

No. 10-9465

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IN THE  
**Supreme Court of the United States**

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CALVIN BATTLES,  
*Petitioner,*

v.

THE STATE OF NEW YORK,  
*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The New York Court of Appeals**

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**BRIEF FOR THE NEW YORK STATE  
ASSOCIATION OF CRIMINAL DEFENSE  
LAWYERS AS *AMICUS CURIAE* IN SUPPORT  
OF PETITIONER**

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## INTEREST OF AMICUS CURIAE

*Amicus curiae* New York State Association of Criminal Defense Lawyers (“NYSACDL”) respectfully submits this brief in support of the petition for a writ of certiorari filed by Calvin Battles.<sup>1</sup> This Court’s review is critical to ensure uniform nationwide enforcement of the Sixth Amendment right to trial by jury—specifically, a criminal defendant’s right to have “any fact” (other than a prior conviction) that increases the penalty for a crime beyond the statutory maximum “be submitted to the jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

NYSACDL is a not-for-profit corporation with a subscribed membership of more than 600 attorneys, including private practitioners, public defenders, and law professors. It is a recognized state affiliate of the National Association of Criminal Defense Lawyers, a nonprofit, professional bar association that works on behalf of criminal defense attorneys to ensure justice

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<sup>1</sup> Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party’s counsel authored this brief in whole or in part and that no party or party’s counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief’s preparation or submission. Pursuant to Rule 37.2, counsel of record for all parties received timely notice of NYSACDL’s intention to file this brief.

and due process for those accused of crimes or misconduct.

NYSACDL regularly participates as *amicus* in state and federal appeals, and in matters before this Court. NYSACDL has a substantial interest in participating in this case because of the constitutional and practical problems created by New York's Persistent Felony Offender ("PFO") sentencing scheme, which permits a judge to give a felony defendant with two prior felony convictions a life sentence—regardless of the sentence authorized by the jury's verdict—if the judge finds by a preponderance of the evidence that "the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest." N.Y. Penal L. § 70.10(2). NYSACDL is concerned that the decision of the New York Court of Appeals upholding the PFO scheme will leave defendants unable to vindicate their Sixth Amendment jury-trial rights.

## INTRODUCTION

In New York, most felony offenses carry a maximum prison term of either four, seven, fifteen, or twenty-five years. N.Y. Penal L. § 70.00(1)-(2). Under the state's PFO sentencing scheme, however, a felony defendant with two prior felony convictions may be sentenced to an indeterminate term of *life* in prison—regardless of the maximum sentence authorized by the jury's verdict—if (and only if) the judge finds, by a preponderance of the evidence, that "the history and character of the defendant and the

nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest.” N.Y. Penal L. § 70.10(2); N.Y. Crim. Proc. L. § 400.20(5). The judge then exercises her discretion to determine *whether* to apply the life-term enhancement that, by virtue of the character-and-criminality finding, she *may* apply. *See* N.Y. Crim. Proc. L. § 400.20(9).

This Court has made crystal clear that the Sixth Amendment requires that, other than the fact of a prior conviction, “any fact” that authorizes a sentence more severe than the maximum authorized by the verdict alone—like the character-and-criminality finding called for by the PFO scheme—must be submitted to the jury and proved beyond a reasonable doubt. *Cunningham v. California*, 549 U.S. 270, 274 (2007); *United States v. Booker*, 543 U.S. 220, 244 (2005); *Blakely v. Washington*, 542 U.S. 296, 301, 305 (2004); *Ring v. Arizona*, 536 U.S. 584, 589 (2002); *Apprendi v. New Jersey* 530 U.S. 466, 476, 490 (2000). A divided New York Court of Appeals nevertheless held that the PFO scheme does not violate the Sixth Amendment. Pet. App. A2. In fact, that court has reached this result repeatedly over the last decade. *See New York v. Quinones*, 906 N.E.2d 1033, 1042 (N.Y. 2009); *New York v. Rawlins*, 884 N.E.2d 1019, 1034 (N.Y. 2008); *New York v. West*, 833 N.E.2d 704, 705 (N.Y. 2005); *New York v. Daniels*, 833 N.E.2d 704, 704 (N.Y. 2005); *New York*

*v. Rivera*, 833 N.E.2d 194, 199 (N.Y. 2005); *New York v. Rosen*, 752 N.E.2d 844, 847 (N.Y. 2001).<sup>2</sup>

The New York Court of Appeals has recognized that, according to the plain text of the PFO statutes, “a defendant *may not* be sentenced as a persistent felony offender until the court has made the *requisite* judgment as to the defendant’s character and the criminality.” *Rivera*, 833 N.E.2d at 198 (footnote omitted) (emphases added). That finding is “mandatory.” *Id.* at 200. The judge “must” make it before imposing a PFO life sentence. *Rosen*, 752 N.E.2d at 847. Indeed, a judge who does not will be reversed. *See, e.g., New York v. Ruffins*, 776 N.Y.S.2d 405, 407 (N.Y. App. Div. 4th Dep’t 2004) (reversing PFO life sentence where judge “merely confirmed that defendant admitted to two prior felony convictions”).

Nevertheless, the court has rejected Sixth Amendment challenges at every turn. In the court’s view, in net effect and “[i]n practical terms,” the scheme is constitutional because it resembles one in which the defendant’s prior convictions authorize the judge to impose the life sentence, and the judge then simply evaluates character-and-criminality to determine whether to do so, or whether to impose a lesser punishment. *Rivera*, 833 N.E.2d at 200; *see*

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<sup>2</sup> In the decision below, the majority disposed of Petitioner’s Sixth Amendment challenge in a single sentence followed by a citation to one of those earlier cases. Pet. App. A2 (citing *Quinones*, 906 N.E.2d 1033).

*Quinones*, 906 N.E.2d at 1039; *Rosen*, 752 N.E.2d at 847.

Dissenting from the majority's ruling below, Chief Judge Lippman observed that this Court has held that a court's characterization of a sentencing scheme's ostensible "operation and effect" is irrelevant for Sixth Amendment purposes. Pet. App. A7 (quoting *Cunningham*, 549 U.S. at 289-90); see also *Rivera*, 833 N.E.2d at 201-05 (Kaye, C.J., dissenting), 205-10 (Ciparick, J., dissenting). What matters is what the sentencing judge *actually must do*. See Pet. App. A7. Here, the sentencing judge must make the character-and-criminality finding before she may apply the PFO enhancement, so the PFO scheme violates the Sixth Amendment—regardless of whether it may in some sense resemble a scheme that complies with it. See Pet. App. A3, A5-A6.

This Court should grant the petition for certiorari for three reasons. *First*, the decision below conflicts with this Court's decision in *Cunningham*. In that case, the Court reiterated the Sixth Amendment's absolute rule that, other than the fact of a prior conviction, "any fact" that authorizes a sentence beyond the one authorized by the verdict alone must be submitted to the jury and proved beyond a reasonable doubt. The Court made clear that the Sixth Amendment's "any fact" rule applies regardless of whether the sentencing scheme in "operation and effect" resembles one in which the judge simply uses that fact to select a sentence from within an applicable range. 549 U.S. at 289. The decision below further conflicts with decisions from the highest courts of other states applying the "any fact"

rule to invalidate recidivism enhancement schemes materially identical to New York's. *See* Part I(B), *infra*.

*Second*, the sentencing judge here violated the Sixth Amendment in a particularly egregious manner. Typically, when a judge enhances a sentence in violation of the Sixth Amendment, she does so by relying upon facts that supplement the facts found by the jury. Here, however, the sentencing judge trampled on Petitioner's jury-trial rights even more, applying the PFO enhancement to give Petitioner a life term by relying upon facts that *conflicted* with the jury's findings.

*Third*, the decision below will make innocent defendants more likely to plead guilty. By refusing to require that character-and-criminality be proved to the jury beyond a reasonable doubt, the decision below makes this finding harder for a defendant to contest, and a PFO life sentence upon conviction thus harder for a defendant to avoid. Therefore, even innocent defendants will be more likely to relinquish their jury-trial rights and plead guilty to avoid the possibility of a PFO life-term enhancement upon conviction.

## REASONS FOR GRANTING THE PETITION

### **I. The Decision Below Conflicts With Decisions From This Court And Other State High Courts Holding That, Other Than The Fact Of A Prior Conviction, “Any Fact” Necessary To Authorize A Sentence Greater Than The Maximum Authorized By The Verdict Must Be Proved To The Jury Beyond A Reasonable Doubt.**

A. As the New York Court of Appeals has acknowledged, a sentencing court “must” find character-and-criminality before imposing a PFO life sentence. *Rosen*, 752 N.E.2d at 847; *see Rivera*, 833 N.E.2d at 198, 200. And the PFO scheme permits the judge to make that finding by a mere preponderance. N.Y. Crim. Proc. L. § 400.20(5). Nevertheless, the New York Court of Appeals has held repeatedly that the PFO scheme does not violate the Sixth Amendment because, in the court’s view, the scheme is effectively no different from a scheme in which the defendant’s prior convictions authorize the life sentence, and the judge simply evaluates character-and-criminality in deciding whether to impose it.

This Court’s decision in *Cunningham* demonstrates that the New York Court of Appeals is wrong. In *Cunningham*, the Court reaffirmed the unequivocal Sixth Amendment rule that other than the fact of a prior conviction, “any fact” that authorizes a sentence more severe than the maximum authorized by the verdict must be submitted to the jury and proved beyond a reasonable doubt. 549 U.S. at 281-83, 288-89; *see*

also *Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. at 301, 305; *Ring*, 536 U.S. at 589; *Apprendi*, 530 U.S. at 476, 490. The Court also made clear that this rule applies regardless of whether the sentencing scheme in practical effect resembles one in which the judge simply uses that fact to select a sentence from within an applicable range.

Under the sentencing scheme at issue in *Cunningham*, the jury's guilty verdict on a particular charge exposed the defendant to 12 years in prison. 549 U.S. at 277. But, if (and only if) the judge found that a preponderance of the evidence established a "circumstance in aggravation," such as the fact that the defendant "ha[d] engaged in violent conduct which indicates a serious danger to society," the judge could impose a 16-year sentence. *Id.* at 279 & n.8. The California Supreme Court held that the scheme complied with the Sixth Amendment. While recognizing that, as a technical matter, the jury's verdict alone did not authorize the 16-year sentence, the court upheld the sentencing scheme because, in its view, the scheme in "operation and effect" functioned just like one in which the jury's verdict authorized the 16-year sentence and the judge "simply . . . engage[d] in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within [that] statutorily prescribed sentencing range." *Id.* at 279.

This Court rejected the California Supreme Court's rationale and invalidated the sentencing scheme. It observed that notwithstanding that seeming resemblance, the sentencing judge in fact was not authorized to impose the 16-year sentence *until* she found the "circumstance in aggravation."

*See id.* at 290, 294. Thus, that finding had to be made by a jury, beyond a reasonable doubt. *See id.*; *see also Blakely*, 542 U.S. at 303-304 (“[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” (emphasis in original)).

The rationale of the New York Court of Appeals in upholding the PFO scheme is strikingly similar to the rationale of the California Supreme Court in upholding the scheme this Court invalidated in *Cunningham*. The New York Court of Appeals has recognized that, as a technical, statutory matter, the sentencing judge “must” find character-and-criminality before imposing a PFO life sentence. *Rosen*, 752 N.E.2d at 847; *Rivera*, 833 N.E.2d at 198, 200 (describing character-and-criminality finding as “mandatory” and “requisite” to support PFO life sentence). But, in the court’s view, the PFO scheme is constitutional because it resembles one in which the defendant’s prior convictions authorize the life sentence, and in which

the legislative command that sentencing courts consider the defendant’s ‘history and character’ and the ‘nature and circumstances’ of the defendant’s criminal conduct [after having found the prior convictions] merely makes explicit what sentencing courts have always done in deciding where, within a range, to impose a sentence.

*Rivera*, 833 N.E.2d at 200; *see Quinones*, 906 N.E.2d at 1039; *Rosen*, 752 N.E.2d at 847.

*Cunningham*, however, squarely rejected that line of reasoning: A sentencing scheme does not comply with the Sixth Amendment simply because it may resemble another sentencing scheme that does. *See* 549 U.S. at 279. If “any fact” necessary for enhancement may be found by a judge by a preponderance, the scheme is unconstitutional. *Id.* at 281-83, 288-89. Because the PFO scheme requires a sentencing judge to make a character-and-criminality finding before imposing the life-sentence enhancement, that scheme, contrary to the decision below, is plainly unconstitutional under *Cunningham* and its predecessors.

**B.** Following this Court’s precedents, other state high courts have considered recidivism enhancement schemes materially identical to New York’s PFO scheme and have struck them down on Sixth Amendment grounds. For example, the Hawaii Supreme Court invalidated a scheme that permitted the judge to enhance a recidivist’s sentence after finding, by a preponderance of the evidence, that his “criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for the protection of the public.” *Hawaii v. Maugaotega*, 168 P.3d 562, 576-77 (Haw. 2007).<sup>3</sup>

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<sup>3</sup> After the Hawaii Supreme Court initially upheld this scheme in an earlier Sixth Amendment challenge, this Court vacated the decision and remanded in light of *Cunningham*. *See* (continued...)

Similarly, the Connecticut Supreme Court struck down a scheme that permitted the judge to enhance a recidivist's sentence after finding, by a preponderance of the evidence, that the defendant's "history and character and the nature and circumstances of such person's criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest." *Connecticut v. Bell*, 931 A.2d 198, 231 (Conn. 2007). The Ohio Supreme Court did likewise. *Ohio v. Foster*, 845 N.E.2d 470, 493 (Ohio 2006) (striking down scheme providing for enhancement upon preponderance finding that, absent enhancement, sentence is "inadequate to punish the [recidivist] offender and protect the public from future crime" and is "demeaning to the seriousness of the offense"). And so did the Minnesota Court of Appeals. *Minnesota v. Fairbanks*, 688 N.W.2d 333, 336-37 (Minn. Ct. App. 2005), *review denied*, 2005 Minn. LEXIS 777, \*2 (Minn. Dec. 13, 2005) (striking down scheme providing for enhancement upon preponderance finding that recidivist defendant is "a danger to public safety").

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*Maugaotega v. Hawaii*, 549 U.S. 1191, 1191 (2007). And in a parallel Sixth Amendment challenge in the habeas context, the Ninth Circuit held that the Hawaii Supreme Court's initial decision to uphold the recidivism enhancement scheme was an unreasonable application of clearly established federal law. *Kaua v. Frank*, 436 F.3d 1057, 1058 (9th Cir. 2006).

Because the New York Court of Appeals has repeatedly upheld the materially indistinguishable PFO sentencing scheme, this Court should grant certiorari to resolve the conflicts with *Cunningham* and with these state court decisions.

**II. The Sentencing Judge Committed A Particularly Egregious Sixth Amendment Violation By Applying The Life-Term Enhancement Based Upon Facts Contrary To The Jury's Verdict.**

In the mine-run Sixth Amendment violation, the judge enhances a sentence based upon facts that supplement those found by the jury. For example, in *Apprendi*, the judge violated the Sixth Amendment by enhancing the defendant's sentence based upon a preponderance finding that the defendant committed his crime out of racial animus, a fact the jury never found. 530 U.S. at 471. Here, the Sixth Amendment violation is even more stark because the sentencing judge imposed the PFO life term based upon facts that *contradicted* the jury's verdict.

In determining that the PFO enhancement was warranted, the sentencing judge cited Petitioner's "heinous crime" of "[g]oing in and pouring gasoline on a person, lighting that gasoline, [and] killing and maiming these people." Pet. App. A27. But, as Chief Judge Lippman pointed out in his dissent, "[t]he court's crucial enhancement finding that defendant lit the gasoline was one that the jury specifically declined to make when it acquitted defendant on the arson-based counts." Pet. App. A6.

As Chief Judge Lippman further observed, if allowed to stand, the PFO scheme will continue to permit judges to apply the life-term enhancement based upon findings that “essentially nullify a critical component of the verdict.” Pet. App. A6. The Court should grant review to prevent that result.

### **III. The Decision Below Makes Innocent Defendants More Likely To Plead Guilty.**

NYSACDL’s membership has observed first-hand that prosecutors regularly use the PFO life-term enhancement as a bargaining chip in plea negotiations with twice-convicted felony defendants.<sup>4</sup> Specifically, the prosecutor promises not to seek the enhancement if the defendant will plead guilty and save the State the cost of a trial. Ideally, an innocent defendant would reject this offer. But, by making the character-and-criminality finding so easy to trigger—and a PFO life-term enhancement if convicted thus so hard to avoid—the decision below increases the likelihood that an innocent defendant will take the deal. *See Blakely*, 542 U.S. at 311; Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 1034 (2006);

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<sup>4</sup> That is a substantial segment of the offender population. Approximately 20,000 New York parolees have returned to prison due to a new conviction since *Apprendi* cast constitutional doubt on sentencing statutes like § 70.10. *See* N.Y. State Div. of Parole, Annual Report 1930-2010, at 4 (2010) (statistics for fiscal years 2000-01 through 2009-10), *available at* <https://www.parole.state.ny.us/pdf/parole-annual-report-2010.pdf>.

Nancy J. King & Susan R. Klein, *Apprendi* and Plea Bargaining, 54 Stan. L. Rev. 295, 296, 306 (2001).

When a prosecutor offers to forgo seeking a PFO life-term enhancement if the defendant will plead guilty, the defendant will consider his ability to contest the character-and-criminality finding called for by the PFO scheme. The stronger his ability to meaningfully dispute character-and-criminality, the more likely he will be to opt for a trial: If he can disprove character-and-criminality, then the risks of an unsuccessful bid for acquittal are not as severe. Conversely, the weaker the defendant's ability to meaningfully dispute character-and-criminality, the more likely he will be to take the deal: If he cannot disprove character-and-criminality, then even a small risk of conviction could be too much given the high likelihood of a PFO life sentence if convicted. *See Blakely*, 542 U.S. at 311; King & Klein, 54 Stan. L. Rev. at 296, 306; *cf.* Barkow, 58 Stan. L. Rev. at 1034.

Moreover, in New York, unlike in the federal system, judges actively participate in plea discussions. It is not unusual for a judge to emphasize the risk of a PFO sentence if the defendant elects a trial and is convicted, and then suggest that a PFO sentence will not be imposed if he pleads guilty. *See, e.g., New York v. Fulmore*, 592 N.Y.S.2d 449, 449 (N.Y. App. Div. 2d Dep't 1993) (noting that the defendant pleaded guilty after the court "did not give a complete description of the minimum and maximum sentences facing the defendant" but did explain that, "as a potential persistent felony offender, the defendant was facing

15 years to life imprisonment”). The active role that judges play in the plea-bargaining process is another factor that may impel defendants to relinquish their jury-trial right for fear of antagonizing the judge and inviting a PFO life sentence in the event of conviction.

By permitting character-and-criminality to be found by a judge by a mere preponderance, rather than demanding that it be proved to a jury beyond a reasonable doubt as the Sixth Amendment requires, the decision below makes that finding significantly harder to contest. It turns the PFO life-term enhancement into the “tail which wags the dog of the substantive offense” charged, *Apprendi*, 530 U.S. at 495, because it makes even innocent defendants more likely to plead guilty simply to avoid the risk of a PFO life sentence should they be convicted at trial. The Court should grant review to eliminate this perverse incentive and prevent further encroachment on defendants’ Sixth Amendment right to a jury trial.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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