No.

In the Supreme Court of the United States

VINCENT ASARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD M. LANGONE
LANGONE & ASSOCIATES, PLLC
300 Old Country Road
Suite 341
Mineola, NY 11501

LISA S. BLATT
Counsel of Record
AMY MASON SAHARIA
MICHAEL J. MESTITZ
JYOTI JINDAL
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
lblatt@wc.com

QUESTION PRESENTED

Whether the Fifth and Sixth Amendments prohibit a federal court from basing a criminal defendant's sentence on conduct underlying a charge for which the defendant was acquitted by a jury.

RELATED CASES

The other defendants in the proceeding before the United States District Court for the Eastern District of New York were John J. Gotti, Michael Guidici, and Matthew Rullan. None appealed their conviction or sentence to the United States Court of Appeals for the Second Circuit.

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Vincent Asaro respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-5a) is available at 767 F. App'x 173 (2d Cir. 2019).

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law[.]

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]

STATEMENT

The time has come for the Court to review a sentencing practice that has long troubled federal jurists: a sentencing court's consideration of conduct underlying a charge for which a jury has acquitted the defendant. Seven current and former Justices have questioned the constitutionality of this practice. Judges in the lower courts have called for this Court's review and decried the practice as circumventing the jury's constitutionally protected role as a "liberty-protecting bulwark." *E.g.*, *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in denial of rehearing en banc).

In *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), a divided Court held in a summary disposition that use of acquitted conduct at sentencing does not offend the Double Jeopardy Clause. The lower courts, however,

have interpreted *Watts* to foreclose any and all constitutional challenges to use of acquitted conduct at sentencing, including under the Due Process Clause and the Sixth Amendment's right to trial by jury. Absent guidance from this Court on this significant question, the lower courts will continue to view themselves bound by *Watts*.

This is the ideal case in which to decide whether the Fifth and Sixth Amendments prohibit this long-controversial practice. The federal government tried petitioner in 2015 for charges related to his alleged participation in a 1978 robbery and a 1969 murder. The jury acquitted him of all charges. Two years later, petitioner pleaded guilty to a separate offense. He was sentenced by the same judge who had presided over his earlier trial. Although the applicable Guidelines range was 33 to 41 months, the court sentenced petitioner to 96 months' imprisonment. *See* App. 21a, 27a. In so doing, the court gave "particular weight" to the evidence presented at the earlier trial. App. 23a. Stating that she was relying on her recollection of and notes from the earlier trial, the judge observed that she was "firmly convinced" that the government had proven the charged crimes, notwithstanding the jury's acquittal. App. 24a. The court of appeals affirmed, relying on *Watts*. App. 2a-3a.

The Constitution cannot condone this sentence, and *Watts* does not hold to the contrary. Use of acquitted conduct at sentencing tramples the jury-trial right secured by the Sixth Amendment. And permitting a sentencing court to disregard a jury's verdict of acquittal and to impose punishment for the acquitted offense by a mere preponderance of the evidence contravenes elemental due process principles. This Court should grant certiorari and hold that the Constitution prohibits the use of acquitted conduct at sentencing.

1. The federal government indicted petitioner in 2014 for alleged crimes related to a 1978 robbery at John F. Kennedy airport, a 1969 murder, and loansharking. After a four-week trial in the U.S. District Court for the Eastern District of New York, the jury acquitted petitioner of all charges in November 2015.

2. Less than two years after his acquittal, the government again indicted petitioner, this time in connection with a 2012 road rage incident in which another driver cut off petitioner in traffic. The government alleged that petitioner found the registration information for the other driver and requested that one of his associates set fire to the car while it sat unoccupied in the owner's driveway. Although this incident occurred in 2012, the government charged petitioner in 2017, after his prior acquittal. As relevant here, the government claimed that the 2012 act of arson violated the Travel Act, 18 U.S.C. § 1952(a)(3)(B).

The same prosecutors who had tried petitioner's prior case handled this case as well. For reasons that are not apparent from the record, the district judge originally assigned to the case recused herself, and the district court randomly reassigned the case to the same district judge who had presided over petitioner's earlier trial. D. Ct. Dkt. 28 at 1. This time, petitioner pleaded guilty.

3. The government's sentencing memorandum read as if it had prevailed at the prior trial. The government devoted almost a third of its memorandum to evidence from the earlier trial. C.A.2 App. 109, 115-121. It assured the sentencing court that under *Watts*, the court could "rely" on "any facts it finds beyond a preponderance of the evidence, including acquitted conduct proven by evidence introduced at the defendant's 2015 trial." *Id.* at 111. Petitioner objected in a presentencing letter to the court's

consideration of acquitted conduct in imposing a sentence. *See id.* at 130; D. Ct. Dkt. 123 at 3-6.

Before sentencing, the government, the probation office, and petitioner all agreed that the Sentencing Guidelines range was 33 to 41 months' imprisonment. App. 21a. At sentencing, defense counsel again objected to the court's reliance on acquitted conduct in imposing a sentence, arguing that the government was not "asking [the court] to sentence [petitioner] for the crime of conviction" but "to sentence him purely [for] crimes that he was acquitted of which allegedly occurred 50 and 60 years ago." App. 10a. The court disagreed. When the government cited *Watts* "for the proposition that basically the Court is not bound by the jury's verdict," the court agreed that the law on that point was "very clear." App. 15a.

Acknowledging the Guidelines range of 33 to 41 months, the court nonetheless sentenced petitioner to 96 months—more than double the high end of the Guidelines range. App. 27a. In so doing, it made clear that it was basing the length of petitioner's sentence on the 1978 robbery and 1969 murder for which he was acquitted in 2015, observing that it was according "particular weight" to those "crimes." App. 23a. In pronouncing its sentence, the court explained:

> As trial judge, I had the opportunity to observe the demeanor of the witnesses and to make first-hand assessments of their credibility. And I have since reviewed my notes and the transcript from the trial.

App. 22a. The court recited its recollection of the evidence from petitioner's 2015 trial and stated that it was "relying on acquitted conduct in sentencing the defendant." App. 27a.

4. Petitioner appealed his sentence, arguing that the sentencing court's consideration of acquitted conduct violated the Fifth and Sixth Amendment guarantees of due process, a right to a jury trial, and the Double Jeopardy Clause. Pet. C.A.2 Br. at 15, 18, 24, 34-35. He maintained that *Watts* involved only the Double Jeopardy Clause and was distinguishable on its facts, *see id.* at 15-18, and that, alternatively, this Court's intervening precedents had overruled *Watts*. *Id.* at 19-23. He further argued that the court's consideration of the acquitted conduct in a case involving different charges and conduct was an "end-run" around petitioner's fundamental constitutional rights and the jury's acquittal. *Id.* at 24.

The court of appeals rejected petitioner's arguments and affirmed his sentence, concluding that the principle espoused in *Watts* that "'a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proven by a preponderance of the evidence,' guides [its] decision in this case." App. 2a (quoting *Watts*, 519 U.S. at 157). The court of appeals rejected petitioner's argument that the sentencing court could not properly use unrelated conduct alleged in the earlier case to increase his sentence in this case, reasoning that "[u]nder *Watts*, the distinction between unrelated and related conduct is irrelevant." App. 3a. Focusing on the 1969 murder and the 1978 robbery, the court of appeals held that the sentencing court could permissibly consider the acquitted conduct as bearing on the statutory sentencing factors. App. 3a.

REASONS FOR GRANTING THE PETITION

I. The Use of Acquitted Conduct at Sentencing Is an Important Question That Only This Court Can Resolve

This Court has never squarely considered whether the Due Process Clause of the Fifth Amendment or the Sixth Amendment's jury-trial guarantee forbid the use of acquitted conduct at sentencing. In *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), the Court considered only whether the practice offended the Double Jeopardy Clause. In the two decades since, numerous Justices and judges have questioned whether use of acquitted conduct at sentencing comports with the Sixth Amendment's jury-trial guarantee and due process principles and have urged this Court to "take up this important, frequently recurring, and troubling contradiction in sentencing law." *E.g.*, *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in denial of rehearing en banc).

1. In *Watts*, a divided Court held that taking acquitted conduct into account at sentencing did not offend the Double Jeopardy Clause of the Fifth Amendment. 519 U.S. at 154. As this Court later recognized, *Watts* "presented a very narrow question" regarding the Double Jeopardy Clause. *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005). Nevertheless, in the intervening decades "[n]umerous courts of appeals [have] assume[d] that *Watts* controls the outcome of both the Fifth *and* Sixth Amendment challenges to the use of acquitted conduct." *United States v. White*, 551 F.3d 381, 392 n.2 (6th Cir. 2008) (en banc) (Merritt, J., dissenting, joined by five others).

Even at the time, some Justices doubted the wisdom of the Court's summary approach to the issue. Justice Kennedy noted in dissent that *Watts* "raise[d] a question of recurrent importance" and presented a "precise issue"

upon which the Court had not yet passed: the use at sentencing of "not just prior criminal history but conduct underlying a charge for which the defendant was acquitted." *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting). Observing that "to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal," he urged the Court to "confront[]" the question with "a reasoned course of argument," instead of "shrugging it off." *Id.* Justice Stevens went further, calling the Court's holding "repugnant" to its constitutional jurisprudence. *Id.* (Stevens, J., dissenting).

In the years since, other Justices have called for the Court to address this and related issues. In *Jones v. United States*, a jury convicted petitioners of distributing small amounts of cocaine but acquitted them of conspiring to distribute drugs. 135 S. Ct. 8 (2014) (Scalia, J., dissenting from denial of certiorari). Nevertheless, the sentencing judge found that they had engaged in the alleged conspiracy and based their sentences on that finding. Dissenting from the denial of certiorari, Justice Scalia, joined by Justices Thomas and Ginsburg, highlighted the pressing need for the Court to resolve whether the Due Process Clause and the Sixth Amendment's jury-trial right permit judges to sentence defendants based on acquitted conduct. *Id.* at 8-9. Justice Scalia's dissent noted that "[t]he Sixth Amendment, together with the Fifth Amendment's Due Process Clause," require that each element of a crime be either admitted to the jury or proved beyond a reasonable doubt. *Id.* at 8. The dissent lamented that the courts of appeals had "uniformly taken [the Court's] continuing silence" on the question "to suggest that the Constitution *does* permit" sentences supported by judicial findings, including findings that defendants "engaged in [an offense] of which the jury acquitted them." *Id.* at 9. The dissent

viewed the question of acquitted conduct as a "particularly appealing" one for the Court's review, writing that it represented a "disregard[]" for the Sixth Amendment that had "gone on long enough." *Id.*

Shortly thereafter, then-Judge Gorsuch invoked Justice Scalia's dissent in *Jones* in *United States v. Sabillon-Umana*, 772 F.3d 1328 (10th Cir. 2014). There, he similarly observed that "[i]t is far from certain whether the Constitution allows" a judge to increase a defendant's sentence "based on facts the judge finds without the aid of a jury or the defendant's consent"—which would include, by necessity, a finding that a defendant had committed an offense for which a jury acquitted him. *Id. at* 1331.

The next year, in *Bell*, 808 F.3d 926 (D.C. Cir. 2015), then-Judge Kavanaugh observed that "[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." *Id.* at 928 (Kavanaugh, J., concurring in denial of rehearing en banc); *see also United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part) (noting "good reasons to be concerned about the use of acquitted conduct at sentencing").

2. Numerous lower-court judges have expressed the view that the Fifth and Sixth Amendments should prohibit consideration of acquitted conduct at sentencing and have urged this Court to provide guidance. Judge Millett has called the use of acquitted conduct at sentencing an "important, frequently recurring, and troubling contradiction in sentencing law" that "only the Supreme Court can resolve." *Bell*, 808 F.3d at 932 (Millett, J., concurring in denial of rehearing en banc); *id.* at 927 (Kavanaugh, J., concurring in denial of rehearing en banc) ("shar[ing] Judge Millett's overarching concern" and observing that

a solution "would likely require" intervention by this Court). Judge Bright has argued that "the use of acquitted conduct to enhance a defendant's sentence should be deemed unconstitutional under both the Sixth Amendment and the Due Process Clause of the Fifth Amendment," *United States v. Lasley*, 832 F.3d 910, 920-21 (8th Cir. 2016) (Bright, J., dissenting), and has "urge[d] the Supreme Court to re-examine its continued use," *United States v. Canania*, 532 F.3d 764, 776-78 (8th Cir. 2008) (Bright, J., concurring). A number of other federal judges have reached the same conclusion. *See White*, 551 F.3d at 392 (Merritt, J., dissenting, joined by five others); *United States v. Mercado*, 474 F.3d 654, 663 (9th Cir. 2007) (Fletcher, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring); *United States v. Coleman*, 370 F. Supp. 2d 661, 671 (S.D. Ohio 2005) (Marbley, J.); *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005) (Gertner, J.).[1]

State courts too are divided over whether to permit the use of acquitted conduct at sentencing. *See People v. Rose*, 776 N.W.2d 888, 891 (Mich. 2010) (Kelly, C.J., dissenting) (cataloging "the split among state courts on the issue"). Even where judges would otherwise be permitted to consider prior misconduct in imposing a sentence, "many states make an exception for acquitted conduct—conduct that formed the basis for a charge resulting in an acquittal at trial." Nora V. Demleitner et al., *Sentencing Law and Policy* 290 (3d. ed. 2013). These states find it

[1] Courts of appeals judges also expressed doubt about the constitutionality of considering acquitted conduct at sentencing before *Watts*. *See United States v. Silverman*, 976 F.2d 1502, 1527 (6th Cir. 1992) (Merritt, J., dissenting); *id.* at 1533, 1534 (Martin, J., dissenting); *United States v. Lanoue*, 71 F.3d 966, 984 (1st. Cir. 1995) (Bownes, J., joined by two others).

"disingenuous at best to uphold the presumption of innocence until proven guilty" while "at the same time punishing a defendant based upon charges in which that presumption has not been overcome." *State v. Cote*, 530 A.2d 775, 785 (N.H. 1987); *see State v. Cobb*, 732 A.2d 425, 442 (N.H. 1999) (citing *Cote*); *see also Bishop v. State*, 486 S.E.2d 887, 897 (Ga. 1997); *State v. Marley*, 364 S.E.2d 133, 138 (N.C. 1988). Others permit courts to take acquitted conduct into account. *See State v. Witmer*, 10 A.3d 728, 733-34 (Me. 2011) (collecting cases).[2]

3. Without the Court's intervention to clarify or overrule *Watts*, the use of acquitted conduct at sentencing will continue unabated. True to the dissent's prediction in *Jones*, courts of appeals have construed this Court's "continuing silence" as consent. *See Jones*, 135 S. Ct. at 9 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari). This case illustrates the point. The decision below held that the district court "did not err when it considered acquitted conduct in sentencing Asaro," believing that this Court had "approved the consideration of acquitted conduct at sentencing" in *Watts*. App. 2a, 3a. Every circuit has by now adopted the same view, applying *Watts* not only in the Double Jeopardy context in which it was decided, but also expanding it to reject defendants' Due Process Clause and Sixth Amendment challenges. *See White*, 551 F.3d at 392 n.2 (Merritt, J., dissenting) (collecting cases); *see also* Barry

[2] Scholars, too, have called for this Court to examine the use of acquitted conduct, noting that reliance on acquitted conduct at sentencing is out of step with due process principles and the jury-trial guarantee. *See, e.g.*, 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, 3 & n.15, 29 (2016) (collecting sources).

L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 Suffolk U. L Rev. 1, 2-3 (2016) (federal appellate courts have been "unanimous" in holding that "reliance on acquitted conduct" is permissible at sentencing).

Thus, even judges who believe that *Watts* did not resolve the constitutionality of this process under the Due Process Clause or the Sixth Amendment now find their hands tied by circuit precedent. *See, e.g.*, *United States v. Bagcho*, 923 F.3d 1131, 1141 (D.C. Cir. 2019) (Millett, J., concurring) (noting that "circuit precedent forecloses this panel from righting this grave constitutional wrong"); *Faust*, 456 F.3d at 1349 (Barkett, J., specially concurring) (similar). It is therefore little surprise that circuits have declined to revisit the issue in the absence of clearer guidance from this Court, despite admitting that "there is room for debate." *United States v. Briggs*, 820 F.3d 917, 922 (8th Cir. 2016); *United States v. Cassius*, 777 F.3d 1093, 1099 n.4 (10th Cir. 2015) (calling argument about judge-found sentencing facts "precluded by binding precedent" but citing *Jones*); *see also United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008) (noting that "we understand why defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence," but ultimately relying on "binding precedent" to affirm the sentence).

Nor does it seem likely that any other institution will remedy the problem. Justice Breyer suggested in *Watts* that, "[g]iven the role that juries and acquittals play in our system," the Sentencing Commission "could decide to revisit this matter." *Watts*, 519 U.S. at 159 (Breyer, J., concurring). But more than two decades later, the Commission has not done so.

Nor can sentencing judges necessarily address the issue as a practical matter by "disclaim[ing] reliance" on acquitted conduct in individual cases. *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing en banc). If they do so, they run the risk of reversal for procedural error. In *United States v. Ibanga*, 271 F. App'x 298 (4th Cir. 2008), for example, the government appealed the sentence and challenged the district court's refusal to consider acquitted conduct. *Id.* at 300. The Fourth Circuit held that the district court committed "significant procedural error" and reversed for resentencing. *See id.* at 301(citing *Watts*).

In short, only this Court can clarify *Watts*.

II. The Decision Below Is Erroneous

The court of appeals erred in concluding that *Watts* forecloses petitioner's Fifth and Sixth Amendment claims. As a growing chorus of jurists have now observed, *Watts* addressed only the Double Jeopardy Clause, not the Due Process Clause or the Sixth Amendment. And even if it addressed those latter constitutional provisions, it would be ripe for reexamination in light of intervening precedents.

The practice of sentencing defendants based on acquitted conduct weakens the twin pillars of the Sixth Amendment right to a jury and the Fifth Amendment right to due process of law, whose "historical foundation[s] . . . extend[] down centuries into the common law." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). Together, these guarantees "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Id.* (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). Sentencing based on

acquitted conduct violates that "indisputabl[e]" principle. *Id.*

A. *Watts* Did Not Decide Whether the Due Process Clause and Jury-Trial Right Prohibit the Use of Acquitted Conduct at Sentencing

1. The court of appeals relied on *Watts* to affirm petitioner's sentence. App. 2a-3a. But, properly considered, *Watts* does not control the question presented. As this Court has acknowledged, *Watts* presented a "very narrow" question involving the Double Jeopardy Clause. *Booker*, 543 U.S. at 240 & n.4. *Watts* did not consider whether a sentencing court's use of acquitted conduct implicated—let alone violated—the Fifth Amendment's due process guarantee or the Sixth Amendment's jury-trial right. Reliance on it to foreclose those questions is therefore "misplaced." *Mercado*, 474 F.3d at 661 (Fletcher, J. dissenting).

Moreover, this Court should reject an expansive reading of *Watts* because the Court decided the case by summary reversal, based on only the limited arguments presented in the certiorari-stage briefs and without the benefit of full briefing on the merits or oral argument. Justice Kennedy dissented in *Watts* on this basis, observing that the Court's summary opinion "at several points . . . show[ed] hesitation" in confronting the question of acquitted conduct, an issue he believed "ought to be confronted by a reasoned course of argument." *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting). He would have scheduled the case for full briefing and argument. *Id.* at 171. That *Watts* yielded two concurrences and two dissents further counsels against the expansive reading that courts of appeals have given it.

2. Even if *Watts* controls whether the Due Process Clause and the Sixth Amendment jury right permits use

of acquitted conduct at sentencing, this Court's more recent jurisprudence would call such a holding into question. *Stare decisis* is "not an inexorable command," and is "at its weakest when [the Court] interpret[s] the Constitution." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (internal quotation marks omitted). This is particularly true "in the *Apprendi* context," where this Court has found that "*stare decisis* does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law." *Hurst v. Florida*, 136 S. Ct. 616, 623-24 (2016) (internal quotation marks omitted).

The Court has not hesitated to revisit its Sixth Amendment precedent in light of its recent sentencing case law, and has overruled prior cases in order to protect the integrity and consistency of the Sixth Amendment. *See id.* at 624 (overruling *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), and *Spaziano v. Florida*, 468 U.S. 447 (1984)); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)); *Alleyne v. United States*, 570 U.S. 99, 116 & n.5 (2013) (overruling *Harris v. United States*, 536 U.S. 545 (2002)).

In evaluating whether it is appropriate to overrule precedent, this Court looks to "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Hyatt*, 139 S. Ct. at 1499. Each consideration here counsels in favor of overruling *Watts*—and, at a minimum, to the extent it is deemed to apply to the Sixth Amendment and Due Process Clause.

Watts's reasoning on the relevant issue is slight, as explained above. *Watts* was a per curiam summary reversal, issued without briefing and argument, and it concerned only the Double Jeopardy Clause. *See supra* p. 14. This

Court has previously acknowledged the limited precedential value of summary decisions on the merits, finding itself "less constrained" when an opinion "was rendered without full briefing or argument." *See Hohn v. United States*, 524 U.S. 236, 251 (1998); *see also McCutcheon v. FEC*, 572 U.S. 185, 202 (2014) (declining to rely on prior decision decided without full briefing and argument). Even if *Watts* has any weight on the question presented here, it cannot survive a "reasoned course of argument." *See Watts*, 519 U.S. at 170 (Kennedy, J., dissenting).

Nor do any reliance interests counsel in favor of keeping *Watts* in place. Ordinarily, parties' reliance on precedent counsels in favor of *stare decisis*, particularly if a decision regulates primary conduct. *See Alleyne*, 570 U.S. at 118-19 (Sotomayor, J., concurring). But whether courts may consider acquitted conduct at sentencing is akin to a "procedural" issue that "do[es] not implicate the reliance interests of private parties." *Id.* "And any reliance interest that the Federal Government . . . might have is particularly minimal here" because the government already tried—and failed—to prove the underlying acquitted conduct to a jury. *Id.* (noting minimal reliance interests where "prosecutors are perfectly able to 'charge facts upon which a mandatory minimum sentence is based in the indictment and prove them to a jury.'" (internal quotation marks omitted)). Under such circumstances, "*stare decisis* cannot excuse a refusal to bring 'coherence and consistency,' to . . . Sixth Amendment law." *Id.* at 121.

Moreover, *Watts*'s inconsistency "with related decisions" and subsequent "legal developments" strongly favor this Court's attention. In the two decades since *Watts*, the Court has issued over a dozen opinions addressing the Sixth Amendment's effects on criminal sentencing: *see, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (jury

must find all facts affecting statutory maximum); *Harris v. United States*, 536 U.S. 545 (2002) (sentencing factors could be considered by judge); *Ring v. Arizona*, 536 U.S. 584 (2002) (jury must find aggravating factors permitting death penalty); *Blakely v. Washington*, 542 U.S. 296 (2004) (jury must find all facts legally essential to sentence); *United States v. Booker*, 543 U.S. 220 (2005) (Sentencing Guidelines subject to Sixth Amendment); *Rita v. United States*, 551 U.S. 338 (2007) (presumption of reasonableness for Guidelines sentences comports with Sixth Amendment); *Cunningham v. California*, 549 U.S. 270 (2007) (jury must find facts exposing defendant to longer sentence); *S. Union Co. v. United States*, 567 U.S. 343 (2012) (jury must find facts permitting imposition of criminal fine); *Alleyne v. United States*, 570 U.S. 99 (2013) (jury must find facts increasing mandatory minimum, overruling *Harris*); *Hurst v. Florida*, 136 S. Ct. 616 (2016) (jury must make critical findings needed for imposition of death sentence); *United States v. Haymond*, 139 S. Ct. 2369 (2019) (judge cannot make findings to increase sentence during period of supervised release).

Many of the above decisions also have cited the Due Process Clause in emphasizing that a court's power to sentence a defendant flows fundamentally from an authorization by the jury. *See, e.g.*, *Hurst*, 136 S. Ct. at 621; *Alleyne*, 570 U.S. at 104. All these cases, taken collectively, have "emphasized the central role of the jury in the criminal justice system." *Lasley*, 832 F.3d at 921 (Bright, J., dissenting). They provide a compelling reason to examine whether the Constitution permits consideration of acquitted conduct at sentencing—and, at a minimum, to give the question the full hearing in this Court that it has not yet received.

B. The Sixth Amendment Prohibits Courts from Relying on Acquitted Conduct at Sentencing

The Sixth Amendment preserves the "jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." *S. Union Co.*, 567 U.S. at 350 (internal quotation marks omitted). Its guarantee of trial by jury is a constitutional protection "of surpassing importance." *Apprendi*, 530 U.S. at 476-77. Since the Founding, the jury "has occupied a central position in our system of justice by safeguarding a person accused of a crime against the arbitrary exercise of power by prosecutor or judge." *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).

When courts sentence defendants on the basis of acquitted conduct, they diminish the right to trial by jury. "Americans of the [founding] period perfectly well understood the lesson that the jury right could be lost not only by gross denial, but by erosion." *Jones v. United States*, 526 U.S. 227, 248 (1999). When the government loses at trial but is permitted to submit the acquitted conduct to the judge at sentencing, it gets a "second bite at the apple" that "trivializes" the jury's role. *Canania*, 53 F.3d at 776 (Bright, J., concurring). Prohibiting consideration of acquitted conduct at sentencing would restore this important reservation of power to the people.

1. The Sixth Amendment's right to jury trial is one of two "fundamental reservation[s] of power in our constitutional structure." *Blakely*, 542 U.S. at 305-06. The first is the right to vote, which guarantees that the people have a voice in the halls of the legislative and executive houses and that they can impose their will on the politicians populating them. Its companion is the right to trial by jury, which guarantees that the citizenry exercise not only a voice in the courtroom but also "control in the judiciary." *Id.*

Thus, "[j]ust as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions." *Haymond*, 139 S. Ct. at 2375 (plurality op.).

In keeping with this aim, "[t]hose who wrote our constitution" "insisted" on the jury right as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). So fundamental was this guarantee that, even before the Sixth Amendment guaranteed "the right to . . . an impartial jury," Article III enshrined the right to a jury in criminal cases. *See* U.S. Const. art. III, § 2, cl. 3. This guarantee was one of the least controversial elements of the Framers' design at the constitutional convention, as explained by 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 Court's recent cases "carr[y] out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict," for "[w]ithout that restriction, the jury would not exercise the control that the Framers intended." *Blakely*, 542 U.S. at 306.

To be sure, judges have long exercised substantial discretion at sentencing. But, in both the English tradition and at the time of the founding, juries possessed the power to check "[t]he potential or inevitable severity of sentences" by issuing either "verdicts of guilty to lesser included offenses" or "flat-out acquittals in the face of guilt." *Jones*, 526 U.S. at 245. As one scholar has explained, "[t]his power to mitigate or nullify the law in an individual case is no accident. It is part of the constitutional design—and has remained part of that design since the Nation's founding." Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 36 (2003).

Sentencing courts' consideration of acquitted conduct denies the jury its constitutionally protected role as the "circuitbreaker in the State's machinery of justice." *Blakely*, 542 U.S. at 306-07. Ordinarily, "[a]n acquittal is accorded special weight." *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980). "[I]ts finality is unassailable," "[e]ven if the verdict is based upon an egregiously erroneous foundation." *Yeager v. United States*, 557 U.S. 110, 122-23 (2009) (internal quotation marks omitted). But when an acquittal does not preclude a judge from later relying on the very same facts that a jury rejects, the jury's acquittal becomes merely "advisory." *Cf. Hurst*, 136 S. Ct. at 622. If a jury agrees with the government's view and convicts a defendant, its guilty verdict is final unless the defendant is able to prove error. But when the jury disagrees and acquits the defendant, the government essentially gets to try its case again at sentencing, before a judge and under a lower standard of proof. In other

words, if the government wins, it wins decisively. And if it does not, it gets the benefit of "try[ing] its case not once but twice[:] The first time before a jury; the second before a judge." *Canania*, 532 F.3d at 776 (Bright, J., concurring).

To be sure, judges may retain latitude to find facts by a preponderance of the evidence in determining information relevant to sentencing. Even if the Sixth Amendment permits these findings as a general matter, however, it is wholly different to "allow[] judges to materially increase the length of imprisonment based on facts that were *submitted directly to and rejected by* the jury." *Bell*, 808 F.3d at 930 (Millett, J., concurring in denial of rehearing en banc). "[W]hen a court considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved." *Pimental*, 367 F. Supp. 2d at 152. That practice invades the sanctity and finality of jury verdicts.

3. The practical consequences of that reading of *Watts* are precisely those that concerned the Founders: unchecked power of the prosecutor and the judge.

Even if a defendant is acquitted of all charges at trial—as petitioner was after his 2015 trial—the government can await another opportunity to charge him with an unrelated offense and introduce the prior acquitted conduct in arguing for a significant sentence. The lower courts' reading of *Watts* thus stacks the odds in the government's favor and creates yet another incentive for defendants to plead guilty rather than stand on their right to be convicted only upon a jury finding of guilt beyond a reasonable doubt.

To restore the jury's role as the ultimate check on otherwise unbridled power, the Court should bar consideration of acquitted conduct at sentencing. Doing so would not limit a judge's sentencing discretion to find facts generally; rather, it simply places beyond a court's reach the power to punish the defendant for conduct previously submitted to, and rejected by, a jury of his peers.

C. The Fifth Amendment Prohibits Courts from Relying on Acquitted Conduct at Sentencing

1. In addition, the use of acquitted conduct at sentencing offends the Due Process Clause. Both before and after the adoption of the Sentencing Guidelines, this Court emphasized that sentencing procedures are not "immune from scrutiny" under the Due Process Clause. *Williams v. New York*, 337 U.S. 241, 252 n.18 (1949); *see Beckles v. United States*, 137 S. Ct. 886, 896 (2017) (same, while holding Guidelines not subject to vagueness challenges). The *Apprendi* line of cases acknowledges that "the Due Process Clause of the Fifth Amendment" works hand-in-hand with the Sixth Amendment in this realm. *Jones*, 526 U.S. at 243 n.6; *see also Alleyne*, 750 U.S. at 104 (same).

Even without relying on *Apprendi* and its progeny, there is good reason to conclude that the Due Process Clause forbids courts from treating acquitted conduct as a sentencing factor that can be found based on a mere preponderance of the evidence, thereby "removing procedural protections that the Constitution would otherwise require." *Apprendi*, 530 U.S. at 562 (Breyer, J., dissenting). In his dissenting opinion in *Apprendi*, Justice Breyer acknowledged that there may be circumstances in which "unusual and serious procedural unfairness" in sentencing could give rise to due process violations—such as

when a statute permits a factor found by a preponderance of the evidence "to be a tail which wags the dog of the substantive offense." *Id.* at 563 (internal quotation marks omitted).

Justice Breyer posited one such "egregious" hypothetical: a case in which a prosecutor charges and convicts the defendant for five counts of embezzlement, each of which carries a statutory maximum of 10 years, then "ask[s] the judge to impose maximum and consecutive sentences because the embezzler murdered his employer." *Id.* at 562. His proposed solution in such a case lay in part in "procedural protections . . . for example, use of a 'reasonable doubt' standard . . . and invocation of the Due Process Clause." *Id.* at 562-63. In a similar vein, Justice Breyer observed that the prospect that "Congress might permit a judge to sentence an individual for murder though convicted only of making an illegal lane change" is "the kind of problem that the Due Process Clause is well suited to cure." *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting).

This case *is* Justice Breyer's hypothetical. Petitioner pleaded guilty to arson under the Travel Act but was sentenced on the basis of murder and robbery charges for which he was previously acquitted. And, by virtue of the high statutory maximum prescribed for the Travel Act violation to which he pleaded, no impediment prevented the court from imposing a significant sentence at more than double the high end of the sentence that the Guidelines otherwise recommended. This is precisely the "egregious" end-run around constitutional protections that the Due Process Clause ought to solve.

2. Due process principles already limit the types of information courts may consider at sentencing. For example, "due process of law" makes it "constitutionally impermissible" for a court to enhance a sentence based on the "race, religion, or political affiliation of the defendant." *Zant v. Stephens*, 462 U.S. 862, 885 (1983). It likewise forbids sentencing courts from relying on the defendant's exercise of his right to appeal, *United States v. Pearce*, 395 U.S. 711, 723-25 (1969), or his right to a jury trial, *United States v. Jackson*, 390 U.S. 570, 581-83 (1968), and forbids a court from resting a sentence upon a prior conviction that has been found constitutionally infirm, *United States v. Tucker*, 404 U.S. 443, 447 (1972) (conviction secured in violation of right to counsel). And it prevents courts from imposing a sentence on the basis of "assumptions concerning his criminal record which were materially untrue." *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

Due process should similarly exclude the consideration of acquitted conduct at sentencing. Due process guarantees to every individual the "[a]xiomatic and elementary" presumption of innocence that "lies at the foundation of our criminal law." *Nelson v. Colorado*, 137 S. Ct. 1249, 1255-56 (2017) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). It likewise "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). This standard provides "concrete substance for the presumption of innocence," and averts the "lack of fundamental fairness" that would arise if a defendant "could be adjudged guilty and imprisoned for years on the

strength of the same evidence as would suffice in a civil case." *Id.* at 363 (internal quotation marks omitted).

Judges historically have enjoyed discretion to impose sentences based on additional facts found by a preponderance of the evidence at sentencing. But that discretion should not extend to making factual findings that conflict with a jury's acquittal. "When a sentencing judge finds facts that could, in themselves, constitute entirely free-standing offenses under the applicable law—that is, when an enhancement factor could have been named in the indictment as a complete criminal charge—the Due Process Clause of the Fifth Amendment requires that those facts be proved beyond a reasonable doubt"—at least where a jury has already acquitted the defendant of that conduct. *Faust*, 456 F.3d at 1352 (Barkett, J., specially concurring).

3. The Due Process Clause also guards against inaccuracy in verdicts by requiring an exacting standard of proof for conviction. The government's burden to prove guilt beyond a reasonable doubt is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. at 372 (Harlan, J., concurring). And the Due Process Clause guarantees defendants, if nothing else, the right to be sentenced based on accurate information. *See Townsend*, 334 U.S. at 741.

Courts' reliance on acquitted conduct at sentencing heightens the risk of inaccuracy in sentencing. The Court has found that even the use of facts underlying prior *convictions* to enhance a sentence raises a concern about "unfairness" because those facts or records may be "prone to error." *Mathis v. United States*, 136 S. Ct. 2243, 2253

(2016) (justifying categorical approach to sentencing enhancements). This concern applies even more strongly to prior acquittals—where one factfinder has already weighed the evidence and rejected it as a basis for criminal liability—especially where the prior acquittal involved conduct unrelated to the crime for which the defendant is being sentenced.

III. The Question Presented Warrants Review In This Case

This case presents an excellent vehicle for the Court to consider whether the Fifth or Sixth Amendments prohibit the use of acquitted conduct at sentencing.

1. First, petitioner's sentence was based on conduct underlying charges for which he was previously acquitted. Although the undisputed Guidelines range was 33 to 41 months, App. 21a, the court imposed a sentence of 96 months and said it was "relying on acquitted conduct in sentencing the defendant," App. 27a. Moreover, the government's sentencing memorandum relied heavily on evidence from petitioner's previous trial in arguing for a harsh sentence. C.A.2 App. 115-121.

This case also provides an excellent vehicle because, absent consideration of the acquitted conduct, petitioner's well-above-Guidelines sentence must be reversed. If the court's reliance on acquitted conduct was impermissible, then it constitutes procedural error that would require resentencing. *See Gall v. United States*, 552 U.S. 38, 51 (2007). And because a sentencing court must "justify the extent of [a] variance" from the Guidelines range, petitioner's sentence is substantively unreasonable if the court could not have constitutionally relied on acquitted conduct in varying upward from the Guidelines range. *Id.*

Indeed, Justices of this Court have raised particular concerns about sentences that would be substantively unreasonable in these circumstances, and noted as "particularly appealing" a similar case in which acquitted conduct formed the basis for the defendant's longer sentence. *See Jones*, 135 S. Ct. at 9 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari); *see also Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing en banc) (calling reliance on acquitted conduct to enhance a sentence "a dubious infringement of the rights to due process and to a jury trial"). The court's significant deviation from the Guidelines range, based on conduct for which petitioner was acquitted, makes this just such a case.

2. Second, petitioner raised and preserved the question presented in both the trial court and the Second Circuit, so there is no procedural barrier to review. Defense counsel and the government argued at sentencing over the interpretation of *Watts* and the propriety of sentencing petitioner "purely [for] crimes that he was acquitted of" and that "allegedly occurred 50 and 60 years ago." App. 10a; *see also* App. 14a-15a, 20a-21a. And the district court observed not only that the acquitted conduct drove the length of petitioner's sentence, but that the law "is very clear" and "will remain quite clear" that it could take such conduct into account. App. 15a.

On appeal, petitioner argued both that use of "unrelated" acquitted conduct to impose a well-above-Guidelines sentence "violates double jeopardy, due process, and the right to trial[] under the Fifth and Sixth Amendments," Pet. C.A.2. Br. at 3, and that the court "unfairly rejected the 2015 jury's judgment by relying on precisely

the same factual allegations the jury rejected," *id.* at 32. He argued that *Watts* "did not consider the role or importance of the jury in our criminal system [or] a defendant's Sixth Amendment rights under the Constitution," *id.* at 17, and that *Watts* had been repeatedly called into question and overruled by intervening precedents, *id.* at 19-23 & n.5. The government, in turn, argued that *Watts* foreclosed petitioner's claim that the district court "erred in considering his acquitted conduct." Gov't C.A.2 Br. at 18. And the Second Circuit squarely addressed the issue, holding that "under *Watts* a district court may consider acquitted conduct at sentencing," and holding that petitioner's remaining arguments were "without merit." App. 2a, 5a.

3. This case is a better vehicle than other petitions for a writ of certiorari the Court has seen—or will likely see again—on this issue.

For one, petitioner's conviction arises from a guilty plea, a posture resulting in a straightforward record in which use of acquitted conduct was the primary issue in dispute. It also presents a particularly stark setting for the question presented, because there is *no* evidence in the record beyond the facts admitted by petitioner in his plea hearing. The case is therefore on all fours with *Blakely*, where the petitioner entered a guilty plea admitting to the elements of the crime of conviction, "but no other relevant facts," including the facts ultimately considered in imposing his sentence. *See* 542 U.S. at 299.

Moreover, the particular facts of this case brings the due process concerns to the fore. The acquitted conduct here is not merely conduct enhancing the crime for which petitioner was ultimately convicted but which a jury failed to find—for example, the possession of a firearm in furtherance of the offense of conviction or the quantity of

contraband at issue. Nor does the enhancement stem from conduct the government introduced into the record, giving the defendant an opportunity to address it before a jury or a sentencing judge. Rather, the conduct used to increase petitioner's sentence here comprised wholly separate crimes, allegedly committed decades ago, and for which petitioner already had been acquitted.

The government's "proof" of the acquitted conduct consisted only of its reference to a lengthy trial proceeding that petitioner had no opportunity to relitigate in the limited context of his sentencing proceeding. Indeed, petitioner was ultimately sentenced based on material wholly outside the record, and to which he had no opportunity to respond, including the trial judge's recollection of "the demeanor of the witnesses" and her "first-hand assessments of their credibility," as well as her "notes . . . from the trial." App. 22a.

Finally, other petitions have sought review of the use of acquitted conduct at sentencing solely on the basis of the Sixth Amendment. Petitioner, in contrast, has consistently challenged his sentence under both the Fifth and Sixth Amendments. Granting this petition would permit the Court the greatest flexibility in considering the relevant constitutional protections that bear on this issue.

In sum, this case presents an ideal opportunity for the Court to answer the growing chorus of calls for this Court's review of the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD M. LANGONE
LANGONE & ASSOCIATES, PLLC
300 Old Country Road
Suite 341
Mineola, NY 11501

LISA S. BLATT
AMY MASON SAHARIA
MICHAEL J. MESTITZ
JYOTI JINDAL
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
lblatt@wc.com

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