**NO. _____**

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

LORENZO DAVIS,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether a criminal defendant's sentence should be based upon acquitted conduct.

# LIST OF PARTIES

All of the parties to the proceeding are listed in the style of the case.

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**IN THE**

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# PETITION FOR WRIT OF CERTIORARI

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Petitioner, Lorenzo Davis, respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINION BELOW

The Sixth Circuit opinion is available electronically at United States v. Davis, No. 19-6382, 2020 U.S. App. LEXIS 22375 (6th Cir. July 16, 2020). It is also submitted herewith in Appendix A.

## JURISDICTION

On July 16, 2020, a three-judge panel of the Sixth Circuit Court of Appeals entered its opinion in United States v. Davis, No. 19-6382, 2020 U.S. App. LEXIS 22375 (6th Cir. July 16, 2020). This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

## STATUTES, ORDINANCES AND REGULATIONS 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[.]

U.S. Const. amend. V.

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[.]

U.S. Const. amend. VI.

## STATEMENT OF THE CASE

Mr. Davis was charged with six counts and opted to go to trial. Count One charged Mr. Davis with armed bank robbery (a forced ATM withdrawal). See Davis, 2020 U.S. App. LEXIS 22375, at *2. Count Two charged him with using, carrying, and brandishing a firearm during a crime of violence (the bank robbery). Id. Count Three charged carjacking with intent to cause death or serious bodily injury. Id. Count Four charged Mr. Davis with using, carrying, brandishing and discharging a firearm during a crime of violence (the carjacking). Id. Counts Five and Six charged him with being a felon in possession of a firearm. Id.

The jury convicted Mr. Davis for the first two counts (related to the bank robbery), along with the felon-in-possession counts. Id. at *3. On Count Three, the jury found Mr. Davis not guilty of carjacking with intent to cause serious bodily injury (though it did convict him of the lesser included offense of carjacking without bodily injury). Id. And on Count Four, the firearm charge linked to the carjacking, the jury acquitted Mr. Davis entirely. Id.

At sentencing, the probation officer recommended multiple sentencing enhancements because Mr. Davis allegedly discharged a firearm during the carjacking, causing serious bodily injury to the victim. Id. Specifically, the enhancement under USSG § 2B3.1(b)(2)(A) was applied, which adds seven levels if a firearm is discharged., and the enhancement under USSG § 2B3.1(b)(3)(B) was applied, which adds four levels if any victim sustains serious bodily injury. Mr. Davis objected to this eleven-level increase based on acquitted conduct, pointing out that the jury had acquitted him of discharging (or even using) a firearm during the carjacking, and also found that he did not cause serious bodily injury during said carjacking by opting to convict him of the lesser included offense of carjacking without bodily injury. Id.

The district court overruled his objections and applied the enhancements. Id. Mr. Davis was sentenced to 376 months in prison. Id.

On appeal, Mr. Davis made two arguments. Id. The argument of relevance here was that the district court erred by relying on acquitted conduct to enhance his sentence. Id. Mr. Davis acknowledged that the Sixth Circuit Panel before which he appeared would be bound by prior circuit precedent, but requested that the issue be preserved for further discretionary appellate review. The Panel indeed found itself bound by prior precedent, concluding that Mr. Davis' argument was a "nonstarter" because the Sixth Circuit permits district courts to use acquitted conduct when sentencing a defendant. Id. at *6 (citing United States v. White, 551 F.3d 381, 382 (6th Cir. 2008) (en banc)).

## REASONS FOR GRANTING THE PETITION

Allowing federal judges to increase sentences based upon acquitted conduct would shock the conscience of the average American. Indeed, when called to jury duty, most civic-minded Americans believe that they are performing a vital role in one of the fairest criminal justice systems in the world. What a shock it would be to the average lay juror to learn that his or her "not guilty" verdict was effectively tossed aside, and the defendant punished for the very conduct that the jury labored over and found to have not been proven beyond a reasonable doubt.

Due process guarantees to every individual the "[a]xiomatic and elementary" presumption of innocence that "lies at the foundation of our criminal law." Nelson v. Colorado, 137 S. Ct. 1249, 1255-56 (2017) (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)). It likewise "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). This standard provides "concrete substance for the presumption of innocence." Id. Indeed, the presumption of innocence is a bedrock principle of America's criminal justice system that has its roots in the Fifth and Sixth amendments. This is why, in Coffin, this Court firmly established the presumption of innocence, noting that this cornerstone tradition dates back to Roman and English law.

The Constitution also affords defendants the "right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. That right is "designed to guard against a spirit of oppression and tyranny on the part of rulers[.]" United States v. Gaudin, 515 U.S. 506, 510-511 (1995) (quotations omitted); see also Duncan v. Louisiana, 391 U.S. 145, 155 (1968) ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government."). Accordingly, before depriving a defendant of liberty, the government must obtain permission from

the defendant's fellow citizens, who must be persuaded themselves that the defendant committed each element of the charged crime beyond a reasonable doubt. That jury-trial right is "no mere procedural formality," but rather a "fundamental reservation of power in our constitutional structure." Blakely v. Washington, 542 U.S. 296, 306 (2004).

### A. The practice of permitting sentencing increases based upon acquitted conduct usurps the constitutional importance of the jury.

The reason the Constitution imposes a strict beyond-a-reasonable-doubt standard is because it would be constitutionally intolerable, amounting "to a lack of fundamental fairness," for an individual to be convicted and then "imprisoned for years on the strength of the same evidence as would suffice in a civil case." Winship, 397 U.S. at 364. Hence, proof beyond a reasonable doubt is what is demanded from the government as an indispensable precondition to depriving an individual of liberty for the alleged conduct.

Yet, as the law now stands, prosecutors can brush off the jury's judgment under that beyond-a-reasonable-doubt standard by persuading judges to use the very same facts the jury rejected at trial to exponentially multiply the duration of a defendant's loss of liberty. In this regime, the jury is largely "relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish" at sentencing. Blakely, 542 U.S. at 307.

Despite constitutional protections, federal law, in 18 U.S.C. § 3661, allows federal judges to enhance a sentence for conduct for which the defendant was acquitted, or found "not guilty." Section 3661 provides: "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."

Thus, while federal judges generally follow sentencing guidelines to decide the punishment of a convicted defendant, they may add additional time for acquitted conduct if the prosecution proves by a preponderance of the evidence – a threshold substantially lower than proof beyond a reasonable doubt – that the defendant is guilty of a crime of which he or she was acquitted. Yet, as former Sen. Orrin Hatch (R-Utah) wrote in 2018, "[j]udges should not wield that kind of veto" over a jury. See Orrin Hatch, Judge Kavanaugh's fight for stronger jury rights, SCOTUSblog (Aug. 31, 2018). Indeed, 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).

Moreover, the proliferation of plea bargaining, which was completely unknown to the Founders, has transformed the country's robust "system of trials" into a "system of pleas." Lafler v. Cooper, 566 U.S. 156, 170 (2012). Plea bargains now comprise all but a tiny fraction of convictions. Id. (in 2012, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"). "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). Such erosion is furthered by permitting punishment based on acquitted conduct because, as one judge put it, "factoring acquitted conduct into sentencing decisions imposes almost insurmountable pressure on defendants to forgo their constitutional right to a trial by jury." United States v. Bell, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc). Even if a defendant goes to trial and wins on the more serious counts, "a hard-fought partial victory . . . can be rendered practically meaningless when that acquitted conduct nonetheless produces a drastically lengthened sentence." Id. The implication

of this practice is that "[d]efendants will face all the risks of conviction, with no practical upside to acquittal unless they run the board and are absolved of all charges." Id.

Allowing judges to materially increase the length of imprisonment based on facts that were submitted directly to and rejected by the jury in the same criminal case is too deep of an intrusion into the jury's constitutional role. "[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." United States v. Pimental, 367 F. Supp. 2d 143, 152 (D. Mass. 2005), criticized by, United States v. Brika, 487 F.3d 450, 459-460 (6th Cir. 2007); see also United States v. Scott, 437 U.S. 82, 91 (1978) ("[T]he law attaches particular significance to an acquittal."); United States v. DiFrancesco, 449 U.S. 117, 129 (1980) ("An acquittal is accorded special weight."). Acquiescing in this ongoing regime in which judges deprive defendants of liberty on the basis of the very same factual allegations that the jury specifically found did not meet the constitutional standard for a deprivation of liberty puts the guilt and sentencing halves of a criminal case at war with each other.

### B. The evolution of this Court's jurisprudence surrounding this issue and the need for full briefing and argument on the merits.

In 1997, this Court held in the controversial case of United States v. Watts, 519 U.S. 148 (1997), that sentencing courts may consider uncharged and even acquitted conduct for purposes of enhancing a defendant's sentence. The Watts Court, however, considered only whether the practice offended the Double Jeopardy Clause. It did not squarely consider whether the Due Process Clause of the Fifth Amendment or the Sixth Amendment's jury-trial guarantee forbid the use of acquitted conduct at sentencing. Courts of Appeal nationwide nevertheless are interpreting themselves as bound by Watts in all instances, though some jurists have argued that 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).

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

Indeed, this Court has previously acknowledged the limited precedential value of summary decisions on the merits, finding itself "less constrained" when an opinion "was rendered without full briefing or argument." See Hohn v. United States, 524 U.S. 236, 251 (1998); see also McCutcheon v. FEC, 572 U.S. 185, 202 (2014) (declining to rely on prior decision decided without full briefing and argument). Thus, if Watts has any weight on the question presented here, it should be tested under a "reasoned course of argument," to determine if it survives. The fact that Watts yielded two concurrences and two dissents not only counsels against the expansive reading that the Courts of Appeal have given it, but begs for full briefing and argument on the issue in light of more recent developments in this Court's precedent.

This Court's more recent case law suggests that there is reason for full consideration of the impact of Watts. Since Watts, this Court has limited the effect of judicial fact-finding at sentencing, holding in Apprendi v. New Jersey, 530 U.S. 466 (2000), that any facts that increase a statutory maximum penalty are to be considered elements of the offense and therefore must be

proved beyond a reasonable doubt by a jury or admitted by the defendant. Where Apprendi made clear that factors increasing a statutory maximum penalty must be treated as elements of a crime, it would not be until Alleyne v. United States, 570 U.S. 99 (2013), that this Court would hold Apprendi also applies to mandatory minimum penalties. In short, as the law now stands, a judge alone cannot make a finding that would increase the statutory maximum penalty, or mandatory minimum, to which a defendant is exposed without violating the Sixth Amendment's notice requirement.

In recent years this Court has also observed that stare decisis is "not an inexorable command," and is "at its weakest when [the Court] interpret[s] the Constitution." Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1499 (2019) (internal quotation marks omitted); see also Johnson v. United States, 135 S. Ct. 2551, 2563 (2015) ("Although it is a vital rule of judicial self-government, stare decisis does not matter for its own sake. It matters because it promotes the evenhanded, predictable, and consistent development of legal principles.") (internal quotation marks and citation 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).

Apprendi eventually was applied to the U.S. Sentencing Guidelines in United States v. Booker, 543 U.S. 220 (2005). Booker remains unique in the annals of Supreme Court jurisprudence because it has two majority opinions, inasmuch as Justice Ginsburg sided with both otherwise diametrically opposed factions. The first majority opinion – known as the "constitutional holding" – posited that since the Guidelines were mandatory, judge-found facts used to enhance sentences effectively made each "sentencing factor" an element of an offense and,

in light of Apprendi, must be found by a jury or admitted by the defendant. In other words, judge-found facts under the mandatory guidelines violated the Sixth Amendment. And that, many thought, including at least four of the justices in the majority, was the end of the story.

It was not. The second majority opinion – known as the "remedial holding" – posited that since the Guidelines violated the Sixth Amendment due to their mandatory nature, the Guidelines would thereinafter be considered merely "advisory," which effectively mooted the constitutional problem identified in the constitutional holding. As this Court is aware, the Guidelines are now just one of many factors a judge considers when imposing a sentence, although they still must be correctly calculated inasmuch as they serve as a starting point and anchor a judge's discretion. In light of Booker, federal sentences now are reviewed for procedural error: whether the guidelines are applied correctly; and substantive reasonableness: whether the ultimate sentence imposed constitutes an abuse of discretion even in the absence of procedural error. See Gall v. United States, 552 U.S. 38, 51 (2007).

Nine years after Booker, in a dissent from a denial of certiorari in Jones v. United States, 574 U.S. 948, 949 (2014), the late Justice Scalia, joined by Justices Thomas and Ginsburg, criticized the Court for its silence on the use of acquitted conduct at sentencing, noting: "[T]he Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution does permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range." Justice Scalia called for the Court to "to put an end to the unbroken string of cases disregarding the Sixth Amendment – or to eliminate Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable." Id. at 950. With just one more vote, the case would have been heard.

Today, the Court has yet to address the reach of the Sixth Amendment within the statutory outer limits in terms of its application to substantive reasonableness review. While the U.S. Sentencing Commission long has "believe[d]" that judicial fact-finding by a mere preponderance of evidence without the strictures of the Federal Rules of Evidence suffices for due process, and the courts of appeals have agreed, to date this Court has never directly addressed whether a preponderance of the evidence evidentiary standard is constitutionally sufficient. This question is reflected in Justice Kennedy's dissent in Watts itself, where he opined that "to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal." Watts, 519 U.S. at 170 (Kennedy, J., dissenting).

The new Justices, Gorsuch and Kavenaugh, have previously recognized in their prior roles as circuit judges that the constitutionality of judicial fact-finding at sentencing rests upon a very shaky foundation. The very shaky foundation that three sitting Supreme Court Justices noted in Jones and were anxious to address in 2014. That same year, Justice Gorsuch wrote that the practice of federal judges using acquitted conduct for harsher sentences "rests in part on a questionable foundation." See United States v. Sabillon-Umana, 772 F.3d 1328, 1331 (10th Cir. 2014). He averred that "[i]t is far from certain whether the Constitution allows" such practice. Id. (citing Scalia's dissent in Jones, supra.) Similarly, while sitting on the U.S. Court of Appeals for the D.C. Circuit, Judge Kavanaugh opined that allowing judges to rely upon acquitted conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the right to due process and to a jury trial. See Bell, 808 F.3d at 928 (Kavanaugh, J., concurring); 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").

True to the three-Justice dissent prediction in 2014 in Jones, Courts of Appeal have construed this Court's "continuing silence" as consent. See Jones, 135 S. Ct. at 9 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari). 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). Petitioner begs this Court to end its silence.

**C. This unconstitutional practice will not cease without this Court's intervention.**

As happened in this case, Circuit Court judges have their hands tied by circuit precedent. Hence, the Courts of appeal are unable to correct the error.

True, there has more recently been bipartisan congressional support to revamp sentencing law to eliminate increased sentences based upon acquitted conduct. Three bills have been introduced in recent years – the Jobs and Justice Act, H.R. 5785, 115th Congress (2017-2018), the SAFE Justice Act, H.R. 4261, 115th Congress (2017-2018), and the Prohibit Punishment of Acquitted Conduct Act of 2019, S. 2566, 116th Congress (2019).

But, if this Court is waiting on another actor to address this issue, it will most likely continue to wait. It appears that the Prohibit Punishment of Acquitted Conduct Act of 2019 is languishing in Committee with little chance of reaching the floor for a vote. Besides, Congress has repeatedly entertained similar proposals to forbid consideration of acquitted conduct at sentencing, and those legislative attempts have uniformly failed. See S.B. 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). As this Court well knows, Congress tends to be reticent when it comes

to what can be construed as laws that are "tough on crime." Indeed, it took this Court's action for Congress to finally change the unconstitutional residual clause definition that was contained in the Armed Career Criminal Statute, despite the Court's repeated calls for Congress to do so. See generally Johnson v. United States, 135 S. Ct. 2551 (2015).

And, it has been over two decades since Watts, where Justice Bryer noted that the Sentencing Commission "could decide to revisit the matter. Watts, 519 U.S. at 159 (Bryer, concurring). The Sentencing Commission, which has supported the use of acquitted conduct for years (and would be unlikely to change the practice in any event), has not amended the Guidelines since 2018 because it does not have a quorum.

The case is thus perfect for addressing this "oddit[y] in sentencing law." Bell, 808 F.3d at 928 (Kavanaugh, J., concurring). Allowing a judge to dramatically increase a defendant's sentence based on jury-acquitted conduct is at war with due process and the fundamental purpose of the Sixth Amendment's jury-trial guarantee. It is time to do away with "a sentencing regime that allows the government to try its case not once but twice. The first time before a jury; the second before a judge." See United States v. Canania, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring).

To restore the jury's role as the ultimate check on otherwise unbridled power, the Court should bar consideration of acquitted conduct at sentencing. Doing so would not limit a judge's sentencing discretion to find facts generally; rather, it would simply place beyond a court's reach the power to punish a defendant for conduct previously submitted to, and rejected by, a jury of his peers. Mr. Davis respectfully requests this Court to grant certiorari on this issue and provide the opportunity to fully brief and argue the expansive interpretation given to Watts in light of this Court's more recent precedent.

## CONCLUSION

For all of the foregoing reasons, Petitioner respectfully prays that this Court will grant certiorari to review the judgment of the Sixth Circuit in his case.

DATED: 17th day of September, 2020.

Respectfully submitted,

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