No.

In the Supreme Court of the United States

DAYONTA MCCLINTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii).

United States District Court (S.D. Ind.):

United States v. *McClinton*, No. 1:18-cr-00252-TWP-MJD-1 (Sept. 23, 2020)

United States Court of Appeals (7th Cir.):

United States v. *McClinton*, No. 20-02860 (Jan. 12, 2022)

TABLE OF CONTENTS

Page

APPENDIX CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Cases—Continued **Page(s)**

Constitution and Statutes:

Miscellaneous:

In the Supreme Court of the United States

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OPINION BELOW

The opinion of the court of appeals (App. 1a-8a) is reported at 23 F.4th 732.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2022. On March 22, 2022, Justice Barrett extended the time for filing a petition for a writ of certiorari until June 11, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall * * * be subject for the same offense to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty, or property, without due process of law * * * .

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

This case concerns the constitutionality of a common sentencing practice that has long troubled jurists: whether sentencing judges can enhance a defendant's sentence based on conduct of which the jury acquitted him.

This Court has never squarely addressed the question. In *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), a divided Court in a summary disposition held that use of acquitted conduct at sentencing does not offend the Double Jeopardy Clause of the Fifth Amendment. But lower courts—including the Seventh Circuit in this case, App. 3a-4a—have long misinterpreted *Watts* to foreclose all constitutional challenges to the use of acquitted conduct at sentencing, including under the Fifth Amendment's Due Process Clause and the Sixth Amendment's right to trial by jury. Nevertheless, as the Seventh Circuit recognized below, an "increasing[]" number of distinguished jurists and scholars, including "many circuit court judges and Supreme Court Justices * * * have questioned the fairness and constitutionality of allowing courts to factor acquitted conduct into sentencing calculations." App. 3a-4a (collecting authorities). The issue has divided the lower courts and prompted calls for this Court's review. *E.g.*, *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting); *Jones* v. *United States*, 574 U.S. 948, 948 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of cert.); *United States* v. *Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc); *United States* v.

Canania, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring).

This case perfectly illustrates how acquitted-conduct sentencing "guts the role of the jury in preserving individual liberty and preventing oppression by the government," *United States* v. *Brown*, 892 F.3d 385, 408 (D.C. Cir. 2018) (Millett, J., concurring), because the facts at issue involve not just traditional "facts enhancing the crime of conviction, like the presence of a gun or the vulnerability of a victim. Rather, they are facts comprising [a] different crime[] * * *." *United States* v. *Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass. 2005). Indeed, this case involves what may be *the most serious offense* known to the law: murder. In *Blakely* v. *Washington*, 542 U.S. 296 (2004), this Court called "absurd" the idea "that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it." *Id.* at 306. And Justice Breyer, while dissenting from decisions holding that the Constitution requires jury factfinding in sentencing, acknowledged that a constitutional violation could arise in what he called "egregious" situations, such as when a judge greatly increases a defendant's sentence based on its own finding that the defendant had committed murder. *Apprendi* v. *New Jersey*, 530 U.S. 466, 562 (2000) (Breyer, J., dissenting); *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting) (writing that a judge "sentenc[ing] an individual for murder though convicted only of making an illegal lane change" is "the kind of problem that the Due Process Clause is well suited to cure").

That is exactly what happened here. A jury convicted petitioner Dayonta McClinton of being one of a group that robbed an Indianapolis CVS pharmacy in 2015. But the jury acquitted petitioner of a much more serious offense—shooting one of the other robbers, Malik Perry, in the back of the head at point-blank range after Perry

announced that the robbery proceeds were so meager that he refused to share what he had stolen. The jury rejected the testimony of cooperating witness Willonte Yates—the self-described "mastermind" of a series of pharmacy robberies, Tr. 114—that Perry had not been shot by Yates himself, a relative stranger whose girlfriend had been "two-timing" him with Perry, Tr. 132, but rather had been murdered by petitioner, whom even government witnesses described as Perry's longtime "best friend" (Tr. 347), "real close," and "like brothers" (Tr. 372), and at whose house Perry often stayed, see Tr. 341-342. Although the jury plainly credited the defense's theory that Yates had "framed" petitioner for a murder he had himself committed (Tr. 37, 43), because sentencing enhancements are subject to judicial factfinding under a lower preponderance-of-the-evidence standard, the sentencing judge nevertheless enhanced petitioner's sentence for murdering his best friend, *more than tripling* his sentence from a range of 57-71 months to a sentence of 228 months.

Unless this Court resolves this issue, tens of thousands of criminal defendants will continue to be sentenced using sentencing practices that are impossible to square with the Constitution. Several state supreme courts apply a different constitutional rule than their regional federal courts, making a defendant's constitutional protections turn on the happenstance of which jurisdiction charges him. And for the many jurisdictions in which relief is unavailable, this state of affairs will continue to put defendants in the untenable position of having to continue to preserve an issue on which only this Court can grant relief, substantially burdening courts, prosecutors, and defense counsel.

As Justice Scalia (joined by Justices Thomas and Ginsburg) wrote in 2014, "[t]his has gone on long enough."

Jones, 574 U.S. at 949 (Scalia, J., dissenting from denial of cert.). Review is urgently warranted.

1. Between September 2014 and June 2016, a group of young men committed a series of more than 20 armed robberies of Indianapolis pharmacies to obtain controlled substances, which its members then sold. D. Ct. Dkt. 138-1 at 1-2, 5. Among the principal organizers was Willonte Yates; other members included Clevon Williams, Justin Rudolph, Larry Warren, and M.G., a juvenile. Beginning on October 12, 2015, Yates and M.G. began planning to rob a CVS pharmacy on College Avenue. Tr. 107, 116. On the day of the robbery, Rudolph, the designated getaway driver, was arrested for another offense, so the group recruited another person, known as "Tote," to drive. For this robbery, the group also involved petitioner and Malik Perry, petitioner's "best friend." Tr. 341-342, 344, 347, 371-372. With Yates, the group's leader, in the front passenger seat, he, Warren, Perry, M.G., and petitioner drove to the pharmacy.

During the robbery, Yates and Perry took lead roles, going behind the pharmacy counter to attempt to force the pharmacist to open the safe and to obtain controlled substances, while others guarded customers throughout the store. Upon learning that the safe containing the controlled substances was on a timer and could not be opened for several minutes, Yates and Perry became angry and agitated, and Yates smashed his gun on the pharmacy counter, denting it. Tr. 175, 177, 183. Fearing that police were coming, the group left before the safe could be opened with only a small bottle of opioid pills the pharmacy left out of the safe specifically for robberies, a bottle of promethazine syrup, and kidney medicine the robbers mistook for opioids. The total value was only around $68. App. 17a. With Yates again in the front passenger seat, the group drove to a residential neighborhood. Tr. 98.

Because they had obtained so little during the robbery, Perry announced that he would not share the drugs he had stolen with the others and got out of the car and started walking away. One of the other robbers shot Perry in the back of the head from close range, killing him. See App. 41a.

Yates was arrested two days later. Tr. 108. Warren, Rudolph, and Williams were later arrested on a variety of racketeering and armed robbery charges. 17-CR-93-1 Docket entry Nos. 1, 91 (S.D. Ind.); Tr. 259-260. Yates and Williams were housed in the same detention facility for a year. See Tr. 110-111, 215, 222-236. Many months (or, in some cases, years) after their arrests, Rudolph, Williams, and Yates agreed to plead guilty to the armed robberies, and, for the first time, implicated petitioner in Perry's murder. See Tr. 109, 113, 232, 235, 259-260. Each agreed to testify against petitioner in exchange for reduced sentences. Tr. 73, 208, 246.

In April 2017, as the only remaining defendant in the CVS robbery, the government charged petitioner as a juvenile for the robbery and the murder of Perry. D. Ct. Dkt. 3. The government alleged in Counts One and Two that petitioner robbed the CVS while using a firearm. It alleged in Counts Three and Four that petitioner subsequently robbed Perry of the proceeds and shot Perry to death. *Ibid.*; see also App. 21a-24a. Petitioner asserted his right to a jury trial. The government then successfully sought to transfer petitioner's case for trial as an adult in district court, citing the seriousness of the murder charge. D. Ct. Dkt. 52 at 3-4.

The government's case against petitioner for the robbery and murder of Perry was based entirely on the cooperator testimony of Yates and his friends Williams and Rudolph, all of whom were cooperating in an effort to reduce lengthy prison sentences (in Rudolph's case, an

expected life sentence, 17-CR-93-8 Docket entry No. 35 (S.D. Ind. May 16, 2017)). Yates, the self-proclaimed "mastermind" of the CVS robbery (Tr. 114), had moved to Indianapolis relatively recently and had not known Perry long, Tr. 342-344; Yates's girlfriend had been "two-timing" him with Perry. Tr. 132. Yates testified that petitioner murdered Perry, Tr. 99-100. Rudolph testified that, during a dice game held the day after the CVS robbery, petitioner initiated a trade of their pistols. Tr. 262-263. Williams testified that petitioner, who was not friendly with him and indeed was a rival because Williams's girlfriend had been "two-timing [him] with" petitioner (Tr. 216), supposedly confided in Williams privately at the dice game that petitioner had murdered Perry. Tr. 43, 132, 208, 210-213. The government presented no corroborating physical or forensic evidence to tie petitioner to the robbery or murder of Perry. Nor did the government introduce any evidence tying petitioner to the murder weapon; indeed, the government never introduced the gun it believed was used in the murder. Numerous people testified that petitioner and Perry were "best friends" (Tr. 341-342, 344, 347, 371-372), and Perry regularly stayed at petitioner's house, Tr. 341-342. The government's own witness, Aja Harges, testified that petitioner and Perry were "real close," "like brothers." Tr. 372.

After a three-day trial, the jury deliberated for just a few hours. The jury found petitioner guilty of robbing the CVS and brandishing a firearm during the robbery under Counts One and Two. App. 25a-26a. But it acquitted petitioner of the charges in Counts Three and Four for the robbery and murder of Perry. App. 27a-28a.

2. The probation office prepared a presentence investigation report (PSR) concluding that petitioner's Guidelines total offense level was 23, which, given his criminal history category of III, carried a Guidelines

imprisonment range of 57-71 months. PSR 14. The government objected to the probation office's findings, arguing that "McClinton's murder [of Perry] constitutes relevant conduct," which the government argued can include "crimes [for] which the defendant has been acquitted." Gov't PSR Resp. 2. Accordingly, the government argued that petitioner's offense level should be increased to the maximum level of 43, bearing a minimum sentence of 324 months—more than 4.5 times the maximum Guidelines sentence calculated by the probation office. See *id.* at 4. The Probation Office then issued a revised PSR adopting the government's favored calculation. Am. PSR 6-7.

Petitioner objected to the use of acquitted conduct to calculate his sentence. *Id.* at 20. Petitioner argued that enhancing his sentence based on "conduct that he was acquitted of" violated his Sixth Amendment right to a jury trial and his Fifth Amendment right to due process of law. App. 36a.

3. The sentencing judge "recognize[d] that the jury acquitted Mr. McClinton of the counts related to the death of Mr. Perry and the robbery of Mr. Perry." App. 42a. But the court concluded that it would consider the killing in calculating petitioner's sentence because, "in determining relevant conduct, the jury finding was beyond a reasonable doubt, but the government's burden * * * in a sentencing hearing, is by a preponderance of the evidence." *Ibid.* Based solely upon the jury's verdict, the judge observed that petitioner's sentencing range would have been between 57 and 71 months' imprisonment. App. 56a. But based upon the judge's own finding that petitioner had killed Perry, the judge enhanced petitioner's offense level by 20 levels from 23 to 43, and based on his criminal history category of III, calculated a Guidelines range of 324 months to life imprisonment. See App. 44a. The court observed that three of the other

participants in the CVS robbery had been sentenced to far lesser terms of incarceration, App. 56a-57a, with Yates receiving *no* sentence for the CVS robbery he led and a total sentence for other offenses of just 99 months' imprisonment. Yates, M.G., and Warren were never charged with, nor had their sentences enhanced because of, Perry's murder.

Based on petitioner's age and the shorter sentences of the other robbery participants, the judge sentenced petitioner to 228 months' imprisonment, a downward variance from the Guidelines range. App. 57a. Petitioner's sentence rivaled that of every other participant in the CVS robbery *combined*.[1]

4. Petitioner appealed his sentence, arguing that "acquitted conduct should not be utilized to enhance a sentence" because that practice violates the Fifth and Sixth Amendments' guarantees of due process and a jury trial. Pet. C.A. Br. 14-22. While, petitioner argued, courts had upheld acquitted-conduct sentencing "in light of the Supreme Court's *Watts* decision," *id.* at 18-19, "reliance on *Watts* as controlling in the outcome of challenges to the use of acquitted conduct under both the Fifth and Sixth Amendments" is "a mistake," because this Court clarified that in *Watts*, a double jeopardy case, "[t]he issue * * * simply was not presented." *Id.* at 19-21 (quotation marks omitted) (citing *United States* v. *Booker*, 543 U.S. 220, 240 (2005)).

The court of appeals affirmed. App. 1a-8a. It held that, although petitioner had "advocated thoroughly," App. 4a, his arguments were barred by *Watts* and "[t]he

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[1] Warren was sentenced to just 151 months' imprisonment for three robberies. App. 56a-57a. M.G. was convicted as a juvenile and sentenced to time served. App. 57a. Rudolph was detained pretrial for approximately three years before receiving a sentence of time served. 17-CR-93-8 Docket entry No. 299 (S.D. Ind. Oct. 17, 2019).

holdings in this circuit [that] have followed this precedent," App. 3a, under which "the murder was relevant conduct that could be used to calculate McClinton's sentence," App. 6a. But the court of appeals observed that, "McClinton's contention is not frivolous," and "preserve[d] for Supreme Court review an argument that has garnered increasing support among many circuit court judges and Supreme Court Justices, who in dissenting and concurring opinions, have questioned the fairness and constitutionality of allowing courts to factor acquitted conduct into sentencing calculations." App. 3a-4a. The court of appeals noted, "[u]ntil such time as the Supreme Court alters [*Watts*'s] holding, we must follow its precedent." App. 4a.

REASONS FOR GRANTING THE PETITION

I. The Constitutionality Of Considering Acquitted Conduct At Sentencing Is An Important And Recurring Question That Only This Court Can Resolve

This Court has never squarely addressed whether a sentencing judge's consideration of acquitted conduct to enhance a defendant's sentence violates the Due Process Clause of the Fifth Amendment or the Sixth Amendment's guarantee of trial by jury. In *Watts*, a divided Court held in a summary disposition that considering acquitted conduct at sentencing does not offend the Double Jeopardy Clause of the Fifth Amendment. 519 U.S. at 154. This Court later emphasized that *Watts* "presented a very narrow question regarding the interaction of the [U.S. Sentencing] Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 n.4. Thus, the *Watts* Court did not have occasion to 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. Yet for decades, "[n]umerous courts of appeals"—including the Seventh Circuit below, App. 3a-4a—have "assume[d] that *Watts* controls the outcome of both the Fifth *and* Sixth Amendment challenges to the use of acquitted conduct," *United States* v. *White*, 551 F.3d 381, 392 n.2 (6th Cir. 2008) (en banc) (Merritt, J., dissenting, joined by five others).

A. Distinguished Jurists Have Long Criticized Acquitted-Conduct Sentencing

1. From the very outset, members of this Court questioned the holding in *Watts*, as well as its summary disposition of such an important issue. Justice Stevens decried the idea "that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved" as "repugnant" to the Constitution. *Watts*, 519 U.S. at 170 (Stevens, J., dissenting). And Justice Kennedy criticized the Court for failing to clearly "confront[] the distinction between uncharged conduct and [acquitted] conduct," which he called a "question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system" and which "ought to be confronted by a reasoned course of argument, not by shrugging it off." *Id.* at 170 (Kennedy, J., dissenting). "At the least it ought to be said 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." *Ibid.*

As the Seventh Circuit noted below, in the quarter-century since *Watts*, there has been "increasing support among many circuit court judges and Supreme Court Justices" for "question[ing] the fairness and constitutionality of allowing courts to factor acquitted conduct into sentencing calculations." App. 3a-4a.

For instance, in *Jones* v. *United States*, petitioners convicted by a jury of distributing small amounts of crack cocaine, but acquitted of conspiring to distribute drugs, challenged the constitutionality of the sentencing judge imposing sentencing enhancements based on the acquitted conduct. Justice Scalia, joined by Justices Thomas and Ginsburg, dissented from the Court's denial of certiorari, explaining that "[t]he Sixth Amendment, together with the Fifth Amendment's Due Process Clause, requires that each element of a crime be either admitted by the defendant, or proved to the jury beyond a reasonable doubt." *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial of cert.) (quotation marks omitted). Accordingly, "[a]ny fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, and must be found by a jury, not a judge." *Id.* at 949 (citation and quotation marks omitted). The group observed that "the 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." *Ibid.* The dissenters protested that "[t]his has gone on long enough," and urged the Court to "grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment." *Id.* at 950.

2. Since then, the criticisms of acquitted-conduct sentencing and related practices have steadily grown. Following *Jones*, then-Judge Gorsuch questioned the lawfulness of imposing sentences based on judge-found facts, writing that "[i]t is far from certain whether the Constitution allows" "a district judge [to] * * * increase a defendant's sentence * * * based on facts the judge finds without the aid of a jury." *United States* v. *Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (citing *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial of cert.)).

Then-Judge Kavanaugh has repeatedly criticized acquitted-conduct sentencing. In *United States* v. *Bell*, where the sentencing judge increased the defendant's sentence by more than 300% based on acquitted conduct, then-Judge Kavanaugh wrote that "[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing en banc). He observed that "resolving that concern as a constitutional matter would likely require" Supreme Court review. *Id.* at 927. Similarly, in *United States* v. *Brown*, where the defendant was acquitted on most counts but "then sentenced in essence as if he had been convicted on all of the counts," 892 F.3d at 415 (Kavanaugh, J., dissenting in part), then-Judge Kavanaugh called acquitted-conduct sentencing "unsound," and noted "good reasons to be concerned about [it]," *ibid.*; see also *United States* v. *Henry*, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring) (noting "[t]he oddity * * * that courts are still using *acquitted* conduct to increase sentences" after *Booker* held that "the Constitution requires that facts used to increase a sentence beyond what the defendant otherwise could have received be proved *to a jury beyond a reasonable doubt*").

3. Numerous other federal appeals court judges have written that using acquitted conduct to calculate a criminal defendant's sentence is unconstitutional. Judge Millett has repeatedly expressed the view that "allowing a judge to dramatically increase a defendant's sentence based on jury-acquitted conduct is at war with the fundamental purpose of the Sixth Amendment's jury-trial guarantee" because "it considers facts of which the jury expressly disapproved." *Bell*, 808 F.3d at 929-930 (Millett, J., concurring in the denial of rehearing en banc)

(quotation marks omitted); see also *id.* at 927 (Kavanaugh, J., concurring in denial of rehearing en banc) ("shar[ing] Judge Millett's overarching concern"). Judge Millett has written that the practice "guts the role of the jury in preserving individual liberty and preventing oppression by the government." *Brown*, 892 F.3d at 408 (Millett, J., concurring). Judge Millett has observed that "only the Supreme Court can resolve the contradictions in the current state of the law," and urged the 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).

Judge Bright has likewise argued "that the consideration of 'acquitted conduct' to enhance a defendant's sentence is unconstitutional" under both the Due Process Clause of the Fifth Amendment and the Sixth Amendment. *Canania*, 532 F.3d at 776 (Bright, J., concurring). In his "strongly held view," acquitted-conduct sentencing "violates the Due Process Clause of the Fifth Amendment" because it "undermines the notice requirement that is at the heart of any criminal proceeding." *Id.* at 776-777. And it violates the Sixth Amendment jury-trial guarantee because it creates 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." *Id.* at 776. Judge Bright has "urge[d] the Supreme Court to re-examine [the] * * * continued use forthwith" of "'acquitted conduct' to fashion a sentence." *Id.* at 777. Similarly, Judge Fletcher has called acquitted-conduct sentencing a practice that "defies logic" and that plainly violates the Fifth and Sixth Amendments because it "allows the jury's role to be circumvented by the prosecutor and usurped by the judge." *United States* v. *Mercado*, 474 F.3d 654, 658, 664 (9th Cir. 2007) (Fletcher, J., dissenting). Numerous other federal judges have reached the same conclusion. See,

e.g., *White*, 551 F.3d at 392 (Merritt, J., dissenting); *United States* v. *Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) ("sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment").

B. State Courts Are Split Regarding The Constitutionality Of The Practice

There is a much wider range of opinion among state courts. Since long before *Watts*, state courts have been divided on whether the federal constitution permits consideration of acquitted conduct at sentencing. Unsurprisingly, some states have held that the Constitution permits sentencing courts to consider acquitted conduct. *E.g.*, *State* v. *Witmer*, 10 A.3d 728, 733 (Me. 2011) (identifying California, Colorado, Florida, Missouri, Ohio, and Wisconsin).

But even where state law would ordinarily permit trial judges to consider other misconduct in imposing a sentence, "many" state supreme courts construe the federal constitution to "make an exception for acquitted conduct—conduct that formed the basis for a charge resulting in an acquittal at trial." Nora V. Demleitner et al., *Sentencing Law and Policy* 290 (3d ed. 2013). The New Hampshire Supreme Court, for example, has concluded that considering acquitted conduct at sentencing violates due process because it denies to the defendant the "full benefit" of the presumption of innocence "when a sentencing court may have used charges that have resulted in acquittals to punish the defendant." *State* v. *Cote*, 530 A.2d 775, 785 (N.H. 1987) (citing *United States* v. *Tucker*, 404 U.S. 443 (1972), and *Coffin* v. *United States*, 156 U.S. 432, 453 (1895)); see also *State* v. *Cobb*, 732 A.2d 425, 442 (N.H. 1999) (reaffirming *Cote* post-*Watts*). Likewise, the North Carolina Supreme

Court has held "that due process and fundamental fairness" preclude a sentencing judge from using acquitted conduct to calculate a defendant's sentence, holding that it violates the presumption of innocence. *State* v. *Marley*, 364 S.E.2d 133, 139 (N.C. 1988); see also *Bishop* v. *State*, 486 S.E.2d 887, 897 (Ga. 1997) ("In aggravation of the sentence, the State may prove the defendant's commission of another crime, despite the lack of conviction, so long as there has not been a previous acquittal." (quotation marks omitted)).

Although federal courts have treated *Watts* as the last word on acquitted-conduct sentencing, several state supreme courts have construed *Watts* narrowly, consistent with this Court's description of it in *Booker*. For example, the Michigan Supreme Court has held that sentencing based on acquitted conduct violates the Due Process Clause of the Fifth Amendment of the U.S. Constitution. *People* v. *Beck*, 939 N.W.2d 213, 225-226 (Mich. 2019). There, a jury convicted the defendant of firearm counts, but acquitted him of other charges, including a murder charge. *Id.* at 216-217. At sentencing, however, the judge found by a preponderance of the evidence that the defendant "*actually was the person who perpetrated the killing*," and accordingly imposed a significant sentence enhancement. *Id.* at 217.

The Michigan Supreme Court held that the sentence violated the Due Process Clause of the Fourteenth Amendment: "[W]hen a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent," and "conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process." *Beck*, 939 N.W.2d at 225. The Michigan Supreme Court "f[ou]nd *Watts* unhelpful in resolving whether the use of

acquitted conduct at sentencing violates due process" because "*Watts* addressed only a double-jeopardy challenge." *Id.* at 224. The court wrote:

> While we recognize that our holding today represents a minority position, one final consideration informs our conclusion: 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.
>
> * * * *
>
> This ends here. Unlike many of those judges and commentators, we do not believe existing United States Supreme Court jurisprudence prevents us from holding that reliance on acquitted conduct at sentencing is barred by the Fourteenth Amendment.

Id. at 225-226.

The New Jersey Supreme Court canvassed both federal and state constitutional law, emphasizing the criticisms of members of this Court and other federal appellate judges, before holding as a matter of state law that, "once the jury has spoken through its verdict of acquittal, that verdict is final and unassailable. * * * Fundamental fairness simply cannot let stand the perverse result of allowing in through the back door at sentencing conduct that the jury rejected at trial." *State* v. *Melvin*, 258 A.3d 1075, 1086, 1089, 1093-1094 (N.J. 2021). The New Jersey Supreme Court "agree[d] with the Michigan Supreme Court that *Watts* is not dispositive of the due process" issue because, "[a]s clarified in *Booker*, *Watts* was cabined specifically to the question of whether the practice of using acquitted conduct at sentencing was inconsistent with double jeopardy." *Id.* at 1090.

Thus, several state supreme courts applying federal law have adopted rules about acquitted-conduct sentencing at odds with the corresponding regional

federal court of appeals. This Court has recognized that such splits are particularly intolerable, because the rule of decision turns on the happenstance of whether a matter is brought in federal or state court. See, *e.g.*, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994) (granting review to resolve "conflict between" state supreme court and regional court of appeals regarding constitutionality of state action).

C. This Court's Intervention Is Necessary

Without this Court's intervention, this division of authority will continue to persist. Just as the *Jones* dissenters warned, the federal courts of appeals continue to "take[] [this Court's] continuing silence to suggest that the Constitution *does* permit" acquitted-conduct sentencing. See 574 U.S. at 949 (Scalia, J., dissenting from denial of cert.). Not only has every federal court of appeals with criminal jurisdiction foreclosed these claims, see *ibid.*—every court of appeals has been asked to reconsider the issue en banc, and each has refused.[2]

No other mechanism will resolve the issue. Justice Breyer suggested in *Watts* that the Sentencing Commission *could* "revisit this matter in the future." 519 U.S. at 159 (Breyer, J., concurring). The Sentencing Commission has lacked a quorum for more than three

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[2] See, *e.g.*, *United States* v. *S. Union Co.*, No. 09-2403 (1st Cir. Feb. 17, 2011); *United States* v. *Allums*, No. 18-1794 (2d Cir. Aug. 13, 2021), ECF No. 420; *United States* v. *Jackson*, No. 16-1200 (3d Cir. Sept. 6, 2017); *United States* v. *Benkahla*, No. 07-4778 (4th Cir. July 22, 2008), ECF No. 57; *United States* v. *Redd*, No. 06-60806 (5th Cir. Mar. 17, 2009); *United States* v. *Baquedano*, No. 13-1007 (6th Cir. Nov. 27, 2013), ECF No. 66; *United States* v. *Ashqar*, No. 07-3879 (7th Cir. Oct. 28, 2009), ECF No. 60; *United States* v. *Shield*, No. 15-2341 (8th Cir. Sept. 29, 2016); *United States* v. *Fitch*, No. 07-10607 (9th Cir. Feb. 22, 2012), ECF No. 142; *United States* v. *Ray*, No. 11-3383 (10th Cir. Feb. 1, 2013); *United States* v. *Sims*, 309 F. App'x 384 (11th Cir. 2009); *Bell*, 808 F.3d at 927.

years and thus cannot act. But even when it had a quorum, the Commission's silence on the issue during the quarter century since *Watts* speaks volumes.

Nor do "federal district judges have power in individual cases to disclaim reliance on acquitted or uncharged conduct" "in the absence of a change of course by the Supreme Court, or action by Congress or the Sentencing Commission." *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc). In *United States* v. *Ibanga*, 271 F. App'x 298 (4th Cir. 2008) (per curiam), for example, the district court "refus[ed] to consider acquitted conduct * * * in determining [a defendant's] sentence." *Id.* at 299. The government appealed and the Fourth Circuit reversed, holding that the district court "committed significant procedural error by categorically excluding acquitted conduct from the information that it could consider in the sentencing process." *Id.* at 301. The Second Circuit reached the same conclusion in *United States* v. *Vaughn*, 430 F.3d 518 (2005), where it vacated the district court's sentence and ordered the district court "to consider all facts relevant to sentencing it determines to have been established by a preponderance of the evidence as it did pre-*Booker*, even those relating to acquitted conduct." *Id.* at 527.

Thus, as the Seventh Circuit concluded below, "[u]ntil such time as the Supreme Court alters its holding," App. 4a, the practice of acquitted-conduct sentencing will persist. Numerous respected jurists have called on this Court to definitively resolve this question, see, *e.g.*, *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting); *Jones*, 574 U.S. at 948 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of cert.); *Canania*, 532 F.3d at 777 (Bright, J., concurring); *United States* v. *Baylor*, 97 F.3d 542, 550 (D.C. Cir. 1996) (Wald, J., concurring specially). As Judge Millett wrote:

> I agree with Justices Scalia, Thomas, and Ginsburg * * * that the circuit case law's incursion on the Sixth Amendment has gone on long enough. For multiple reasons, the time is ripe for the Supreme Court to resolve the contradictions in Sixth Amendment and sentencing precedent * * *.

Bell, 808 F.3d at 929 (Millett, J., concurring in the denial of rehearing en banc) (citations and quotation marks omitted).

II. The Decision Below Is Wrong

A. *Watts* Did Not Resolve Whether The Due Process Clause Or Sixth Amendment Jury-Trial Right Prohibits Consideration Of Acquitted Conduct At Sentencing

The Seventh Circuit relied on *Watts* to affirm petitioner's sentence. App. 3a. But *Watts* did not pass on the issue at hand. As this Court has explained, *Watts* presented a "very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause," and did not consider whether a judge's "sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment" or the implications of acquitted-conduct sentencing for the Due Process Clause. *Booker*, 543 U.S. at 240 & n.4. Lower courts' reliance on *Watts* to resolve different constitutional arguments is therefore "misplaced." *Mercado*, 474 F.3d at 661 (Fletcher, J., dissenting); accord, *e.g.*, *White*, 551 F.3d at 392 (Merritt, J., dissenting, joined by five others) ("reliance on *Watts* as authority for enhancements based on acquitted conduct is obviously a mistake"); *Melvin*, 258 A.3d at 1090 ("*Watts* is not dispositive of the due process challenge presently before this Court"); *Beck*, 939 N.W.2d at 224 ("find[ing] *Watts* unhelpful in resolving whether the use of acquitted

conduct at sentencing violates due process" because "*Watts* addressed only a double-jeopardy challenge").

This Court should be particularly reluctant to read *Watts* broadly because the Court decided the case by summary disposition and "did not even have the benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 n.4. Justice Kennedy dissented in *Watts* on this basis. *Watts,* 519 U.S. at 170 (Kennedy, J., dissenting). Giving *Watts* a "very narrow" reading is likewise warranted, *Booker*, 543 U.S. at 240 n.4, because a broader reading is hard to square with the Court's more recent sentencing precedents. In the quarter century since *Watts*, this Court has issued numerous decisions emphasizing the essential importance of jury factfinding under the Sixth Amendment in determining sentences. See, *e.g.*, *Apprendi*, 530 U.S. 466 (jury must find all facts affecting statutory maximum); *Ring* v. *Arizona*, 536 U.S. 584 (2002) (jury must find aggravating factors permitting death penalty); *Blakely*, 542 U.S. 296 (jury must find all facts essential to sentence); *Booker*, 543 U.S. 220 (Sentencing Guidelines are subject to Sixth Amendment); *Cunningham* v. *California*, 549 U.S. 270 (2007) (jury must find facts exposing defendant to longer sentence); *S. Union Co.* v. *United States*, 567 U.S. 343 (2012) (jury must find facts permitting imposition of criminal fine); *Alleyne* v. *United States*, 570 U.S. 99 (2013) (jury must find facts increasing mandatory minimum); *Hurst* v. *Florida*, 577 U.S. 92 (2016) (jury must make critical findings needed for imposition of death sentence); *United States* v. *Haymond*, 139 S. Ct. 2369 (2019) (judge cannot make findings to increase sentence during supervised release term).

From those cases, "[i]t unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element [of the crime] that must be either admitted by the defendant or

found by the jury. It *may not* be found by a judge." *Jones*, 574 U.S. at 949 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of cert.). Many of those decisions have emphasized that the jury trial right works "in conjunction with the Due Process Clause" because a court's authority to sentence a defendant fundamentally flows from jury findings regarding facts essential to punishment, which are elements of the offense. *Alleyne*, 570 U.S. at 104; accord *Hurst*, 577 U.S. at 97-98. These cases have thus "emphasized the central role of the jury in the criminal justice system." *United States* v. *Lasley*, 832 F.3d 910, 921 (8th Cir. 2016) (Bright, J., dissenting). This series of cases provides a compelling reason to at least limit *Watts* to the Double Jeopardy context, if not to overrule it entirely. See *Faust*, 456 F.3d at 1349 (Barkett, J., specially concurring) ("*Watts* * * * has no bearing on this case in light of the Court's more recent and relevant rulings in *Apprendi v. New Jersey*, *Ring v. Arizona*, *Blakely*, and *Booker*." (citations omitted)).

Indeed, *Booker*'s narrow reading of *Watts* was likely necessary to avoid having to overrule the case. Cf. *Melvin*, 258 A.3d at 1089; *Beck*, 939 N.W.2d at 224. *Watts* must yield when in conflict with this large body of law that has since developed. As a summary disposition, *Watts*'s reasoning was slight. And this Court has long recognized that it is "less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument." *Hohn* v. *United States*, 524 U.S. 236, 251 (1998); *Connecticut* v. *Doehr*, 501 U.S. 1, 12 n.4 (1991) ("A summary disposition does not enjoy the full precedential value of a case argued on the merits * * *.").

B. The Sixth Amendment Prohibits Courts From Relying On Acquitted Conduct At Sentencing

The Sixth Amendment's jury-trial right is one of the most "fundamental reservation[s] of power in our constitutional structure." *Blakely*, 542 U.S. at 305-306. It not only gives citizens a voice in the courtroom but also guarantees them "control in the judiciary." *Id.* at 306. And by giving citizens a voice, it "safeguard[s] 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). Accordingly, the right to a trial by jury is a right "of surpassing importance," *Apprendi*, 530 U.S. at 476, and "occupie[s] a central position in our system of justice." *Batson*, 476 U.S. at 86.

The Sixth Amendment right-to-jury trial grew out of "several centuries" of Anglo-American common-law tradition, under which the right to trial by jury was an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968). Historically, juries acted as the conscience of the community not only through "flat-out acquittals," but also "indirectly check[ing]" the "severity of sentences" by issuing "what today we would call verdicts of guilty to lesser included offenses." *Jones* v. *United States*, 526 U.S. 227, 245 (1999); see also Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 Wis. L. Rev. 377, 393-394 (1999). For example, "juries w[ould] often * * * bring in larceny to be under the value of twelvepence," and its lower valuation would thereby avoid a mandatory death sentence. 4 William Blackstone, *Commentaries on the Laws of England* *238-239 (1769). It was therefore common for eighteenth-century jurors to, for example, "downvalue from grand to petty larceny" based on their determination that "the goods were of relatively small amount." John H. Langbein, *Shaping the*

Eighteenth-Century Criminal Trial: A View from the Ryder Sources, 50 U. Chi. L. Rev. 1, 54-55 (1983); see, *e.g.*, *State* v. *Bennet*, 5 S.C.L. 515 (S.C. 1815).

Through partial acquittals, juries determined not only guilt but also the defendant's sentence. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 70-71 (2003). The common law system "left judges with little sentencing discretion: once the facts of the offense were determined by the jury, the 'judge was meant simply to impose [the prescribed] sentence.'" *Alleyne*, 570 U.S. at 108 (quoting Langbein, *supra*, at 36-37; citing 3 William Blackstone, *Commentaries on the Laws of England* *396 (1768)).

Consistent with this history, in the decades since *Watts*, this Court has again focused on the importance of jury factfinding in sentencing. Beginning with *Apprendi*, this Court's sentencing cases have "carrie[d] out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict," because "[w]ithout that restriction, the jury would not exercise the control that the Framers intended." *Blakeley*, 542 U.S. at 306. Accordingly, "[a]ny fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, and must be found by a jury, not a judge." *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial of cert.) (citations and quotation marks omitted). "It unavoidably follows that 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. It *may not* be found by a judge." *Id.* at 949.

When courts consider acquitted conduct as a basis for enhancing a defendant's sentence, it undermines the "jury's historic role as a bulwark between the State and

the accused at the trial for an alleged offense." *S. Union Co.*, 567 U.S. at 350. Traditionally, "[a]n acquittal is accorded special weight." *United States* v. *DiFrancesco*, 449 U.S. 117, 129 (1980). "[I]ts finality is unassailable," "[e]ven if the verdict is based upon an egregiously erroneous foundation." *Yeager* v. *United States*, 557 U.S. 110, 122-123 (2009) (quotation marks omitted). "[I]f [jurors] acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor * * *." *United States ex rel. McCann* v. *Adams*, 126 F.2d 774, 775-776 (2d Cir. 1942) (L. Hand, J.).

But acquitted-conduct sentencing affords the government a "second bite at the apple," in which "the Government almost always wins by needing only to prove its (lost) case to a judge by a preponderance of the evidence." *Canania*, 532 F.3d at 776 (Bright, J., concurring). This "diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment." *Mercado*, 474 F.3d at 658 (Fletcher, J., dissenting). Moreover, "[m]any judges and commentators" have observed that "using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system," *United States* v. *Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (Kavanaugh, J., for the court), undermining public perceptions of the importance of jury service and discouraging jurors from taking their duties seriously, see *Canania*, 532 F.3d at 778 & n.4 (quoting letter from juror to judge calling imposition of sentence based on conduct of which jury had acquitted the defendant a "tragedy" that denigrates "our contribution as jurors").

Only this Court can end this abridgement of the fundamental right to a jury trial and restore the jury's role as the "circuitbreaker in the State's machinery of justice." *Blakely*, 542 U.S. at 306-307.

C. The Fifth Amendment Prohibits Courts From Relying On Acquitted Conduct At Sentencing

This Court has held that the Due Process Clause works in conjunction with the Sixth Amendment to guarantee fair sentencing procedures. Just as "[a]ny fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, and must be found by a jury, not a judge," *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial of cert.) (citation and quotation marks omitted), due process "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). The beyond-a-reasonable-doubt "standard provides concrete substance for the presumption of innocence." *Ibid.*

Considering acquitted conduct at sentencing offends the Due Process Clause in several related ways. To begin with, the Clause does not permit courts to treat acquitted conduct as a sentencing factor that can be imposed based on facts found by a preponderance of the evidence, thereby eliminating the core procedural protection of proof beyond a reasonable doubt. Several courts have held that revisiting facts the jury rejected under a preponderance standard deprives the accused of the full benefit of the presumption of innocence. See *Beck*, 939 N.W.2d at 225 ("conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process"); *Marley*, 364 S.E.2d at 139; *Cote*, 530 A.2d at 785.

Even *Apprendi* skeptics acknowledge that basing enhancements that drastically increase sentences on findings made by a preponderance could cause "unusual and serious procedural unfairness" that could give rise to

due process violations. 530 U.S. at 562-563 (Breyer, J., dissenting). In his *Apprendi* dissent, Justice Breyer posited an "egregious" hypothetical in which a prosecutor charges and convicts a defendant for embezzlement, and then "ask[s] the judge to impose maximum and consecutive sentences because the embezzler murdered his employer." *Id.* at 562. Justice Breyer acknowledged that the unfairness of such a ploy could be remedied by "use of a 'reasonable doubt' standard * * * and invocation of the Due Process Clause." *Id.* at 562-563; accord *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting) (similar). This case, in which petitioner's sentence was more than tripled based on a murder of which the jury acquitted him, obviously implicates the concerns Justice Breyer identified.

A court's reliance on acquitted conduct also implicates due process concerns because it increases the risk of inaccurate sentencing. Even when a defendant has previously been convicted of a crime, this Court has cautioned that reliance on facts underlying those prior convictions may raise concerns about "unfairness" and lead to "error." *Mathis* v. *United States*, 579 U.S. 500, 501 (2016). Those same accuracy concerns obviously apply when the court relies on facts underlying prior jury acquittals, *i.e.*, facts that the jury determined the prosecution had failed to prove. See *Townsend* v. *Burke*, 334 U.S. 736, 740-741 (1948) (saying of person whose sentence was enhanced because of acquitted conduct, "this prisoner was sentenced on the basis of assumptions concerning his criminal record *which were materially untrue*. Such a result * * * is inconsistent with due process of law, and such a conviction cannot stand." (emphasis added)).

Lastly, some jurists have written that the consideration of acquitted conduct undermines "the notice requirement that is at the heart of any criminal

proceeding." *Canania*, 532 F.3d at 777 (Bright, J., concurring). If the court is permitted to consider acquitted conduct during sentencing, "a defendant can never reasonably know what his possible punishment will be"; after all, "[i]t is not unreasonable for a defendant to expect that conduct underlying a charge of which he's been acquitted to play no determinative role in his sentencing." *Ibid.*

III. This Case Presents An Ideal Vehicle To Resolve The Question Presented

This case presents an excellent vehicle for the Court to consider whether the Fifth or Sixth Amendments prohibit consideration of acquitted conduct at sentencing.

1. The record in this case is straightforward and there are no relevant factual disputes. Petitioner's sentence was indisputably based on conduct of which he was acquitted. The acquitted conduct at issue "constituted entirely free-standing offenses under the applicable law" that was "named in the indictment as a complete criminal charge," *Faust*, 456 F.3d at 1352 (Barkett, J., specially concurring), and the jury unequivocally marked on the verdict form that petitioner was not guilty.

This case also provides an excellent vehicle because, absent consideration of the acquitted conduct, petitioner's sentence would plainly be unreasonable, because the resulting enhancement more than tripled the otherwise-applicable Guidelines range from 57 to 71 months to a sentence of 228 months' imprisonment. App. 57a. If the court's reliance on acquitted conduct was impermissible, such a large variance would be unreasonable and require resentencing. See *Gall* v. *United States*, 552 U.S. 38, 51 (2007). Thus, the issue here is outcome determinative. Further, the other participants in the armed robbery—none of whom went to trial and obtained acquittals of

Perry's murder—received dramatically lesser sentences ranging from time served to 151 months. And Yates, the self-described "mastermind" of the robbery, who led the robbery and who camera footage revealed was the most violent participant, *received no sentence at all* based on the CVS robbery. App. 57a. Petitioner was the *only* participant in the CVS robbery who had his sentence enhanced because of the murder.

2. Petitioner squarely challenged acquitted-conduct sentencing at every step of the litigation, and both courts addressed and rejected his claim. Petitioner argued in the district court that "the Sixth Amendment [and] the Fifth Amendment require[] that a sentence be imposed on that which the defendant has either admitted or been found guilty of," and he objected to consideration of Perry's murder because "that would triple his sentence for conduct that he was acquitted of." App. 36a. The court nonetheless "f[oun]d that the murder of Malik Perry constitute[d] relevant conduct for the robbery committed by this defendant." App. 43a. The court "recognize[d] that the jury acquitted Mr. McClinton of the counts related to the death of Mr. Perry and the robbery of Mr. Perry." App. 42a-43a. But the court concluded that the acquittal did not prevent the court from considering the murder in sentencing because "the jury finding was beyond a reasonable doubt, but the government's burden * * * in a sentencing hearing, is by a preponderance of the evidence * * *." *Id.* at 43a. In making its findings, the judge specifically referenced Yates's testimony that petitioner was the shooter, which the jury refused to credit. App. 53a-54a.

On appeal, petitioner argued that "reliance on *Watts* * * * [for] the use of acquitted conduct under both the Fifth and Sixth Amendments" was "a mistake" because "[t]he issue * * * simply was not presented" in *Watts*, a double jeopardy case. Pet. C.A. Br. 18-20 (quoting

Booker, 543 U.S. at 240). The government identified no procedural shortcomings, addressing petitioner's argument on the merits. The Seventh Circuit squarely addressed the issue, concluded it was bound by circuit precedent holding *Watts* to be controlling, and acknowledged that petitioner had "advocated thoroughly[,] preserving the issue for Supreme Court review." App. 4a-5a.

3. This case presents a particularly stark example of acquitted-conduct sentencing. The acquitted conduct here was not merely traditional "facts enhancing the crime of conviction, like the presence of a gun or the vulnerability of a victim. Rather, they are facts comprising [a] different crime[] * * * ." *Pimental*, 367 F. Supp. 2d at 153 (arguing that judicial factfinding of "facts that amount to separate crimes" of which a person has been acquitted is particularly egregious).

This Court has singled out sentencing enhancements based on murder as the *ne plus ultra* of acquitted-conduct sentencing, perhaps because it has long been considered the most serious crime. In *Blakely*, the Court termed "absurd" the idea "that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it," a result that "[n]ot even *Apprendi*'s critics would advocate." *Blakely*, 542 U.S. at 306-307. And even while dissenting in *Apprendi* and *Blakely*, Justice Breyer twice acknowledged that under "egregious" circumstances, a constitutional violation could arise when conduct found by a preponderance so increases a sentence as "to be a tail which wags the dog of the substantive offense." *Apprendi*, 530 U.S. at 563 (Breyer, J., dissenting) (quotation marks omitted). Both times Justice Breyer chose the same crime to illustrate his example: murder. *Id.* at 562; *accord Blakely*, 542 U.S. at 344 (Breyer, J., dissenting).

This case thus presents the issue of acquitted-conduct sentencing particularly starkly. The sentencing judge more than tripled petitioner's sentence based on its finding that petitioner had killed his best friend Malik Perry, who sometimes lived at his house, for refusing to share $68-worth of stolen drugs—not the hot-tempered government witness who led the robbery and whose girlfriend was sleeping with Perry. This case thus presents a compelling illustration of how acquitted-conduct sentencing eliminates the jury's role "as circuitbreaker in the State's machinery of justice" and instead "relegate[s]" the jury to "a mere preliminary" role of deciding which minor offense will serve as the predicate for "the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 306-307.

In sum, this case presents an ideal opportunity for this Court to address the growing concerns about a persistent practice that has long troubled federal jurists. As Justices Scalia, Thomas, and Ginsburg wrote nearly a decade ago: "This has gone on long enough." *Jones*, 574 U.S. at 949 (Scalia, J., dissenting from denial of cert.). The Court "should grant certiorari to put an end to the unbroken string of cases disregarding" the Constitution and this Court's precedents. *Id.* at 950.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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