No. 19-107

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioner's Fifth and Sixth Amendment rights by considering conduct that it found by a preponderance of the evidence, but that a jury in a prior case had not found beyond a reasonable doubt, in determining his sentence.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D.N.Y.):

United States v. *Asaro*, No. 17-cr-127 (Jan. 4, 2018)

United States Court of Appeals (2d Cir.):

United States v. *Asaro*, No. 18-48 (Apr. 23, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 767 Fed. Appx. 173.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2019. The petition for a writ of certiorari was filed on July 22, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of interstate travel or transportation in aid of a racketeering enterprise, in violation of 18 U.S.C. 1952(a)(3)(B). Judgment 1. He was sentenced to 96 months of imprisonment, to be followed by

three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-5a.

1. In early April 2012, petitioner—a longtime member and captain of the Bonanno organized crime family—was driving home when an individual identified as John Doe cut him off. Pet. C.A. Br. 7; Presentence Investigation Report (PSR) ¶ 1. Petitioner aggressively followed Doe and tried to drive him off the road. *Ibid.* The next day, petitioner called an associate who, by looking up Doe's license plate in a local law-enforcement database, found Doe's address and gave it to petitioner. PSR ¶ 2. Petitioner then drove another associate to that address and directed him to set fire to Doe's car. *Ibid.* On the morning of April 4, that associate and two others went to Doe's house, poured gasoline on the car, and lit it on fire, completely destroying the car. PSR ¶¶ 3, 8. Petitioner was charged with one count of committing arson affecting interstate and foreign commerce, in violation of the Travel Act, 18 U.S.C. 1952(a)(3)(B). Superseding Information 1-2. Petitioner pleaded guilty. Plea Agreement 1-6; Plea Tr. 1-39. Petitioner acknowledged that he would face a statutory maximum of 20 years of imprisonment for the conviction. Plea Tr. 25; Plea Agreement 1; see PSR ¶ 83.

At sentencing, the district court agreed with the parties that petitioner's advisory guidelines range was 33 to 41 months of imprisonment. Pet. App. 21a. The government requested an above-guidelines sentence of at least 15 years of imprisonment based on petitioner's "lifelong allegiance to a dangerous criminal organization," "his extensive participation in heinous criminal acts, including murder," and "the nature of the charged crime, an arson he directed as a result of road rage." D. Ct. Doc. 108, at 1 (Nov. 20, 2017); see D. Ct. Doc. 112,

at 1 (Dec. 4, 2017). The court recognized that 18 U.S.C. 3553(a)(1) required it to consider both "the nature and circumstances of the offense" as well as "the history and characteristics of the defendant." Pet. App. 21a.

Most prominent in that history were the 1969 murder of Paul Katz and the 1978 robbery of Lufthansa Airlines at John F. Kennedy International Airport (a fictionalized account of which was depicted in the 1990 Martin Scorsese film *Goodfellas*). Although petitioner was never specifically charged with or convicted of those crimes, they constituted two of the fourteen predicate acts forming the basis of a charge of racketeering conspiracy on which petitioner had been acquitted in 2015. See Verdict 1-6, *United States* v. *Asaro*, No. 14-cr-26 (E.D.N.Y. Nov. 12, 2015); PSR ¶ 57. Citing *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), and other precedents, the government argued that the district court could rely upon that conduct as long as the court "find[s] it proven by a preponderance of the evidence." D. Ct. Doc. 108, at 3.

The district court, which by coincidence had overseen petitioner's 2015 trial, agreed that "[t]he testimony and other evidence introduced at [petitioner's] 2015 trial showed not only just by a preponderance of the evidence but by overwhelming evidence that [he] has lived a life of violence." Pet. App. 22a. Among other things, the court noted recordings in which petitioner "boasted of being a 'wise guy' for numerous years and of the dirty deeds he had done to earn his place in the mob." *Id.* at 23a. And the court gave "particular weight to two crimes committed by [petitioner], the murder of Paul Katz and the Lufthansa heist." *Ibid.*

With respect to the 1969 Katz murder, the district court observed that a cooperating witness whom the

court had found "forthright, credible, and corroborated in numerous details" testified at the 2015 trial that petitioner had admitted to helping another man "strangle[] Paul Katz to death because Katz was cooperating with law enforcement." Pet. App. 23a. The witness had further testified that petitioner "buried Katz's body" and "later poured lime and cement over the hole," and ordered the witness and petitioner's son to move the body in the 1980s. *Ibid.* The court also cited evidence corroborating the witness's testimony: "human remains of an adult male" were recovered "from where [the witness] said they buried the body," and "the DNA profile * * * from these remains appeared to be that of Paul Katz." *Ibid.*

With respect to the 1978 Lufthansa heist, the district court explained that "[the witness] credibly testified that [petitioner] played a leading role," and that the witness's testimony was "amply corroborated." Pet. App. 23a-24a. In particular, two other cooperating witnesses had testified that petitioner "had jewelry from the Lufthansa heist," and petitioner "himself corroborated his involvement" by "implicitly admitt[ing], in highly profane terms" in a recorded conversation, "his involvement in the Lufthansa heist." *Id.* at 24a. The court further observed that "the testimony at [petitioner's] 2015 trial established that he remained involved in loansharking up until 2013." *Ibid.*

The district court observed that petitioner's "guilty plea in this case showed that he remained a powerful player within the Bonanno Family, capable of orchestrating violent acts as of 2012." Pet. App. 24a. The court recognized that it was "not required to consider" any "acquitted conduct in sentencing" petitioner, but explained that it would "exercise [its] discretion to do

so." *Ibid.* The court was "mindful of the weight that [it] must give to the jury's verdict of acquittal, but [the court] nonetheless [was] firmly convinced that the Government proved [petitioner's] conduct by more than a preponderance of the evidence." *Ibid.* The court could "imagine few things that are more relevant to the factors that [it] must consider under Section 3553(a) than [petitioner's] lifelong history of violent crime." *Ibid.* The court explained that petitioner's conduct "also shows that the guidelines significantly underestimate" his criminal history. *Ibid.*

Turning to other factors, the district court acknowledged that petitioner's "poor health and advanced age are significant mitigating personal characteristics," and it "g[a]ve these factors considerable weight." Pet. App. 25a. The court also gave "some but marginal weight" to the letters submitted by petitioner's friends and family. *Ibid.*; see *id.* at 25a-26a. But the court explained that "the other sentencing factors that [it] must consider all militate in favor of a substantial prison sentence." *Id.* at 26a. And "[b]alancing all the pertinent sentencing factors," the district court determined that a sentence of 96 months of imprisonment was appropriate. Pet. App. 27a. The court observed that "although [it was] relying on acquitted conduct in sentencing [petitioner], had he been found guilty at the trial in 2015, he would have been facing far more than the statutory maximum of 20 years of imprisonment he faces here." *Ibid.*

2. The court of appeals affirmed in an unpublished summary order. Pet. App. 1a-5a. The court observed that this Court's decision in *Watts*, which explained "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 [the] decision" here. *Id.* at 2a (citation omitted). The court further observed that "[a]n acquittal does not necessarily mean a jury found the defendant innocent; rather it indicates there exists reasonable doubt as to his guilt." *Ibid.* And the court explained that in *United States* v. *Vaughn*, 430 F.3d 518 (2d Cir. 2005) (Sotomayor, J.), cert. denied, 547 U.S. 1060 (2006)—decided "[a]fter [this] Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005)"—it had "reaffirmed that under *Watts* a district court may consider acquitted conduct at sentencing." Pet. App. 2a.

Applying those principles here, the court of appeals determined that "[t]he district court did not err when it considered acquitted conduct in sentencing [petitioner]." Pet. App. 2a. The court of appeals explained that the district court had found the evidence underlying petitioner's extensive criminal history to have been proven by "'overwhelming evidence' based on [petitioner's] 2015 RICO trial at which the government presented evidence of crimes alleged to have been committed by [him] during a period of over forty years." *Id.* at 3a (citation omitted).

The court of appeals rejected petitioner's argument that sentencing courts may consider only acquitted conduct that is "related" to the instant crime of conviction. Pet. App. 3a. The court explained that "[u]nder *Watts*, the distinction between unrelated and related conduct is irrelevant." *Ibid.* The court further explained that the prior murder and robbery "informed the [district] court's assessment of the danger [petitioner] posed to the community * * * and spoke to the level of specific deterrence needed—each of which the court found rel-

evant under [Section] 3553(a) in exactly the way approved by *Watts*." *Ibid.* As the court of appeals observed, "[t]hat history also informed the district court's understanding of the seriousness of the present crime," which it viewed as being "not merely an isolated instance, however reprehensible, of road rage, but an example of [petitioner's] continued ability to exert the power of the underworld to intimidate and harm law-abiding citizens." *Id.* at 3a-4a.

ARGUMENT

Petitioner contends (Pet. 13-26) that the district court's reliance on acquitted conduct at sentencing violated his Fifth Amendment right to due process and his Sixth Amendment right to a jury. But this Court already has upheld a district court's authority to consider acquitted conduct at sentencing, and as petitioner correctly acknowledges, every federal court of appeals with criminal jurisdiction has recognized sentencing courts' authority to rely on conduct that the judge finds by a preponderance of the evidence but that the jury did not find beyond a reasonable doubt. This Court has repeatedly denied writs of certiorari in cases raising the issue and should follow the same course here.

1. When selecting an appropriate sentence, a district court may, consistent with the Fifth and Sixth Amendments, consider conduct that was not intrinsic to the underlying conviction. Although the Sixth Amendment requires that, other than the fact of a prior conviction, "any fact that increase[s] the prescribed statutory maximum sentence" or the statutory "minimum sentence" for an offense "must be submitted to the jury and found beyond a reasonable doubt," *Alleyne* v. *United States*, 570 U.S. 99, 106-108 (2013) (plurality opinion), judges have broad discretion to engage in factfinding to

determine an appropriate sentence within a statutorily authorized range, see, *e.g.*, *id.* at 116 (majority opinion) ("[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."); *United States* v. *Booker*, 543 U.S. 220, 233 (2005) ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."); see also 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and 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.").

Contrary to petitioner's contention (Pet. 18-26), neither the Fifth Amendment nor the Sixth Amendment precludes sentencing courts from finding facts about relevant conduct under this framework when the defendant is acquitted of that conduct under a higher standard of proof at trial. As this Court explained in *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), in addressing judicial factfinding under the then-mandatory federal Sentencing Guidelines, "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 proved by a preponderance of the evidence." *Id.* at 157. The Court observed that under the pre-Guidelines sentencing regime, it was "'well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted,'" and that "[t]he Guidelines did not alter this aspect of the sentencing court's discretion." *Id.* at 152 (citation omitted). And the Court explained that

a jury's determination that the government failed to prove a fact beyond a reasonable doubt does not have preclusive effect in contexts in which a lower standard of proof applies. *Id.* at 156 ("[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.") (citation omitted).

Petitioner's effort (Pet. 14) to cast *Watts* as an inapposite double-jeopardy case lacks merit. Although *Watts* specifically addressed a challenge to acquitted conduct based on double-jeopardy principles, its clear import is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution. See *Watts*, 519 U.S. at 157; see also, *e.g.*, *Alabama* v. *Shelton*, 535 U.S. 654, 665 (2002); *United States* v. *Grubbs*, 585 F.3d 793, 798-799 (4th Cir. 2009) (describing *Watts* as "clear Supreme Court * * * precedent holding that a sentencing court may consider uncharged and acquitted conduct in determining a sentence, as long as that conduct is proven by a preponderance of the evidence"), cert. denied, 559 U.S. 1022 (2010). Indeed, *Watts* is incompatible with petitioner's core premise: that consideration of acquitted conduct as part of sentencing contravenes the jury's verdict or punishes the defendant for a crime for which he was not convicted. If consideration of such conduct at sentencing were in fact a re-prosecution of the prior charges, it is difficult to see how *Watts* could have found it compatible with the Double Jeopardy Clause.

This Court's decision in *United States* v. *Booker*, *supra*, confirms that a judge may constitutionally base a defendant's sentence on conduct that was not found by the jury, so long as the sentence is at or below the statutory maximum. In discussing the type of information

that a sentencing court could consider under the advisory Guidelines, *Booker* made no distinction between acquitted conduct and other relevant conduct. See, *e.g.*, 543 U.S. at 252 (emphasizing the need to consider all relevant conduct to achieve "the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways"). To the contrary, after emphasizing the judge's "broad discretion in imposing a sentence within a statutory range," *id.* at 233, *Booker* cited *Watts* for the proposition that "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found unproved (beyond a reasonable doubt)," *id.* at 251 (emphasis omitted). And the majority opinion in *Alleyne* expressly distinguished "facts that increase either the statutory maximum or minimum" from those "used to guide judicial discretion in selecting a punishment 'within limits fixed by law.'" 570 U.S. at 113 n.2 (citation omitted). The Court made clear that although the latter "may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing." *Ibid.*

Petitioner's Fifth Amendment argument (Pet. 22-26) is likewise unsound. Petitioner acknowledges that judges "historically have enjoyed discretion to impose sentences based on additional facts found by a preponderance of the evidence at sentencing." Pet. 25; see Pet. 21 (conceding that "judges may retain latitude to find facts by a preponderance of the evidence in determining information relevant to sentencing"). Yet petitioner proposes (Pet. 25) to create an exception for "factual findings that conflict with a jury's acquittal." That exception is logically unsound because factual findings

that satisfy the preponderance standard do not "conflict" (*ibid.*) with a jury's verdict of acquittal under the more demanding beyond-a-reasonable-doubt standard. See *Watts*, 519 U.S. at 156; cf. 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4422, at 634 (3d ed. 2016) (explaining that an acquittal is not issue-preclusive in civil cases when the standard of proof is lower, and that the same rule "applies also when further criminal proceedings do not require proof beyond a reasonable doubt"). For example, no logical conflict or inconsistency exists between the government's proving that petitioner more likely than not committed the 1969 murder and 1978 robbery, on the one hand, and its failure to prove the prior racketeering charges beyond a reasonable doubt, on the other. Indeed, the jury's prior general verdict of acquittal does not necessarily reflect any specific finding as to those two charged racketeering predicates, as opposed to other elements of the offense.

Petitioner's suggestion that he was "adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case" is without merit. Pet. 24-25 (citation omitted). Petitioner was sentenced solely for his conviction on the Travel Act count, see Judgment 1-3, to a term of imprisonment far below the 20-year statutory maximum Congress authorized for that conviction, see 18 U.S.C. 1952(a)(3)(B). And the conviction itself is beyond reproach; petitioner pleaded guilty and does not challenge the validity of his plea here. The only facts relevant to petitioner's sentencing "as would suffice in a civil case," Pet. 25 (citation omitted), were ones used to "guide judicial discretion in selecting a punishment 'within limits fixed by law,'" *Alleyne*, 570 U.S. at 113 n.2 (citation omitted). Petitioner

himself appears to acknowledge (Pet. 21, 25) that a preponderance-of-the-evidence standard generally suffices in that context.

2. As petitioner recognizes (Pet. 2-3, 11), every federal court of appeals with criminal jurisdiction has recognized, even after *Booker*, that a district court may consider acquitted conduct for sentencing purposes. See, *e.g.*, *United States* v. *Gobbi*, 471 F.3d 302, 313-314 (1st Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 526-527 (2d Cir. 2005) (Sotomayor, J.), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Ciavarella*, 716 F.3d 705, 735-736 (3d Cir. 2013), cert. denied, 571 U.S. 1239 (2014); *Grubbs*, 585 F.3d at 798-799; *United States* v. *Farias*, 469 F.3d 393, 399-400 & n.17 (5th Cir. 2006), cert. denied, 549 U.S. 1272 (2007); *United States* v. *White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc), cert. denied, 556 U.S. 1215 (2009); *United States* v. *Waltower*, 643 F.3d 572, 575-578 (7th Cir.), cert. denied, 565 U.S. 1019 (2011); *United States* v. *High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States* v. *Mercado*, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 552 U.S. 1297 (2008); *United States* v. *Magallanez*, 408 F.3d 672, 683-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Siegelman*, 786 F.3d 1322, 1332-1333 & n.12 (11th Cir. 2015), cert. denied, 136 S. Ct. 798 (2016); *United States* v. *Settles*, 530 F.3d 920, 923-924 (D.C. Cir. 2008), cert. denied, 555 U.S. 1140 (2009).

Instead, petitioner cites (Pet. 11) four decisions from the Supreme Courts of Georgia, New Hampshire, and North Carolina that disallowed the use of acquitted conduct at sentencing. Two of those decisions predate *Watts* and are therefore of minimal relevance. See *State* v. *Cote*, 530 A.2d 775 (N.H. 1987); *State* v. *Marley*, 364 S.E.2d 133 (N.C. 1988). The other two did not cite

this Court's decision in *Watts*, let alone attempt to distinguish it. See *Bishop* v. *State*, 486 S.E.2d 887 (Ga. 1997), cert. denied, 522 U.S. 1119 (1998); *State* v. *Cobb*, 732 A.2d 425 (N.H. 1999). Indeed, the Supreme Court of New Hampshire has since clarified that its earlier decision in "*Cote* provides greater protection than that provided to a defendant in * * * *Watts*"—a statement best read as clarifying that its decisions are rooted in state law and thus do not create a conflict on the federal constitutional question presented here. *State* v. *Gibbs*, 953 A.2d 439, 442 (2008).

In a supplemental brief (at 2-5), petitioner cites the Supreme Court of Michigan's recent decision in *People* v. *Beck*, 2019 WL 3422585 (July 29, 2019), which held that "due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted." *Id.* at *11. *Beck* not only is an outlier decision, but appears to be the first of its kind. *Beck* concluded that the sentencing court erred in relying on conduct underlying a murder charge directly before the jury in the same case. *Id.* at *4. To the extent that *Beck* could be read to further preclude Michigan state courts from considering acts included as additional support for a racketeering charge in a prior case, any conflict it has created remains too shallow to warrant this Court's review.

Moreover, *Beck*'s reasoning is tenuous. In the court's view, "when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent," and reliance on acquitted conduct at sentencing "'is fundamentally inconsistent with the presumption of inno-

cence itself.'" 2019 WL 3422585, at *10 (citation omitted). Yet an individual is equally "presumed innocent" when he is never charged with a crime in the first place. Under the *Beck* majority's reasoning, therefore, a sentencing court could not rely on *any* conduct not directly underlying the elements of the offense on which the defendant is being sentenced. Yet *Beck* itself acknowledged that "[w]hen a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard." *Ibid.* The majority did not attempt to explain that logical inconsistency in its reasoning.

This Court has repeatedly and recently denied petitions for writs of certiorari challenging the reliance on acquitted conduct at sentencing. See, *e.g.*, *Villarreal* v. *United States*, 139 S. Ct. 592 (2018) (No. 18-5468); *Musgrove* v. *United States*, 139 S. Ct. 591 (2018) (No. 18-5121); *Thurman* v. *United States*, 139 S. Ct. 278 (2018) (No. 18-5528); *Rayyan* v. *United States*, 139 S. Ct. 264 (2018) (No. 18-5390); *Muir* v. *United States*, 138 S. Ct. 2643 (2018) (No. 17-8893); *Okechuku* v. *United States*, 138 S. Ct. 1990 (2018) (No. 17-1130); *Soto-Mendoza* v. *United States*, 137 S. Ct. 568 (2016) (No. 16-5390); *Montoya-Gaxiola* v. *United States*, 137 S. Ct. 371 (2016) (No. 15-9323); *Davidson* v. *United States*, 137 S. Ct. 292 (2016) (No. 15-9225); *Krum* v. *United States*, 137 S. Ct. 41 (2016) (No. 15-8875); *Bell* v. *United States*, 137 S. Ct. 37 (2016) (No. 15-8606); *Siegelman* v. *United States*, 136 S. Ct. 798 (2016) (No. 15-353). The same result is warranted here.

3. To the extent petitioner suggests that "th[is] Court's intervention" is the only way to address any policy concerns with reliance on acquitted conduct at sentencing, Pet. 11, or that "only this Court can resolve" the question presented, Pet. 7 (capitalization altered; emphasis omitted), that suggestion is incorrect. Congress could pass a statute or the Sentencing Commission could promulgate guidelines to preclude such reliance. See *Watts*, 519 U.S. at 158 (Breyer, J., concurring); *United States* v. *Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (per curiam) (Kavanaugh, J., concurring in the denial of rehearing en banc). Indeed, Congress currently is considering a bill to amend 18 U.S.C. 3661 to prohibit consideration of acquitted conduct at sentencing except in mitigation. See S. 2566, 116th Cong., 1st Sess. § 2(a)(1) (as introduced Sept. 26, 2019). And individual sentencing courts retain discretion to consider the extent to which acquitted conduct should carry weight in their assessment of a defendant's "background, character, and conduct" for purposes of imposing a sentence in a given case. 18 U.S.C. 3661; see *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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