No. 18-___

IN THE

Supreme Court of the United States

MIGUEL CABRERA-RANGEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, or under what circumstances, the Sixth Amendment right to jury trial prohibits a federal court from basing a criminal defendant's sentence on a charge for which the jury acquitted him.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Miguel Cabrera-Rangel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a) is unpublished but appears at 730 Fed. Appx. 227. The district court's relevant rulings (Pet. App. 4a) are unreported.

JURISDICTION

The court of appeals issued its opinion on July 9, 2018. Pet. App. 1a. On September 14, 2018, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including November 6, 2018. *See* 18A269. On October 19, 2018, Justice Alito further extended the filing date to and including December 6, 2018. *Id.* This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury."

The Sentencing Reform Act provides in relevant part: "No limitation shall be placed on the information concerning the . . . conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661.

INTRODUCTION

A jury's acquittal in a criminal case is meant to be inviolate—an authoritative expression of the community that the defendant should not be punished based on particular allegations. At common law, therefore, a judge could not base a defendant's sentence on charges a jury rejected, even if the acquittal was coupled with a conviction on another charge. Today, "the overwhelming majority of states" maintain this prohibition. *United States v. White*, 551 F.3d 381, 394 & n.5 (6th Cir. 2008) (en banc) (Merritt, J., dissenting) (collecting authorities).

But the Sentencing Reform Act, and the Federal Sentencing Guidelines promulgated pursuant to it, depart sharply from this tradition. They provide "[n]o limitation" on a federal court's ability to sentence a defendant based on allegations a jury has rejected. 18 U.S.C. § 3661; *see also* U.S.S.G. §§ 1B1.3, 1B1.4. And in fact, federal district judges now regularly consider acquitted conduct in setting defendants' sentences.

In *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), the Court held that considering such conduct does not contravene the Fifth Amendment. But *Watts* did not present anything other than a "very narrow" question "regarding the interaction of the Guidelines with the Double Jeopardy Clause." *See United States v. Booker*, 543 U.S. 220, 240 n.4 (2005). In particular, the Court did not consider whether increasing the defendant's sentence based on acquitted conduct transgressed the province of the jury "in violation of the Sixth Amendment" right to jury trial. *Id.* at 240.

As numerous Justices and judges have recently suggested, this Court should end its "silence" on the

Sixth Amendment implications of basing a sentence on acquitted conduct. *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari); *see also infra* at 10-11 (statements from other Justices and judges). This Court's Sixth Amendment jurisprudence—moribund when *Watts* was decided but reinvigorated since—makes clear that allowing a judge to base a defendant's sentence on acquitted conduct is at war with the right to jury trial. That right preserves the jury's common-law function as a "bulwark" between the defendant and the Government, preventing defendants from being subjected to punishment for allegations juries reject. *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). Sentences based on acquitted conduct make a mockery of that design.

STATEMENT OF THE CASE

1. In early 2017, a border patrol agent came across petitioner Miguel Cabrera-Rangel and four others near the Texas-Mexico border. The group scattered, and the agent pursued petitioner. The agent tackled petitioner, and a struggle ensued. Def. C.A. Br. 4-5. After the altercation, the border patrol agent reported, and received treatment for, injuries to his face. *Id.* 6.

2. A federal grand jury returned a two-count indictment against petitioner. Count One charged assault on a federal officer by physical contact inflicting bodily injury, under 18 U.S.C. § 111(a)(1) & (b). Count Two was a lesser-included charge of assault on a federal officer by physical contact, under 18 U.S.C. § 111(a)(1).

Petitioner exercised his constitutional right to jury trial. At trial, the agent testified that petitioner punched him in the face, grabbed the agent's

flashlight, and then struck the agent with the flashlight. Def. C.A. Br. 4-6.

In pretrial interviews introduced into evidence, petitioner conceded that he had an altercation with the agent. Def. C.A. Br. 8-9. But he maintained that he never punched the agent or struck him with the flashlight. *Id.* Physical evidence also cast doubt on the agent's testimony. At trial, forensic examiners testified that they found no fingerprints, DNA, or blood on the flashlight. An investigator also recorded that petitioner was missing two fingers on his left hand—the hand the agent accused petitioner of using to grip the flashlight. Finally, the testimony of the agent's treating physician indicated that the agent's facial injuries could have been caused either by being struck in the face *or* simply by tackling another person. *Id.* 7-11.

The jury ultimately acquitted petitioner of the greater charge, infliction of bodily injury. It convicted him of the lesser-included charge, assault by physical contact. Pet. App. 20a.

3. When a defendant is convicted of a federal crime, the Federal Sentencing Guidelines recommend a sentencing range based on the defendant's offense level and criminal history. When setting the offense level, the Guidelines start with the defendant's offense of conviction. But the Guidelines also require adjustments based on all of the defendant's "relevant conduct." U.S.S.G. § 1B1.3. And pursuant to Congress's directive to place "[n]o limitation" on the information a sentencing court "may receive and consider," 18 U.S.C. § 3661, the Guidelines allow a court to consider *any* relevant conduct it believes occurred, even if the jury acquitted the defendant of

the allegation. *See United States v. Watts*, 519 U.S. 148, 153-54 (1997) (per curiam).

The district court relied on acquitted conduct here. Looking only to the facts encompassed within the jury's verdict, the Guidelines would have produced a base offense level of 10 and an ultimate offense level of 13. *See* U.S.S.G. § 2A2.4. Pairing that offense level with petitioner's criminal history category (IV) would have yielded a Guidelines sentencing range of 24 to 30 months in prison. Def. C.A. Br. 32.[1]

But the presentence report (PSR), prepared by a probation officer who attended the trial, did not set petitioner's recommended sentence in this manner. Instead, the PSR recommended a base offense level of 14 under the guideline for Aggravated Assault—the guideline corresponding to the charge the jury rejected. *See* U.S.S.G. § 2A2.2. The PSR also recommended a 6-level enhancement for the victim sustaining bodily injury and a 4-level enhancement for use of a dangerous weapon (the flashlight). Based on a total offense level of 24, the PSR produced a Guidelines range of 77 to 96 months' imprisonment. Def. C.A. Br. 11-12.

4. Before and during sentencing, petitioner objected on Sixth Amendment grounds to the district court's consideration of acquitted conduct to determine his sentence. Pet. App. 11a-23a; Def. C.A. Br. 12-13. As the judge recognized, there was "no dispute" that

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[1] Petitioner previously suggested the appropriate offense level would have been 15, generating a range of 30 to 37 months. Pet. App. 39a. But that accounting mistakenly included a 2-level enhancement under U.S.S.G. § 2A2.4(b)(2) for sustaining bodily injury, the allegation the jury rejected.

the jury acquitted petitioner of the conduct the PSR relied upon to increase the Guidelines range above 30 months. Pet. App. 29a. The judge nevertheless overruled petitioner's objections, insisting that in her "role as presiding judge over the trial and the sentencing, the law allow[ed her] to take into account all of that conduct." *Id.*

With respect to the acquitted conduct itself, the judge acknowledged that petitioner "made very compelling arguments" at trial and that the jury "went along with" those arguments. Pet. App. 29a. But the judge saw things differently. In her view, the agent's testimony regarding the use of the flashlight was "very credible," and the evidence petitioner introduced "[did]n't really support [his] contention" that he never wielded the flashlight against the agent. *Id.* 29a-30a. Accordingly, the judge imposed a 96-month sentence—the "high end" of the Guidelines range for committing an assault inflicting bodily injury (and the statutory maximum under the U.S. Code for the offense for which he was actually convicted). *See id.* 41a.[2]

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[2] At the end of the sentencing hearing, the district judge remarked that she "would have sentenced [petitioner] to the statutory maximum penalty regardless of the offense level." Pet. App. 44a. But such an alternative suggestion can insulate a sentence from appellate scrutiny only where "the sentence the district court imposed was not influenced in any way" by the Guidelines range the defendant argues was incorrectly calculated. *United States v. Martinez-Romero*, 817 F.3d 917, 924-26 (5th Cir. 2016) (quoting *United States v. Ibarra-Luna*, 628 F.3d 712, 718-719 (5th Cir. 2010)). And here, the district judge explicitly chose 96 months because it was the "high end" of the range calculated according to petitioner's acquitted conduct. Pet. App. 41a. Consequently, the Fifth Circuit paid no heed to the

5. Petitioner appealed his sentence, renewing his Sixth Amendment claim. Pet. App. 2a. He maintained that calculating his advisory Guidelines range based on the charge the jury rejected—and thereby using that range as an anchor for his sentence—violated his right to jury trial. He also stressed that all federal sentences must be substantively reasonable, *see United States v. Booker*, 543 U.S. 220, 264 (2005), and that the Sixth Amendment requires juries to find all facts "essential to the [legality of the] punishment," *Blakely v. Washington*, 542 U.S. 296, 303-06 (2004) (quoting 1 Joel P. Bishop, *Criminal Procedure* § 87, at 55 (2d ed. 1872)). That being so, petitioner contended, the Sixth Amendment does not permit a court to justify an otherwise unreasonable sentence by relying on acquitted conduct.

The Fifth Circuit rejected petitioner's arguments and affirmed. The court of appeals recognized that *Watts* "did not address whether consideration of acquitted conduct at sentencing violates the Sixth Amendment." Pet. App. 2a. But the court of appeals nevertheless treated *Watts* as "foreclos[ing]" the claim that basing a sentence on acquitted conduct contravenes the right to jury trial. *Id.*

Turning to the thread of petitioner's argument relating to the substantive reasonableness of his sentence, the court of appeals did not question that petitioner's sentence would be substantively unreasonable if the allegations rejected in the jury's verdict were set aside. But the Fifth Circuit reaffirmed

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judge's passing comment, instead deciding only whether the district court was constitutionally permitted to consider acquitted conduct at sentencing. *See id.* 2a-3a.

its prior precedent holding that the Sixth Amendment does not prohibit sentences that are substantively reasonable "only if" acquitted conduct is taken into account. Pet. App. 3a (citing *United States v. Hernandez*, 633 F.3d 370, 374 (5th Cir. 2011)).

REASONS FOR GRANTING THE WRIT

I. Sentencing based on acquitted conduct presents a vexing and persistent problem that warrants this Court's review.

As a growing chorus of jurists has recognized, the time has come for this Court to address the Sixth Amendment implications of relying on acquitted conduct in sentencing criminal defendants.

1. Judicial reliance on acquitted conduct is an "important, frequently recurring, and troubling contradiction in sentencing law." *United States v. Bell,* 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc), *cert. denied*, 137 S. Ct. 37 (2016). The Sixth Amendment right to jury trial is designed to protect defendants from prosecutorial and judicial overreach. *See Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). But, under the current federal sentencing system, defendants' sentences can balloon based not on facts proved to their peers beyond a reasonable doubt, but on factual allegations juries have actually *rejected*. *See, e.g.*, *United States v. White*, 551 F.3d 381, 388 (6th Cir. 2008) (en banc) (Merritt, J., dissenting), *cert. denied*, 556 U.S. 1215 (2009) (14-year increase to defendant's sentence); *Bell*, 808 F.3d at 929 (Millett, J., concurring in the denial of rehearing en banc) (10-to-12-year increase). This phenomenon occurs across

the full range of criminal cases, from tax evasion to drug crimes.[3]

Judges' ability to rely on jury-rejected allegations at sentencing also discourages defendants from exercising their right to jury trial in the first place. Where a defendant faces multiple charges, "a hard-fought partial victory" on the more serious charges "can be rendered practically meaningless when that acquitted conduct nonetheless produces a drastically lengthened sentence." *Bell*, 808 F.3d at 932 (Millett, J., concurring in the denial of rehearing en banc). Faced with "no practical upside" to acquittals on greater charges unless they secure acquittals on *all* charges, such defendants face an "almost insurmountable pressure" to accept plea deals. *See id.*

2. Despite entreaties from Members of this Court, no other institutional actor has stepped in to obviate the need to decide whether sentencing defendants based on acquitted conduct violates the Sixth Amendment. In light of "the role that juries and acquittals play in our system," Justice Breyer suggested years ago that the U.S. Sentencing Commission may want to bar the practice. *United States v. Watts*, 519 U.S. 148, 159 (1997) (per curiam) (Breyer, J., concurring). But the Sentencing

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[3] *See, e.g.*, *United States v. Bolton*, No. 17-60502, 2018 WL 5603038, at *11 (5th Cir. Oct. 26, 2018) (tax evasion); *United States v. Grace*, 640 Fed. Appx. 298, 300 (5th Cir. 2016) (corruption-related offenses); *Bell*, 808 F.3d at 929 (Millett, J., concurring in the denial of rehearing en banc) (drug conspiracy); *United States v. Shahid*, 486 Fed. Appx. 915, 916-17 (2d Cir. 2012) (bribery); *United States v. Papakee*, 573 F.3d 569, 576 (8th Cir. 2009) (sexual abuse); *United States v. Dewitt*, 304 Fed. Appx. 365, 368 (6th Cir. 2008) (murder).

Commission has not acted. Nor has Congress amended 18 U.S.C. § 3661.

Similarly, while sitting on the D.C. Circuit, then-Judge Kavanaugh called for district judges themselves to "disclaim reliance" on acquitted conduct. *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc). Yet many district judges have continued to impose sentences based on such conduct. All too often, as in this case, defendants are acquitted on certain charges, only to see judges "brush off the jury's judgment" by "us[ing] the very same facts the jury rejected at trial to multiply the duration of a defendant's loss of liberty." *See id.* at 930 (Millett, J., concurring in the denial of rehearing en banc).

3. As Justices and judges have increasingly emphasized, this "disregard[]" for the Sixth Amendment "has gone on long enough." *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari).

A few Terms ago, three Justices called on the Court to "put an end" to the practice of sentencing defendants based on acquitted conduct. *Id.* Justice Kennedy warned that increasing a sentence based on facts the jury rejected raises concerns of "undercutting the verdict of acquittal." 519 U.S. at 170 (Kennedy, J., dissenting). And this Court's two newest members have expressed similar sentiments. Then-Kavanaugh has posited that increasing a defendant's sentence based on acquitted conduct "seems a dubious infringement of the rights to due process and to a jury trial." *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc). Citing the *Jones* case, then-Judge Gorsuch likewise has maintained

that it is at least "questionable" for a judge to find facts "without the aid of a jury or the defendant's consent." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014).

At least ten other federal appellate judges have expressed similar misgivings, with many also urging the Court to "resolve the contradictions in the current state of [Sixth Amendment] law." *See Bell*, 808 F.3d at 928-32 (Millett, J., concurring in the denial of rehearing en banc); *see also, e.g.*, *United States v. Canania*, 532 F.3d 764, 776-77 (8th Cir.) (Bright, J., concurring), *cert. denied*, 555 U.S. 1037 (2008). Some of these judges have concluded that the use of acquitted conduct at sentencing is flatly unconstitutional, maintaining that the practice "violates both our common law heritage and common sense." *White*, 551 F.3d at 387 (en banc) (Merritt, J., dissenting) (writing on behalf of six judges); *see also, e.g.*, *United States v. Mercado*, 474 F.3d 654, 658-65 (9th Cir. 2007) (Fletcher, J., dissenting), *cert. denied*, 552 U.S. 1297 (2008); *United States v. Faust*, 456 F.3d 1342, 1349-53 (11th Cir.) (Barkett, J., specially concurring), *cert. denied*, 549 U.S. 1046 (2006).

To be sure, no split among the courts of appeals has developed on this Sixth Amendment question. *See Mercado*, 474 F.3d at 657. But the fact that so many federal appellate judges perceive a constitutional infirmity in a recurring and consequential sentencing practice strongly signals that this Court's intervention and guidance is needed.

What is more, the current rule across the courts of appeals derives more from the courts' misperception that they are bound by seemingly broad language in *Watts* than from any considered judgment on the

issue. In *Watts*, the Court stated that "acquittal does not prevent the sentencing court from considering the conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." 519 U.S. at 157. But *Watts* concerned only the Double Jeopardy Clause and did not consider the Sixth Amendment issue. *See United States v. Booker*, 543 U.S. 220, 240 & n.4 (2005).

Needless to say, a given practice can violate one provision of the Constitution even where the Court has held that it does not violate a different provision. For example, although the Court earlier held that grossly excessive punitive damages awards do not violate the Eighth Amendment's Excessive Fines Clause, it later held that such awards do violate the Due Process Clause. *Compare Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 260 (1989), *with BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). And carrying over the Fifth Amendment analysis in *Watts* to the Sixth Amendment is even less justified where, as here, the prior opinion "was rendered without full briefing or argument." *See Hohn v. United States*, 524 U.S. 236, 251 (1998).

The Fifth Circuit and other federal courts of appeals have nonetheless taken *Watts* to "foreclose[]" any claim that sentencing a defendant based on acquitted conduct violates the Sixth Amendment. *See* Pet. App. 2a; *see also, e.g.*, *United States v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *Mercado*, 474 F.3d at 656-57; *Faust*, 456 F.3d at 1348. Only this Court can disabuse them of that notion.

II. The decision below is fundamentally wrong.

A. The Sixth Amendment precludes judges from using acquitted conduct to increase a criminal defendant's sentence.

As this Court has explained, the Sixth Amendment right to trial by jury incorporates the common-law understanding of that right. Both that historical conception and this Court's modern jurisprudence show that the use of acquitted conduct at sentencing violates the Sixth Amendment.

1. A criminal defendant's right to jury trial is "a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). In two ways, this reservation serves as "the great bulwark of [our] civil and political liberties." *See* 3 Joseph Story, *Commentaries on the Constitution of the United States* 652 (1833).

First, the right to jury trial reflects a "profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). In particular, making a criminal defendant's peers the ultimate arbiters of fact is designed to shield the accused from "the corrupt or overzealous prosecutor" or the "compliant, biased, or eccentric judge." *Id.* at 156. "If the defendant preferred the common-sense judgment of a jury . . . he was to have it." *Id.*

Second, the right to jury trial safeguards citizen authority over the extent to which courts may deprive persons of their liberty. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely*, 542 U.S. at 306.

Such popular control over criminal punishment is essential to the Framers' vision of a government by the people. In the words of Alexander Hamilton:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

The Federalist No. 83, at 499 (Clinton Rossiter ed., 1961).

2. The jury carries out its role as the "circuitbreaker in the State's machinery of justice," *Blakely*, 542 U.S. at 306-07, through its unreviewable power to acquit defendants of criminal charges. When the jury acquits, it makes a "legal certification" that "an accused person is not guilty of the charged offense." *Acquittal*, *Black's Law Dictionary* (10th ed. 2014). As this Court has emphasized, "the law attaches particular significance," *United States v. Scott*, 437 U.S. 82, 91 (1978), and "special weight" to a jury's decision to acquit a defendant, *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980).[4] An acquittal is meant to be final and "unassailable." *Yeager v. United States*, 557 U.S. 110, 122-23 (2009).

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[4] The famed acquittal of William Penn and William Mead is illustrative. There, the royal judges threatened to starve the jurors—and later fined and jailed them—to pressure them to change their verdict. But because the jury refused, the judges could not punish the defendants for allegations the jury rejected. *See* Leonard W. Levy, *The Palladium of Justice* 57-60 (1999).

Juries can exercise their constraining power by fine-tuning their verdict to multiple charges before them. By convicting a defendant on one or more charges but acquitting on others, a jury can indicate when it thinks a prosecutor has overreached or when a defendant's conduct otherwise does not warrant punishment on the basis of a particular charge.

This practice has its roots in eighteenth-century England. The jury's "power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses." *Jones v. United States*, 526 U.S. 227, 245 (1999).

These mixed verdicts—part of our common law "inheritance" that the Sixth Amendment preserves, *Duncan*, 391 U.S. at 154 (quoting *Thompson v. Utah*, 170 U.S. 343, 349-50 (1898))—allowed juries to modulate a defendant's punishment. At common law, each crime carried a determinate sentence, whether it was death, corporal punishment, fines, or some other specified sanction. *See* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 891-92 (1990). Juries generally knew what punishment would result from any given verdict. *See* Judge Nancy Gertner, *A Short History of American Sentencing*, 100 J. Crim. L. & Criminology 691, 692-94 (2010). Therefore, by virtue of the charges on which they acquitted or convicted a defendant, English juries effectively controlled which sanction a defendant would receive—or at least whether the defendant would be punished more harshly or not. *See id.* at 693.

The jury's power to find "an offense less in degree than that charged in the indictment" was "one of the

most important aspects of the jury's prerogative." Julius Goebel, Jr. & T. Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)*, at 673-75 (1944). Take homicide, for instance. By finding a defendant guilty of either murder or manslaughter, English juries made "the choice between capital punishment and branding." John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 304 (1978). Juries similarly dictated sanctions in larceny cases. Through their power to establish the valuation of stolen goods, juries effectively determined defendants' punishments—whether transportation or death, whipping or a short jail term, or branding the thumb. *Id.* at 303-04.

At times, juries exercised their acquittal power (as they do today) because they were unpersuaded by the prosecution's case concerning the greater charge. Other times, they did so in the teeth of the evidence, with the express purpose of mitigating harsh sentences—a practice William Blackstone praised as "pious perjury." *See Apprendi v. New Jersey*, 530 U.S. 466, 479 n.5 (2000) (quoting 4 William Blackstone, *Commentaries on the Laws of England* *238 (1769)). Either way, "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 Press ed. 2003).

3. It is incumbent upon this Court to "preserv[e] [this] ancient guarantee under a new set of circumstances"—namely, the sentencing system prescribed by the Federal Sentencing Guidelines.

United States v. Booker, 543 U.S. 220, 237 (2005); *see also Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014) (emphasizing the Court's equivalent duty in the Fourth Amendment context). And calculating a defendant's sentence according to jury-rejected charges is a direct affront to the integrity of the jury's acquittal.

When a federal court relies on acquitted conduct at sentencing, it "expressly consider[s] facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved." *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005) (Gertner, J.). This is especially true where, as here, a jury has acquitted on a greater offense but convicted on a lesser offense. A single element, or fact, often differentiates the greater from the lesser offense. In such cases, the judge's contrary factual finding tramples the jury's factfinding domain.

Worse yet, a judge who bases a sentence on an acquitted charge nullifies the jury's determination that a defendant should not be punished according to the more serious allegation. After all, the jury can only authorize punishment, or withhold its authorization, through its verdict. *United States v. Mercado*, 474 F.3d 654, 663 (9th Cir. 2007) (Fletcher, J., dissenting). When a judge so directly overrides the jury verdict—the jury's only tool for modulating punishment—the "liberty-protecting bulwark [of the jury] becomes little more than a speed bump at sentencing." *See United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc).

Finally, the use of acquitted conduct at sentencing threatens the legitimacy of the system of trial by jury.

In construing and enforcing constitutional guarantees, this Court frequently considers whether a given practice "undermine[s] public confidence in the fairness of our system of justice." *See Batson v. Kentucky*, 476 U.S. 79, 87 (1986); *see also Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903 (2018) (expressing concern where sentencing practices "seriously affect the fairness, integrity, or public reputation of judicial proceedings").

The use of acquitted conduct at sentencing "rob[s the criminal justice] system of the democratic legitimacy conferred by the jury's role." Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 Suffolk U. L. Rev. 1, 26 (2016). It transforms jurors from participants in the system into mere bystanders, "allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing." *United States v. Canania*, 532 F.3d 764, 778 (8th Cir. 2008) (Bright, J., concurring). This defeats the purpose of jury service. It also signals to the public that a defendant's punishment turns entirely on the views of the prosecutor and judge, not the judgment of his peers.[5]

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[5] As one juror wrote about the use of acquitted conduct at sentencing for an eight-month trial in which he served:

> It seems to me a tragedy that one is asked to serve on a jury, serves, but then finds their work may not be given the credit it deserves. . . . It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the [prosecutor] would have liked them to have been found guilty.

B. Vindicating the right to jury trial is compatible with the realities of modern sentencing.

Some courts of appeals have noted that, unlike the common law, the U.S. Code provisions that govern modern sentencing provide judges with broad statutory sentencing ranges. These courts thus reason that, "[s]o long as the defendant receives a sentence at or below the [applicable] statutory ceiling," the Sixth Amendment poses no barrier to increasing the sentence based on acquitted conduct. *United States v. White*, 551 F.3d 381, 385 (6th Cir. 2008) (en banc). This approach is misguided.

1. It is of course true that modern sentencing differs in some ways from the prevailing model at common law. Not only do judges now customarily select sentences within broad statutory ranges, but they do so based on facts not found by the jury. *See Williams v. New York*, 337 U.S. 241, 247-51 (1949).

But under the Federal Sentencing Guidelines system, courts do not have unbridled discretion within applicable statutory sentencing ranges to impose any sentence they like. *See Gall v. United States*, 552 U.S. 38, 49-50 (2007). Judges are required, in every single case, to calculate and consider the Guidelines range. *See id.* at 51; 18 U.S.C. § 3553(a)(4). And while judges can deviate from that range, the Guidelines' highly regimented and specific numerical prescriptions exert—in the words of an editor of the *Federal Sentencing Reporter*—a "special gravitational pull" in

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Canania, 532 F.3d at 778 n.4 (Bright, J., concurring) (quoting May 16, 2008 Letter from Juror # 6 to The Honorable Richard W. Roberts).

sentencing. *See* Michael M. O'Hear, *Explaining Sentences*, 36 Fla. St. U. L. Rev. 459, 482 (2009). As a result, most federal sentences are either within-Guidelines sentences or are significantly influenced by the Guidelines. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345-47 (2016); *Peugh v. United States*, 569 U.S. 530, 543-44 (2013).[6]

In light of this finely reticulated framework and its consequences, prohibiting judicial consideration of acquitted conduct strikes the proper balance between tailoring sentences to defendants' individual circumstances and preserving Sixth Amendment values. In numerous areas of constitutional law, governmental actors generally have wide governmental discretion, but certain specific considerations are off the table. *See* Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 Hastings L.J. 711, 712 (1994). In the realm of sentencing itself, it is "constitutionally impermissible" for courts to rely on a defendant's race, religion, or political affiliation, *Zant v. Stephens*, 462 U.S. 862, 885 (1983); the fact that the defendant successfully exercised his right to appeal, *North Carolina v. Pearce*, 395 U.S. 711, 723-24 (1969); or that the defendant exercised his right to jury trial, *United States v. Jackson*, 390 U.S. 570, 581-83 (1968); *United States v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982) (describing this prohibition as "well settled"). Given the incompatibility of acquitted conduct with the right to jury trial, such conduct must also be off the table.

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[6] Three-quarters of federal sentences thus far in fiscal year 2018 were imposed according to the Guidelines. *See* U.S. Sentencing Comm'n, Quarterly Data Report 11 tbl.8A (Oct. 22, 2018).

Indeed, recognizing Sixth Amendment limits on sentencing courts' ability to rely on acquitted conduct would further—rather than undercut—the Sentencing Reform Act's goal of "increased uniformity" in sentencing, *United States v. Booker*, 543 U.S. 220, 246 (2005) (Breyer, J.). Under the current system, district judges are free either to rely on or to "disclaim reliance on acquitted or uncharged conduct." *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc). Some judges refuse as a matter of practice to take acquitted conduct into account. *See, e.g.*, *United States v. Wendelsdorf*, 423 F. Supp. 2d 927, 929 (N.D. Iowa 2006); *United States v. Pimental*, 367 F. Supp. 2d 143, 146-47 (D. Mass. 2005). Yet others, like the judge here, have no qualms about relying on acquitted conduct. *See, e.g.*, *United States v. Bolton*, No. 17-60502, 2018 WL 5603038, at *10-11 (5th Cir. Oct. 26, 2018); *United States v. Moment*, No. 17-3149, 2018 WL 4847082, at *2-3 (6th Cir. Oct. 5, 2018); *United States v. Jackson*, No. 16-17119, 2018 WL 4492376, at *2 (11th Cir. Sept. 19, 2018). Barring reliance on acquitted conduct would thus further Congress's goal of imposing comparable sentences where defendants engage in similar conduct resulting in similar jury verdicts.

2. Even if the Sixth Amendment does not categorically prohibit reliance on acquitted conduct, this Court's *Apprendi* jurisprudence prohibits the use of acquitted conduct where, as here, a sentence would be substantively unreasonable but for reliance on facts that the jury rejected.

Under the *Apprendi* rule, juries must find all facts essential to a lawful sentence. The Sixth Amendment

"does not permit a defendant to be 'expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002) (alteration in original) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000)); *see also Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).

While the U.S. Code sets a maximum sentence for every crime, even sentences below that maximum are lawful only if they are "substantive[ly] reasonable[]." *See Gall*, 552 U.S. at 51; *Booker*, 543 U.S. at 261-63. And substantive reasonableness "imposes a very real constraint on a judge's ability to sentence across the full statutory range." *Cunningham v. California*, 549 U.S. 270, 309 (2007) (Alito, J., joined by Kennedy and Breyer, JJ., dissenting).[7] Thus, substantive reasonableness—and not the maximum delineated in the U.S. Code—establishes the ceiling for any lawful federal criminal sentence. *See Rita v. United States*, 551 U.S. 338, 372 (2007) (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment).

Putting the *Apprendi* rule together with the requirement that federal sentences be substantively reasonable dictates that if a particular fact is required to make a federal sentence substantively reasonable, then that fact implicates the Sixth Amendment right

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[7] *See, e.g.*, *United States v. Singh*, 877 F.3d 107, 116-17 (2d Cir. 2017) (5-year sentence was substantively unreasonable where the statutory maximum was 20 years); *United States v. Chandler*, 732 F.3d 434, 437, 440 (5th Cir. 2013) (35-year sentence was substantively unreasonable where the statutory maximum was life imprisonment).

to trial by jury.[8] At the very least, the Sixth Amendment prohibits a judge from relying on facts a jury *rejected* to justify an otherwise unreasonable sentence.

III. This case is an ideal vehicle for resolving the question presented.

For three reasons, this case offers the right opportunity to decide whether, or under what circumstances, the Sixth Amendment prohibits federal judges from basing sentences on acquitted conduct.

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[8] Justice Scalia illustrated this reality with the following hypothetical:

> [T]he base offense level for robbery under the Guidelines is 20, which, if the defendant has a criminal history of I, corresponds to an advisory range of 33-41 months. If, however, a judge finds that a firearm was discharged, that a victim incurred serious bodily injury, and that more than $5 million was stolen, then the base level jumps by 18, producing an advisory range of 235-293 months. When a judge finds all of those facts to be true and then imposes a within-Guidelines sentence of 293 months, those judge-found facts, or some combination of them, are not merely facts that the judge finds relevant in exercising his discretion; they are the legally essential predicate for his imposition of the 293-month sentence. His failure to find them would render the 293-month sentence unlawful. That is evident because, were the district judge explicitly to find *none* of those facts true and nevertheless to impose a 293-month sentence (simply because he thinks robbery merits seven times the sentence that the Guidelines provide) the sentence would surely be reversed as unreasonably excessive.

Rita, 551 U.S. at 371-72 (Scalia, J., concurring in part and concurring in the judgment) (citations omitted).

1. There are no procedural obstacles to reaching the question presented. During sentencing, defense counsel objected to the use of acquitted conduct in calculating petitioner's offense level. Pet. App. 11a-23a. The Sixth Amendment question was the sole issue on appeal, and the Fifth Circuit squarely addressed the claim. *Id.* 1a-3a.

2. The facts of this case place the question of using acquitted conduct at sentencing in stark relief. First, unlike some acquitted conduct cases that arise from a mixed verdict on two unrelated charges, this case involves the classic scenario of a greater and lesser charge. Thus, it is especially clear what factual allegation the jury rejected—namely, the allegation that petitioner caused the agent to suffer bodily injury.

Second, the judge explicitly took this acquitted conduct into account. She acknowledged that the prosecution's evidence in support of the greater charge was, in the "eyes of the jury," not persuasive. *See* Pet. App. 29a. Yet the judge disregarded the jury's findings, stating that in her "role as the presiding judge . . . the law allow[ed her] to take into account all of that [acquitted] conduct." *Id.* She then based her sentence on the very allegation and testimony the jury rejected.

3. The district court's reliance on acquitted conduct had a pronounced effect on petitioner's sentence. His offense of conviction (assault by physical contact) carried a Guidelines range of 24 to 30 months. *See supra* at 5. Yet the judge calculated petitioner's Guidelines range as if he had been convicted of the greater charge (inflicting bodily injury on the border patrol agent). This resulted in a Guidelines range of 77 to 96 months—roughly triple the applicable range for

his offense of conviction. The judge ultimately imposed a sentence of 96 months, the high end of the Guidelines range for the acquitted offense. *See* Pet. App. 41a.

The dramatic effect of using acquitted conduct means that this case also highlights the subsidiary question whether acquitted conduct can be used to justify a sentence that would otherwise be substantively unreasonable. When reviewing a sentence for substantive reasonableness, a court must "take into account the totality of the circumstances, including the extent of any variance" from the Guidelines range that would have applied but for the facts at issue. *Gall v. United States*, 552 U.S. 38, 51 (2007); *see also United States v. Rhine*, 637 F.3d 525, 529 (5th Cir. 2011).

Petitioner's sentence was a sharp departure from the Guidelines range corresponding only to the facts of his conviction. His sentence was *four times* longer than the median federal sentence imposed on defendants convicted of assault in the same criminal history category.[9] It was also more than *three times* longer than the maximum Guidelines sentence for facts encompassed in the offense of conviction. Indeed, the district court sentenced petitioner to the maximum sentence of the Guidelines range for the offense of which he was *acquitted*. In light of all of these touchstones, the Fifth Circuit did not question that the

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[9] U.S. Sentencing Comm'n, Interactive Sourcebook, Sentence Length for Offenders in Each Criminal History Category by Primary Offense Category (2017). The Sentencing Commission calculated a 24-month median for individuals with a criminal history category of IV sentenced to the primary offense category of "Assault" in fiscal year 2017.

bodily injury allegation that the jury rejected is essential to the substantive reasonableness of petitioner's sentence.

This Court should settle once and for all whether hinging a sentence on acquitted conduct in this manner transgresses the Sixth Amendment. And the Court should hold that it does.

CONCLUSION

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

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