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 United States Court of Appeals for the Eleventh Circuit

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AMICUS BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

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 crime or misconduct. It has a nationwide membership of many thousands of direct members, up to 40,000 with 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. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files many amicus briefs each year in this Court, and other federal and state courts, seeking to provide amicus assistance in cases presenting issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.[1]

NACDL's interest in this case centers on safeguarding the Sixth Amendment right to trial by jury and Due Process rights under the Fifth Amendment. NACDL has repeatedly filed amicus briefs before this Court on the use of acquitted conduct at sentencing. NACDL's members routinely practice in federal criminal courts across the country and have long argued that the use of acquitted conduct is antithetical to rights guaranteed by the Fifth and Sixth Amendments.

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[1] No person or entities other than amicus, their members, or their counsel authored this brief, in whole or in part, or made a monetary contribution to this brief's preparation or submission. Amicus gave the parties ten days' notice of its intent to file the instant amicus brief, and the parties consented to filing. S.Ct.R. 37.2.

NACDL agrees with Petitioner that the use of acquitted conduct at sentencing raises important constitutional concerns that warrants this Court's review.

SUMMARY OF THE ARGUMENT

When a jury acquits a defendant of specific conduct, the Constitution forbids a sentencing court from using that very conduct to increase the defendant's punishment. This Court should reverse and remand.

The constitutionality of sentencing court's use of acquitted conduct to increase the sentence for other convictions has plagued courts for decades. Much of this Court's acquitted-conduct jurisprudence concerns whether that practice violates the Fifth Amendment's Double Jeopardy Clause. Recently, this Court declined to consider a case that asked whether a sentencing court's use of acquitted conduct at sentencing to enhance a defendant's guideline range violated the Due Process Clause and right to jury trial under the Fifth and Sixth Amendments. In denying that petition, four members of the Court agreed that the timing was not quite right given the U.S. Sentencing Commission's proposed amendment limiting relevant conduct.

The purpose of the amendment was to remedy the fundamental unfairness inherent to acquitted-conduct sentencing. Today, U.S.S.G. § 1B1.3 effectively precludes the use of acquitted conduct to enhance a defendant's guideline range. Despite that amendment, sentencing courts still consider acquitted conduct as an aggravating factor under 18 U.S.C. § 3553(a) and may vary above the applicable guidelines based on that acquitted conduct. In effect, absent this Court's intervention, a sentencing judge can simply disregard the guidelines and impose a heightened sentence based on acquitted conduct.

The use of acquitted conduct at sentencing is a pervasive issue that continues to raise the same constitutional and public policy concerns this Court has flagged. Acquitted-conduct sentencing is in direct contravention of Due Process and the Sixth Amendment right to a jury trial. Moreover, this practice erodes the presumption of innocence inherent in all criminal cases by allowing judge-found facts to overrule a jury's finding of acquittal. The Fifth and Sixth Amendments require that all facts necessary to punish a defendant be proven beyond a reasonable doubt. Under acquitted-conduct sentencing, however, the court only needs to find "facts," by a simple preponderance, to increase the sentence on crimes where the government met its burden. What "right" does one have to a jury trial and due process if, despite prevailing at trial on some, but not all, charged conduct, a sentencing court can use the conduct the government failed to prove to increase the sentence on other counts?

Moreover, acquitted-conduct sentencing contributes significantly to the well-known "trial penalty" and the government's ability to coerce defendants into guilty pleas. *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct. Permitting acquitted-conduct sentencing not only runs afoul of the Fifth and Sixth Amendments, it also systematically pressures defendants not to invoke those protections in the first place. Acquitted-conduct sentencing contributes to the erosion of the criminal jury trial that the Framers envisioned and should be stopped altogether.

This case is an ideal vehicle for the Court to end this unjust practice once and for all. Mr. Pharms was

charged with, *inter alia*, violating 18 U.S.C. § 924(c), an offense typically punishable by five years to life imprisonment. 18 U.S.C. § 924(c)(1)(A)(i). Later, the government obtained a superseding indictment that alleged Mr. Pharms discharged the firearm. That amendment raised the statutory punishment range to a ten-year minimum sentence. 18 U.S.C. § 924(c)(1)(A)(iii). In a special interrogatory form, the jury found Mr. Pharms guilty of possession of a firearm in furtherance of a crime of violence, but specifically found Mr. Pharms did not discharge the firearm.

The presentence investigation report (PSR) recognized that the jury specifically found that Mr. Pharms did not discharge the firearm. Mr. Pharms' recommended Guidelines range was determined to be 63 to 78 months imprisonment, plus an additional 60 months for the § 924(c) conviction to run consecutively to all other counts.

At sentencing, the government argued for an upward variance under 18 U.S.C. § 3553(a). It argued that "[a] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge so long as the conduct has been proved by a preponderance of the evidence." (Pet. App. 37a). The government argued that the district court should functionally sentence Mr. Pharms for discharge of the firearm despite the jury's acquittal on that essential fact.

The parties and sentencing court recognized that under Amendment 826, the court could not raise Mr. Pharms' Guidelines range based on acquitted conduct. Nonetheless, the sentencing court utilized § 3553(a) to apply an upward variance and sentenced Mr. Pharms to 192 months imprisonment – an additional 114 months (9 and one-half years) above the top-end of the

guideline range. The variance imposed was based solely on the acquitted conduct of discharging a firearm.

In *United States v. McClinton*, 143 S. Ct. 2400 (2023), four members of this Court recognized the host of problems that using acquitted conduct at sentencing raises. However, those four members declared it was more prudent to wait until after the Sentencing Commission's proposed amendment took effect. Now, with Amendment 826 in place, the use of acquitted conduct at sentencing under § 3553(a) grossly circumvents the purpose of the Sentencing Commission's amendment.

This case is the perfect procedural vehicle for the Court to address the use of acquitted-conduct sentencing and end the practice for good. The petition for writ of certiorari should be granted.

ARGUMENT

I. The Use of Acquitted Conduct at Sentencing Violates the Fifth and Sixth Amendment.

A. Under the Sixth Amendment, All Facts Legally Necessary to Justify a Defendant's Sentence Must Be Found by a Jury.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]" U.S. Const. amend. VI. "It is hard to overemphasize the importance of trial by jury for our revolutionary ancestors who wrote the Declaration of Independence, framed the Constitution, ratified it in state conventions, and explained it in the Federalist Papers." *United States v. White*, 551 F.3d 381, 392

(6th Cir. 2008) (*en banc*) (Merritt, J., dissenting). The Sixth Amendment right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. 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." *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (Scalia, J.); *see also Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part, dissenting in part).

"The Sixth Amendment, together with the Fifth Amendment's Due Process Clause, requires that each element of a crime be either admitted by the defendant, or proved to the jury beyond a reasonable doubt." *Jones v. United States*, 574 U.S. 948, 948 (2014) (Scalia, J., joined by Thomas, Ginsburg, JJ., dissenting from denial of certiorari). "Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime," which cannot be found by a judge at sentencing. *Id*.

It is beyond dispute that "all facts essential to imposition of the level of punishment that the defendant receives–whether the statute calls them elements of the offense, sentencing factors, or Mary Jane–must be found by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring). And, "any increase in a defendant's authorized punishment contingent on the finding of a fact requires a jury and proof beyond a reasonable doubt no matter what the government chooses to call the exercise." *United States v. Haymond*, 139 S. Ct. 2369, 2379 (2019) (cleaned up). "The fact that a jury has not authorized a particular punishment is never more clear than when the jury is asked for, yet specifically withholds, that authorization."

United States v. Mercado, 474 F.3d 654, 664 (9th Cir. 2007) (Fletcher, J., dissenting). This is precisely what happened in Pharms' case.

B. The Reliance on Acquitted Conduct to Lengthen Mr. Pharms' Sentence Violates the Sixth Amendment.

The district court relied on conduct that a jury had specifically acquitted Mr. Pharms of having engaged in to vary above the advisory Guidelines range and punish Mr. Pharms just as if he had been convicted of the acquitted conduct. A jury convicted Mr. Pharms of violating 18 U.S.C. § 924(c), which requires a specific statutory minimum sentence that depends on whether the firearm was possessed, brandished, or discharged. 18 U.S.C. § 924(c)(1)(A)(i)–(iii). In a special interrogatory, the jury acquitted Mr. Pharms of discharging a firearm, resulting in a statutory penalty range of five years to life imprisonment for the § 924(c) conviction. Had the jury found that Mr. Pharms discharged the firearm, the mandatory minimum sentence would have been 10 years imprisonment on that count.

Mr. Pharms' Guidelines range was found to be 63 to 78 months, plus an additional 60 months on the § 924(c) conviction to run consecutively to all other counts. Under U.S.S.G. § 2K2.4(b), the Guidelines range for a § 924(c) conviction is the minimum term imposed by statute.[2] Accordingly, Mr. Pharms effective Guidelines range was 123 to 138 months imprisonment.

[2] Had a jury convicted Mr. Pharms of discharging the firearm, the advisory Guideline range for the § 924(c) count would have been 120 months. However, because Mr. Pharms was acquitted of discharging the firearm, the Guidelines were correctly calculated to be 60 months.

At sentencing, the government moved for an upward variance under 18 U.S.C. § 3553(a) based on its theory that Mr. Pharms discharged the firearm, notwithstanding the jury's verdict. Over Pharms' objection, the district court found, by a preponderance, that Mr. Pharms discharged the firearm. The court acknowledged that its finding was by a lower standard than that required by the jury. (Pet. App. 42a–43a). Mr. Pharms was sentenced to 192 months imprisonment–a variance from the Guidelines based on acquitted conduct.

As the late Justice Scalia (joined by Justice Ginsburg and Justice Thomas) explained, "any fact necessary to prevent a sentence from being substantively unreasonable–thereby exposing the defendant to the longer sentence–is an element that must be either admitted by the defendant or found by the jury. It may not be found by a judge." *Jones*, 574 U.S. at 949 (Scalia, J., dissenting from the denial of certiorari). This case presents the exact situation Justice Scalia warned of in *Rita v. United States*, in which judicial factfinding violates the Sixth Amendment as-applied to a particular defendant regardless of whether these judge-found facts related to acquitted conduct. 551 U.S. 338, 374–75 (2007) (Scalia, J., concurring in part). This is because "[t]he Constitution prohibits allowing a judge alone to make a finding that raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant." *United States v. Booker*, 543 U.S. 220, 313 (2005) (Thomas, J., dissenting); *see also United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (calling into question the constitutionality of a judge changing a defendant's sentence "within the statutorily authorized range based on facts the judge finds without the aid of a jury or the defendant's consent).

The jury found Mr. Pharms guilty of violating § 924(c), but it specifically found that Mr. Pharms did not discharge the firearm which would subject him to an enhanced sentence. Nonetheless, at sentencing the district court concluded that Mr. Pharms had discharged the firearm by a preponderance of the evidence and sentenced him as if the jury had not acquitted Mr. Pharms of the conduct. This is an error of constitutional magnitude.

"This has gone on long enough." *Jones*, 574 U.S. at 949 (Scalia, J., dissenting from denial of certiorari). For decades, federal judges have questioned the constitutionality of acquitted-conduct sentencing. *See, e.g., United States v. Lasley*, 832 F.3d 910, 921 (8th Cir. 2016) (Bridge, J., dissenting) (collecting cases); *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millet, J., concurring in the denial of rehearing *en banc*); *White*, 551 F.3d at 386–97 (Merritt, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1348–53 (11th Cir. 2006) (Barkett, J., specially concurring). "[M]any individual judges have expressed in concurrences and dissents the strongest concerns, bordering on outrage, about the compatibility of such a practice with the basic principles underlying our system of criminal justice." *United States v. Baylor*, 97 F.3d 542, 549 (D.C. Cir. 1996) (Wald, J., specially concurring).

Allowing "a judge to dramatically increase a defendant's sentence based on jury-acquitted conduct is at war with the fundamental purpose of the Sixth Amendments jury-trial guarantee." *United States v. Bell*, 808 F.3d 926, 929 (Millet, J., concurring in the denial of rehearing *en banc*). "There is something fundamentally wrong with such a result." *Baylor*, 97 F.3d at 549 (Wald, J., specially concurring).

II. Acquitted-conduct sentencing erodes the presumption of innocence.

The presumption of innocence is axiomatic to our constitutional order. Indeed, it is the bedrock of our criminal justice system from which a defendant's right to due process and jury trial derive. However, when sentencing courts are allowed to make fact-finding based on preponderance of evidence, that constitutional guarantee is hollow and only serves to undermine the jury's historic role. "Juries are democratic institutions called upon to represent the community as 'a bulwark between the State and the accused,' and their verdicts are the tools by which they do so." *McClinton v. United States*, 143 S. Ct. 2400, 2401 (Sotomayor, J., respecting the denial of certiorari) (quoting *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012)). "When one looks to the practicalities of the criminal justice system, it becomes apparent that the most pernicious effect . . . is its implicit and often hopeless demand that, in order to avoid punishment for charged conduct, criminal defendants must prove their innocence under two drastically different standards at once." *Faust*, 456 F.3d at 1353 (Barkett, J., specially concurring).

The "presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895). The Due Process clause requires that the government affirmatively "pro[ve] beyond a reasonable doubt . . . every fact necessary to constitute the crime charged." *In re Winship*, 397 U.S. 358, 364 (1970). "The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument

for reducing the risk of convictions resting on factual error." *Id*. at 363.

> "[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with the utmost certainty."

Id. at 363–64.

However, judge-found facts at sentencing only demand a preponderance of evidence standard. *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam) ("[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."). As Justice Sotomayor has noted:

> "The argument for acquitted-conduct sentencing is generally based on standards of proof. A sentencing judge makes findings by a preponderance of the evidence, whereas a jury applies the higher beyond-a-reasonable-doubt standard. Because an acquittal could reflect a jury's conclusion that the evidence of guilt fell just short of the beyond-a-reasonable-doubt standard, the argument goes, there is no conflict with a judge making

> a contrary finding of guilt under a lower evidentiary standard."

McClinton, at 2402 (Sotomayor, J., respecting the denial of certiorari). Yet, tension arises when judge-found facts contradict a jury's finding of acquittal. "The fact is that even though a jury's specific reasons for an acquittal will typically be unknown, the jury has formally and finally determined that the defendant will not be held criminally culpable for the conduct at issue." *Id*.

Permitting judicial factfinding under a preponderance of the evidence standard to replace the jury's verdict beyond a reasonable doubt defies common sense and gives the government "a second bite at the apple with evidence that did not convince the jury coupled with a *lower* standard of proof." *Id*. (emphasis in original). This practice guts the presumption of innocence standard and is not how our criminal justice system is intended to work.

Allowing sentencing courts to continue to use the preponderance of evidence standard to justify lengthening a defendant's sentence based on acquitted conduct is antithetical to the Constitution's guarantee of Due Process and the Sixth Amendment's right to jury trial. At its core, acquitted-conduct sentencing permits courts to overrule a unanimous jury acquittal to enhance a defendant's punishment. That practice was antithetical to anything the Founders would have envisioned.

III. The use of acquitted conduct under 18 U.S.C. § 3553(a) undermines the legitimacy of the criminal justice system.

The right to a trial by jury of your peers forms the bedrock of the American criminal justice system. Justice Sotomayor was concerned with the fairness and integrity of the criminal justice system, as well as the public's perception of the legitimacy of that system, in the context of acquitted-conduct sentencing. *McClinton*, at 2402–03 (Sotomayor, J., respecting the denial of certiorari). That sentiment has been echoed by federal judges throughout the country. *See e.g. United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, B., J., dissenting) ("Reliance on acquitted conduct in sentencing diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment."); *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."); *United States v. Iganga*, 454 F.Supp.2d 532, 536 (E.D.Va. 2006) (Kelley, J.) ("Sentencing a defendant to time in prison for a crime that the jury found he did not commit is a Kafka-esque result.") (footnote omitted), vacated by, 271 Fed.Appx. 298 (4th Cir. 2008); *United States v. Pimental*, 367 F.Supp.2d 143, 153 (D. Mass. 2005) (Gertner, J.) ("To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense-as a matter of law or logic.")

Additionally, the use of acquitted conduct at sentencing increases the trial penalty. *See e.g. Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) (recognizing the risk of "prosecutorial overcharging

that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense"). "The real-world consequence of permitting judge-found facts to increase a potential punishment is that prosecutors are vested with a degree of power that would have shocked the Framers." *United States v. Scheiblich*, 346 F.Supp.3d 1076, 1085 (S.D. Ohio 2018), *rev'd*, 788 Fed. Appx. 305 (6th Cir. 2019). Ultimately, "[t]he right to trial by jury means little if a sentencing judge can effectively veto the jury's acquittal on one charge and sentence the defendant as though he had been convicted of that charge." *United States v. Jones*, 863 F. Supp. 575, 578 (N.D. Ohio 1994).

"In short, allowing jury-acquitted conduct to increase a defendant's sentence places defendants and their attorneys between a proverbial rock and a hard place: a hard-fought partial victory . . . can be rendered practically meaningless when that acquitted conduct nonetheless produces a drastically lengthened sentence." *Bell*, 808 F.3d at 932 (Millett, J., concurring in denial of rehearing *en banc*). "[A] defendant considering whether to exercise his right to trial knows that, even if he decides to put the prosecution to its proof and is acquitted of certain charged conduct, he may still face an enhancement for that conduct at sentencing." National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, 34 (2018), https://www.nacdl.org/Document/TrialPenalty SixthAmendmentRighttoTrialNearExtinct.

"Allowing the government to lock people up for a discrete and identifiable term of imprisonment for criminal charges rejected by a jury is a dagger pointed at the heart of the jury system and limited government." *United States v. Brown*, 892 F.3d 385,

408–09 (D.C. Cir. 2018) (Millett, J., concurring). That erosion is not just felt by jurists and lawyers, but the public as well. As Justice Sotomayor observed:

> "One juror, after learning about acquitted-conduct sentencing, put it this way: 'We, the jury, all took our charge seriously. We virtually gave up our private lives to devote our time to the cause of justice . . . . What does it say to our contribution as jurors when we see our verdicts, in my personal view, not given their proper weight. It appears to me that these defendants are being sentenced not on charges for which they have been found guilty but on the charges for which for which the [government] would have liked them to have been found guilty.'"

McClinton, at 2403 (Sotomayor, J., respecting denial of certiorari) (quoting *United States v. Canania*, 532 F.3d 764, 778, n.4 (8th Cir. 2008) (Bright, J., concurring)).

Acquitted-conduct sentencing is perhaps one of the most controversial and perverse practices in our criminal justice system. Past and present Justices of this Court, federal judges across the nation, practicing attorneys, and the public have all expressed how this practice undermines the legitimacy of the criminal justice system on a Constitutional level. It also erodes the public's perception of the legitimacy of the federal criminal justice system.

Since this Court's decision in *McClinton*, the United States Sentencing Commission has amended the Sentencing Guidelines to preclude the use of acquitted conduct in determining the Guidelines. While certainly a step in the right direction, those efforts are

meaningless if courts can simply circumvent the amendment by way of the § 3553(a) factors.

At its core, Mr. Pharms case is a simple one that provides an apt procedural vehicle for this Court to end the acquitted-sentencing practice once and for all. A jury unanimously acquitted Mr. Pharms of discharging the firearm only for the sentencing court to rely on that acquitted conduct to increase the sentence imposed for possessing the firearm. What good is an acquittal if it means nothing under the § 3553(a) factors? What purpose does the jury serve if its factfinding can be unilaterally overruled by one decisionmaker?

The Constitution does not stand for this. This Court should put an end to the unconstitutional practice of acquitted conduct sentencing.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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