No. 21-996

In the Supreme Court of the United States

YONELL ALLUMS, *Petitioner,*
v.
UNITED STATES OF AMERICA, *Respondent.*

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

BRIEF OF PROFESSOR DOUGLAS BERMAN AND DUE PROCESS INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CORRINE A. IRISH
ELLEN H. PHILLIPS
SQUIRE PATTON BOGGS
1211 Avenue of the Americas, 26th Floor
New York, NY 10036
212-872-9800
corrine.irish@squirepb.com
ellen.phillips@squirepb.com

KEITH BRADLEY
Counsel of Record
SQUIRE PATTON BOGGS
1801 California Street
Suite 4900
Denver, CO 80202
303-830-1776
keith.bradley@squirepb.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

Professor Berman is a legal scholar who teaches, conducts research, and practices in the fields of criminal law and sentencing in the United States.[1] Professor Berman is the co-author of the casebook *Sentencing Law and Policy: Cases, Statutes and Guidelines* (https://www.aspenpublishing.com/Demleitner-SentencingLawAndPolicy5), and has served as an editor of the *Federal Sentencing Reporter* (https://online.ucpress.edu/fsr) for more than a decade. Professor Berman is also the sole creator and author of the widely-read blog, *Sentencing Law and Policy* (https://sentencing.typepad.com/sentencing_law_and_policy/), which this Court and numerous lower courts have cited.

Due Process Institute is a bipartisan nonprofit that works to honor, preserve, and restore principles of fairness in the criminal legal system.

They both have strong interests 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*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. The parties have consented to this filing.

SUMMARY OF ARGUMENT

Yonell Allums, 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*, 1515 U.S. 506, 510 (1995). The jury acquitted Allums of the most serious charges against him, but the judge at sentencing decided to base sentencing calculations and his 20-year sentence on jury-rejected facts. This case thus raises the oft-recurring issue of whether the Constitution and reasonableness review place any limits on judicial reliance on jury-rejected facts in federal sentencing. As Allums' petition demonstrates, guidance from this Court has repeatedly been sought on this enduring question and resolution of this issue is overdue.

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

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

As Allums' petition makes clear, this case provides another stark example of how sentence enhancements based on jury-rejected facts undermine the jury's constitutionally-defined role in our criminal system and the protections of the Fifth and Sixth Amendments. After a lengthy trial resulted in jury acquittals on some of the most serious charges against Allums, the judge adopted factual determinations—using the traditional civil proof standard of proof by a mere preponderance of evidence—that contradicted those of the jury regarding drug quantities and use of a firearm. A circuit court thereafter affirmed this sentence as "reasonable" without considering that it was sanctioning a sentence that a jury had, through its acquittals, formally and functionally disavowed. The use of acquitted conduct at sentencing has long garnered ample criticism for eviscerating a jury's fundamental role, and it is time for this Court to clarify that the Constitution and reasonableness review may place limits on judicial reliance on jury-rejected facts. For these reasons, the Court should grant Petitioner's petition for a writ of certiorari.

ARGUMENT

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

Failing to recognize the constitutional problems resulting from Guidelines sentencing enhancements based on alleged offense "facts" which were expressly rejected by the jury verdict, the district judge embraced the jury-rejected allegations that Allums was involved in greater criminality, effectively quintupling Allums' Guidelines range. The people's role in determining the truth of the prosecutors' accusations was ignored; Allums' jury acquittal on major charges was rendered irrelevant to the lengthy prison sentences he received.

When acquittals carry no real sentencing consequences, prosecutors have nothing to lose (and much to gain) from bringing multiple charges even

when they might expect the jury to ultimately reject many such charges. Prosecutors can overcharge defendants safe in the belief that they can renew their allegations for judicial reconsideration as long as the jury finds that the defendant did something wrong. 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's work enables overzealous prosecutors to run roughshod over the traditional democratic checks of the adversarial criminal process the Framers built into the U.S. Constitution.

This case concerns the uniquely serious and dangerous erosion of Fifth and Sixth Amendment substance if and whenever Guidelines ranges are enhanced by facts clearly rejected by the jury. It may remain possible "to give intelligible content to the right of a jury trial," *Blakely*, 542 U.S. at 305-06, when Guidelines ranges are calculated based on facts never contested by a jury to inform judicial sentencing discretion. But when a federal judge significantly enhances a prison sentence based expressly on allegations indisputably rejected by a jury verdict of not guilty, the jury trial right is nullified.

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

This Court has repeatedly emphasized that the jury-trial right is "clearly intended to protect the accused from oppression by the Government." *Singer*

v. United States, 380 U.S. 24, 31 (1965); *see also Williams v. Florida*, 399 U.S. 78, 100 (1970); *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (the jury-trial right "safeguard[s] a person accused of crime against the arbitrary exercise of power by prosecutor or judge"); *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *Jones v. United States*, 526 U.S. 227, 244–48 (1999); *Apprendi*, 530 U.S. at 477 (the jury "guard[s] against a spirit of oppression and tyranny on the part of rulers," and acts "as the great bulwark of our civil and political liberties" (citation omitted)); *Blakely*, 542 U.S. at 305–06; *Booker*, 543 U.S. at 237–39; *Alleyne*, 570 U.S. at 114 (noting "the historic role of the jury as an intermediary between the State and criminal defendants"). This Court has long regarded the jury-trial right as an "inestimable safeguard" protecting the 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*, 140 S. Ct. 1390, 1397 (2020) (quoting *Duncan*, 391 U.S. at 148-50).

Yet these oft-repeated proclamations about the importance of "the jury's historic role as a bulwark between the State and the accused," *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012), ring disturbingly hollow for Allums and other defendants if and when, after being vindicated by jury verdicts of not guilty, the prosecutors will still seek, and judges will still calculate, enhanced Guidelines ranges based expressly on the very same criminal allegations the jury expressly rejected. Acquittals, in these cases, are only formal matters; acquittals in name only with no meaningful consequence or limit on the state's effort

to punish based on the very allegation the jury unanimously rejected. Allums and other defendants subject to sentences enhanced by acquitted conduct are left to wonder just what kind of "bulwark" or "safeguard" the Fifth and Sixth Amendments truly provide if and when prosecutors and judges can effectively disregard jury findings at sentencing. Indeed, Allums and other like defendants must find jarring that this Court in *Colorado v. Nelson* ruled that after a state acquittal "Colorado may not presume a person . . . nonetheless guilty *enough* for monetary exactions," 137 S. Ct. 1249, 1256 (2017) (emphasis in original), and yet federal judges, after jury acquittals, may still find defendants "guilty *enough*" for a massive increase in liberty deprivation in the form of prison time. *Cf. id.* at 1256 n.9 (explaining that the "presumption of innocence unquestionably" constitutes a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental").

Recognizing the fundamental tension between sentence enhancements based on acquitted conduct and giving real meaning to jury trial rights, Justices of this Court and lower court judges have repeatedly described the practice of increasing sentences based on jury-rejected facts as, among other things, "repugnant," "Kafka-esque," "uniquely malevolent," and "pernicious." *See United States v. Watts*, 519 U.S. 148, 169-70 (1997) (Stevens, J., dissenting); *United States v. Ibanga*, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006) (Kelley, J.); *United States v. Canania*, 532 F.3d 764, 776-77 (8th Cir. 2008) (Bright, J., concurring); *United States v. Papakee*, 573 F.3d 569, 578 (8th Cir. 2009) (Bright, J., concurring); *see also United States v. Mercado*, 474 F.3d 654, 663 (9th Cir. 2007)

(Fletcher, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring); *United States v. Safavian*, 461 F. Supp. 2d 76, 83 (D.D.C. 2006) (Friedman, J.); *United States v. Coleman*, 370 F. Supp. 2d 661, 671 (S.D. Ohio 2005) (Marbley, J.); *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005) (Gertner, J.).

Notably, a newer member of this Court repeatedly recognized problems with acquitted conduct enhancements while serving as a Circuit Judge. In 2008, then-Judge Kavanaugh rightly described reliance on acquitted conduct as "unfair," *United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008) (Kavanaugh, J.), and then later called it "a dubious infringement of the rights to due process and to a jury trial." *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J. concurring). Tellingly, then-Judge Kavanaugh suggested the Supreme Court might see fit to "fix" this problem because there were "good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness." *United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part).

The late Justice Scalia, of course, dissented from a denial of certiorari in a case raising this issue in *Jones v. United States*, 574 U.S. 948, 948-49 (2014), and he was joined by Justices Thomas and Ginsburg. Justice Scalia stressed that he found a judge's fact-finding which significantly increased a drug defendant's sentence to be especially concerning when based on acquitted conduct. In his view, the *Jones* case was "a particularly appealing case" for review "because not only did no jury convict these defendants

of the offense the sentencing judge thought them guilty of, but a jury *acquitted* them of that offense." *Id.* (emphasis in original).

Even in the courts of appeals that have read this Court's precedents to allow use of acquitted conduct to enhance sentences, judges continue to criticize the practice as unconstitutional and unjust. *See e.g.*, *United States v. Martinez*, 769 Fed. App'x. 12 (2d Cir. 2019) (Pooler, J., concurring) (stating that the district court's practice of using acquitted conduct to enhance a defendant's sentence is "deeply unfair" and runs afoul of the Sixth Amendment); *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) ("[T]he consideration of 'acquitted conduct' to enhance a defendant's sentence is unconstitutional."); *Faust*, 456 F.3d at 1349 (Barkett, J., specially concurring) ("I strongly believe . . . that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment."); *Mercado*, 474 F.3d at 658 (Fletcher, J., dissenting) ("Reliance on acquitted conduct in sentencing diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment. Both *Booker* and the clear import of the Sixth Amendment prohibit such a result."). As aptly noted by Judge Millett of the D.C. Circuit in describing the evisceration of the jury bulwark, "when the central justification the government offers for such an extraordinary increase in the length of imprisonment is the very conduct for which the jury acquitted the defendant, that liberty-protecting bulwark becomes little more than a speed bump at sentencing." *Bell*, 808 F.3d at 928 (Millett, J., concurring); *see also id.* at 927 (Kavanaugh, J.,

concurring) ("I share Judge Millett's overarching concern about the use of acquitted conduct at sentencing").

Likewise, more than a few district courts have concluded that crafting a sentence based upon conduct for which the defendant was acquitted is unconstitutional. *See, e.g., Coleman*, 370 F. Supp. 2d at 671 (Marbley, J.) ("[T]he jury's central role in the criminal justice system is better served by respecting the jury's findings with regard to authorized *and* unauthorized conduct." (emphasis in original)); *Pimental*, 367 F.Supp. 2d at 152 (Gertner, J.) ("To consider acquitted conduct trivializes 'legal guilt' or 'legal innocence'—which is what a jury decides—in a way that is inconsistent with the tenor of the recent case law."); *Ibanga*, 454 F. Supp. 2d at 539 (Kelley, J.) ("Punishing defendant Ibanga for his acquitted conduct would have contravened the statutory goal of furthering respect for the law and would have resulted in unjust punishment for the offense for which he was convicted."); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1028 (D. Neb. 2005) (Bataillon, J.) ("[T]he court finds that it can never be 'reasonable' to base any significant increase in a defendant's sentence on facts that have not been proved beyond a reasonable doubt."); *United States v. Carvajal*, 2005 U.S. Dist. LEXIS 3076, at *10-11 (S.D.N.Y. Feb. 17, 2005) (Hellerstein, J.) ("I decline[] to accept the Government's argument that, nonwithstanding the jury's verdict that Carvajal was not guilty of actually distributing crack, I should nevertheless consider that the acts necessary for completing the substantive crime were proved by a preponderance of the evidence.").

Notably, a number of state supreme courts have recognized, both recently and even before this Court's modern *Apprendi* jurisprudence, the serious constitutional problems with enhancing a sentence based on acquitted conduct. *See, e.g.*, *People v. Beck*, 939 N.W.2d 213, 226 (Mich. 2019); *State v. Cote*, 530 A.2d 775 (N.H. 1987) ("We think it disingenuous at best to uphold the presumption of innocence until proven guilty. . . while at the same time punishing a defendant based upon charges in which that presumption has not been overcome."); *State v. Marley*, 364 S.E.2d 133 (N.C. 1988) (concluding that "due process and fundamental fairness precluded the trial court from aggravating defendant's" sentence with acquitted conduct). These rulings, which are often grounded in both the Fifth and Fourteenth Amendments' guarantee of due process and the Sixth Amendment's jury trial right, recognize and confront the fundamental problems with allowing prosecutors and judges to nullify jury findings at sentencing and render jury trials "a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 306-07.

As these opinions show, for the judicial system to demonstrate genuine respect for the "jury's historic role as a bulwark between the State and the accused," *Southern Union Co.*, 567 U.S. at 350, the Constitution and reasonableness review must place some limits on judicial reliance on jury-rejected facts in federal sentencings.

II. This Case Provides an Effective Setting to Utilize Reasonableness Review to Guard Against Constitutionally Problematic Sentencing Practices.

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

This Court has since clarified the functioning of the *Booker* remedy in a series of follow-up rulings that have detailed and reiterated the Guidelines' central and foundational role in all federal sentencing proceedings: (1) a district court must begin all sentencing proceedings by calculating the applicable Guidelines range and then use this range as "the starting point and the initial benchmark" for its sentencing decision-making, *Gall v. United States*, 552 U.S. 38, 49 (2007); (2) any major departure from the Guidelines needs to "be supported by a more significant justification than a minor one," *id.* at 50; (3) any "failure to calculate the correct Guidelines

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

Allums' case not only illustrates the real consequences Guidelines calculations still have on a defendant's sentence, but also how judicial fact-finding regarding jury-rejected facts can still drive sentencing outcomes. Without fact-finding based on the jury-rejected acquitted conduct, Allums' advisory Guidelines range would have been 57-71 months. Because roughly 98% of all sentences in the federal system are imposed within or below the calculated range, *see* U.S. Sentencing Commission, 2020 Sourcebook of Federal Sentencing Statistics, Table 29 (2021), it is highly unlikely the sentencing judge in this case would have even contemplated sentencing Allums above the applicable 10-year statutory minimum absent consideration of another Guidelines range inflated by jury-rejected judicial findings.

Moreover, due to the fundamental role that the Guidelines range still plays in reasonableness review in every circuit, in order to sentence Allums to 240 months absent the calculation of a higher Guidelines range based on acquitted conduct, the district judge would have had to identify considerable aggravating individual circumstances to warrant such a high sentence. But, having found alleged facts that the jury rejected, the judge here calculated a Guidelines range of 30 years to life. Now, the 240-month, below-Guidelines sentence not only could appear

presumptively reasonable on appeal, *see United States v. Jones*, 858 F. App'x 420, 423 (2d Cir. 2021) (stressing imposition of "substantially below-Guidelines sentence of 240 months' imprisonment" while conducting reasonableness review in this case), but it also surely enabled the sentencing judge to feel as though he was sentencing leniently even though his sentence was roughly four times as long as the Guidelines range absent acquitted-conduct enhancements. In other words, judicial fact-finding focused here on acquitted conduct that allowed the district judge, functionally and formally, to impose a much higher sentence and one that likely would not have even been considered at sentencing and likely would have been deemed unreasonable on appeal. Indeed, this fact-finding of jury-rejected facts enabled the circuit court to summarily conclude that this sentence was "reasonable" without even any serious discussion of the reality that a decade of liberty deprivation hinged on a Guidelines calculation based on prosecutorial allegations conclusively repudiated by the jury. *See id.*

In other words, the judicial fact-finding was, as the judge applied the law in this case, "essential to the punishment imposed." *Cf. Alleyne*, 570 U.S. at 109-10 (Thomas, J., plurality op.) (describing "a well-established practice of . . . submitting to the jury, every fact that was a basis for imposing or increasing punishment"); *id.* at 125 (Roberts, C.J., dissenting) (explaining a standard for what facts must be found by a jury). Under a proper application of *Apprendi* and its progeny, this process of enhanced sentencing based on jury-rejected facts must be considered constitutionally unsound. Moreover, it seems especially problematic that "reasonableness review"

in this setting gives no attention to the very constitutional concerns that led to the *Booker* ruling and its revised approach to federal sentencing.

One means to possibly "give intelligible content to the right of a jury trial" in this setting, *Blakely*, 542 U.S. at 305-06, would be to reverse the sentence below as unreasonable because of its undue reliance on acquitted conduct to *greatly* enhance the applicable Guidelines range and thereby serve as the only given justification for a much longer sentence. There may be cases in which judicial reliance on acquitted conduct is minor—perhaps as the basis for only a small Guidelines enhancement or a modest sentence increase—and in those cases it could be sound to conclude that a sentence is "reasonable" because it does not pose a real "threat to the jury's domain" or an "erosion of the jury's traditional role." *Ice v. Oregon*, 555 U.S. 160, 169-70 (2009). But, as in the case at bar—when judicial reliance on jury-rejected facts doubles or triples or even more massively increases the Guidelines range and serves as the clear and only stated basis for a highly elevated sentence—the sentence should be found "unreasonable" because it is so much higher than what jury-found facts support. At least through reasonableness review, there must be legal check and limits on acquitted-conduct sentence enhancements to ensure that the "right of jury trial [will] be preserved, in a meaningful way guaranteeing that the jury [will] still stand between the individual and the power of the government." *Booker*, 543 U.S. at 237.

Put differently, this Court could and should consider utilizing this case as a means to define the standard of "reasonableness" to guard against undue

and excessive reliance on acquitted conduct in the calculation of Guidelines ranges and in the imposition of federal sentences. Doing so would honor the "core concerns animating the jury and burden-of-proof requirements," such as the importance of "guard[ing] against a spirit of oppression and tyranny on the party of rulers," and establishing a "great bulwark of our civil and political liberties." *Apprendi*, 530 U.S. at 477, 490 n.16. As one judge has put it, the current system "makes absolutely no sense," because "the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury," but at the same time "the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing." *See Mercado*, 474 F.3d at 663 (Fletcher, J., dissenting) (quoting *Pimental*, 367 F. Supp. 2d 143). A more practical solution would be to curtail the use of acquitted conduct at sentencing by removing any presumption of reasonableness—and even adopting a presumption of unreasonableness—for sentences in which a Guidelines range or final sentence was significantly enhanced based on jury-rejected facts. *See, e.g.*, *Huerta-Rodriguez*, 355 F. Supp. 2d at 1028 ("[T]he court finds that it can never be 'reasonable' to base any significant increase in a defendant's sentence on facts that have not been proved beyond a reasonable doubt.").

III. By Empowering Prosecutors and Impacting All Indictments and Pleas, Reliance on Acquitted Conduct is of Foundational and Fundamental Importance to the Operation of the Entire Federal Justice System.

Allowing significant acquitted-conduct-Guidelines enhancements undermines our criminal justice system by taking liberty-protecting authority away from the people and giving it back to the state and its agents. From Allums' and similar defendants' perspectives, their jury trials served not as a mechanism to "prevent oppression by the Government," *Duncan*, 391 U.S. at 155, but rather as prosecutors' means to enjoy the first of two distinct chances to convince either of two courtroom decision-makers that defendants should be severely punished based on questionable accusations. Not only does this approach degrade a fundamental constitutional right, it also undermines confidence in the entire criminal justice system. It provides prosecutors with significant benefits (and no obvious costs) from always alleging and pursuing any and every charge at their disposal among "the sprawling scope of most criminal codes." *Blakely*, 542 U.S. at 311. This circumvention of the jury's work enables overzealous prosecutors to run roughshod over the traditional democratic checks of the adversarial criminal process the Framers built into the U.S. Constitution. Prosecutors can brazenly charge any and all offenses for which there is a sliver of evidence, then pursue those charges throughout trial without fear of any consequences when seeking later to make out their case to a sentencing judge. They can overcharge defendants safe in the belief they can renew their

allegations for judicial reconsideration as long as the jury finds that the defendant did *something* wrong. This enhances prosecutorial power at each major stage of a criminal prosecution.

First, at the outset of criminal cases, prosecutors can allege and pursue every possible statutory charge in order to increase plea bargaining leverage because they know there will be no real sentencing consequences even upon a jury acquittal on most charges. *See* Clark Neily*, A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 Geo. Mason L. Rev. 719, 730 (2020) ("American prosecutors possess a wide array of levers that they can—and routinely do—bring to bear on defendants to persuade them to waive their right to trial and simply plead guilty instead[,] . . . [including] threatening to use uncharged or even acquitted conduct to enhance a defendant's sentence"). Indeed, the prospect of future acquitted-conduct Guidelines enhancements requires competent federal defense attorneys in multi-count cases to inform their clients that securing a jury acquittal on many charges at trial may produce little or no Guidelines range benefit but likely still will result in the defendant losing any sentencing credit for accepting responsibility. It is little wonder plea bargaining now "is the criminal justice system," *Missouri v. Frye*, 566 U.S. 134, 144 (2012), when sentencing rules require defense attorneys to advise clients that pleading guilty even to the most questionable of government charges may result in a better sentencing outcome than if a jury were to reject those charges at a trial. *See generally An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty,* Human Rights Watch 78-

90 (December 5, 2013) (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"), https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead#.

Second, as criminal cases proceed to trial, prosecutors can continue to pursue any and every possible charge, knowing still that there will be no real sentencing consequences after any jury acquittal. Doing so, even if the evidence supporting many charges may be weak or 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 306-07. The more charges that prosecutors pursue against a defendant at trial, the more likely it becomes that the defendant will be convicted on at least one. That is, "[t]he prosecution's ability to bring multiple charges increases the risk that the defendant will be convicted on one or more of those charges. The very fact that a defendant has been arrested, charged, and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of those crimes." *Missouri v. Hunter*, 459 U.S. 359, 372 (1983) (Marshall, J. dissenting)*; see also* Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. Rev. 621, 627–28 (2004) ("The 'compromise' and 'decoy' effects predict that when the jury is presented with more than one guilty option, the percentage of defendants found not guilty of both offenses will be

lower than the percentage of defendants found not guilty when there is just one charge."). In this arrangement thanks to acquitted conduct sentencing, the prosecution 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, and after having enjoyed the benefit and luxury of the jury trial serving as a dress rehearsal, prosecutors can and often will become even more aggressive in the presentation of offense allegations and related accusations. Prosecutors may persistently tell judges (and the authors of a presentence report) that they are duty-bound to wholly disregard any and all jury acquittals, rather than reflect upon and respect the democratic judgment represented by a jury verdict. Judicial use of acquitted conduct thus permits and prompts prosecutors to directly disregard and immediately undermine the jurors' efforts and to minimize the meaning and value of the citizenry's deliberative process and perspective.

This trial practice diminishes the fairness of a criminal justice system in many respects. Reliance on acquitted conduct 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 "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).

Additionally, prosecutors are encouraged to over-charge defendants, knowing that if they obtain a conviction on at least one count, they can "ask[] the judge to multiply a defendant's sentence many times over based on conduct for which the defendant was just acquitted." *Bell*, 808 F.3d at 932 (Millett. J, concurring).

As but one recent example, we can see these dynamics on display in the ongoing high-profile federal case that recently resulted in a mixed trial verdict (as many do), namely the case of Elizabeth Holmes, the founder of blood-testing startup Theranos. Following a lengthy trial, a jury convicted Holmes of only four out of eleven charges. *See United States v. Holmes*, Case No. 5:18-cr-258, Doc. 1235 (N.D.Cal., Jan. 3, 2022) (jury verdict). She was found guilty of four counts of conspiracy and wire fraud against investors, but acquitted of four counts of conspiracy and wire fraud against patients (the jury was hung on three other wire fraud counts). *Id*. As one commentator explains, "We've gotten so used to the prosecutorial practice of 'overcharging'—throwing everything at the defendant, in the hope that something will stick—that the narrative was 'Holmes guilty,' rather than, 'Prosecutors fail to win conviction on more than half of the counts.'" Ira Stoll, *While*

Decrying Misconduct, Let's Not Forget the Prosecutors, The New York Sun (Feb. 2, 2022) https://www.nysun.com/opinion/while-decrying-misconduct-lets-not-forget/92017/.

Moreover, though acquitted on a number of charges, Holmes' acquittals are now unlikely to bear any real significance at her sentencing. The four counts of which she was convicted make her functional statutory sentencing range 0 to 80 years, and the prosecutors can and likely will ask the presiding judge to consider in Guidelines calculations and in the final sentencing determination all of the allegations for those four counts that jurors unanimously rejected. Thus, the likely calculated range (and thus the purported "reasonable" Guidelines range) for Ms. Holmes, under current jurisprudence, could be much higher than one based on those facts found by the jury. Once the jury decided to convict on a few charges, its deliberations and verdicts on other charges became essentially inconsequential because a judge is expected to calculate a range based on his own factual findings by a preponderance without giving any regard whatsoever to what the jury actually decided. How this kind of sentencing reality squares with a Constitution that twice extols the jury trial right is what Allums' petition squarely raises.

Finally, the allowance of acquitted-conduct-based sentences not only marginalizes the work of one of the criminal justice system's most critical participants—jurors—but it also risks leading jurors to no longer take their work seriously. Jurors, who are called on to put their lives on hold and serve on significant criminal cases are unlikely to be dedicated

to their task when observing that their supposedly significant constitutional role in our justice system is regularly undermined at sentencing and their findings ignored without explanation.[2]

As this and similar cases demonstrate, the practice of judges significantly enhancing sentences based on jury-rejected facts "has gone on long enough." *Jones*, 574 U.S. at 948–49. This Court should take up Petitioner's case in order to again ensure that the "right of jury trial [will] be preserved, in a meaningful way guaranteeing that the jury [will]

---

[2] Take, for instance, the experience of a juror in the trial of Antwaun Ball, who was sentenced to 225 months in prison based on an acquitted-conduct Guidelines range after the jury acquitted him of all but one charge, the Guidelines range for which would have been 27-71 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 also* Jim McElhatton, *A $600 drug deal, 40 years in prison*, The Washington Times (Jun. 29, 2008), https://www.washingtontimes.com/news/2008/jun/29/a-600-drug-deal-40-years-in-prison/; Jim McElhatton, *"Juror No. 6" stirs debate on sentencing*, The Washington Times (May 3, 2009) https://www.washingtontimes.com/news/2009/may/3/juror-no-6-questions-rules-of-sentencing/. He detailed the toll of jury service, and the disappointment when the result of that toll falls on deaf ears: "What does it say to our contribution as jurors when we see our verdicts, in my personal view, not given their proper weight." *Canania*, 532 F.3d at 778 n.4 (Bright, J., concurring) (quoting Letter from Juror No. 6, citation omitted).

still stand between the individual and the power of the government." *Booker*, 543 U.S. at 237.

CONCLUSION

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

Respectfully submitted,

CORRINE A. IRISH
ELLEN H. PHILLIPS
SQUIRE PATTON BOGGS
211 Avenue of the
Americas, 26th Floor
New York, NY 10036
212-872-9800
corrine.irish@squirepb.com
ellen.phillips@squirepb.com

KEITH BRADLEY
Counsel of Record
SQUIRE PATTON BOGGS
1801 California Street
Suite 4900
Denver, CO 80202
303-830-1776
keith.bradley@squirepb.com

February 14, 2022