08-1830-cr (L)

08-1887-cr (XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee/Cross-Appellant,

v.

PIETRO POLOUIZZI, also known as Peter Polouizzi,
also known as Peter Pietro-Polouicci, also known as Peter Polizzi,

Defendant-Appellant/Cross-Appellee,

On Appeal From the United States District Court
for the Eastern District of New York

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT-CROSS-APPELLEE PIETRO POLIZZI

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The National Association of Criminal Defense Lawyers ("NACDL") and the Families Against Mandatory Minimums Foundation ("FAMM"), with leave of Court by Order dated July 15, 2008, respectfully submit this brief as amici curiae in support of Appellant/Cross-Appellee Pietro Polizzi.[1]

INTEREST OF AMICI CURIAE

NACDL is a nonprofit organization with a direct national membership of more than 12,800 attorneys, in addition to more than 35,000 affiliate members, from all fifty states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal-defense profession; and to promote the proper and fair administration of justice. Given the breadth of its membership and the perspectives it brings to bear, NACDL is regularly permitted to file amicus curiae briefs in this Court and other courts and has filed such briefs in previous cases involving mandatory minimum sentencing statutes. *See, e.g.*, *Begay v. United States*, 128 S. Ct. 1581 (2008).

[1] Although there are various spellings in the case caption, this is the correct spelling of Polizzi's name, and the spelling that appears in the indictment. *See* Appellant's Principal Br. 3 n.1.

FAMM is a national, nonprofit, nonpartisan organization of 14,300 members founded in 1991. FAMM's primary mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory-sentencing laws. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through amicus filings in important cases.

This Court's resolution of the government's cross-appeal is of great interest to amici, as it will affect numerous prosecutions, brought and to be brought, both in district courts within this Circuit and in trial and appellate courts elsewhere.

ARGUMENT

Pietro Polizzi was convicted on twelve charges each of receipt and possession of child pornography under 18 U.S.C. §§ 2252(a)(2) and 2252(a)(4)(B), respectively. *United States v. Polizzi*, 549 F. Supp. 2d 308, 319 (E.D.N.Y. 2008). After the jury reached its verdict, Judge Weinstein recognized that he had erred by not permitting the jury to be informed that Polizzi's receipt convictions under Section 2252(a)(2) carried a mandatory minimum sentence of five-years incarceration. The district court concluded that this error necessitated a new trial on the receipt counts.

Amici contend that the Sixth Amendment entitled Polizzi to the trial court's exercise of its discretion to inform the jury of the sentencing implications of a conviction for receipt of child pornography under 18 U.S.C. § 2252(a)(2), and that such instruction was not foreclosed by prior decisions of this Court or the Supreme Court. In addition, amici submit that the receipt charges against Polizzi violate the Constitution's prohibition against Double Jeopardy. This Court should therefore affirm the district court's grant of a new trial on the receipt counts. In the alternative, the Court should vacate the twelve receipt counts against Polizzi as impermissibly multiplicitous under the Fifth Amendment.

I. UNDER THE SIXTH AMENDMENT THE TRIAL COURT HAD DISCRETION TO INFORM THE JURY OF THE MANDATORY MINIMUM SENTENCE FOR RECEIPT CONVICTION

"The essential feature of a jury," in a criminal case, "obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Williams v. Florida*, 399 U.S. 78, 100 (1970); *see also Duncan v. Louisiana*, 391 U.S. 145, 153 (1968) (declaring "the right to jury trial in criminal . . . fundamental to our system of justice").

An examination of the historical record from the Colonial and post-Revolutionary eras shows that eighteenth-century jurors would have been keenly

aware of the sentencing implications of their verdicts. Accordingly, the Sixth Amendment at the very least permits a trial court to exercise discretion, under all the facts and circumstances best known to it, to instruct the jury on the mandatory minimum sentence that would follow from a defendant's conviction.

A. Historic Practice Guides Sixth Amendment Jurisprudence

In order to "give intelligible content to the right of jury trial," *Blakely v. Washington*, 542 U.S. 296, 305 (2004), the Supreme Court–especially in its recent Sixth Amendment jurisprudence–has looked to the jury's role in early American and English cases preceding and contemporaneous with ratification of the Bill of Rights, particularly with respect to the jury's sentencing function. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 478-489 (2000) (examining historical record and holding that any fact that increases penalty for crime beyond statutory maximum must be submitted to jury). Specifically, the Court has examined the Framers' intent in order to ascertain the Sixth Amendment's meaning and scope. *See United States v. Booker*, 543 U.S. 220, 238-239 (2005) ("The Framers of the Constitution understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases."); *Blakely*, 542 U.S. at 306 (jury must "exercise the control that the Framers intended"); *Jones v. United States*, 526 U.S. 227, 244 (1999) (considering historical record, especially "tension between jury powers and powers exclusively

judicial [that] would likely have been very much to the fore in the Framers' conception of the jury right"); *see also United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18-19 (1955) (defining scope of jury right and discussing knowledge of Founders in fashioning Sixth Amendment).

Following the historical analysis undertaken in these cases, this Court, in order to determine the meaning of the right to a jury trial, should, like the district court before it, consider historical jury practice during the pre- and post-Revolutionary era. *See Jones*, 526 U.S. at 246 (examining historical treatises to ascertain historical understanding of Sixth Amendment); *see also Crawford v. Washington*, 541 U.S. 36 (2004) (reviewing English and early American historical sources to apply Confrontation Clause, and departing from prior, contrary case law); *Apprendi*, 530 U.S. at 477 (reviewing historical sources). Such examination of the historical record, amici submit, shows that the district court was correct in determining that, in light of the Sixth Amendment, it had discretion to inform the jury of the punishment that would be imposed on Polizzi following a conviction for receipt.

B. Juries Have Historically Considered The Sentencing Consequences Of Conviction When Determining Guilt

The English colonists in America viewed the right to trial by jury "as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of

arbitrary power." *Thompson v. Utah*, 170 U.S. 343, 349-350 (1898) (citing 2 J. Story, Commentaries on the Constitution of the United States § 1779); *see also Strauder v. West Virginia*, 100 U.S. 303, 308-309 (1879) ("Blackstone, in his Commentaries, says, 'The right of trial by jury . . . is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter.'").

Given the central role that criminal juries performed over centuries of English law, it is no surprise that colonial legal commentary, colonial legislatures, and colonial courts all spoke to the importance of the jury trial. Thus, as the Supreme Court noted in *Duncan*:

> Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765 -- resolutions deemed by their authors to state 'the most essential rights and liberties of the colonists' -- was the declaration:
>
> > 'That trial by jury is the inherent and invaluable right of every British subject in these colonies.'
>
> The First Continental Congress, in the resolve of October 14, 1774, objected to trials before judges dependent upon the Crown alone for their salaries and to trials in England for alleged crimes committed in the colonies; the Congress therefore declared:
>
> > 'That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.'

391 U.S. at 152 (citing 18. R. Perry, ed., Sources of Our Liberties 270, 288 (1959)). Even more prominently, the Second Continental Congress gave voice to the importance of this right to a jury in the Declaration of Independence, which complained (¶¶ 20-21) that the King had "depriv[ed] us in many cases, of the benefits of Trial by Jury . . . transporting us beyond Seas to be tried for pretended offences." The Framers further affirmed the significance of the right to a jury trial by including such a right in Article III, Section 2 of the Constitution, which provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." Thus, the Founders considered the right to a jury trial so fundamental that it was the only right elaborated in both the Bill of Rights and the unamended Constitution.

In guaranteeing the right to criminal trial "by their peers of the vicinage, according to the course of that law," the drafters of the Sixth Amendment understood just how knowledgeable the "peers of the vicinage" were with respect to the punishments imposed for particular offenses. For example, one of the earliest colonial statutory compilations on record is *The Book of the General Lawes and Libertyes Concerning the Inhabitants of the Massachusets,* a comprehensive legal code published in 1648 that was widely owned by magistrates and literate freemen in Massachusetts Bay Colony, many of whom would have composed the venire. Thomas G. Barnes *Introduction* to *The Book of the General Lawes and*

Libertyes Concerning the Inhabitants of the Massachusets 5-6 (Thomas G. Barnes ed., Huntington Library 1975) (1648). Thus, most jurors in colonial Massachusetts would have been aware of the sentences that accompanied all crimes.

This code not only provided information about punishments, but also contained an early description of the juror's role in the criminal process. *See Juries* §§ 1-5, at 31-32 *in id*. Although the code granted judges the ability to "declare the Sentence" in criminal matters, the law suggested that judges could "direct the Jurie to finde" the sentence against the accused. *Id.* § 1. In addition, the code mandated that a criminal could be convicted of a crime and sentenced to death or banishment only "by a Special Jurie so summoned for that purpose, or by the [legislature]."[2] *Id.* § 2. Finally, the code also granted jurors the right to enter a "positive verdict,"[3] the "libertie to give a *Non liquet* or a special verdict,"[4] and the

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[2] An earlier Massachusetts statute also granted jurors the discretion to sentence individuals convicted of rape to death. *Woodson v. North Carolina*, 428 U.S. 280, 289-291 n.24 (1976) (citing H. Bedau, The Death Penalty in America, 5-6, 15, 28 (rev. ed. 1967)).

[3] A "positive verdict," also known as a "general verdict," is an instance in which a jury returns a finding of guilt or innocence, without making special findings of fact. According to John Adams, the general verdict provided jurors the ability to "find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court." John Adams, *Diary Notes on the Rights of Juries* (Feb. 12, 1771) *in* 1 *Legal Papers of John Adams* 228, 230 (L. Kinvin Wroth & Hiller B. Zobel eds., The Belknap Press 1965). English law around this time also recognized the jury's power to return general verdicts. *See, e.g.*, Libel Act 1792, 32 Geo. III, c. 60 (Old Gr. Brit. Parl.)

ability to "present in their verdict so much as they can."[5] *Id.* § 3. In this manner, the jury, well-aware of the range of punishments specified for particular crimes and available on a guilty verdict, possessed great discretion over the sentencing of a criminal defendant.

Jury practice in colonial New York appears similar. Again, jurors would have been permitted to return partial verdicts, which reflected "one of the most important aspects of the jury's prerogative—the power to effect a mitigation of the severity of the law by verdicts which would let off an obvious offender with penalties less than the worst of the charges against him would make inevitable." Julius Goebel Jr. & T. Raymond Naughton, *Law Enforcement in Colonial New*

(in cases of criminal libel that "the jury . . . may give a general verdict [of guilty or not guilty] upon the whole matter put in issue.").

[4] A special verdict results when individual questions of fact are put to the jury for resolution, or when the jury returns verdicts on "any issue in any case" that it desires to resolve. In this manner, "the special verdict had its origin in the desire of the jury to avoid the responsibility of determining questions of law." Edmund M. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 Yale L.J. 575, 588 (1923).

[5] The 1648 Code also defines this ability as the right of a jury to return a "partial verd[ict]." A partial verdict reflects the jury's ability to convict a defendant of a lesser offense or to convict a defendant of some (but not all) of the offenses charged by the government. *See* J.H. Baker, *An Introduction to English Legal History* 590-591 (3d ed. 1990) (discussing the history of "pious perjury," the merciful disregard of law by jurors by means of returning a partial verdict to effect a lesser sentence); *see also* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 52-55 (1983) (discussing partial verdicts and concluding that "[t]he jury not only decided guilt, but it chose the sanction through its manipulation of the partial verdict").

York 673-674 (Julius Goebel Jr. ed., The Commonwealth Fund 1944). In fact, juries in colonial New York were empowered to deliver partial verdicts by convicting on one or more (but fewer than all) offenses charged or by, on their own initiative, "finding . . . an offense less in degree than that charged in the indictment." *Id.* at 674.

Of course, this *sua sponte* aspect of the partial-verdict power necessarily depended upon and pre-supposed the jury's knowledge of the law and its potential penal consequences. Indeed, it was common practice for juries to receive the law as evidence prior to deliberations. One English treatise indicated that acts of Parliament were "taken notice of by the judges or jury without being pleaded . . . [and] particular laws which do not concern the whole Kingdom . . . must be brought before them to judge thereon." *Id.* at 648 (citing Gilbert, *Law of Evidence* 40-41 (1769)). These practices, like those in Massachusetts, indicate that New York jurors would have had knowledge about the law and its effects, and would have been able to exercise their power to render verdicts informed, in part, by this familiarity.

Other historians and analysts have described similar jury practices in other colonies. *See, e.g.*, Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. Mich. J.L. Reform 93, 103 (2006) ("the available evidence suggests that trials in the colonies were notable for

the presence of robust jury powers and an impotent judiciary."); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 Harv. L. Rev. 582, 590-591 (1939) (suggesting that judges in colonial Connecticut, Rhode Island, and New Hampshire exercised little control over criminal matters, deferring instead to the jury). Canvassing the entirety of colonial practice, one noted historian has remarked, "the trial jury exercised an important role in what was functionally the choice of sanction through its power to manipulate the verdict by convicting on a charge that carried a lesser penalty." John H. Langbein, *The Origins of Adversary Criminal Trial* 57-58 (Oxford University Press 2003). The district court's extensive opinion (as well as the briefs submitted by Polizzi) details additional historical instances in which jurors exercised power in the sentencing of defendants.

An examination of the debates surrounding the ratification of the Constitution and the Sixth Amendment further underscores the historic role that juries performed in rendering verdicts with an eye towards sentencing. Although records of Congress's debate on the Bill of Rights are sparse, *see Williams*, 399 U.S. at 94-95, other correspondence and documentary materials from this period help round out the historical record. These all suggest that jurors would have understood and considered the sentencing implications of their verdicts in criminal cases.

One set of writings that reliably capture the underpinnings of the Sixth Amendment are essays from prominent "Anti-Federalists."[6] *See, e.g.*, *District of Columbia v. Heller*, 128 S. Ct. 2783, 2800-2804 (2008) (relying on writings of Anti-Federalists in assessing scope of Second Amendment); *Blakely*, 542 U.S. at 306 (citing writings from Anti-Federalists in articulating meaning of Sixth Amendment). Documents drafted by several of these individuals illustrate the scope of the jury's power in this era.

One Anti-Federalist writer who identified himself as "Brutus"–likely a pseudonym for Robert Yates, one of New York's delegates to the Constitutional Convention[7]–argued that a Bill of Rights securing the right to a trial by jury was absolutely necessary. Absent such a provision, Brutus warned that

> the administration of justice under the powers of the judicial [branch] will be dilatory; that it will be attended with such an heavy expence as to amount to little short of a denial of justice to the poor and middling class of people who in every government stand most in need of the protection of the law; and that the trial by jury, which

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[6] Generally speaking, Anti-Federalists were those who opposed the ratification of the Constitution. Herbert J. Storing, *What the Anti-Federalists Were For* 3-6 (The University of Chicago Press 1981). Many Anti-Federalists participated in drafting the Constitution, and the "major legacy of the Anti-Federalists is the Bill of Rights." *Id.* at 64. Accordingly, their writings are useful for discerning the purpose of the Sixth Amendment and the traditional scope of the jury's power in the late eighteenth century.

[7] *See The Anti-Federalist* 103 (Herbert J. Storing ed., The University of Chicago Press 1985).

> has so justly been the boast of our fore fathers as well as ourselves is taken away under them.

The Supreme Court: The Danger of Appellate Jurisdiction (Brutus XIV) *in* 2 *The Debate on the Constitution* 258, 263 (Bernard Bailyn ed., The Library of America 1993). To be effective, he argued, the jury must reflect the polity's "sense of our laws," and a defendant may only be subjected to "long and ruinous confinement" after "a fair and impartial trial by a jury" of the vicinage. *Id.* at 259.

The Letters of the "Federal Farmer," who is usually identified as Virginia's Richard Henry Lee,[8] a signatory of the Declaration of Independence and a member of the First Congress, further suggest that eighteenth-century jurors would have been well aware of the sentencing ramifications of their verdicts. "The jury trial," declared Federal Farmer, is one of "the best features of a free government ever as yet discovered, and the only means by which the body of the people can have their proper influence in the affairs of government." *Letters of the Federal Farmer VI, in The Anti-Federalist* 65, 69 (1985). Continuing, he suggested that the jury could only exercise this "proper influence" by "shar[ing] . . . in the judicial as well as in the legislative department." *Letters of the Federal Farmer IV, in The Anti-Federalist* 54, 58 (1985). Specifically, Federal Farmer insisted that the Constitution should affirm "the jury's right to return a general verdict in all cases

[8] *See The Anti-Federalist* 24. Storing, however, cautions that the identity of Federal Farmer is difficult to ascertain with any certainty.

sacred," thus "secure[ing] to the people at large, their just and rightful controul in the judicial department." *Letters of the Federal Farmer XV, in* 2 *The Complete Anti-Federalist* 320 (Herbert J. Storing ed., The University of Chicago Press 1981). This "right to give a general verdict has never been disputed, except by a few judges and lawyers, governed by despotic principles." *Id.*

However, Federal Farmer's defense of the jury system extended beyond the ability of the jury to render general verdicts. He also offered a philosophical rationale as to why jurors should have the ability to render these general verdicts and suggested that jurors needed to be aware of the sentencing impact of their decisions. Federal Farmer observed that lay jurors, "the freemen of a country[,] are not always minutely skilled in the laws." *Id.* Nevertheless, jurors possess "common sense in its purity, which seldom or never errs in making and applying laws to the condition of the people, or in determining judicial causes, when stated to them by the parties." *Id.* Moreover, jurors, who "bear the burdens of the community," could only exercise this common sense when they "are let into the knowledge of public affairs." *Id.* Thus, these common citizens, who served both "as jurors and representatives" in each case, could render a verdict on each case only upon "acquir[ing] information and knowledge in the affairs and government of the society . . . com[ing] forward, in turn, as the centinels and guardians of each other." *Letters of the Federal Farmer IV*, 54, 59. In this manner, jurors exercised

"controul in [society's] important concerns, both in making and executing the laws" and bringing "with it an open and public discussion of all causes." *Letters of the Federal Farmer XV*, *in* 2 *The Complete Anti-Federalist* 320.

Thus, in the mind of Federal Farmer, the jury, once properly exposed to the "burdens of the community" and the "knowledge of public affairs," should exercise its "common sense" by acting simultaneously as a "juror" and "representative" and checking the judiciary and the executive in their prosecutions. In this manner, Federal Farmer indicates that information, both of the punishments available for particular crimes and of the polity's views of those punishments, was essential to the proper functioning of the jury.

As this colonial practice and understanding make clear, the right to a jury trial embodied in the Sixth Amendment assumes, as an essential characteristic, that the jury would possess all accurate available information about crimes and punishments that will aid its decision-making. *See*, *e.g.*, *United States v. Glick*, 463 F.2d 491, 492, 494 (2d Cir. 1972) (judges must correct possible juror misimpressions of sentencing rules; conviction vacated where court answered "yes" to the jury's query, "[c]an the jury in its verdict recommend leniency?"). Such information is critical if "an open and public discussion of all causes" submitted to the jury for verdict is to occur.

C. The Jury In This Case Needed Information About Sentencing, And The Court Had Ample Discretion To Supply It

The government's argument against providing sentencing information to the jury amounts to one for either juror ignorance (no information) or juror confusion (disinformation).[9] As Appellant persuasively points out, Appellant's Resp. & Reply Br. 28 n.24, instructing jurors that they should not consider the sentence may imply that the judge himself retains ample discretion over the range of any prison sentence—an implication that in this case would have been manifestly erroneous. *See* Kristen K. Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 Colum. L. Rev. 1232, 1263 (1995) ("[I]nstructing the jury that the setting of punishment is a matter exclusively within the province of the court may even mislead the jury by encouraging it to assume that the defendant will receive individual consideration at sentencing."). Jurors may likewise be misinformed about the relative harshness of sentences for the discrete crimes of receipt and possession, and there is no gain for anyone—accused or prosecution—in a system that invites misinformed guesswork. *Cf. United States v. Tucker*, 404 U.S. 443 (1972); *Townsend v. Burke*, 334 U.S. 736 (1948); *King v. Hoke*, 825 F.2d 720, 724-725 (2d Cir. 1987) (sentence predicated in any material respect on factual or legal misinformation or misapprehension violates due

[9] Here, conspicuously, the jurors "assumed that [Polizzi] would receive treatment, not long incarceration." *Polizzi*, 549 F. Supp. 2d at 320. At minimum, information should have been provided to the jury to correct this misimpression.

process).

Nor is the government correct when it argues that the only purpose to which sentencing information could be put in a case like this would be to facilitate nullification. Both logic and experience show otherwise. As a matter of common sense, there is no more reason to think that knowledge about a mandatory minimum sentence would encourage the jury to ignore facts supporting conviction than to think the very opposite—that juror knowledge of the mandatory minimum would underscore the seriousness that Congress has attached to child pornography receipt, thereby encouraging conviction. There is as much reason to think that such knowledge would reinforce the determination of the lone holdout for conviction as the lone holdout for acquittal. To be sure, while more, rather than less, information seems desirable in sentencing as in much else in our complex society, it is also the case that information that could cause juror confusion or prejudice needs to be handled by courts with great caution. But just as curative instructions can appropriately channel juror consideration of evidence that could otherwise be prejudicial or confusing, so here any nullification danger can be addressed by court instructions that make clear that jurors are not permitted to ignore the evidence.[10]

[10] Judges may–and often do–affirmatively instruct jurors that the jury "has a duty to follow the law, even though it may in fact have the power not to." *United States v. Carr*, 424 F.3d 213, 219-220 (2d Cir. 2005). Moreover, prior to

The experience of the trial-attorney members of NACDL confirms that information about mandatory minimums is seldom used by jurors to nullify. In amici's experience, juries in many instances learn of the existence and harsh effects of mandatory minimums in criminal trials through the cross-examination of cooperating witnesses. Courts routinely permit inquiry–as the Confrontation Clause requires they must–into the possible self-interest of cooperating witnesses, including pending indictments, plea agreements, and leniency in sentencing. *See, e.g.*, *United States v. Rosa*, 11 F.3d 315, 336 (2d Cir. 1993) (approving cross-examination of cooperating witnesses "as to their plea agreements, the statutory maximum sentences they faced, and the benefits they hoped to gain from cooperation."); *United States v. Cabrera*, 116 F.3d 1243, 1244 (8th Cir. 1997) (plea agreements).

As cooperating witnesses and defendants are frequently indicted for the same offenses, cross-examination often reveals to jurors the potential sentence faced by the accused. In these situations–where defense counsel can inquire into the potential sentence faced by the cooperating witness and the possible relief from that term of imprisonment if the government files motions pursuant to U.S.

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deliberation, every juror must swear an oath to "render a true verdict according to the law and the evidence." *Id.* at 220 (citation omitted) (emphasis omitted); *see also United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) (court can give anti-nullification instructions or dismiss nullifying juror). There is nothing to suggest that these anti-nullification measures would be ineffective where a juror understood the punitive ramifications of a guilty verdict.

Sentencing Guidelines Manual § 5K1.1 (p.s.) and 18 U.S.C. § 3553(e)–jurors are acutely aware of what punishment a guilty verdict will produce for defendants.

Nevertheless, the experience of NACDL and FAMM demonstrates that jurors are not hesitant to convict defendants where the evidence warrants, even after they indirectly learn sentencing information through cross-examination. This experience provides empirical reason to reject the government's position that jurors should not become aware of sentencing implications out of a fear of nullification, and it indicates that the government's anti-nullification rhetoric is overstated.

As the district court noted, under the increasingly complex federal sentencing regime, modern jurors, unlike the juries of the eighteenth century, are unlikely to have even a rudimentary understanding of the different punishments that result from convictions under various provisions of Section 2252. Indeed, even now, in amicis' experience, more than twenty years after enactment of the Sentencing Reform Act, ordinary citizens commonly believe that persons sentenced to prison in federal court are released early on parole and that many others receive little or no punishment at all. Without an adequately informed jury, and in light of the great potential for juror misinformation based on everything the jury had seen and heard, Judge Weinstein had the undoubted discretion to make

sure the jury had the correct facts about the sentencing ramifications of guilty verdicts.

Absent such information, jurors cannot maintain a knowledgeable and open dialogue during deliberation, and the jury's ability to perform its historical function–bringing the voice and values of the community into the courtroom–would be undercut. *See, e.g.*, *United States v. Gilliam*, 994 F.2d 97, 100-101 (2d Cir. 1993) (jury serves as a mechanism by which accused can be judged according to community's mores). Only a jury that understands the implications of its actions, having obtained "information and knowledge in the affairs and government of the society," can "come forward, in turn, as the centinels and guardians of each other."[11] *Letters of the Federal Farmer IV*, 54, 59.

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[11] In addition, the district judge's discretion under *Ball v. United States*, 470 U.S. 856, 864 (1985), to vacate either the possession or the receipt charges, *see infra* Part II, further underscores the need to inform the jury about potential sentencing ramifications. Because the court has the power to choose which convictions to vacate, the judge, in effect, possesses the power to choose what law will govern the defendant's sentence even where, as here, one crime carries a steep mandatory minimum penalty. In other words, juries, bereft of information, are required blindly to find the predicate facts attendant to a conviction and a mandatory minimum sentence under Section 2252(a)(2), only to later have the court potentially find a different sentence. This scheme stands contrary to the Supreme Court's guidance in *Booker*, 543 U.S. at 244, which reaffirmed that facts 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 the jury* beyond a reasonable doubt." (Emphasis added). This problem could be avoided if jurors were instructed as to the relevant mandatory minimum sentence.

D. Precedent Cited By The Government Does Not Preclude Informing The Jury Of A Mandatory Minimum Sentence

The government errs when it asserts that precedent compels this Court to reverse the district court's grant of a new trial. Gov't Br. 32 (citing *Shannon v. United States*, 512 U.S. 573 (1994); *United States v. Pabon-Cruz*, 391 F. 3d 86 (2d Cir. 2004)). The precedent on which the government relies compels no such conclusion.

The only Second Circuit case that the government cites that held that a district court lacked discretion to inform the jury of a mandatory minimum is an unpublished order granting a writ of mandamus, in *United States v. Pabon-Cruz*, No. 02-3080 (2d Cir. Oct. 11, 2002).[12] This unpublished order is not binding precedent. *See* Local Rule 32.1(b) ("Rulings by Summary Order do not have precedential effect."). More importantly, in a subsequent appeal in *Pabon-Cruz*, this Court expressly and pointedly decided not to address "whether, or in what circumstances, a trial judge may inform the jury of the relationship between punishment and offense," 391 F.3d at 95 n.11, and declined to embrace the prior panel's contrary determination. Accordingly, the government's reliance on the *Pabon-Cruz* decisions is not persuasive.

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[12] The government's citation to *United States v. Thomas*, 116 F.3d at 614, does not support its argument against juror information. Although *Thomas* broadly addresses the topic of jury nullification in discussing whether it was permissible for the Court to dismiss a nullifying juror, *Thomas* does not discuss whether the judge can exercise discretion to reveal a potential sentence to the jury.

In light of the limitation that Section 2252 places on the court's ability to fashion a sentence appropriate to the facts of the case, it is essential that the district court be accorded the customary discretion that trial courts have in managing their cases and the juries that hear them, as the facts of each case may demand. *See, e.g.*, *United States v. Quinones*, 511 F.3d 289, 315 (2d Cir. 2007) ("trial judge retains extensive discretion in tailoring jury instructions, provided that they correctly state the law and fairly and adequately cover the issues presented") (citation omitted), *cert. denied*, 129 S. Ct. 252 (2008); *United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992) (courts have "broad discretion" to "order a new trial to avert a perceived miscarriage of justice").

The government's reliance on *Shannon* also misses the mark. *Shannon* established that courts are not required to inform the jury that the defendant, if found not guilty by reason of insanity, could be civilly committed. 512 U.S. at 580. *Shannon* considered only the scope of the Insanity Defense Reform Act, not the Sixth Amendment right regarding jury instructions in criminal trials. Regardless, the Court noted that its "decision will not be misunderstood as an absolute prohibition" against instructing a jury of the potential for civil commitment. 512 U.S. at 587-88. Instead, *Shannon* stands for the proposition that an instruction on the possibility of civil commitment lies within the court's discretion. *United States v. Blume*, 967 F.2d 45, 49 (2d Cir. 1992).

II. THE RECEIPT CHARGES VIOLATE THE DOUBLE JEOPARDY CLAUSE

Even if this Court reverses the grant of a new trial on the receipt charges, this Court should vacate the receipt convictions against Polizzi, as these charges violate the Double Jeopardy Clause of the Fifth Amendment.[13] As Polizzi has observed, every circuit court to address the issue has concluded that under Section 2252, possession is a lesser included offense of receipt, demonstrating that the receipt and possession charges against Polizzi are impermissibly multiplicitous of one another. *See* Appellant's Opening Br. at 41-43 (citing cases from Third, Ninth, and Tenth Circuits). *See also United States v. Morgan*, 435 F.3d 660, 662-663 (6th Cir. 2006) ("possessing images depicting minors engaged in sexually explicit conduct . . . [is] a lesser-included offense of" receipt). Given the multiplicitous nature of the receipt and possession charges, this Court should remand this case to the district court in order for it to determine, in its discretion, which to vacate. *See* Appellant's Response & Reply Br. at 48-49. *See also Ball v. United States*, 470 U.S. at 864; *Ogando v. United States*, No. 00-2599, 2001 WL 533545, at *1 (2d Cir. May 17, 2001) ("[A] district court has discretion regarding which count to dismiss.").

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[13] Amici address only the receipt charges, because only those charges are at issue on the government's cross-appeal, in response to which this brief is filed. Nevertheless, amici note their agreement with and support for Polizzi's claims that the possession charges, too, violate the Fifth Amendment. *See* Appellant's Principal Br. at 35-43; Appellant's Response & Reply Br. at 43-46.

Moreover, the receipt counts are impermissibly multiplicitous in themselves, as Section 2252(a)(2) permits only one conviction per transaction, and the government has not alleged multiple transactions. In determining whether a defendant may be subjected to multiple charges under a given statutory provision, the court must look to the "allowable unit of prosecution." *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221 (1952); *United State v. Ansaldi*, 372 F.3d 118 (2d Cir. 2004); *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002), *overruled in part on other grounds by United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc). The allowable unit of prosecution is a matter of statutory interpretation, and is not determined by the alleged conduct of the defendant or the form of the indictment. *Bell v. United States*, 349 U.S. 81, 83 (1955); *Ansaldi*, 372 F.3d at 124 ("It is not the conduct that underlies the offense that matters for multiplicity analysis, but rather 'the offense – in the legal sense, as defined by Congress.'" (quoting *United States v. Chacko*, 169 F.3d 140, 146 (2d Cir. 1999))).

Thus, "[w]here a statutory offense is charged as two separate counts, [a reviewing court] must determine whether Congress intended the counts to constitute separate 'units of prosecution.'" *United States v. Kerley*, 544 F.3d 172, 178 (2d Cir. 2008) (internal citations and quotations omitted). If a court determines that Congress has not clearly spoken and unambiguously established

the "unit of prosecution," the court must apply the rule of lenity and construe the provision in the least punitive manner consistent with the text. *Bell*, 349 U.S. at 84 ("[I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses . . . "). "When Congress has the will it has no difficulty . . . defining what it desires to make the unit of prosecution. . . . When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Id.* at 83.

These principles demonstrate that the receipt charges violate the Double Jeopardy Clause independently of their duplication of the possession charges. Section 2252(a)(2) penalizes any individual who "knowingly receives, or distributes, any visual depiction" of child pornography via interstate commerce. Because the word "any" is inherently ambiguous as to quantity,[14] Section 2252(a)(2) does not specify a unit of prosecution. *See, e.g.*, *United States v. Olmeda*, 461 F.3d 271, 279 (2d Cir. 2006) ("[S]tatutory reference to 'any firearm or ammunition' creates '[u]ncertainty as to the unit of prosecution intended by Congress.'" (citations omitted)); *United States v. Coiro*, 922 F.2d 1008, 1014 (2d

[14] *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (quoting Webster's Third New International Dictionary 97 (1976))); *United States v. Genendo Pharm., N.V.*, 485 F.3d 958, 962-964 (7th Cir.) (statutory provision ambiguous due to its use of the term "any"), *cert. denied*, 128 S. Ct. 670 (2007).

Cir. 1991) ("[T]he word 'any' has 'typically been found ambiguous in connection with the allowable unit of prosecution'") (collecting cases).

It is instructive to compare the language of Section 2252 with the statutory text at issue in *Bell*, the seminal Supreme Court case applying the rule of lenity where Congress fails to establish clearly the unit of prosecution. In *Bell*, a defendant was charged with two counts of violating the Mann Act, which criminalizes "knowingly transport[ing] in interstate or foreign commerce . . . *any* woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." *Bell*, 349 U.S. at 82 (quoting 18 U.S.C. § 2421) (emphasis added, ellipses in original). The two charges arose from a single trip, on which the defendant transported two women. The Court held that although "Congress could no doubt make the simultaneous transportation of more than one woman . . . liable to cumulative punishment . . . [i]t ha[d] not done so in words in the provisions defining the crime and fixing its punishment." *Id.* at 82-83. Thus, the two charges flowing from the defendant's single trip were impermissibly multiplicitous, and only one could survive.

By criminalizing the receipt of "any visual depiction" of child pornography, Congress similarly failed to specify the unit of prosecution applicable under Section 2252(a)(2), leaving to this Court "the task of imputing to Congress an undeclared will." This Court must therefore apply the rule of lenity, which

establishes that the statute may give rise to only one charge per prohibited *transaction*, irrespective of the number of items or individual acts at issue in each transaction. *Bell*, 349 U.S. at 84.

The Fifth Circuit, following this analysis, has applied the "transaction" test to multiplicitous prosecutions under Section 2252. *See United States v. Reedy*, 304 F.3d 358, 361 (5th Cir. 2002) (Section 2252 "does not speak to the question" of unit of prosecution, and courts must therefore apply "rule of lenity" in reviewing multiplicitous charges under Section 2252). That court therefore recently held that multiple charges of receipt under Section 2252(a)(2) violated Double Jeopardy because the conduct alleged in the indictment did not show "separate receipt . . . of the images identified." *United States v. Buchanan*, 485 F.3d 274, 282 (5th Cir. 2007).

Here, the receipt charges against Polizzi specified only (a) the file names of the underlying images, and (b) the dates on which the images were downloaded. The indictment did not, however, allege conduct showing that each image was received in an individual transaction. The rule of lenity thus requires this Court to hold that the receipt charges against Polizzi violated the Double Jeopardy Clause of the Fifth Amendment.

CONCLUSION

For reasons set forth above, this Court should affirm the grant of a new trial. In the alternative, the Court should remand to permit the district court to determine which convictions to vacate on double jeopardy grounds.

Respectfully submitted,

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Dated: November 17, 2008

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2008, ten copies of the foregoing Brief for National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums Foundation as *Amici Curiae* in Support of Defendant-Appellant-Cross-Appellee Pietro Polizzi were filed with the U.S. Court of Appeals, Second Circuit by Federal Express overnight mail, postage prepaid, and submitted in Portable Document Format by electronic mail to <criminalcases@ca2.uscourts.gov>.

I further certify that on November 17, 2008, two copies of the foregoing Brief for National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums Foundation as *Amici Curiae* in Support of Defendant-Appellant-Cross-Appellee Pietro Polizzi were sent by Federal Express overnight mail, postage prepaid, and in Portable Document Format by electronic mail to:

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ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

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