No. _____

In The
Supreme Court of the United States

MICHAEL LUDWIKOWSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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

LIST OF PARTIES

Petitioner was indicted in the United States District Court for the District of New Jersey, Crim. No. 16-513 (D.N.J.), with co-defendant named David Goldfield. Goldfield pled guilty and did not appeal. He is not a party in this Court.

RELATED CASES

United States v. Michael Ludwikowski, No. 16-cr-00513, U.S. District Court for the Eastern District of Pennsylvania. Judgment entered April 13, 2018.

United States v. Michael Ludwikowski, No. 18-1881, U.S. Court of Appeals for the Third Circuit. Judgment entered December 5, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Michael Ludwikowski respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-29) is available at 944 F.3d 123 (3d Cir. 2019).

JURISDICTION

The opinion and judgment of the court of appeals were issued on December 5, 2019. App. 1-29. Pursuant to this Court's Rules 13.1 and 13.3, a petition for certiorari was initially due on or before March 4, 2020. By order dated February 21, 2020, under Dkt. 19A932, Justice Alito extended the time for filing a petition for a writ of certiorari until May 3, 2020. This petition is timely filed on or before the extended due date. Rules 13.1, 13.3, 13.5.

Petitioner invokes this Court's jurisdiction 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[.]

INTRODUCTION

The case is an excellent vehicle for addressing a persistent and troubling question: how, if at all, permitting a judge to sentence a defendant for conduct of which the jury acquitted him may be squared with the Fifth Amendment Due Process Clause and Sixth Amendment guarantee of the right to a jury trial.

Petitioner put his faith in our jury system. He rejected a pretrial plea offer that would have required him to admit a charged conspiracy that would triple the term of imprisonment advised by the U.S. Sentencing Guidelines. His decision to stand on his rights appeared to be vindicated when the jury acquitted him of conspiracy while convicting him only on substantive counts warranting a far lesser sentence. But the

district court overrode the very jury verdict from which its sentencing authority derived—and sentenced petitioner for the conspiracy he had chosen to submit to the jury, which rejected it.

The district court sentenced petitioner to fifteen years in prison when the counts of conviction suggested a sentence of five. It supplanted the jury's reasonable doubt with its own decision to credit the prosecution's trial evidence. The clarity of the record in this case, and the robust development in this Court and others of the legal principles that inform the Question Presented, warrant granting the writ.

STATEMENT OF THE CASE

1. Petitioner Michael Ludwikowski was a pharmacist. He owned two "mom-and-pop" independent pharmacies in southern New Jersey: Olde Medford Pharmacy ("Olde Medford"), opened in 2008, and Medford Family Pharmacy ("MFP"), opened in 2012.

The trial of this matter indisputably demonstrated that three sophisticated rings of drug dealers targeted small pharmacies, including petitioner's, to fill opioid prescriptions for illegal resale. In 2016 petitioner was indicted for conspiring with those dealers to illicitly distribute controlled substances. *See* C.A.3 App. 28 (Count 1, 21 U.S.C. § 846). He was also charged with substantive distribution and related counts. *See* C.A.3 App. 50-51 (Counts 2 and 3, 21 U.S.C. § 856),

C.A.3 App. 52 (Counts 4-9, 21 U.S.C. §§ 841, 846), C.A.3 App. 54 (Count 16, 21 U.S.C. § 843(b)).

Pretrial, petitioner declined a plea offer that would have required him to admit the charged conspiracy. *See* Tr. Jul. 17, 2017 at 3 (referring to proposed plea agreement, entered into record as Exh. P-1); DDE 62-1 at 6 n.2 (same). Having elected to put the government to its proof on that offense, petitioner centered his trial defense on the theme that he did not conspire with the dealers to distribute opioids illegally but merely filled prescriptions they presented.

Five dealers testified at trial, three of them pursuant to cooperation plea agreements. On cross-examination each denied having conspired with petitioner to distribute controlled substances, confirming that they were not "in cahoots" with him. To the contrary, they had gone to great lengths to make fraudulent prescriptions look legitimate, and targeted vulnerable small pharmacies (of which Olde Medford and MFP were two of many). The evidence showed that petitioner sold the pharmaceuticals at their ordinary retail price and earned nothing from the illegal resale. Indeed, when petitioner refused to fill prescriptions for two of the dealers after being alerted to prescription fraud by local law enforcement, they threatened his and his children's lives.

The jury carefully parsed the evidence and delivered a mixed verdict. Pertinent here, it found the proof of conspiracy lacking; it acquitted petitioner of

conspiracy while convicting him on some, but not all, of the charged substantive counts. *See* App. 30.

As the court of appeals later explained, only five fraudulent prescriptions were associated with the counts of conviction. App. 11. Yet over defense objection, at sentencing the district court found by a preponderance of the evidence that petitioner had joined the conspiracy of which the jury acquitted him. Thus it included "hundreds of fraudulent prescriptions" associated with the conspiracy when calculating drug quantity under the Sentencing Guidelines. *Id.* The result was a Guidelines imprisonment range of 151-188 months, rather than the 51-63 months dictated by the counts of conviction. App. 90-93. The court sentenced petitioner to 180 months in prison. App. 32.

The defense's objections at sentencing to the use of acquitted conduct did not encompass the constitutional challenges presented here. Petitioner acknowledged that controlling law permits the court to supplant the verdict of acquittal with its own findings made by a preponderance of the evidence.[1] App. 56; *see* Def. Sent. Mem. at 12 (citing *United States v. Watts*, 519 U.S. 148 (1997) (per curiam) and *United States v. Grier*, 475 F.3d 556, 585 (3d Cir. 2007) (en banc)).

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[1] Though the defense acknowledged this point, the district court addressed it at sentencing: "I must reject the notion that the acquittal on conspiracy precludes the application of the doctrine of relevant conduct." App. 86. "Relevant conduct" is the mechanism by which acquitted conduct is used to calculate an offense level under the Sentencing Guidelines. *See* U.S. Sentencing Guideline § 1B1.3.

Nevertheless, the sentencing court acknowledged that "the defense will argue that none of this [drug quantity] should count as relevant conduct because the jury acquitted Mr. Ludwikowski of the charge of conspiracy." App 54. Defense counsel confirmed "Your Honor precisely hit on the defense's position." App. 56. Urging the court to sentence on the conduct underlying the counts of conviction alone, petitioner cited both the acquittals and the prosecution's failure of proof. *E.g.*, Def. Sent. Mem. at 11-14; App. 56-73.

2. The sentencing court expressly based its conspiracy finding solely on its decision to credit the trial evidence the jury had rejected. The prosecution offered no new evidence at sentencing, arguing inferences from the trial evidence alone to support a finding that petitioner joined the conspiracy. *See* App. 73-81. The court weighed the evidence, made credibility assessments, and drew inferences. *See* App. 84-93; *e.g.*, *id.* at 86-87 ("this has been shown by the testimony of the witnesses at trial" . . . "by Mr. Ludwikowski's own statements [introduced at trial]" . . . "As the evidence at trial demonstrated. . . ."); *id.* at 88 ("And there was ample proof. . . ." (reviewing trial evidence)); *id.* at 91 ("And I sat through the trial and I credit the testimony. . . ."); *id.* at 92 ("That testimony I also credit. . . ."); *id.* at 92 ("I also don't see Goldfield's testimony as somehow ambiguous. He was asked, and I credit his testimony. . . .").

The inferences the court drew were those the jury declined to draw: it inferred that petitioner joined the distribution conspiracy.

3. In the court of appeals petitioner expressly raised the constitutional challenges raised herein. He invoked both the Due Process Clause of the Fifth Amendment and the Sixth Amendment jury-trial guarantee, arguing that his sentence was substantively unreasonable because it was nearly triple the Guideline range prescribed by the counts of conviction (180 months, versus a range of 51-63 months). Pet. C.A.3. Br. at 56-61. He acknowledged there too, as required, that binding precedent prevented the circuit from so ruling on direct appeal. *Id.* at 56 (citing *Watts* and *Grier*, supra). The circuit ruled accordingly, citing *Watts*. App. 28 n.5.

REASONS FOR GRANTING THE WRIT

I. The use of acquitted conduct at sentencing poses a persistent and weighty constitutional problem that only this Court will resolve.

This Court has never squarely addressed whether the Due Process Clause of the Fifth Amendment or the Sixth Amendment's jury-trial guarantee forbids the use of acquitted conduct at sentencing. In *Watts*, a divided Court held only that taking acquitted conduct into account at sentencing does not violate the Double Jeopardy Clause of the Fifth Amendment. 519 U.S. at 154. 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).

Numerous Justices and judges have questioned whether using acquitted conduct at sentencing comports with due process and the right to a jury trial, urging this Court to "take up this important, frequently recurring, and troubling contradiction in sentencing law." *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in denial of rehearing en banc).

1. As this Court later recognized, *Watts* decided "a very narrow question." *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005). Even contemporaneously, some Justices urged the Court to resolve the broader "question of recurrent importance" that *Watts* did not address: the use at sentencing of "conduct underlying a charge for which the defendant was acquitted." *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting). Justice Stevens went further, calling the Court's holding "repugnant" to its constitutional jurisprudence. *Id.* (Stevens, J., dissenting).

Since then, other Justices have called for the Court to address whether the use of acquitted conduct at sentencing comports with the Due Process Clause and the Sixth Amendment right to a jury trial. *In Jones v. United States*, for example, a jury convicted petitioners on substantive counts of distributing small amounts of cocaine but acquitted them of conspiring to distribute. 135 S. Ct. 8 (2014) (Scalia, J., dissenting

from denial of certiorari). Nevertheless, the sentencing judge found that they had joined a conspiracy and based their sentences on the large quantity of drugs distributed in the course of it. Dissenting from the denial of certiorari, Justice Scalia, joined by Justices Thomas and Ginsburg, highlighted the pressing need for the Court to resolve the question presented. *Id.* at 8-9. The 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 viewed *Jones* as a "particularly appealing" vehicle for correcting 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 federal lower-court judges have also opined that the Fifth and Sixth Amendments should prohibit reliance on 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). Others 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.).[2]

As the Court knows, some state courts have taken the step that federal courts of appeals have not, prohibiting the use of acquitted conduct at sentencing. The Michigan Supreme Court did so in *People v. Beck*, 504 Mich. 605 (2019), *cert. denied*, 140 S. Ct. 1243 (2020). States that do so find it "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); *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). Other states take a different view, permitting the practice. *See State v. Witmer*, 10 A.3d 728, 733-34 (Me. 2011) (permitting practice and collecting cases); *People v. Rose*, 776 N.W.2d 888, 891 (Mich. 2010) (Kelly, C.J., dissenting) (cataloging "the split among state courts on the issue").

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

3. As the dissent lamented in *Jones*, the Court's "continuing silence" on the question has led the courts of appeals to infer that "the Constitution does permit" sentences supported by judicial findings that defendants "engaged in [an offense] of which the jury acquitted them." 135 S. Ct. at 9 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari). The Third Circuit did so en banc in 2007. *Grier*, 475 F.3d at 585.

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). Thus, even judges who believe that *Watts* did not resolve the constitutionality of this process under the Due Process Clause or the Sixth Amendment are now bound 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 recognizing 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 challenge to 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) (acknowledging apparent "unfair[ness]" of reliance on acquitted conduct at sentencing, but citing "binding precedent" to affirm).

The passage of time has confirmed that no 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 are sentencing judges free to redress the problem 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 challenged on appeal the district court's refusal to consider acquitted conduct. *Id.* at 300. The Fourth Circuit found "significant procedural error" and reversed for resentencing. *See id*. at 301 (citing *Watts*).

Without the Court's intervention to clarify or overrule *Watts*, the use of acquitted conduct at sentencing will continue unabated in the federal courts.

II. The use of acquitted conduct at sentencing violates the Fifth and Sixth Amendments.

Basing a criminal sentence on acquitted conduct weakens two core rights whose "historical foundation[s] . . . extend[] down centuries into the common law": the Sixth Amendment right to a jury and the Fifth Amendment right to due process. *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 principle.

A. The Court should not permit *Watts* to control the issue.

1. While urging the district court not to use acquitted conduct at sentencing, petitioner nonetheless acknowledged that *Watts*, and the en banc Third Circuit ruling in *Grier*, authorized it to do so. Def. Sent. Mem. at 12. The circuit cited *Watts* when affirming. App. 28 n.5.

Watts does not control this Court's examination of the Question Presented, however. As the 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.

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 merits briefing or oral argument. As Justice Kennedy pointed out in dissent, the Court's summary opinion "show[ed] hesitation" in confronting the broader questions implicated by the use of acquitted conduct, which he thought the Court "ought to . . . confront[ ] 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 reading it as dispositive of constitutional issues it did not address.

2. Even if the Court were to conclude that *Watts* held that the Due Process Clause and the Sixth Amendment jury-trial guarantee permit the use of acquitted conduct at sentencing, this Court's more recent jurisprudence would call that aspect of *Watts* into question. Stare decisis has "never been treated as an inexorable command," and is "at its weakest when [the Court] interpret[s] the Constitution," because a mistaken judicial interpretation is often "practically impossible" to correct through other means.[3] *Ramos v. Louisiana*, ___ S. Ct. ___, 2020 WL 1906545 (Apr. 20, 2020), at *12 (internal quotations and citations

[3] That has proven to be the case here. *See* supra pp. 12-13.

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).

Thus, the Court has not hesitated to revisit its sentencing jurisprudence to ensure that it preserves the integrity of the Sixth Amendment jury-trial right. *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)). Indeed, the Court recently acknowledged again that stare decisis does not require adherence to precedent that undermines that right, which is "fundamental to the American scheme of justice." *Ramos*, ___ S. Ct. at ___, 2020 WL 1906545 at *6 (overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality) and *Johnson v. Louisiana*, 406 U.S. 356 (1972)).

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." *Ramos*, ___ S. Ct. at ___, 2020 WL 1906545 at *12 (quoting *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019)). Each factor favors

overruling *Watts*—or, at least, cabining it to the double jeopardy context.

Watts's reasoning is thin, as explained above. It was a per curiam summary reversal, issued without briefing and argument, and concerned only the Double Jeopardy Clause. *See supra* p. 8. It forwent a "reasoned course of argument" on the questions presented here. *See Watts*, 519 U.S. at 170 (Kennedy, J., dissenting). This Court recognizes the limited precedential value of summary decisions on the merits, finding itself "less constrained" by opinions "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 case decided without full briefing and argument).

The Court also recently explained that the "quality of reasoning" prong favored overruling a plurality opinion that "spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right," even in a case that received full briefing and argument. *Ramos*, ___ S. Ct. at ___, 2020 WL 1906545 at *12 (discussing *Apodaca*). *Watts* spent no time "grappling" with that issue at all.

Nor do any reliance interests favor allowing *Watts* to control the use of acquitted conduct at sentencing. Ordinarily, parties' reliance on precedent favors 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.* Indeed, if treated as a new rule of criminal procedure the ruling would not apply on collateral review at all, and thus would upset no reliance interest. *Ramos*, ___ S. Ct. at ___, 2020 WL 1906545 at *13 (citing *Teague v. Lane*, 489 U.S. 288, 311-12 (1989) (plurality)).

Moreover, "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. *Alleyne*, 570 U.S. at 119 (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.

Subsequent legal developments also strongly favor revisiting *Watts*. In the two decades since *Watts*, the Court has issued more than a dozen opinions addressing the Sixth Amendment's constraints on criminal sentencing. *See*, *e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466 (2002) (jury must find all facts affecting statutory maximum); *Harris v. United States*, 536 U.S. 545 (2002) (sentencing factors may 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) (appellate 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); *Southern 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 findings needed for 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 these decisions also cite the Due Process Clause in emphasizing that a court's sentencing authority flows from the jury's verdict—with the jury, not the judge, occupying the central role in our criminal justice system. *See*, *e.g.*, *Hurst*, 136 S. Ct. at 621; *Alleyne*, 570 U.S. at 104. The cases 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." *Southern Union*, 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 undermine 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 fails to persuade a jury at trial but is permitted to persuade the court 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 is essential to protecting the jury-trial right.

1. The Sixth Amendment jury-trial guarantee 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 the

people a voice in the halls of legislative and executive power. Its companion is the right to trial by jury, which guarantees the people 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).

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; *Ramos*, ___ S. Ct. at ___, 2020 WL 1906545 at *6 (jury-trial right is "fundamental to the American scheme of justice").

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.

A sentencing court's 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 a jury's acquittal does not preclude a judge from later basing a sentence on the very facts that the jury rejected, the acquittal becomes merely "advisory." *Cf. Hurst*, 136 S. Ct. at 622. If a jury agrees with the prosecution and convicts, its guilty verdict is final unless the defendant demonstrates error. But if a jury finds that the prosecution did not carry its burden and acquits, the government may try again at sentencing, to a new trier of fact and under a lower standard of proof. In other words, if the government wins, it wins decisively. And if it loses, it has a chance to "try 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).

Thus even though the Sixth Amendment generally permits judges latitude to make findings of fact at sentencing, 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 permitting the use of acquitted conduct at sentencing are precisely those that concerned the Founders: giving the prosecutor and the judge the power to override the jury, obviating a defendant's choice to go to trial and the prosecution's failure to prove guilt beyond a reasonable doubt.

Petitioner here reposed his faith in the jury system: pretrial he rejected a plea offer that would have required him to admit guilt on the conspiracy count. *See* Tr. Jul. 17, 2017 at 3 (referring to proposed plea agreement, entered into record as Exh. P-1); DDE 62-1 at 6 n.2 (same). The centerpiece of his trial defense was denying that he was "in cahoots" with—that is, conspired with—the dealers who resold on the streets the prescription drugs petitioner dispensed at his pharmacy. On cross-examination each of the dealers denied entering into a conspiratorial agreement with petitioner, and other evidence undermined the suggestion of intentional concerted action. *See* discussion above, at p. 4. The jury apparently found the denials credible and other evidence of a conspiratorial agreement weak: it acquitted petitioner of conspiracy. App. 30.

Petitioner's decision to stand on his Sixth Amendment jury-trial right rather than plead guilty to conspiracy appeared to have been validated. But it was undone at sentencing. Presenting no fresh evidence of a conspiratorial agreement, the prosecutor simply urged a new trier of fact—the court—to make a different finding on a lower standard of proof. The court did so. Petitioner was sentenced as though he had taken the guilty plea he rejected pretrial, or as though the government had proved its case to the jury.

Permitting the use of acquitted conduct at sentencing made petitioner's assertion of right to trial by jury functionally meaningless. The rule creates a powerful incentive for all defendants to waive that right and plead guilty—because anything less than a complete acquittal on every count is functionally equivalent to pleading guilty to all of them.

Barring consideration of acquitted conduct at sentencing would not limit a judge's sentencing discretion to find facts generally. But it would protect the integrity of the jury-trial right by prohibiting courts from punishing a defendant for prosecution theories submitted to, and rejected by, a jury of his peers. And it would properly subordinate the court's sentencing authority to the jury's verdict (*Blakely*, 542 U.S. at 306), instead of allowing the court to override the verdict by making findings the jury rejected.

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 that 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 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).

Indeed even while dissenting in *Apprendi*, Justice Breyer recognized that "unusual and serious procedural unfairness" at 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." *Apprendi*, 530 U.S. at 563 (Breyer, J., dissenting) (internal quotation marks omitted).

It is well-settled that due process principles constrain 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 [a defendant's] 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 "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).

2. Due process also guards against the risk of inaccuracy in verdicts and sentencing—a risk that the reliance on acquitted conduct at sentencing heightens. 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.

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. That the factfinder that rejected it—the jury—has primacy in our legal system illustrates the synergy between the due process and jury-trial guarantees.

III. This case is an excellent vehicle for addressing the Question Presented.

This case presents an excellent vehicle for the Court to consider whether the Fifth and Sixth Amendments prohibit the use of acquitted conduct at sentencing. In fact it presents the same "particularly

appealing" scenario as did *Jones*: the jury convicted petitioner of distributing a "small amount" of drugs and acquitted him of conspiracy, yet the sentencing court found that he had joined a conspiracy and sentenced him on the vastly larger drug quantities attributable to it. *See Jones*, 135 S. Ct. at 8-9 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari). Yet as explained below (at pp. 29-34), it is a better vehicle than *Jones* and other cases on which the Court has declined to examine the practice.

1. Petitioner's advisory Guideline range was nearly tripled by the court's reliance on charges the jury rejected. As the court of appeals observed:

> The jury found Ludwikowski guilty of five of the six drug distribution charges and one of the two premises charges. It acquitted him of conspiracy. At sentencing, the District Court found by a preponderance of the evidence that Ludwikowski had acted in concert with others. It sentenced him based on hundreds of fraudulent prescriptions, *rather than the five associated with the counts of conviction*.

App. 11 (emphasis added). The five fraudulent prescriptions "associated with the counts of conviction" yielded a Guideline range of 51-63 months. Including prescriptions distributed in the course of the purported conspiracy essentially tripled that range, to 151-188 months. App. 90-93. The sentence actually imposed, 180 months (App. 32), is nearly three times the high end of the Guideline range dictated by the offenses of conviction.

Indeed, if the court's reliance on acquitted conduct was impermissible, then petitioner's sentence was substantively unreasonable. *See Gall v. United States*, 552 U.S. 38, 51 (2007). That is the precise concern that led Justice Scalia to describe *Jones* as a "particularly appealing" vehicle for resolving the propriety of sentencing that relies on acquitted conduct. *See Jones*, 135 S. Ct. at 9 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari). The court's significant deviation from the Guidelines range dictated by the jury's verdict makes this another "appealing" vehicle.

2. This case is a superior vehicle to *Asaro v. United States*, No. 19-107 (U.S.), *cert. denied*, 140 S. Ct. 1104 (2020), and other cases in which the Court has denied the writ. It starkly represents a court overriding the very jury verdict from which its sentencing authority derived—after the defendant rejected a plea offer that would have waived his right to that verdict on the facts that eventually tripled his sentence.

The *Asaro* petitioner, in contrast, was not actually acquitted of—indeed, not even charged with—the murder and robbery that his sentencing court took into account. Rather, they were two of fourteen predicate acts underlying a racketeering conspiracy charged in an earlier case. *See* Brief for the United States in Opposition, *Asaro v. United States*, No. 19-107, at 3; Verdict Form, Doc. 327, *United States v. Asaro*, No. 14-cr-26 (E.D.N.Y. Nov. 12, 2015) at 1-2 (Racketeering Acts 2 ("Murder of Paul Katz") and 3 ("Lufthansa Heist")). The earlier jury simply acquitted Asaro of conspiring

to commit racketeering. *Id.* at 1. That verdict may have indicated reasonable doubt that an "enterprise" existed; that the enterprise affected interstate commerce; that Asaro was "associated with or employed by" the enterprise; that there was a "pattern" of "racketeering activity"; that Asaro "conducted, or participated in conducting" the affairs of the enterprise through that pattern; and/or that he conspired to do so. *See* 18 U.S.C. § 1962(d)*;* Final Jury Charge, Doc. 322, *United States v. Asaro*, No. 14-cr-26 (E.D.N.Y. Nov. 6, 2015) at 18-29.

And having acquitted Asaro of the racketeeting conspiracy, his jury did not reach the question of whether he "intentionally committed, or caused, or aided and abetted" any of the predicate acts, including the murder and robbery. *See* Final Jury Charge, *Asaro*, at 25 (reciting standard). Its verdict literally did not indicate whether it found the predicate acts "proved" or "not proved." Verdict Form, *Asaro*, at 1-6.

Moreover, the authority of the court that sentenced Asaro derived from a different jury verdict entirely: he was sentenced on different charges brought nearly two years after his acquittal in the racketeering case. *See* Pet. for Certiorari, *Asaro v. United States*, No. 19-107, at 4-5. His sentencing judge did not override the verdict that authorized the sentencing; she used her knowledge of the defendant's history of bad acts—acts on which *no* jury had ever declared a verdict—to sentence him. That was a mine-run exercise of sentencing discretion with no implications for the defendant's invocation of his jury-trial right or due process.

Petitioner here, in contrast, declined to plead guilty to conspiracy and insisted that the government attempt to convince a jury of his guilt beyond a reasonable doubt. The government tried and failed to do so on the conspiracy count. Yet the sentencing court substituted its view of the evidence, at a lower standard of proof, for that of the very jury from whose verdict its sentencing authority derived.

Though petitioner did not raise constitutional challenges in the district court, he did object to the use of acquitted conduct to calculate drug quantity, citing both the verdicts themselves and the prosecution's failure of proof. *E.g.*, Def. Sent. Mem. at 11-14. He acknowledged that current law permits the court to supplant the verdict of acquittal with its own findings, made by a preponderance of the evidence. App. 56; *see* Def. Sent. Mem. at 12. As detailed above (at p. 6) the court did exactly that, making its own credibility findings and drawing inferences as a juror would—though reaching a different conclusion than the jury itself did.

On appeal petitioner expressly invoked both the Due Process Clause of the Fifth Amendment, and the Sixth Amendment jury-trial guarantee, arguing that his sentence was substantively unreasonable. Pet. C.A.3. Br. at 56-61. The circuit rejected his claims on plain error review, citing *Watts*. App. 28 n.5.

The fact that the court of appeals did not make a thorough examination of the issue does not affect the matter's suitability for certiorari, however. The Court itself, members of it, federal lower court judges, and

state courts—not to mention myriad legal scholars—have carefully examined for decades the application of the Sixth Amendment and Fifth Amendment Due Process Clause at sentencing, in many cases expressly exploring their implications for the use of acquitted conduct. *See* discussion above, at pp. 8-11. No further development of the law in the lower courts will shed light on the issue.

Indeed, at the federal level no further development is possible; every court of appeals understands its hands to be tied by this Court's perceived approval of the practice. Here both the district court and the court of appeals were additionally constrained by a prior circuit ruling en banc (*Grier*, 475 F.3d at 585). Thus even had petitioner raised his constitutional claims at sentencing the Third Circuit would have been required to summarily rebuff them on direct appeal, even if it otherwise believed itself free to question *Watts*. That petitioner raised constitutional challenges on plain error in the circuit does not undermine the matter's utility as a vehicle for this Court to examine them.

The fact that petitioner invoked both the Fifth and Sixth Amendments on appeal also makes this case a superior vehicle to others recently presented to the Court, which raised Sixth Amendment challenges only. The *Jones* case that may otherwise have been a "particularly appealing" vehicle (135 S. Ct. at 8-9 (dissent)) suffered from this limitation. *See* Pet. for Certiorari, *Jones v. United States*, at 1-2; *cert. denied*, 135 S. Ct. 8 (2014); *see also*, *e.g.*, Pet. for Certiorari, *Cabrera-Rangel*

v. United States, No. 18-650, at 1 (Sixth Amendment only); *cert. denied*, 139 S. Ct. 926 (2019). Nor does this case present the confounding factor of a state constitution that may provide greater protection than the federal. *See* Brief in Opposition, *Michigan v. Beck*, No. 19-564, at 8-11, *cert. denied*, 140 S. Ct. 1243 (2020).

Indeed, this case may be a uniquely useful vehicle because petitioner did not challenge on appeal the sufficiency of the evidence to prove, under a preponderance standard, that he joined the changed conspiracy. Thus the record squarely presents the legal question of whether a preponderance standard suffices. If the Court grants certiorari it may be assured that no constitutional avoidance problem—as would be posed by the failure to meet even the preponderance standard—will prevent it from reaching the constitutional question of the standard of proof.

Moreover, even in the district court petitioner conceded the accuracy of the drug quantity figures attributed to the conspiracy. He challenged only the attribution of that quantity to petitioner. App. 65. Again, the record cleanly presents the question of whether a district court may predicate a sentence on a finding of its own, on a lower standard of proof, that the jury rejected—here, that the defendant joined a conspiracy.

This case will provide the Court great flexibility, on an uncomplicated record, to finally "confront by a reasoned course of argument" (*Watts*, 519 U.S. at 170 (Kennedy, J., dissenting)) the weighty question of

how—if at all—to square the practice of sentencing a defendant for acquitted conduct with the Fifth and Sixth Amendments' due process and jury-trial guarantees.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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