No. 21-_____

In The
Supreme Court of the United States

IVAN ROSARIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Amendment's Due Process Clause and the Sixth Amendment's right to trial by jury protect criminal defendants from being sentenced based on judicial factfinding about charged conduct that the jury did not find proven beyond a reasonable doubt.

PARTIES TO THE PROCEEDINGS

Petitioner was indicted in the United States District Court for the District of Connecticut, Case Nos. 3:17-cr-00055-VLB and 3:18-cr-00007-VLB. In Case No. 3:17-cr-00055-VLB, petitioner was indicted with codefendants Wilfredo Rosado-Rodriguez, Randy Machi, Jonathan Brown, Eric Green, Tyevhon King, and Jose David Silva Pestano. Petitioner was the only appellant in the court of appeals proceedings below, and he is the only petitioner in this Court.

RELATED PROCEEDINGS

United States v. Ivan Rosario, No. 3:18-cr-00007, U.S. District Court for the District of Connecticut. Judgment entered July 22, 2019.

United States v. Ivan Rosario, No. 3:17-cr-00055, U.S. District Court for the District of Connecticut. Stayed pending resolution of this appeal.

United States v. Ivan Rosario, No. 18-1994, Court of Appeals for the Second Circuit. Judgment entered Feb. 23, 2021.

United States v. Ivan Rosario, No. 19-2399, Court of Appeals for the Second Circuit. Judgment entered Feb. 23, 2021.

United States v. Ivan Rosario, No. 21-680, Court of Appeals for the Second Circuit. Appeal pending.

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PETITION FOR WRIT OF CERTIORARI

Ivan Rosario petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The relevant decision issued by the court of appeals, App. 10–16, does not appear in the Federal Reporter, but is available at 842 F. App'x 694. The court of appeals decided an unrelated issue in a concurrent opinion, App. 1–9, which is published at 988 F.3d 630. The district court's rulings, *see* App. 17–78, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2021. This Court's March 19, 2020, order extended the deadline for all petitions for writs of certiorari due thereafter to 150 days from the date of the lower court judgment, and the Court's July 19, 2021, order confirms that this deadline remains extended for this petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).[1]

[1] The court of appeals appointed counsel to prepare a petition for rehearing in that court, 2d Cir. ECF No. 185, but the court has not yet set a deadline

(continued...)

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall . . . 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 of the state and district wherein the crime shall have been committed . . . ."

INTRODUCTION

When a jury acquits a criminal defendant or fails to reach a verdict, may a sentencing judge nonetheless increase the defendant's sentence based on the judge's assessment of the defendant's guilt on a charge that the jury rejected? Sentencing judges routinely consider acquitted conduct and other jury-rejected conduct when they sentence defendants convicted of some, but not all, of the charges against

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(…continued)
for the rehearing petition, and the rehearing petition has not been filed. This petition is being filed now in an abundance of caution in the event that the time to petition for certiorari is not extended by a rehearing petition.

them. But this practice, which has spawned controversy and division among courts and commentators, is unconstitutional. Under the Fifth Amendment's Due Process Clause and the Sixth Amendment's right to trial by jury, a defendant's sentence may not be based on charged conduct that the government has failed to prove beyond a reasonable doubt.

Although this Court and the federal courts of appeals have thus far allowed this practice, it is no longer tenable after *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and subsequent decisions reaffirming the constitutional right to factfinding by the jury. Several state supreme courts have now held that sentencing defendants based on charged but jury-rejected conduct is unconstitutional, creating a split of authority with the federal courts. Three Members of this Court have voiced similar concerns.

This case exemplifies why the existing sentencing practice violates the Constitution, and it provides an ideal vehicle for this Court to end the practice once and for all. Petitioner Ivan Rosario went to trial on multiple charges, but the government obtained a conviction on only one relatively minor offense. At sentencing, however, the district court made findings about other charged conduct on which the jury could not reach a verdict. Based on those judicial findings about the charged but jury-rejected conduct, the court imposed a 210-month sentence, far beyond what would have been permissible based on the jury's verdict alone. This Court should grant certiorari and clarify that a sentencing judge may not constitutionally base a criminal defendant's sentence

on alleged conduct that the government attempted, but failed, to prove to the jury beyond a reasonable doubt.

STATEMENT

1. Law enforcement agents investigated what they believed was a heroin-trafficking operation in Bridgeport, Connecticut. *See* Def. 2d Cir. Br. 4. Agents thought that Rosario might be involved, but they never observed him possessing or selling heroin, nor did they intercept any communications implicating Rosario. *See id.* at 3, 15–16.

2. Rosario was charged with conspiracy to distribute heroin and related firearms charges. App. 3. The government later added two obstruction of justice counts. *See id.*

3. Rosario exercised his right to a jury trial. At trial, the government tried to portray Rosario as the leader of a sophisticated heroin-trafficking operation. Despite the testimony of several cooperating witnesses, *see* Def. 2d Cir. Br. at 7–18, the government failed to obtain a conviction on four of the five counts. The jury did not reach a verdict on the narcotics conspiracy count. App. 3, 12. It acquitted Rosario of obstruction of justice based on witness tampering, and also acquitted him of unlawful possession of a firearm. App. 3. The jury convicted Rosario on just one count: obstruction of justice, based on destruction of evidence—a former girlfriend's cellular phone. *Id.* Based on the jury's findings, the district court entered a verdict of not guilty on the other firearms charge. Gov't 2d Cir. Br. 4–5.

4. Even though Rosario was not convicted of narcotics conspiracy, the presentence report included proposed findings about Rosario's purported (but jury-rejected) drug-trafficking conduct. Among other allegations, the presentence report asserted that Rosario was involved in trafficking at least 30 kilograms of heroin. Gov't 2d Cir. Br. 42–43.

5. At sentencing, the district court acknowledged "that the facts in the pre-sentence report, with respect to the drug-trafficking activity, relate to the charge . . . on which the jury did not reach a verdict." App. 32. Even so, the district court found that the preponderance of evidence showed "that all of the allegations of the pre-sentence report as [to] Mr. Rosario are properly included in the pre-sentence report." *Id.* The district court thus adopted the report's allegation that Rosario was involved in trafficking at least 30 kilograms of heroin. App. 14–15. The court also adopted findings that the evidence supported several sentence adjustments specific to the conspiracy charge: for possession of firearms, use of stash houses, and Rosario's supposed leadership role in the conspiracy. App. 15, 32–33.[2] Rosario objected to the use of this jury-rejected conduct at sentencing, but

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[2] Although the district court did not elaborate on most of these findings, it ordered only minor changes to the assertions in the presentence report. App. 32–33. The district court could not have calculated a base offense level of 30, as it did here, unless it made findings about the alleged but unproven conspiracy. *See* App. 15.

the district court disregarded these objections. App. 37–39, 42–51.

6. Rosario's Sentencing Guidelines range should have begun with a base offense level of 24: level 30 for the underlying conspiracy charge, minus six levels because Rosario was convicted only of obstruction, not the underlying offense. *See* U.S. Sent'g Guidelines Manual §§ 2D1.1(c)(5), 2X3.1(a)(1) (U.S. Sent'g Comm'n 2021). But because the district court went beyond the face of the indictment to make offense-specific findings about the alleged conspiracy, it calculated a base offense level of 30. App. 15, 57–58. After the district court applied further enhancements unrelated to the conspiracy count, the offense level was 34, resulting in a Guidelines range of 168 to 210 months. App. 57–58. This was far above the range that would have applied if the district court had applied a base offense level of 24.[3] The district court sentenced Rosario to 210 months—the high end of the Guidelines range. App. 17, 78.

7. Rosario appealed, arguing that the district court violated his Fifth and Sixth Amendment rights by sentencing him based on alleged narcotics

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[3] Without the four levels of enhancements unrelated to this petition, Rosario's Guidelines range would have been 57 to 71 months. Rosario does not concede that the enhancements were properly applied, but even with those enhancements, his Guidelines range would have been 87 to 108 months, roughly half the range applied here.

conspiracy conduct that was charged but did not result in conviction. App. 14; *see* Def. 2d Cir. Br. 34–41. The court of appeals rejected Rosario's argument, relying on circuit precedent "that a court may sentence a defendant based even on acquitted conduct, 'provided that it finds by a preponderance of the evidence that the defendant committed the conduct.'" App. 15 (citations omitted).

REASONS FOR GRANTING THE WRIT

I. Courts are divided on whether judges may sentence criminal defendants based on charged conduct that the jury did not find proven beyond a reasonable doubt.

A. This Court has increasingly recognized constitutional limits on judicial factfinding in connection with sentencing criminal defendants.

Due process and the right to trial by jury are intertwined "pillars of the Bill of Rights." *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019) (plurality opinion). "The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (quoting U.S. Const. amend. VI). Yet for many years, the states and the federal government maintained sentencing regimes that empowered trial judges to make independent findings of fact that went beyond the jury's verdict and increased the

punishment to which a defendant could be subjected. *See United States v. Booker*, 543 U.S. 220, 237 (2005).

That began to change with *Apprendi*, which held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," 530 U.S. at 490, even if that fact is labeled as a sentencing factor or enhancement, *id.* at 494.

Since *Apprendi*, few aspects of sentencing law have remained untouched. In a series of decisions, this Court has reiterated the jury's traditional importance in constraining government power, including the power of the judiciary. This has led the Court to revisit and reverse its precedent as inconsistent with *Apprendi*. *See Hurst v. Florida*, 577 U.S. 92, 96 (2016) (overruling *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam) and *Spaziano v. Florida*, 468 U.S. 447 (1984), and holding that the facts necessary to impose a sentence of death must be found by the jury); *Alleyne*, 570 U.S. at 107 (overruling *Harris v. United States*, 536 U.S. 545 (2002), and holding that facts that increase a mandatory minimum sentence must be found by the jury); *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990), and holding that the jury must find an aggravating circumstance necessary for imposition of the death penalty). And in *Booker*, 543 U.S. at 226–27, the Court applied the *Apprendi* doctrine to the Federal Sentencing Guidelines and held that the Guidelines are advisory, rather than binding, on sentencing judges. Most recently, the Court struck down a federal statute that had allowed revocation of supervised

release based on judicial factfinding without a jury. *Haymond*, 139 S. Ct. at 2378–79.

In applying the *Apprendi* doctrine, the Court has concluded that the right of jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure," in which the jury serves as "circuitbreaker in the State's machinery of justice." *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004). The jury is to the judiciary what voters are to the other two branches of government: an essential component of democratic control. *See id.* at 306. Thus, the jury retains "constitutional authority to set the metes and bounds of judicially administered criminal punishments," with the jury's findings "limiting the judge's power to punish." *Haymond*, 139 S. Ct. at 2376, 2378–79; *see Booker*, 543 U.S. at 236 (observing that the *Apprendi* doctrine is a way of "guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime"); *Apprendi*, 530 U.S. at 482 (discussing the "historic link between verdict and judgment" that confirms the jury's traditional role in determining the permissible limits of punishment).

B. Even so, federal courts hold that sentencing judges may rely on their own findings about charged conduct, regardless of whether those findings conflict with the jury's verdict.

Despite this Court's growing recognition of the constitutional limits on judicial factfinding, the federal courts of appeals have held that trial judges may base their sentencing decisions on findings of fact that

conflict with the jury's verdict. *See Jones v. United States*, 574 U.S. 948, 949 (2014) (Scalia, J., dissenting from the denial of certiorari) (collecting cases); *see, e.g.*, *United States v. White*, 551 F.3d 381, 385–86 (6th Cir. 2008) (en banc); *United States v. Settles*, 530 F.3d 920, 923 (D.C. Cir. 2008); *United States v. Mercado*, 474 F.3d 654, 657–58 (9th Cir. 2007).

This permissive approach to judicial factfinding is rooted in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), a pre-*Apprendi* decision that addressed a Double Jeopardy Clause challenge to the use of acquitted conduct in sentencing. In *Watts*, this Court held (without the benefit of merits briefing or oral argument) that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157; *see McMillan v. Pennsylvania*, 477 U.S. 79, 91–93 (1986) (holding that the preponderance standard for judicial factfinding generally satisfies due process and that "there is no Sixth Amendment right to jury sentencing").

Although *Watts*'s holding was limited to the Double Jeopardy Clause, *Watts*, 519 U.S. at 154; *Booker*, 543 U.S. at 240 n.4 (describing *Watts*'s holding as "very narrow"), lower courts have relied on it to justify sentencing judges' reliance on acquitted conduct to enhance defendants' sentences, *see, e.g.*, *United States v. Vaughn*, 430 F.3d 518, 526–27 (2d Cir. 2005). Federal courts of appeals have also relied on *Watts* to permit other types of judicial factfinding about jury-rejected conduct, including findings about charged conduct on which the jury failed to reach a verdict. *See*

United States v. Brika, 487 F.3d 450, 459 (6th Cir. 2007) (holding that sentencing judge may consider "conduct on which a jury *either* deadlocked *or* rendered a judgment of acquittal" (emphasis added)); *United States v. Magallanez*, 408 F.3d 672, 684–85 (10th Cir. 2005) (holding that sentencing judge may make findings on drug quantity that contradict the jury's findings).

This case fits that pattern. The Second Circuit held that because "a court may sentence a defendant based even on acquitted conduct," the sentencing judge was free to make findings about the alleged narcotics conspiracy and sentence Rosario based on those findings, even though the jury did not reach a verdict on that charge. App. 15. The court treated the jury's failure to reach a verdict as indistinguishable from an acquittal, concluding both allowed for sentencing based on judicial factfinding. *See id.* (citing *Vaughn*, 430 F.3d at 526).

C. By contrast, multiple state courts hold that the Federal Constitution forbids reliance on charged but jury-rejected conduct.

In conflict with the federal courts, several state supreme courts have held that federal law bars consideration of jury-rejected conduct at sentencing. The Michigan Supreme Court's decision in *People v. Beck*, 939 N.W.2d 213 (Mich. 2019), highlights this split of authority.

In *Beck*, the Michigan Supreme Court held that "reliance on acquitted conduct at sentencing is barred

by the Fourteenth Amendment." 939 N.W.2d at 226. The *Beck* court explained that when a jury decides the prosecution has not proven a charged offense beyond a reasonable doubt, "the defendant continues to be presumed innocent" of that charge, even if he is found guilty on other charges. *Id.* at 225. And because the presumption of innocence remains, a sentencing judge cannot rely on the acquitted conduct without violating federal due process. *Id.* Although the *Beck* majority declined to directly address whether sentencing a defendant based on acquitted conduct *also* violates the Sixth Amendment, *id.* at 221 n.10, it recognized the "interwoven nature of the United States Supreme Court's analysis of the Sixth Amendment and due-process rights," *id.* at 223.

Not only did the Michigan Supreme Court base its holding on federal due process, it directly addressed this Court's decisions. The *Beck* court explained at length why *Watts* and *McMillan* do not control: they are distinguishable on their facts, and they are of doubtful validity, given this Court's later decisions in *Apprendi*, *Booker*, and *Alleyne*. *Beck*, 939 N.W.3d at 221–24 & n.16. As a result, the *Beck* court declined to follow the federal courts of appeals that have relied on *Watts* and *McMillan* to approve the use of acquitted conduct at sentencing, *Beck*, 939 N.W.3d at 221, and it sided with federal judges who have written separately to argue that the practice is "inconsistent with fundamental fairness and common sense," *id.* at 225–26.

Michigan is not alone: at least two other states have held that sentencing a defendant based on acquitted conduct violates federal due process.

Sentencing judges in New Hampshire may not "consider offenses for which the defendant has been acquitted," *State v. Cobb*, 732 A.2d 425, 442 (N.H. 1999), because doing so would undermine the presumption of innocence by "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). North Carolina takes the same approach. *See State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988) (sentencing a defendant based on acquitted conduct "is fundamentally inconsistent with the presumption of innocence itself" and is at odds with "due process and fundamental fairness"). In reaching this conclusion, the New Hampshire and North Carolina Supreme Courts relied on *Coffin v. United States*, 156 U.S. 432, 453, 459 (1895), in which this Court established that the presumption of innocence is a fundamental aspect of due process for criminal defendants. *Cote*, 530 A.2d at 785; *Marley*, 364 S.E.2d at 139.[4]

[4] Other states prohibit consideration of acquitted conduct but appear to do so on state-law grounds. *See, e.g.*, *Fugitt v. State*, 348 S.E.2d 451, 455 (Ga. 1986). A New Jersey appellate court recently expressed agreement with *Beck*'s analysis of federal law but ultimately decided the case based on state law. *See State v. Paden-Battle*, 234 A.3d 332, 345–47 (N.J. Super. Ct. App. Div. 2020), *certification granted*, 238 A.3d 280 (N.J. 2020).

D. Federal judges have questioned the constitutionality of this practice.

Three current Members of this Court have questioned whether imposing a sentence based on judicial factfinding violates the Constitution, especially if it conflicts with the jury's verdict. Justice Thomas joined Justice Scalia's dissent from the denial of certiorari in *Jones*, 574 U.S. 948, 949, which urged this Court to decide "whether the Sixth Amendment is violated when courts impose sentences that, but for a judge-found fact, would be reversed for substantive unreasonableness"—as when the judge increases a sentence based on the judge's own findings that conflict with the jury's verdict. Justices Gorsuch and Kavanaugh have likewise expressed their reservations about this practice. *See United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanagh, J., concurring in the denial of rehearing en banc) ("Allowing 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."); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (observing that "[i]t is far from certain whether the Constitution allows" a sentencing judge to increase a sentence "based on facts the judge finds without the aid of a jury or the defendant's consent," and citing *Jones*, 574 U.S. 948 (Scalia, J., dissenting)).

Other federal judges have decried the practice as well. Most recently, Judge Millett highlighted the tension between judicial factfinding about jury-rejected conduct and the *Apprendi* doctrine, and she urged this Court "to take up this important, frequently recurring,

and troubling contradiction in sentencing law." *Bell*, 808 F.3d at 932 (Millett, J., concurring in the denial of rehearing en banc); *see United States v. Brown*, 892 F.3d 385, 408 (D.C. Cir. 2018) (Millett, J., concurring) (writing "separately to put an exclamation" on her point that this sentencing practice is unconstitutional). Judge Millett joined the many other federal judges who have criticized judicial factfinding that conflicts with the jury's verdict. *See White*, 551 F.3d at 392 (Merritt, J., dissenting); *United States v. Canania*, 532 F.3d 764, 778 (8th Cir. 2008) (Bright, J., concurring); *Mercado*, 474 F.3d at 662 (Fletcher, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1350 (11th Cir. 2006) (Barkett, J., concurring); *United States v. Pimental*, 367 F. Supp. 2d 143, 150–54 (D. Mass. 2005) (Gertner, J.).

II. The Constitution forbids sentencing a defendant based on charged conduct that the jury did not find proven beyond a reasonable doubt.

A. Sentencing a defendant based on charged but jury-rejected conduct violates due process, deprives the defendant of his right to trial by jury, and infringes the jury's constitutional role.

"A judge's authority to issue a sentence derives from, *and is limited by*, the jury's factual findings of criminal conduct." *Haymond*, 139 S. Ct. at 2376 (emphasis added). This principle is rooted in both the Due Process Clause and the Sixth Amendment. *See id.*; *Alleyne*, 570 U.S. at 104. Although the sentencing judge has discretion to make certain findings of fact at sentencing, *Alleyne*, 570 U.S. at 116, the judge's

discretion is not boundless. Properly understood, it is limited to "factual matters *not determined by a jury*." *Rita v. United States*, 551 U.S. 338, 352 (2007) (emphasis added).

When the jury finds that an offense has not been proven—whether expressly, through an acquittal, or implicitly, by failing to reach a verdict—the sentencing judge cannot properly brush aside the jury's verdict and sentence the defendant as if the jury had found him guilty. Sentencing a defendant based on jury-rejected conduct diminishes the jury's role in precisely the manner this Court has warned is impermissible: the jury is "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." *Blakely*, 542 U.S. at 306–07. Moreover, this sentencing practice violates the Due Process Clause's guarantee of fundamental fairness and the presumption of innocence by allowing the prosecution to retry its case to the judge under a more lenient standard of proof. *See Beck*, 939 N.W.2d at 225. Put another way, it "renders the jury a sideshow." *Brown*, 892 F.3d at 409 (Millett, J., concurring). Nor can this practice be excused because the jury found the defendant guilty of *other* offenses. "Just because the jury has authorized *a* punishment does not mean that the jury has authorized *any* punishment." *Mercado*, 474 F.3d at 663 (Fletcher, J., dissenting).

This case presents one way that this practice violates the rights of criminal defendants. Federal sentences are subject to appellate review for reasonableness, even if the sentence falls below the

statutory maximum. *See Booker*, 543 U.S. at 224. Judicial findings of fact that increase a defendant's presumptively reasonable Guidelines sentence have the practical effect of exposing the defendant to greater punishment. *See Rita*, 551 U.S. at 347 (reviewing court may treat a sentence within the Guidelines range as presumptively reasonable); *see also Peugh v. United States*, 569 U.S. 530, 543 (2013) ("[D]istrict courts have in the vast majority of cases imposed either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion."). When the sentencing judge makes findings about charged but jury-rejected conduct, those findings effectively expose the defendant to greater punishment even though the jury rejected the same factual assertions. As Justice Scalia argued in urging the Court to take up this question, this practice cannot be squared with *Apprendi* and subsequent cases, because "any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury." *Jones*, 574 U.S. at 949 (Scalia, J., dissenting).

Here, for example, the sentencing judge relied on charged but jury-rejected conduct to ratchet up Rosario's Sentencing Guidelines range, then sentenced him at the high end of that range, imposing a term of imprisonment far above the range that would have otherwise applied. Without that judicial factfinding, Rosario's 210-month sentence is both procedurally and substantively unreasonable. It was based on an incorrect calculation of the Guidelines range, *see Gall*

v. United States, 552 U.S. 38, 51 (2007), and the judge's other findings and explanations cannot justify a 210-month sentence that is far above the range that *should* have applied, *see id.* at 46, 51. But because the court of appeals held that the law allows wide-ranging judicial factfinding about jury-rejected conduct, it summarily rejected Rosario's argument on this point. App. 14–16.

B. *Watts* and *McMillan* do not control.

The government may argue that *Watts*, 519 U.S. 148, and *McMillan*, 477 U.S. 79, foreclose these arguments on the merits. Any such argument would be mistaken. As the Michigan Supreme Court explained in *Beck*, *Watts* and *McMillan* do not specifically address the question presented here, and in any event, they are of dubious validity in light of this Court's later decisions. *Beck*, 939 N.W.3d at 221–24 & n.16.

This Court has noted that *Watts* "presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause" and that as a summary reversal, it "did not even have the benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 n.4. *Watts* did not consider whether the Due Process Clause of the Fifth Amendment or the jury-trial guarantee in the Sixth Amendment prohibits the use of acquitted conduct (or charged conduct not resulting in a conviction) at sentencing. Similarly, *McMillan* involved judicial factfinding about *uncharged* conduct and thus did not address a charged offense that the jury expressly or implicitly rejected. 477 U.S. at 91–93.

Even if *Watts* and *McMillan* bear on the question presented, they are out of step with the Court's recent jurisprudence. Because they predate *Apprendi*, they fail to contend with the Court's post-*Apprendi* understanding of the jury's constitutional role. Indeed, as Justice Sotomayor correctly observed in her concurring opinion in *Alleyne*, 570 U.S. at 121, the Court's decision in that case effectively overruled *McMillan* and showed that its reasoning "has been thoroughly undermined by intervening decisions." This Court has already overruled several decisions in light of *Apprendi* and subsequent authority, and it should do the same for *Watts* and *McMillan*. *See Hurst*, 577 U.S. at 102 ("[I]n the *Apprendi* context, we have found that 'stare decisis does not compel adherence to a decision whose "underpinnings" have been "eroded" by subsequent developments of constitutional law.'"); *see id.* (overruling *Spaziano*, 468 U.S. 447, the decision that *McMillan*, 477 U.S. at 93 cited for its assertion that there is no Sixth Amendment jury right at sentencing).

III. This case is an ideal vehicle to resolve this recurring issue of national importance.

A. The question presented is vital to the administration of criminal justice.

The question presented here is likely to arise nearly every time a defendant goes to trial on multiple charges and the jury delivers a mixed verdict, exposing the defendant to the risk of judicial findings about the charged but jury-rejected conduct. Indeed, the threat of wide-ranging judicial factfinding at sentencing may pressure some defendants to forgo their right to trial in the first place. *See Bell*, 808 F.3d at 932 (Millett, J.,

concurring in the denial of rehearing en banc) (observing that if they choose to go to trial, "[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").

This sentencing practice is not just an affront to the constitutional rights of defendants. As discussed, it also violates the Constitution's "fundamental reservation of power" in the jury, which requires that a judge's "authority to sentence derives wholly from the jury's verdict." *Blakely*, 542 U.S. at 306. It likewise undermines the public's trust in the jury system. *See Canania*, 532 F.3d at 778 & n.4 (Bright, J., concurring) (quoting letter from juror who expressed dismay that the jury's verdict was disregarded and that "defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked them to have been found guilty").

Despite the undeniable importance of this issue, the government has repeatedly—and successfully—urged this Court to deny certiorari. Whatever this Court's reasons for denying past petitions, now is the time to intervene.

To the extent there might have been doubt about the existence of a split of authority, the Michigan Supreme Court's recent decision in *Beck* dispels that concern. As discussed, *Beck* relied on the Federal Constitution to hold that consideration of acquitted conduct violates due process. It addressed *Watts* and *McMillan* at length, and it openly disagreed with the federal courts of appeals that have approved wide-

ranging judicial factfinding. In so doing, Michigan joined what it called the "minority position" represented by other state courts, dissenting federal judges, and scholars. *Beck*, 939 N.W.2d at 225–26.

Waiting for the development of a circuit split among the federal courts of appeals would be futile. Every federal court with jurisdiction over criminal appeals has already decided the issue in the government's favor. Even if these courts were otherwise inclined to grant en banc rehearing to overrule their own precedent, they would likely believe themselves to be bound by *Watts* and *McMillan*. *See, e.g.*, *Canania*, 532 F.3d at 776 (Bright, J., concurring) (concurring "reluctantly" because of "Supreme Court and Circuit precedent").

To be sure, Congress or the Sentencing Commission could address the use of acquitted conduct in federal sentencing. But more than two decades after *Watts* and *Apprendi*—and more than 15 years since *Booker*—they have yet to act. Even if Congress or the Commission were to ban consideration of *acquitted* conduct, that would still leave other forms of judicial factfinding that conflict with the jury's verdict, as shown by the district court's consideration here of conspiracy conduct on which the jury deadlocked. Moreover, a belated federal fix would do nothing for similarly situated state-court defendants in the many jurisdictions that follow *Watts* and *McMillan* in allowing wide-ranging judicial factfinding at sentencing. *See, e.g.*, *People v. Towne*, 186 P.3d 10, 24–25 (Cal. 2008). Ultimately, this Court is the only institution that can protect the rights of all defendants

nationwide and safeguard the vital constitutional role of the jury.[5]

B. This petition presents a strong candidate for review.

This case highlights why sentencing defendants based on charged but jury-rejected conduct violates due process and the right to trial by jury. The government's basic theory was that Rosario led a heroin-trafficking network. Unsurprisingly, the government made the conspiracy charge the centerpiece of its case. But the jury was not convinced: it found Rosario guilty on only a single, relatively minor count. By persuading the district court to make findings at sentencing about the underlying conspiracy charge that the jury rejected, the government obtained a sentence of more than seventeen years without proving its primary charge beyond a reasonable doubt.

In addition, this petition is free from procedural problems that have marred past petitions.

First, it is undisputed that the district court relied on the jury-rejected conspiracy conduct when

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[5] Although federal judges retain discretion regarding what conduct to consider at sentencing, *see Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc), the prospect that individual district judges might choose not to consider jury-rejected conduct only heightens the risk of arbitrary sentencing disparities.

sentencing Rosario. App. 14–15, 32–33; Gov't 2d Cir. Br. 38.

Second, the district court's consideration of this conduct made a material difference. Had the district court not considered the specific characteristics of the conspiracy charge, Rosario's base offense level under the Sentencing Guidelines would have been 24.[6] Even with four added levels for unrelated enhancements, Rosario's offense level would have been 28. Combining an offense level of either 24 or 28 with Rosario's criminal history category would have produced a Guidelines range far below the 168-to-210-month range applied here. If Rosario is correct that the district court should not have considered the specific characteristics of the jury-rejected conspiracy offense—and thus that the upper end of the Guidelines range should have been at most 108 months—his 210-month sentence is both procedurally and substantively unreasonable.

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[6] The district court would have started with level 30, then subtracted six levels, for a base offense level of 24. *See* U.S. Sent'g Guidelines Manual § 2D1.1(c)(5) (U.S. Sent'g Comm'n 2021) (specifying base offense level of 30 for conspiracy involving at least one kilogram of heroin, the amount charged in the indictment here); *id.* § 2X3.1(a)(1) (stating that when defendant is sentenced for obstruction as an accessory after the fact, as here, base offense level is six levels lower than the offense level for the underlying offense).

Third, Rosario preserved his challenge to the consideration of the alleged conspiracy conduct, asserting objections in his sentencing memorandum, at the sentencing hearing, and in the court of appeals. Dist. Ct. ECF No. 93; App. 37–39, 42–51; Def. 2d Cir. Br. 34–41. As a result, the court of appeals squarely addressed and rejected Rosario's argument. App. 14–16.

Fourth, unlike in cases involving acquitted or otherwise jury-rejected conduct from *past* trials—sometimes trials years or decades earlier—here the jury that found Rosario guilty of obstruction is the same jury that failed to reach a verdict on the conspiracy charge. The court effectively nullified the jury's verdict by sentencing Rosario as though he was convicted of a crime the jury had rejected within the same trial.

Rosario was not *acquitted* on the narcotics conspiracy count, but any distinction between acquittal and a hung jury is immaterial. Regardless whether the jury acquits or is unable to reach a verdict, it is unconstitutional to sentence a defendant based on charged conduct that did not result in conviction. In both scenarios, the jury considered the charge but did not find it proven beyond a reasonable doubt.

If anything, Rosario may be worse off than a defendant sentenced based on acquitted conduct. Because he was not acquitted on the narcotics conspiracy charge, Rosario faces a possible retrial. *See* Gov't 2d Cir. Br. 5. If Rosario were to be retried and convicted, he could be sentenced to another prison term for conspiracy—even though his 210-month sentence

for obstruction *already* reflects the district court's findings about the details of the purported conspiracy.[7]

CONCLUSION

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

Respectfully submitted,

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[7] The Second Circuit remanded to the district court for further proceedings on a sentencing enhancement unrelated to this petition, App. 9, but did not direct the district court to reconsider its use of jury-rejected conduct at sentencing.