caused only \$15,000 in loss and will advocate for a Guidelines range tethered to that amount—namely, 0 to 6 months.

A accepts the deal. The government makes good on its promise, and A receives probation. B goes to trial where she is convicted on the minor mortgage-fraud count, but acquitted on the conspiracy count. The acquittal, however, provides cold comfort. At sentencing, the court finds by a preponderance of the evidence that B played an instrumental role in the broader conspiracy and that the scheme caused investors \$70 million in losses. While the court cannot use the acquitted conduct to calculate the Guidelines range, *see* U.S.S.G. § 1B1.3(c), it can rely on that conduct to impose a substantial upward variance under § 3553(a). *See, e.g., United States v. Ware*, 141 F.4th 970 (8th Cir. 2025) (varying upward to 144 months based on

acquitted conduct where the Guidelines range was 84 to 105 months).

This is the dilemma that every defendant facing multiple charges of varying strength must contend with when choosing whether to exercise his or her jury trial right. “[A] hard-fought partial victory ... can be rendered practically meaningless” if the court uses that acquitted conduct to impose a “drastically lengthened sentence”—something which is entirely permissible under the law of the circuits. *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millet, J., concurring in the denial of rehearing en banc). In this context, a defendant faces “all the risks of conviction, with no practical upside to acquittal unless they run the board and are absolved of *all* charges.” *Ibid.* (emphasis in original). Here, too, the rational course will often be to plead guilty to criminal conduct the defendant did not commit and which the government could not prove at trial, simply to secure prosecutors’ commitment not to invoke that misconduct at sentencing.

Use of Dismissed Conduct. Imagine prosecutors bring the same two charges for mortgage fraud and conspiracy to commit mortgage fraud. This time, however, the conspiracy charge has a variety of defects: it falls outside the statute of limitations, venue is improper, the indictment fails to allege an essential element, and the government’s principal evidence was obtained through an unlawful search and/or in violation of the defendant’s rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).

A pleads guilty and is sentenced to probation. B takes a different course. She secures an order suppressing the unlawfully obtained evidence supporting the conspiracy charge, then successfully moves to

dismiss the charge based on the aforementioned legal defects. She then goes to trial on the lesser mortgage fraud count and loses. As with the acquittal, the dismissal of the conspiracy charge quickly turns into a pyrrhic victory. None of the defects that prevented the government from trying the conspiracy charges before a jury prevent prosecutors from presenting evidence of a conspiracy to the sentencing court. *See, e.g., United States v. Behr*, 93 F.3d 764, 766 (11th Cir. 1996) (“relevant conduct” includes conduct outside the statute of limitations); *United States v. Ghanem*, 143 F.4th 1114 (9th Cir. 2025) (sentencing court may consider conduct without regard for venue considerations); *United States v. Seymour*, 94 F.4th 679, 684 n. 1 (7th Cir. 2024) (exclusionary rule does not apply to *Miranda* violations at sentencing); *United States v. Acosta*, 303 F.3d 78, 84 (1st Cir. 2002) (noting that “all the courts that have addressed this issue have held that there is no blanket prohibition on the consideration of illegally seized evidence for the purposes of making the findings required under the Guidelines”) (internal quotation marks omitted). As with the first example, the court credits the government’s allegations that she participated in the mortgage fraud conspiracy and sentences her to 108 months.

This example, though stylized, illustrates a broader point: The ability to enhance a sentence based on dismissed conduct means that defendants often find themselves in a Kafkaesque position in which it is better to plead guilty to a defective charge than secure its dismissal.

**C. Empowering Prosecutors to Seek
Dramatic Enhancements Based on
Uncharged, Dismissed, and Acquitted
Conduct Corrupts the Criminal
Justice System**

The downstream consequences of allowing prosecutors to balloon sentences based on judge-found facts are substantial. It rewards prosecutorial gamesmanship. In some cases, the rule encourages prosecutors to press charges that are factually weak or legally infirm by largely eliminating the downside. If the defendant capitulates to the aggressive charging tactics, the government wins; if the defendant goes to trial and is convicted, the government wins; and even if the defendant succeeds in getting a charge dismissed or secures a partial acquittal, the government can still eke out a win by persuading the court, under the forgiving preponderance standard, to credit the very allegations it could not prove at trial. In other cases, the rule creates an incentive to dispense with charging altogether and unveil the allegation for the first time at sentencing, where the defendant has scant discovery rights, no Confrontation Clause entitlement, and far fewer tools to contest the accusation.

The broader institutional consequences are no less serious. When defendants are coerced into pleading guilty, prosecutors are insulated from having their charging decisions tested in open court, removing a critical check on government overreach and inviting prosecutorial sloppiness. *The Trial Penalty* at 8-9. Defense attorneys, stripped of the opportunity to litigate, lose the skills that adversarial proceedings demand. *Id.* at 9. Judges, who in the federal system

play no role in the plea negotiations, are reduced to rubber-stamping plea agreements rather than deciding legal and evidentiary issues or policing prosecutorial excess. See Rakoff, *Why Do Innocent People Plead Guilty*, *supra* at 7. The public loses its traditional role as a check on the criminal justice system through jury service.

Most troubling of all, the trial penalty induces innocent defendants to plead guilty rather than run the risk that prosecutors will use judge-found facts to add years or decades to their punishment. *Ibid.* (citing data that around 10% of exonerations since 1989 involved false guilty pleas).

A final consequence of the trial penalty is that it obscures its frequency. Threats to seek sentencing enhancements based on uncharged, dismissed, or acquitted conduct rarely appear in any public record, because they usually achieve their purpose before trial and sentencing ever occur. The practice becomes visible only in the exceptional case where a defendant resists and brings a trial penalty claim. For every such case, there are untold others in which defendants quietly surrender their jury-trial right in exchange for the government's agreement not to pursue enhancement that prosecutors did not prove or could not prove at trial. That is not a marginal feature of the modern system. It is a profound distortion of it. This Court should grant certiorari and put an end to that practice.

CONCLUSION

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

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