No. 20-____

IN THE
Supreme Court of the United States

DEMARIO M. PETERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment, Fifth Amendment, and this Court's jurisprudence on the procedural and substantive reasonableness of sentences are implicated when a sentencing court bases a significant upward variance on acquitted conduct?

PARTIES TO THE PROCEEDING

Petitioner is Demario Peterson, an individual. Respondent is the United States.

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Petitioner Demario M. Peterson respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion is unpublished at 840 Fed. Appx. 844.

JURISDICTION

The judgment of the Sixth Circuit was entered on January 6, 2021. This Court's March 19, 2020 order extended the time to file a petition for certiorari to 150 days, making this petition due June 6, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

> process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

INTRODUCTION

The chorus of courts and commentators calling for this Court to address the use of acquitted conduct at sentencing has only grown fiercer in the years since Justice Scalia pronounced the need for this Court to end its "silence" on the issue. *Jones v. United States*, 574 U.S. 948 (2014)(Scalia, J. joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari).

Arguably, newer members of this Court were part of that chorus calling for guidance prior to becoming Associate Justices. *United States v. Brown*, 892 F.3d 385, 415 (2018) (Kavanaugh, J. dissenting in part)("If that system seems unsound — and there are good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness . . . the Supreme Court may fix it . . .); *United States v. Sabillon-Umana*, 722 F.3d 1328, 1331 (10th Cir. 2014)(Then-Judge Gorsuch stating, "It is far from certain whether the Constitution allows 'a judge to sentence based on facts' . . . the judge finds without the aid of a jury or the defendant's consent.").

Recently, the Michigan Supreme Court set forth in detail the "volume and fervor of judges and commentators who have criticized the practice of using acquitted conduct as inconsistent with fundamental fairness and common sense." *People v. Beck*, 939 N.W.2d 213, 225-26 (Mich. 2019). In finding the use of acquitted conduct at sentencing to be a violation of due process, the court quoted Alexander Hamilton, "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them it consists in

this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government." *Id*. at 232.

This Court recently agreed with the latter. In *United States v. Haymond*, this Court affirmed, "Together with the right to vote, those who wrote our Constitution considered the right to trial by jury 'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.' Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977). Just 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. J. Adams, Diary Entry (Feb. 12, 1771), in 2 Diary and Autobiography of John Adams 3 (L. Butterfield ed. 1961); see also 2 J. Story, Commentaries on the Constitution §1779, pp. 540-541 (4th ed. 1873). 139 S. Ct. 2369, 2376 (2019).

Critically, this Court continues to emphasize the jury's historic role of "circuitbreaker in the State's machinery of justice." *Id*. at 2380 (quoting *Blakely*, 542 U. S. at 306). This emphasis cannot be reconciled with the continued practice of using acquitted conduct as the basis to increase sentences.

The Michigan Supreme Court articulated the question best: "How can the jury continue to be " 'the great bulwark of [our] civil and political liberties' when an acquittal means only that a defendant will not formally be sentenced for the crime but may, in reality, spend far longer in prison because a judge finds by a preponderance of the evidence that the

defendant, in fact, committed the crime of which he or she was acquitted by the jury? *People v. Beck*, 939 N.W.2d at 234.(Viviano, J., concurring). If there is a good answer to this question, the time has come for this Court to provide it.

STATEMENT OF THE CASE

1. Demario Peterson was initially indicted on September 29, 2017 for two counts of Possession with Intent to Distribute Controlled Substances, Maintaining a Drug Premises, Felon in Possession of a Firearm, and Possession of Firearms in Furtherance of a Drug Trafficking Crime, in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 856(a), 18 U.S.C. §§922(g)(1), and 18 U.S.C. § 924(c) respectively. Def. C.A. Br. 2.

The United States filed two superseding indictments, one on March 29, 2018 and one on January 22, 2019. The second superseding indictment charged Peterson with Conspiracy to Commit a Title 21 Offense, Distribution of Fentanyl Resulting in Serious Bodily Injury and Death, two counts of Possession with Intent to Distribute Controlled Substances, Maintaining a Drug Premises, Felon in Possession of a Firearm, and Possession of Firearms in Furtherance of a Drug Trafficking Crime in violation of 21 U.S.C. § 846, 21 U.S.C. §§ 841(a)(1); 841(b)(1)(C), 21 U.S.C. § 841(a)(1), 21 U.S.C. § 856(a)(1), 18 U.S.C. § 922(g)(1), and 18 U.S.C. § 924(c) respectively. *Id.* at 3.

2. On February 19, 2019, a jury trial commenced. On February 27, 2019, Peterson made an oral motion for a mistrial after the jury returned a note that they could not come to a unanimous decision. That motion

was granted, a mistrial was declared, and a new trial date was set. The second trial began on May 14, 2019 and concluded on May 17, 2019. Peterson was found guilty of Conspiracy to Commit a Title 21 Offense, two counts of Possession with Intent to Distribute Controlled Substances, Maintaining a Drug Premises, Felon in Possession of a Firearm, and Possession of Firearms in Furtherance of a Drug Trafficking Crime. However, he was found not guilty of Distribution of Fentanyl Resulting in Serious Bodily Injury and Death. *Id.* at 4.

3. On October 22, 2019, the district court sentenced Peterson to 420 months imprisonment, which amounted to a significant upward variance. The Guidelines were determined to be 248 months to 295 months. The upward variance was primarily the result of the district court's disagreement with the jury's decision to acquit Peterson of the most serious allegation against him, namely that he was the source of the drugs that resulted in the overdose death of a young woman. Def. C.A. Br. 28. (quoting the Statement of Reasons for the upward variance as "drugs laced with fentanyl resulted in the death of M.M. and the preponderance of the evidence established that fact" and "defendant's complete lack of remorse.").

For its part, the United States made clear its position on punishing Peterson for something it could not convince multiple juries of having had occurred: "[T]his Court can hold Peterson accountable for lacing his heroin with fentanyl and selling it to M.M. through Payne without offending any due process rights or creating error."

4. At sentencing, Peterson challenged the use of acquitted conduct as the basis for his lengthy sentence, and subsequently appealed the issue to the Sixth Circuit Court of Appeals. On appeal, Peterson challenged the constitutionality and reasonableness of using acquitted conduct arguing, "this case rings all the bells of concern (procedural reasonableness, substantive reasonableness, and due process) with the practice of punishing a defendant for an allegation that a jury of peers found him not guilty of." *Id.* at 25.

5. Ultimately, the Sixth Circuit rejected Peterson's argument that his Fifth and Sixth Amendments rights were violated. Pet. App.1a-16a. According to the Sixth Circuit, "[t]he district court did not 'abridge [Peterson's] right to a jury trial by looking to . . . acquitted conduct' in 'selecting a sentence' within the statutory range envisioned by the jury verdict." *Id.* at 10a.

6. In addition, Peterson challenged the procedural and substantive reasonableness of his sentence, primarily as an extension of his constitutional arguments regarding acquitted conduct. First, Peterson argued that, for his sentence to be constitutional and procedurally reasonable, the district court was required to explain in detail its disagreement with the jury. Def. C.A. Br. 33. In response, the Sixth Circuit did not categorize the district court's use of acquitted conduct as a disagreement at all. According the Sixth Circuit, "True, as the jury verdict reflected, the prosecution did not prove the elements of the death-results crime beyond a reasonable doubt. But Peterson's sentence was premised on findings based on a preponderance

of the evidence—a distinct burden of proof." Pet. App. 12a.

Peterson further argued that his sentence was substantively unreasonable because acquitted conduct, and the lack of remorse for it, were improper (*i.e.* unconstitutional) factors to use for a significant upward variance. Additionally, Peterson maintained that the use of acquitted conduct resulted in an arbitrary sentence pursuant to this Court's recent holdings in *Haymond*. Def. C.A. Br. 37. Again, the Sixth Circuit responded to the substantive reasonableness argument by declaring, "[O]ur precedent permits reliance on acquitted conduct during sentencing. Doing so, moreover, does not disregard or disrespect the jury's verdict." Pet. App. 16a.

REASONS FOR GRANTING THE PETITION

I. Sentencing based on acquitted conduct violates the Fifth Amendment's Due Process Clause and the Sixth Amendment's right to a jury trial.

Many judges and commentators have noted the same obvious observation about using acquitted conduct to increase a sentence: the practice is "at war with the fundamental purpose of the Sixth Amendment's guarantee." *U.S. v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015). (Millet, P., concurring in the denial of rehearing en banc). A citizen's liberty may not be taken away unless and until the government "obtain[s] 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." *Id.* at 930. After all, the "whole reason the Constitution imposes the strict beyond-a-reasonable-doubt standard is that 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.'" *Id.* (quoting *In re Winship*, 397 U.S. 358, 364 (1970).

With one glaring exception, the bedrock of the above principles of constitutional law have only been strengthened in recent years. See e.g. *Haymond*, 139 S.Ct. at 2369. ("Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty.") The glaring exception—use of acquitted conduct at sentencing—has continued to expand in scope (now, suddenly, being used to justify upward variances) as this Court has remained silent.

The violation of the Fifth Amendment's Due Process Cause is straightforward—a conclusion "ground[ed] in the guarantees of fundamental fairness and the presumption of innocence." *People v. Beck*, 939 N.W.2d at 225. ("Because the sentencing court punished the defendant more severely on the basis of the judge's finding by a preponderance of the evidence that the defendant committed the murder of which the jury had acquitted him, it violated the defendant's due process protections."). The Sixth Amendment violation is equally straightforward, as a defendant's right to a jury trial to is meant to protect a citizen from prosecutorial and judicial overreach. *Duncan v. Louisiana* 391 U.S. 145, 155-56 (1968). Such

protections are entirely removed—the "circuitbreaker in the machinery of justice" switched off—when prosecutors advocate for and judges impose sentences based on allegations rejected by a jury.

Therefore, if the constitutional issues are so obvious, such that the use of acquitted conduct has been aptly described as "Kafka-esque, repugnant, uniquely malevolent, and pernicious, 'making no sense as a matter of law or logic," why have the circuit courts unanimously upheld the practice? Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 Suffolk U. L. Rev. 1, 25 (2016).

A. The Circuit Courts are wrong about what constitutional arguments are foreclosed by *Watts* and *Apprendi*.

The circuit courts, including the Sixth Circuit in this case, have approached the acquitted conduct issue by sidestepping the obvious constitutional problems. Genuine discussion of the constitutional issues is often reserved for vigorous dissents or concurrences that begrudgingly acknowledge the prior holdings of the circuit. See e.g. *U.S. v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015)(Kavanaugh, J. concurring in the denial of rehearing *en banc*)("Allowing judges to rely on acquitted . . . to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial.")

Lower court decisions permitting the use of acquitted conduct contain three justifications: 1.) This Court's holding in *Watts* that consideration of acquitted conduct at sentencing does not violate the double

jeopardy clause, 2.) The general principle from *Apprendi* that the Sixth Amendment is not violated unless a sentence exceeds the statutory maximum, and 3.) the different standards of proof used by sentencing courts and juries. *United States v. Watts,* 519 U.S. 148 (1997); (*Apprendi v. New Jersey*, 530 U.S. 466 (2000). These justifications have been described as "excessively formal and hyper-technical" when considered in the face of "the obvious disconnect between the lofty rhetoric of the Due Process Clause and the Sixth Amendment and the gritty reality of heightened punishment despite acquittal." Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 Suffolk U. L. Rev. 1, 27 (2016).

In *Watts*—a decision rendered without full briefing or argument—this Court considered whether the double jeopardy clause prevented a sentencing court from considering acquitted conduct. While this Court found that the double jeopardy clause was not violated by the practice, the case only answered a specific question about one provision of the constitution. *United States v. Booker*, 543 U.S. 220, n.4 (2005) ("*Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us in these cases.).

Thus, *Watts* did not foreclose an argument that the practice violated due process or a citizen's right to a jury trial. However, the circuit courts have unanimously held, like the Sixth Circuit in this case,

that any constitutional question involving acquitted conduct at sentencing rises and falls with *Watts* alone.

Only this Court can provide guidance to the circuit courts on the scope of *Watts*. For its part, the Michigan Supreme Court recently found, "*Watts* addressed only a double-jeopardy challenge to the use of acquitted conduct. Five justices gave it side-eye treatment in *Booker* and explicitly limited it to the double-jeopardy context . . . As we must, we take the Court at its word. We therefore find *Watts* unhelpful in resolving whether the use of acquitted conduct at sentencing violates due process." *People v. Beck*, 939 N.W.2d 213, 224 (Mich. 2019)(citations omitted).

In rejecting Peterson's constitutional arguments, the Sixth Circuit also focused on *Apprendi*, specifically its holding that a judge may "exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgement *within the range* prescribed by statute." Pet. App. 9a.

Thus, according to the hyper-technical logic of the Sixth Circuit, there cannot be any Sixth Amendment or Fifth Amendment violation so long as a judge sentences within the statutory punishment range of an offense that the defendant was convicted.

This is not true. Sentencing judges often have constitutional restraints at sentencing. There are obvious exceptions, beyond just the statutory maximum, to a judge's discretion when considering "various factors relating both to offense and offender." *Apprendi*, 530 U.S. at 481. Is it okay for a sentencing judge to consider the defendant's race, religion, or political affiliation so long as the sentence is below the

statutory maximum? *Zant v. Stephens*, 462 U.S. 862, 885 (1983)(No, it is "constitutionally impermissible.") So too there are prohibitions on considering the fact a defendant successfully appealed his case, or that the defendant exercised his right to a jury. *North Carolina v. Pearce*, 395 U.S. 711, 723-24 (1969); *United States v. Jackson*, 570, 581-83 (1968). Add one more to the list of constitutional exemptions to a sentencing judge's discretion—acquitted conduct—and the madness on this issue is over.

After all, "acquitted conduct is already constitutionalized." *People v. Beck*, 939 N.W. 2d at 222. This Court has made clear, "the law attaches particular significance" to an acquittal. *United States v. Scott*, 437 U.S. 82, 91 (1978). Due process, fundamental fairness, and the presumption of innocence are all concepts built into the legal significance of a jury's determination of legal innocence. Denying the significance of acquitted conduct ignores these foundational concepts and instead cracks the cornerstone of the entire criminal justice system. It is the epitome of judicial erosion on fundamental rights; power is stolen from the people and placed into the hands of judges and prosecutors. *People v. Beck,* 939 N.W.2d at 233 (use of acquitted conduct "divested the '"people at large"'—the men and women who make up a jury of a defendant's peers—of their constitutional authority to set the metes and bounds of judicially administered criminal punishments.")

This is all to protect the "abstract dignity of the statutory maximum" when what is truly at stake is "the integrity of the jury right itself." *United States v. Faust*, 456 F.3d 1342, 1350 (11th Cir. 2006). (Barkett,

J., concurring). Simply put, a citizen's right to a jury trial is eroded to meaninglessness when a judge denies the legal significance of an acquittal—when a judge denies a jury's direct finding that punishment for a certain allegation is not authorized.

Finally, the Sixth Circuit disregarded Peterson's claim that the district court ignored the jury's verdict. In doing so, the Sixth Circuit focused on the distinction between the standards of proof at sentencing and during the guilt phase of a trial. Blind allegiance to this distinction is akin to putting one's head in the sand. It relies on a formalistic rule never intended to be used as a tool to override a jury's ability to authorize punishment for a specific allegation.[1] In the end, narrow focus on the distinction simply provides cover for a clear violation of the Due Process Clause of the Fifth Amendment which "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. See *Winship*, 397 U.S. at 364 (1970).

According to this Court, ". . . It is critical that . . . every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty. *Id.* *Winship* is bedrock constitutional law; nowhere within its pages is an exception *unless a judge finds by a preponderance of the evidence otherwise.*

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[1] Note difference between uncharged conduct and acquitted conduct.

B. This Issue Is Of Urgent Importance.

"Judicial reliance on acquitted conduct is an "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 the denial of rehearing en banc, cert. denied, 137 S. Ct. 37 (2016)). This case serves as a stark illustration of the troubling contradiction. First, a recent quote from this Court: "[a] judge's authority to issue a sentence *derives from, and is limited by*, the jury's factual finding of criminal conduct." *Haymond*, 139 S. Ct. at 2376(emphasis added). Then, juxtapose the Sixth Circuit's opinion in the instant case: [Relying on acquitted conduct to increase a sentence] does not disregard or disrespect the jury's verdict." Pet. App. 16a.

This contradiction is so ingrained in the fabric of the current criminal justice system such that the United States can argue—as it did to the Sixth Circuit—with a straight face: "The fact that the first jury failed to deliberate to verdict, and the second jury acquitted him . . . does not advance [the defendant]"s cause." Govt. Br. 9.

The jury trial cannot protect citizens from prosecutors and judges when the same prosecutors and judges are explicitly telling the public that a jury's decision has no legal significance. In short, this is an urgent problem, it is clear, and its solution is easy.[2]

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[2] Petitioner urges this Court to address this issue, rather than wait for the United States Congress to do so. Since 2015, various iterations of legislation for the exclusion of acquitted conduct in sentencing have never made it out of committee despite bipartisan introduction and co-sponsorship. Even when

Apprendi's general principle regarding statutory maximums need not be disrupted in any meaningful way. Just as considering race to increase a sentence is unconstitutional, this Court must hold the consideration of acquitted conduct to be unconstitutional as well (under different constitutional provisions, of course).

II. An upward variance based on acquitted conduct implicates the Fifth and Sixth Amendments, which, in this case, requires finding that Peterson's sentence was procedurally and substantively unreasonable.

There is an added layer of unconstitutionality when considering Peterson's sentence in relation to this Court's precedent on procedural and substantive reasonableness. The district court did not adjust Peterson's Guidelines range based on acquitted conduct, but rather, used the acquitted conduct as the basis for a significant upward variance.

For a sentence to be procedurally reasonable, "the district court must "adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *United States v. Johnson*, 640 F.3d 195, 205 (6th Cir. 2011) (quoting *Gall*, 552

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congress expresses an intent to act through legislation, that intent does not always come to fruition. Although legislation progresses to the drafting stage, it is not always passed. *See*, H.R.2944, 114th Cong. § 407 (2015); H.R.4261, 115th Congress § 407 (2017); H.R.5785, 115th Cong. § 6006 (2018); S.4 115th Cong. (2018); S.2566, 116th Cong. (2019); H.R.8352, 116th Cong. § 60406 (2020).

U.S. at 51)(emphasis in original). This requires a district court to provide an adequate explanation of any disagreement with the jury, and the failure to do so is a violation of the Due Process Clause of the Fifth Amendment and the Sixth Amendment's right to a jury trial.

Rather than offering a discussion for why the district court disagreed with the jury's factfinding, the district court simply stated, "I can't tell you what the jury was thinking or not thinking, but I can tell you that from the testimony in this matter the way I heard it, that it is certainly, if not more, by a preponderance of the evidence that the drugs were distributed that caused the death by the Defendant in this case." Def. C.A. Br. 30. Using conclusory language is not a proper explanation for a constitutionally momentous discussion of disagreeing with a jury's verdict, and nor for the subsequent punishment of a defendant for acquitted conduct.[3]

Moreover, a sentence is substantively unreasonable "if the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor." *United States v. Lapsins*, 570 F.3d 758, 772 (6th Cir. 2009).

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[3] To be sure, there are many very good trial judges who have presided over wrongful convictions and believed strongly in the defendant's guilt right up until the DNA results proved actual innocence. In this case, there was not even a wrongful conviction, but rather a wrongful sentence based on a non-conviction.

For all the constitutional reasons described above, acquitted conduct and a lack of remorse for such conduct, are improper factors to base a significant upward variance upon. Further, use of acquitted conduct is particularly unconstitutional for large upward variances because "a jury cannot mitigate the harshness of a sentence it deems excessive if a sentencing judge may use acquitted conduct to sentence the defendant as though he had been convicted of the more severe offense." *United States v. White*, 551 F.3d 381, 395 (6th Cir. 2008)(Merritt, J. dissenting).

Finally, Peterson's ultimate sentence in this case is arbitrary—making it substantively unreasonable and unconstitutional—according to this Court in *Haymond*. "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against *arbitrary government*." 139 S. Ct. at 2374 (2019)(emphasis added). This Court must weigh in on this new arbitrary method of incursion on the jury trial: the use of acquitted conduct (and a perceived lack of remorse for it) as the basis for significant upward variances. Despite widespread denunciation of this practice, including by members of this Court, this case illustrates that the use of acquitted conduct at sentencing is expanding, not subsiding.

III. There Are No Vehicle Issues.

There are no procedural issues in the instant case. The issue presented was raised at the district court, objections were made, and then it was appealed to the

Sixth Circuit. Pet.App. 1a. The Sixth Circuit squarely addressed the claim, recognizing the constitutional issues raised and addressing each in turn.

Further, the facts of this case are not ambiguous. The district court was explicit when taking acquitted conduct into account. Peterson was sentenced as if he was responsible for a young woman's death, an allegation that the jury rejected.

Making matters worse, the district court focused heavily on Peterson's lack of remorse for the acquitted conduct. Def. C.A. Br. 27. There was nothing more Peterson could do; two juries did not convict him, and one found him legally innocent. Yet, he will sit in prison for years based solely on a judge's disagreement with the jury.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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