18-3430

United States Court of Appeals
for the
Second Circuit

In Re: UNITED STATES OF AMERICA,

Petitioner.

UNITED STATES OF AMERICA,

Petitioner,

– v. –

YEHUDI MANZANO,

Respondent.

PEITION FOR WRIT OF MANDAMUS OR WRIT OF PROHIBITION
TO THE UNITED STATES DISTRICT COURT
FOR CONNECTICUT (NEW HAVEN)

BRIEF FOR *AMICUS CURIAE* STEFAN R. UNDERHILL IN OPPOSITION TO PETITION

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Amicus Curiae Judge Stefan R. Underhill respectfully submits this brief in opposition to the Petition for Writ of Mandamus or Writ of Prohibition (the "Petition" or "Pet.") filed by the United States of America (the "Government").

PRELIMINARY STATEMENT

The Petition raises two discrete questions:

First, does the Government have a clear and indisputable right to an order from this Court directing that the District Court shall not, under any circumstances, allow testimony or other evidence of the applicable mandatory minimum sentences?

Second, assuming evidence of the mandatory minimums is indeed received at trial, does the Government have a clear and indisputable right to an order from this Court prohibiting the District Court from allowing defense counsel to argue for jury nullification based on the mandatory minimums under any circumstances?

The answer to the first question is clear. There is not only no case that holds that juries can never learn about applicable mandatory minimums, this Court has explicitly *rejected* that proposition. Moreover, the scope and extent of permissible cross-examination are always committed to the broad discretion of the district court. The Government's apparent belief that mandamus review is available whenever it fails to obtain categorical, irrevocable evidentiary decisions in its favor

in the pretrial stage reflects a misapprehension of the nature and purpose of the extraordinary relief it seeks.

The second question implicates an issue of first impression; the Government concedes that this Court has *never* held that a district court cannot allow a properly instructed jury to hear defense counsel argue for jury nullification. Pet. at 27 ("[T]his Court has not expressly held that a defendant may not argue for nullification."). And the issue is necessarily fact-specific, as it touches on a district court's supervision of defense counsel's closing argument, yet the Government seeks a blanket prohibition pre-trial. Thus, the Government's request for extraordinary relief should be rejected both because the order at issue is conditional (on the admission of evidence of the mandatory minimums), and because even if the condition arises, it would not be "clearly and indisputably" an abuse of discretion for the District Court to permit argument on jury nullification.

Finally, apart from the fact that the Government cannot satisfy the extremely heavy burden it has assumed by raising these issues in a petition for a writ of mandamus, there is an additional reason to deny the petition. Specifically, even if this Court were to apply the much less stringent standard of review applicable on a direct appeal, it would not be an abuse of discretion on the facts of this extraordinary case to inform the jury of the applicable mandatory minimum penalties and to permit defense counsel to argue that the jury should not convict

the defendant because of them. As we discuss below, the core rationale of the very cases on which the Government relies is inapplicable here. Those cases draw comfort from the historic division of labor between judges and juries, in which judges in the sentencing phase act as a check on the imprudent exercise of prosecutorial power. But in the event of convictions in this case, the District Court will have literally no role in determining the sentence, and can provide no such check on the executive. A properly informed jury can help fill that void in extreme cases like this one, where a harsh mandatory sentencing provision has been invoked to punish conduct that is different in kind from the conduct the statute was enacted to combat. Indeed, the approach that the District Court has declined to foreclose—in which a jury properly instructed on the law is informed of the consequences of its verdicts and exhorted by counsel to be lenient—dovetails precisely with the historic power of juries, repeatedly acknowledged and reaffirmed by the Supreme Court, to act as a check against arbitrary and oppressive exercises of prosecutorial power.

PROCEDURAL BACKGROUND

The defendant in this case, Yehudi Manzano ("Defendant"), was originally charged in state court with statutory rape, based on an alleged consensual sexual relationship with a fifteen-year old girl. The complainant informed state authorities that, on one occasion, she and the Defendant videotaped the two of them having

sex. Pet. at 4. The video was recorded on the Defendant's phone but later deleted; authorities discovered the video in the Defendant's Google account, where it had been backed-up. *Id.* at 5. Based on the video, the Defendant subsequently was indicted in federal court on two charges: (1) production of child pornography, in violation of 18 U.S.C. § 2251(a); and (2) transportation of child pornography, in violation of 18 U.S.C. § 2252A(a)(1). Both carry mandatory minimum prison terms—fifteen years on the production count and five years on the transportation count. 18 U.S.C. §§ 2251(e), 2252A(b).

Trial was scheduled to begin on October 29, 2018. *See* Dkt. 28. Prior to jury selection, the Defendant sought to present argument on jury nullification during the *voir dire*. *See* Dkt. 35 (proposing, for example, to notify jurors that they "have the right to determine whether the Government has justly prosecuted" the case). The District Court denied the request. Pet. at 8; *see also* Dkt. 62 (Pet. Attachment II) at 3.

In his proposed jury instructions, the Defendant included a charge on nullification. *See* Dkt. 44 (proposing an instruction that stated, among other things, that "[o]ne of your powers as jurors is to decide whether the Government has justly proceeded in this prosecution"). The District Court denied this request as well, ruling that it will not instruct the jury that it can nullify. *See* Dkt. 60 (Pet.

Attachment I) at 34, 39; Dkt. 62 at 4. To the contrary, the District Court explained that it will instruct the jury that:

- "[I]t would be a violation of your sworn duty to base a verdict upon any understanding or interpretation of the law other than the one I give you." Dkt. 62 at 5.
- "If you, the jury, find beyond a reasonable doubt from the evidence in this case that the government has proved each of the foregoing elements for a particular count, then proof of the charged crime is complete, and you should find [the Defendant] guilty on that count." *Id.*
- "The question of the possible punishment that [the Defendant] will receive if convicted is of no concern to the jury and should not, in any way, enter into or influence your deliberations." *Id.* at 6.
- "Under your oath as jurors, you cannot allow a consideration of the punishment that may be imposed upon [the Defendant], if convicted, to influence your verdict or enter into your deliberations." *Id.*

The Defendant also filed a motion seeking permission to introduce evidence of the mandatory minimum sentences if there are convictions on the charged counts, and to argue that the Government's "application of the law to the particular facts of this case is an obscene miscarriage of justice." Dkt. 30 at 1. The Government opposed the motion, *see* Dkt. 36, and filed its own motion *in limine* seeking the preclusion of such evidence and any argument on the propriety of the Government's prosecution, *see* Dkt. 45 at 9–10.

Addressing the motions at a pretrial conference, the District Court did not grant Defendant's motion, but it refused to foreclose the possibility that evidence and argument regarding the mandatory minimums might be received at trial. Judge

Underhill underscored the limited and conditional nature of his determination: "*[I]f* I, under certain circumstances, can admit evidence of the mandatory minimum, *if* that evidence comes in as a matter of trial evidence, [defense counsel] is permitted to argue from that to the jury, period." Dkt. 62 at 6–7 (emphasis added); *see also* Dkt. 60 at 35 (District Court, in response to Government's stated intention to argue that there would be no basis to credit the Defendant's argument, explaining that "[w]e'll have to see if it comes in into evidence").

After the jury was selected but before it was sworn, the Government asked for an adjournment of the trial so it could petition this Court for mandamus relief. The District Court granted that request and the Petition followed.

ARGUMENT

A. *The Legal Standard.*

A writ of mandamus[1] is "a drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. United States*, 542 U.S. 367, 380 (2004) (citation and internal quotation marks omitted). An appellate court should issue mandamus relief only "when necessary to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *United States v. Coonan*, 839 F.2d 886, 889 (2d Cir. 1988) (citation and internal quotation marks omitted); *see also United States v. Will*, 389

[1] The Government alternatively seeks a writ of prohibition, and it is undisputed that the same standard applies to both writs. *See* Pet. at 21 n.7.

U.S. 90, 98 n.6 (1967) ("Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous.").

To obtain a writ of mandamus, the petitioner must also show that it has no other means to obtain the relief it seeks, and must demonstrate a clear and indisputable right to issuance of the writ. Even then, this Court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *See Cheney*, 542 U.S. at 380–81. The mere fact that the Government may be unable to appeal a district court's determination is insufficient to warrant mandamus relief. *See Will*, 389 U.S. at 96–98; *United States v. Sam Goody, Inc.*, 675 F.2d 17, 25 (2d Cir. 1982) (superseded by statute on other grounds). It is the Government's burden to show "that its right to issuance of the writ is clear and indisputable." *Will*, 389 U.S. at 96 (citation and internal quotation marks omitted).

The Petition here is premised on the assertions that the District Court has decided to "permit the introduction of evidence about the statutory mandatory minimum penalty" and to "allow arguments for jury nullification." Pet. at 18. As the procedural history set forth above makes clear, neither assertion is accurate. The District Court has merely declined to preclude the possibility that such evidence or argument will be allowed at trial. As discussed below, neither this

Court nor the Supreme Court has ever held that under no circumstances can evidence or defense argument on mandatory minimums or jury nullification be admitted. Circumstances may arise at trial that would permit the District Court, acting within its discretion, to allow both. Declining to extinguish that possibility in the pretrial phase is no abuse of discretion at all, let alone the "clear and indisputable" abuse of discretion a mandamus petitioner must show in order to be entitled to relief.

B. *The District Court's Refusal to Rule Out Evidence of the Mandatory Minimums at Trial is Not a Proper Subject of Mandamus Review.*

The Government's request for mandamus relief precluding evidence of the mandatory minimums fails for two independent reasons: The District Court did not foreclose the relief the Government seeks, and the Government fails to demonstrate that the District Court clearly and indisputably erred.

First, the District Court has made no ruling on the admissibility of evidence of the applicable mandatory minimums; it stated only that it was refusing to rule *out* the possibility that such evidence might be received at trial. As a result, the Government cannot show, as it must, that it has no means other than this Petition to obtain the relief it seeks.

It may be, depending on how the testimony unfolds, that defense counsel is unable to lay a foundation for questioning a witness about the applicable mandatory minimums. And if and when defense counsel attempts to do so, the

Government will be able to object, and to present argument to the District Court. An order sustaining such an objection has not been foreclosed by the rulings of the District Court. *See Kerr v. United States Dist. Court*, 426 U.S. 394, 404 (1976) (where decision below "did not foreclose" the relief sought by the petitioner, writ should be denied); *Chandler v. Judicial Council of the Tenth Circuit of the U.S.*, 398 U.S. 74, 86 (1970) (denying mandamus because "in the present posture of the case other avenues of relief on the merits may yet be open"); *cf. In re Dow Corning Corp.*, 261 F.3d 280, 285 (2d Cir. 2001) ("Where the record below is ambiguous, the writ of mandamus will not issue." (citation and internal quotation marks omitted)). In addition, the District Court can of course direct that the issue be addressed outside the presence of the jury, so, in the event the application to examine based on the mandatory minimums is denied, the jury will not need to be instructed to disregard the questions. In short, the Government has no right to mandamus review to correct *potential* evidentiary errors on the mere speculation that such errors might be made, the jury might then acquit the defendant, and the Government would then be unable to appeal.

A second fatal defect in the Petition is the nature of the relief it seeks. Specifically, the Government seeks a writ that categorically prohibits the district court from admitting evidence of the mandatory minimums when the case is tried. No decision supports such an extraordinary order. To the contrary, in the context

of jury instructions about mandatory minimums, the Supreme Court and this Court have made it clear that a categorical prohibition on such an instruction would be inappropriate. The Court in *Shannon v. United States*, 512 U.S. 573 (1994), explicitly recognized that an instruction regarding the sentencing consequences of a conviction "may be necessary under certain limited circumstances," and stated that its decision should not be "misunderstood as an absolute prohibition on instructing the jury with regard to the consequences" of its verdicts. *Id.* at 587–88; *see also id.* at 586 (noting that "*as a general matter*, jurors are not informed of mandatory minimum or maximum sentences" (emphasis added)). And in *United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009), this Court rejected the government's argument "that a district court may never instruct the jury on an applicable mandatory minimum sentence." 564 F.3d at 159; *see also id.* at 161 (determining that "the law does not support … an absolute prohibition" on "district court discretion to instruct the jury as to the consequences of a verdict"). In the pretrial stage, before the evidence at trial unfolds and the prosecutor's summation is heard, it is never appropriate to foreclose the possibility that the jury will be informed of applicable mandatory minimums in the district court's instructions.[2]

[2] The District Court's pretrial rejection of the Defendant's request for such an instruction does not suggest otherwise. The fact that a defendant has no right to an instruction regarding mandatory minimum sentences does not strip a trial judge of discretion to give one if, in the court's view, justice requires. Both *Shannon* and *Polouizzi* cite a misleading statement by a witness or the prosecutor regarding the sentencing consequences of a conviction as an example of a circumstance in which such an instruction might be warranted. *Shannon*, 512

As for *evidence* of the mandatory minimums, there are reasons why such evidence might become admissible at the trial of this case. Defense counsel has already suggested that he may seek to question the complainant or government agents regarding bias, or a potential interest in the outcome of the case, and that such questioning, if permitted, could include reference to the mandatory minimums. Dkt. 60 at 17. Although the District Court has ruled that the Defendant will not be permitted to question why the U.S. Attorney's Office brought the case, it has not ruled out that cross-examination (or direct examination, if the Defendant calls the witness) may shed useful light on the witnesses' bias or interest in the outcome of the trial. Dkt. 60 at 20–21.

It is almost always impossible in the pretrial phase to anticipate how a trial will develop, but in this case, the possibility of permissible questioning about the mandatory minimum punishments meted out by the federal statutes at issue is patent. For example, the Defendant contends that the complainant represented that she was born in 1991, *see*, *e.g.*, Dkt. 48 at 6, and whether he was reasonably mistaken about her age will be a jury question at trial. Thus, the complainant's credibility will be at issue. The Defendant further alleges that she tried to extort money from him, stating that she would not report him to the authorities if he paid

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U.S. at 587; *Polouizzi*, 564 F.3d at 162. Judge Underhill's stated intention not to instruct the jury regarding the applicable mandatory minimums will obviously not impair his ability to revisit that decision in such a circumstance.

her. *See, e.g.*, Dkt. 48 at 5; Dkt. 60 at 14. He refused to do so, and the complainant is currently seeking money damages against him in a separate action. *See* Dkt. 48 at 5; Dkt. 60 at 15.

In these circumstances, it is at least conceivable that the threat of taking the complaint to federal court, where the Defendant would face onerous mandatory punishments, will play a role in probing the motives and credibility of the complainant. Similarly, it is possible that law enforcement agents mentioned those mandatory minimums to the Defendant before they brought a statutory rape case to federal court, and did so in ways that may bear on their credibility as well.

If this seems speculative, that is because predicting what will happen at trial is *inherently* speculative. What is clear is this: The scope and extent of cross-examination at trial always lies within the broad and sound discretion of the trial judge. *See, e.g.*, *United States v. Tutino*, 883 F.2d 1125, 1140 (2d Cir. 1989). And that discretion is best exercised at trial, not in the pre-trial stage, before the opening statements and testimony provide the context that is so important to such determinations. *Cf. Wheat v. Illinois*, 486 U.S. 153, 162–63 (1988) (lamenting the need for trial judges to decide motions to disqualify counsel in "the murkier pre-trial stage, when relationships between parties are seen through a glass, darkly"). The Government's attempt to use mandamus review to police that discretion before it is even exercised betrays a misapprehension of the nature and purpose of the

extraordinary writ. *See Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) ("Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'"); *United States v. DiStefano*, 464 F.2d 845, 850 (2d Cir. 1972) (denying writ where district court had power to exercise discretion, even if court on appeal determined that district court wrongly exercised that discretion, because mandamus's purpose "is not to control the decision of the trial court, but rather merely to confine the lower court to the sphere of its discretionary power" (quoting *Will*, 389 U.S. at 102) (internal quotation marks omitted)).

The cases on which the Government relies are inapposite. The Courts in *Shannon*, *Polouizzi*, and *United States v. Pabon-Cruz*, 391 F.3d 86 (2d Cir. 2004), all held, on appeal after trial, that the district court's refusal to inform the jury of the sentencing consequences of its verdict did not deprive the defendant of a fair trial. *Shannon*, 512 U.S. at 575; *Polouizzi*, 564 F.3d at 163; *Pabon-Cruz*, 391 F.3d at 95. Not only is this case still in the pretrial phase, but holdings that a defendant had no *entitlement* to such a jury charge shed no light on whether a district judge has the discretion to give one where the circumstances warrant. Most importantly, the issue before this Court is not whether there should be a jury charge regarding the mandatory minimums; indeed, Judge Underhill has already rejected the Defendant's request for such an instruction. The issue raised by the Petition is

whether the Government has a clear and indisputable right to an order from this Court precluding any testimony or other evidence of the mandatory minimums at trial. For the reasons stated above, the Government has no right to such an order.

C. *The Conditional Ruling that Defense Counsel May Argue for Jury Nullification Based on the Mandatory Minimums Is Not a Proper Subject of Mandamus Review.*

The Government's request for an order precluding defense counsel from arguing for jury nullification should be denied for two reasons.

First, the District Court was clear that it will permit such argument only if evidence of the mandatory minimums is found admissible at trial. Dkt. 62 at 6–7; Dkt. 60 at 35. As discussed above, mandamus relief is unavailable when a petition challenges such a conditional ruling, which does "not foreclose" the relief the Government seeks. *Kerr*, 426 U.S. at 404. If the Government prevails in objecting to the evidence at trial, no argument on that evidence, whether for jury nullification or otherwise, will be permitted.

Second, even if the rulings challenged here were not conditional—that is, even if Judge Underhill had ruled that evidence of mandatory minimums will be admitted at trial and jury nullification argument based on that evidence will be allowed—there would be no clear and indisputable abuse of discretion.

The decisions of this Court do not even address, let alone clearly and indisputably decide, the issue of whether a district court has the discretion to

permit defense counsel to argue in favor of jury nullification. Indeed, the Government concedes that its petition raises an issue of first impression. *See* Pet. at 27 ("[T]his Court has not expressly held that a defendant may not argue for nullification.").

In the absence of controlling precedent, the Government relies heavily on *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997). Specifically, it begins its petition with the emphatic pronouncement that "[e]stablished law requires the district court to *prevent* jury nullification, not to *allow arguments in support of it*." Pet. at 2 (emphases in original). But its only support for that pronouncement is its later argument that "[t]he Court's language in *Thomas* could hardly be more clear: Because nullification is an affront to the rule of law, a judge should prevent jury nullification *if it is within his authority to prevent*." *Id.* at 23 (quoting *Thomas*, 116 F.3d at 615) (emphases supplied by the Government).

Even assuming the quoted language from *Thomas* could fairly be read to extend to the circumstances of this case, it would not support or justify mandamus relief. Only *holdings* create "established law"; *language* that is unnecessary to those holdings does not. *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1282 (2006) ("If a rule was declared only in dictum, the question remains undecided."). The distinction is especially critical in this context, where the petitioner must show a clear and indisputable

right to the relief requested. The holding of *Thomas* was that a district judge may properly remove for cause a juror who refuses to follow the law as long as the record leaves no doubt that the juror would engage in nullification. 116 F.3d at 618, 622, 625. The question whether a district court has the discretion, in an appropriate case, to permit a defense lawyer to argue for jury nullification was not before the Court, was not decided by the Court, and, as the Government concedes, remains an open question in this Circuit.

In addition to being an open question, it is a difficult and nuanced one. Closing arguments of defense counsel have long been recognized as a fundamental aspect of a fair trial, and a judge presiding over trial "must be and is given great latitude" over the scope of summations. *Herring v. New York*, 422 U.S. 853, 862 (1975). Courts have also recognized that, even in the context of jury nullification, defense counsel enjoy certain "leeway in persuading the jury to acquit out of considerations of mercy or obedience to a higher law." *United States v. Burkhart*, 501 F.2d 993, 997 n.3 (6th Cir. 1974)[3]; *see also United States v. Lynch*, 903 F.3d 1061, 1087–88 (9th Cir. 2018) (Watford, J., dissenting) (examining the historic

[3] The Sixth Circuit, relying on *Shannon*, has subsequently held that a district court did not err in refusing to permit a criminal defendant to argue to the jury about the punishment he would receive if convicted. *See United States v. Chesney*, 86 F.3d 564, 574 (6th Cir. 1996) (rejecting defendant's contention that the district court's refusal violated his constitutional right to a fair trial). But a decision that it was not an abuse of discretion to permit such an argument in one case does not undermine the argument that trial judges have the discretion to permit it in appropriate circumstances.

role of the jury "to act as 'the conscience of the community,'" "in the teeth of both law and facts." (internal citations omitted)).

The question whether defense counsel might, in appropriate circumstances, be permitted to argue for jury nullification is both undecided by this Court and, at a minimum, debatable. Given the uncertainty of the law and the pretrial posture of this case, the Government's mandamus petition—which can be granted only when it is clear and indisputable that the petitioner is entitled to relief—is not the proper vehicle for addressing this issue.

D. *Even Under the Standard Applicable to Direct Review, It Would Not Be an Abuse of Discretion to Allow Evidence of Mandatory Minimums and Defense Argument on Nullification in This Case.*

As discussed above, the Government fails to meet the heavy burden that applies to a petition for an extraordinary writ, and for that reason the Petition should be denied in its entirety. But even if the Court were to apply the standard of review applicable to a direct appeal, on the record now before it, it would not be an abuse of discretion for the District Court to allow both evidence of the mandatory minimums and defense argument regarding nullification based on that evidence.

It bears emphasis that the District Court has assiduously followed all of this Court's precedents. It did not, and will not, inform the jury about nullification, and it denied defense counsel's request that it instruct the jury about mandatory minimums. *Cf. Pabon-Cruz*, 391 F.3d at 94; *Polouizzi*, 564 F.3d at 160. It has

stated that it will instruct the jury that it should find the Defendant guilty if it finds beyond a reasonable doubt that the Government has proved each of the relevant elements, and that the jury cannot concern itself with the punishment the Defendant will receive if convicted. *See* Dkt. 62 at 5–6.

The Petition begins by asserting that the District Court "dislikes the penalty that Congress set for" the offense of producing child pornography, Pet. at 1, but the record could hardly be clearer: the District Court dislikes the Government's decision to invoke that penalty *in this case*. And in light of the disconnect between the evils Congress had in mind in enacting the mandatory minimums at issue and the conduct alleged by the Government, the District Court's expressed frustration is entirely justified.

The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today ("PROTECT") Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003), was designed to "strengthen[] law enforcement's ability to prevent, investigate, prosecute and punish violent crimes committed against children."[4] Among other things, the statute made certain sentencing enhancements more severe, resulting in the fifteen-year mandatory minimum applicable to Count One, and creating the five-year mandatory minimum for the transportation of child

[4] DOJ PROTECT Act Fact Sheet (April 30, 2003), available at https://www.justice.gov/archive/opa/pr/2003/April/03_ag_266.htm.

pornography charged in Count Two.[5] These provisions mandate harsh sentences for those who engage in the sexual exploitation of children through the internet, where the commerce in child pornography largely takes place.[6]

The District Court has every reason to believe that the Government has charged the Defendant with producing child pornography—and subjected him to the harsh fifteen-year mandatory sentence—not because he engaged in the kind of conduct Congress had in mind in prescribing that punishment, but simply because it could. There is no allegation that the Defendant created child pornography for mass internet consumption, which harms the photographed victim and sustains a market that victimizes countless others. Rather, it appears that the Defendant is facing fifteen years in prison for creating, for personal use during a consensual relationship, a single video that he never distributed and later deleted. Because that alleged conduct stands in stark contrast to the conduct Congress had in mind when it enacted the mandatory minimums the Defendant is facing, the District Court is rightfully concerned that the prosecutors are misusing the powers Congress gave them.

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[5] PROTECT Act §§ 103(b)(1)(A), (E), 117 Stat. at 653; U.S. Sent'g Comm'n, An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System 13 (July 2017), *available at* https://www.ussc.gov/research/research-reports/2017-overview-mandatory-minimum-penalties-federal-criminal-justice-system.

[6] DOJ PROTECT Act Fact Sheet (April 30, 2003), available at https://www.justice.gov/archive/opa/pr/2003/April/03_ag_266.htm.

The Government obviously wants to exercise those powers unchecked, but the very same cases on which it relies presume the existence of a check on the sort of charging decisions it made in this case. When *Shannon* held in 1994 that judges are not required to instruct juries regarding the consequences of their verdicts, it relied on "the basic division of labor in our legal system between judge and jury," pursuant to which the jury serves as fact finder and the judge imposes the sentence. 512 U.S. at 579; *see also Pabon-Cruz*, 391 F.3d at 94–95 (quoting *id.*). The Supreme Court reasoned that, as a result of this separation, "[i]nformation regarding the consequences of a verdict is … irrelevant to the jury's task." *Shannon*, 512 U.S. at 579.

There will be no such "division of labor" in this case if the Government gets its way, and thus no check on its enormous power. The improvident deployment of the statutes at issue will require the imposition of a sentence so far in excess of what is fair that there will be no judging at the sentencing proceeding if the Defendant is convicted. *See* Dkt. 60 at 34 ("I am going to be allowed no discretion at sentencing to consider the seriousness of this conduct or the lack of seriousness of this conduct ….").

When the Government uses mandatory minimum sentencing provisions in ways that remove the judge's ability to "temper[] prosecutorial discretion,"[7] allowing the jury to hear argument from counsel on the mandatory minimums at stake makes sense. First, it is honest. Keeping information on the applicable mandatory minimums away from jurors will mislead them into believing that if they find the Defendant guilty, the court will give him individualized sentencing consideration.[8] In fact, their verdicts alone will both determine guilt and dictate harsh sentences.

Second, the carefully calibrated approach the District Court has in mind finds ample support in multiple Supreme Court cases that acknowledge and protect the historic role of jury nullification as a check on arbitrary and oppressive exercises of prosecutorial power.

Jury nullification is not uncommon, but because the Government cannot appeal acquittals, the topic reaches the appellate level only when the exercise of this power takes the form of a compromise verdict. The jury finds the defendant guilty of one charged crime but not another despite its finding that the government proved both. The Supreme Court held long ago, in *Dunn v. United States*, 284 U.S. 390 (1932), that the inconsistent verdicts those compromises produce cannot

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[7] Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 Colum. L. Rev. 1232, 1241–42 (1995).

[8] *See id.* at 1263.

be challenged on appeal. As Justice Holmes's opinion for the Court explained, quoting this Court with approval, compromise verdicts can reflect the jury's power to confer leniency on the defendant. *Id.* at 393 ("We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity." (quoting *Steckler v. United States*, 7 F.2d 59, 60 (2d Cir. 1925))).

A half-century later, the Supreme Court stated that *Dunn* and *United States v. Dotterweich*, 320 U.S. 277, 279 (1943), established "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." *Harris v. Rivera*, 454 U.S. 339, 346 (1981). Then, in *United States v. Powell*, 469 U.S. 57 (1984), the Court both reaffirmed *Dunn* and observed that *Dunn* "has been explained by both courts and commentators as a recognition of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch." *Id.* at 65.

These precedents make it clear that the jury that hears this case will have the power to find the Defendant not guilty on one or both of the counts he faces even if it finds he was *proved* guilty of both, and that it can exercise that historic power in order to provide precisely the check on prosecutorial overreaching that the District Court itself will be precluded from providing. However, without information about the sentencing consequences of its verdicts, it will be stripped of that power.

No reasonable juror could intuit that convictions in this case would subject the Defendant to a mandatory fifteen-year term. And if the jurors choose to compromise, as many juries do in order to confer leniency, it would be anomalous indeed to require them to simply guess which count they should acquit on to produce that result, on pain of tripling the Defendant's sentence if they guess wrong.

In sum, a careful and thoughtful district judge has crafted an approach—one that is consistent with every controlling decision of the Supreme Court and this Court—that, if warranted by the circumstances of trial, will tap into the historic power of juries, repeatedly acknowledged and reaffirmed by the Supreme Court, to act as a check against arbitrary and oppressive exercises of prosecutorial power. Even if that approach were reviewed here under the more stringent standard of review applicable on direct review, we respectfully submit that this Court would not find an abuse of discretion.

CONCLUSION

For the reasons stated, the petition for writ of mandamus or writ of prohibition should be denied.

Dated: New York, New York
December 19, 2018

Respectfully submitted,

By: /s/ John Gleeson

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This brief complies with the type-volume limitations of Fed. R. App. Proc. 21(d) because it contains 5,754 words, exclusive of the parts of the brief exempted by Fed. R. App. Proc. 32(f).

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I certify under penalty of perjury that the foregoing statements are true.

Dated: December 19, 2018

/s/ Pooja A. Boisture