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

REPLY BRIEF FOR PETITIONER

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The government does not dispute that the question presented here—whether the Fifth and Sixth Amendments prohibit a federal court from basing a criminal defendant's sentence on conduct underlying a charge for which he has been acquitted—is a critically important one. Nor does the government dispute that the district court sentenced petitioner based on conduct underlying a charge for which he was acquitted. *See* Pet. 4-5; Br. in

Opp. 4-5. It concedes that there is a split between federal courts and a state court of last resort on the question presented in the wake of the Michigan Supreme Court's decision in *People v. Beck*, --- N.W.2d ---, 2019 WL 3422585 (Mich. July 29, 2019). Br. in Opp. 13. And it does not dispute that this case is an ideal vehicle in which to address the question presented. Pet. 28-29.

The government prefers instead to argue that *Beck* is wrong and that this Court should wait for a deeper split. But it is high time for this Court to grant certiorari to address the constitutionality of increasing a defendant's sentence based on conduct underlying a charge for which a jury acquitted him.

I. There Is a Clear Split in Authority

The Michigan Supreme Court's recent decision in *Beck* creates a clear split of authority between a state court of last resort and the federal courts of appeals. Pet. Supp. Br. 1-6. There, the court expressly premised its decision on federal law and concluded that the constitutional right to due process does not permit courts to take acquitted conduct into account at sentencing. 2019 WL 3422585, at *3, *5 n.6. Michigan has recently petitioned for certiorari, arguing in part that the Court should grant *this* petition as a result of the conflict. *See* Pet. for Cert. 35, No. 19-564. And even before that split, numerous Justices and judges have called for review of this important issue. Pet. 7-10.

The government has no good response, arguing that *Beck* is an "outlier" and "appears to be the first of its kind," and that "any conflict it has created remains too shallow to warrant this Court's review." Br. in Opp. 13. When the shoe is on the other foot, however, no split is too

shallow for the government to ask for this Court's attention.[1] The simple fact is that *Beck* created a classic split of authority that plainly warrants this Court's attention now. With the federal courts of appeals bound by circuit precedent even in the face of increasing calls from jurists to reexamine this practice, it is hard to imagine any benefit of further delay. Pet. 7-12.

The government also argues that *Beck*'s reasoning is "tenuous" because it also could have implications for the use of uncharged—rather than acquitted—conduct. Br. in Opp. 13-14. But the Court need not concern itself with that distinction here, where petitioner has raised a narrow and cleanly defined 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*." Pet. I (emphasis added).

The government attempts to downplay the relevance of other state court decisions forbidding the use of acquitted conduct at sentencing, observing that two of those decisions predated *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), and the other two did not cite *Watts*. Br. in Opp. 12-13. True enough. But these decisions nonetheless disagree with *Watts*'s holding, and state jurists perceive an active "split among state courts on the issue." *People v. Rose*, 776 N.W.2d 888, 891 (Mich. 2010) (Kelly, C.J., dissenting). In any event, none of those arguments

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[1] *See, e.g.*, U.S. Pet. for Cert. 11, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, No. 15-290, 2015 WL 5265284 (successfully urging review of a "square but shallow" 1-1 circuit split); *see also* U.S. Pet. for Cert. 25, *United States v. Sanchez-Gomez*, No. 17-312, 2017 WL 7275610 (successfully urging review of a 2-1 circuit split); U.S. Pet. for Cert. 13, *United States v. Ressam*, No. 07-455, 2007 WL 2898699 (successfully urging review of a 3-1 circuit split).

explains away the Michigan Supreme Court's decision in *Beck*, which confronted *Watts* and held that it did not govern the due process analysis.

Finally, the government asserts that the Court has denied petitions presenting this question in the past. Br. in Opp. 14. But all of the cases the government identifies arose before *Beck* created a clear disagreement requiring the Court's attention. Many cases, moreover, raised only a Sixth Amendment challenge to the use of acquitted conduct, *see, e.g.*, *Okechuku v. United States*, No. 17-1130; *Bell v. United States*, No. 15-8606, or had vehicle problems that the government argued counseled against review, *see, e.g.*, *Musgrove v. United States*, No. 18-5121; *Siegelman v. United States*, No. 15-353. That made those cases less attractive candidates for certiorari than this petition. This case addresses the question presented under both the Fifth and Sixth Amendments and therefore gives the Court the greatest flexibility in considering the relevant constitutional protections that bear on this question. And the government has not suggested this case is an unsuitable vehicle in which to review the issue. Indeed, it is unlikely that the other cases arose on facts as stark as those here, where petitioner was sentenced to more than double the Guidelines range expressly on the basis of acquitted conduct, and where the sentencing judge based the sentence on "the demeanor of witnesses" at the earlier trial, her "first-hand assessments of their credibility," and her "notes . . . from the trial." Pet. 28 (quoting Pet. App. 22a).

II. The Government's Merits Preview Provides No Basis To Deny Review

The government defends the merits of the decision below, but that is a question for the merits stage of this case if certiorari is granted. In any event, the government's

defense falls back on *Watts*, and does not engage with *Watts*'s limitations. The government acknowledges that *Watts* "specifically addressed a challenge to acquitted conduct *based on double-jeopardy principles*," but asserts with little explanation that the case's "clear import" is that "sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution." Br. in Opp. 9 (emphasis added). But the government completely ignores the growing chorus of Justices, judges, courts, and commentators who have questioned that conclusion. Pet. 7-11. Nor does it acknowledge that this position was far from "clear" even at the time of *Watts*, when Justice Kennedy urged the Court to "confront[]" that very issue with "a reasoned course of argument" instead of "shrugging it off." *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting).

On petitioner's Sixth Amendment argument, the government argues that the Court's precedents permit the use of "conduct that was not found by a jury." Br. in Opp. 9-10. The petition, however, does not ask the Court to decide whether sentencing judges may ever find facts at sentencing; it is limited to consideration of acquitted conduct. The government does not seriously engage with petitioner's arguments on the historical import of a jury's verdict of acquittal, Pet. 18-22, nor does it acknowledge petitioner's argument that, even if *Watts* does control, it is ripe for reexamination in light of this Court's recent Sixth Amendment jurisprudence, Pet. 14-17. Instead, the government simply asserts that *Watts* forecloses petitioner's claims, without defending *Watts* on its own merits. Br. in Opp. 9-10.

The government's discussion of petitioner's due process argument is similarly circular. The government as-

sumes that judicial findings by a preponderance of the evidence do not "conflict" with a jury's verdict of acquittal—a proposition for which the government cites only *Watts* and a treatise citing *Watts*. Br. in Opp. 10-11; *see also* 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4422, at 634 n.7 (3d ed. 2016) (citing *Watts*). None of this explains why *Watts*, a double-jeopardy case, should control the question presented, or why acquitted conduct should not be among the factors the Due Process Clause prohibits courts from considering, Pet. 24-25—at least when, as here, such conduct becomes "a tail which wags the dog of the substantive offense" of conviction, *Apprendi v. New Jersey*, 530 U.S. 466, 563 (2000) (Breyer, J., dissenting); Pet. 22-23.

The government concludes its merits preview by suggesting that there is no inconsistency between a judicial finding that petitioner committed murder and robbery at sentencing on one hand, and the jury's prior verdict of acquittal on the racketeering charge that centered on those two offenses on the other. Br. in Opp. 11. But *Watts* considered whether "a jury's verdict of acquittal . . . prevent[s] the sentencing court from considering *conduct underlying the acquitted charge*." *Watts*, 519 U.S. at 157 (emphasis added). The sentencing judge plainly relied on that "conduct" here. Indeed, the government does not urge this as a reason to deny certiorari, presumably because it has waived many times over any argument that petitioner was not sentenced for acquitted conduct under *Watts*. "From the beginning, the parties litigated this suit on [that] understanding." *Perez v. Mortg. Bankers Ass'n*,

135 S. Ct. 1199, 1210 (2015) (holding new argument waived).[2]

III. No Other Actor Will Resolve the Question Presented

The government finally argues that the Court need not intervene because "Congress *could* pass a statute or the Sentencing Commission *could* promulgate guidelines to preclude" reliance on acquitted conduct, and because courts could exercise their discretion not to consider acquitted conduct in the meantime. Br. in Opp. 15 (emphases added). As petitioner has already explained, Pet. 12-13, none of these is likely to resolve the issue.

As to the Sentencing Commission, Justice Breyer made the same suggestion in *Watts*, noting that the Commission "could decide to revisit this matter." *Watts*, 519 U.S. at 159 (Breyer, J., concurring). More than two decades later, his call remains unanswered.

The government notes that Congress is currently considering a bill to prohibit the use of acquitted conduct as sentencing. Br. in Opp. 15. But, as the government has

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[2] *See, e.g.*, Pet. App. 14a-15a (government arguing at sentencing that "we cited *Watts* for the proposition that basically the Court is not bound by the jury's verdict. It can consider[] acquitted conduct"); C.A. App. 110-11 (government sentencing brief citing *Watts* and arguing the court could "rely at sentencing on . . . acquitted conduct proven by evidence introduced at the defendant's 2015 trial on racketeering charges"); Gov't C.A.2 Br. 18 (government brief on appeal arguing that "[Petitioner's] claim that the district court erred in considering his acquitted conduct is foreclosed by precedent," and citing *Watts*); *see also* Pet. App. 27a (district court's statement that it was "relying on acquitted conduct"); Pet App. 2a (court of appeals' statement that "[t]he district court did not err when it considered acquitted conduct in sentencing [petitioner]").

often advised this Court, pending legislation is *not* a reason to deny certiorari, and "[t]he speculative possibility that Congress might ultimately enact" a pending bill "should not deter the Court from considering the important questions presented by this case." U.S. Pet. Reply 8, *United States v. Eurodif S.A.*, No. 07-1059, 2008 WL 905193.[3] Moreover, there is little reason to believe that Congress will enact the proposed bill. Congress has repeatedly entertained similar proposals to forbid consideration of acquitted conduct at sentencing, and those legislative attempts have uniformly failed. *See* S. 4, 115th Cong., 2d Sess. (introduced Dec. 4, 2018); H.R. 5785, 115th Cong., 2d Sess. (introduced May 11, 2018); H.R. 4261, 115th Cong., 1st Sess. (introduced Nov. 6, 2017); H.R. 2944, 114th Cong., 1st Sess. (introduced June 25, 2015).

And as to lower courts, experience shows that they cannot effectively refuse to consider acquitted conduct without risking reversal. Br. in Opp. 15. In *United States v. Ibanga*, 271 F. App'x 298 (4th Cir. 2008), the district court declined to rely on acquitted conduct and the government successfully appealed to the Fourth Circuit, which held that the sentencing court committed "significant procedural error" and remanded for resentencing. 271 F. App'x at 301 (citing *Watts*). The Second Circuit in *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005), reversed on a similar record, remanding with directions for

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[3] *Accord* U.S. Pet. for Cert. 26 n.7, *United States v. Clintwood Elkhorn Mining Co.*, No. 07-308, 2007 WL 2608817 ("[B]ills are currently pending in committees in Congress that, if passed, could resolve the question presented . . . . This Court's review is nonetheless warranted."); U.S. Pet. Reply 10 n.8, *Gonzales v. Duenas-Alvarez*, No. 05-1629, 2006 WL 2581844 (similar); U.S. Pet. Reply 8 n.5, *Gonzales v. Penuliar*, No. 05-1630, 2006 WL 2590487 (similar).

the sentencing court to "consider all facts relevant to sentencing . . . even those relating to acquitted conduct." *Id.* at 526-27. And even if individual judges *could* refuse to rely on acquitted conduct, relying on their discretion "would at best constitute a courtroom-by-courtroom solution, in which exposure to massively enhanced sentences would turn on a spin of the judicial assignment wheel." Br. for National Association of Federal Defenders & FAMM as Amici Curiae Supporting Petitioner 21.

CONCLUSION

The use of acquitted conduct at sentencing has gone on long enough. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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