No. _____

IN THE

Supreme Court of the United States

ALBERT LAMONT HECTOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether sentences based on acquitted conduct violate the Fifth Amendment's Due Process Clause or Sixth Amendment's jury-trial guarantee, a question that has caused a split between the federal appeals courts and decisions of multiple state high courts.

PARTIES AND PROCEEDINGS

All parties to the proceedings are listed in the caption. The petitioner is not a corporation.

This case arises from the following proceedings in the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit: *United States v. Albert Lamont Hector*, No. CR 16-00486-PA (C.D. Cal.), and *United States v. Albert Lamont Hector*, Ninth Cir. No. 19-50290 (9th Cir. 2021).

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- v. -

UNITED STATES OF AMERICA,
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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Albert Lamont Hector, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum disposition of the United States Court of Appeals for the Ninth Circuit is not reported in the Federal Reporter, but can be found at 846 Fed. Appx. 487 (9th Cir. 2021). Pet. App. 1a-5a (copy of slip opinion). The sentencing decisions of the district court are unreported; transcripts of the original sentencing and re-sentencing hearings are included in the appendix. Pet. App. 6a-52a.

JURISDICTION

The Ninth Circuit entered its memorandum decision and judgment on February 26, 2021. This petition is timely filed pursuant to Sup. Ct. R. 13 and this Court's Order dated March 19, 2020, extending the deadline to file any petition for a writ of certiorari due on or after the date of the order to 150 days from the date of the lower court judgment, in light of the ongoing public health concerns relating to COVID-19. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

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[.]

U.S.S.G. § 2K2.1(b)(6)(B) provides, in relevant part:

Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(b) Specific Offense Characteristics

(6) If the defendant-- * * *

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels.

STATEMENT OF THE CASE

Offense Conduct.

In February 2016, law enforcement received information that drug sales were occurring at the southeast corner apartment on the first floor of an apartment complex located on West 60th Street in Los Angeles, California where petitioner Albert Lamont Hector resided. (PSR ¶ 10).[1] On February 23, 2016, law enforcement conducted surveillance of the location and observed several individuals walking to the window and conducting activities which appeared consistent with narcotic purchases. (PSR ¶ 10; ER 79-81). Based on that activity and the anonymous tip police had received, police decided to use a confidential informant ("CI") to conduct a purchase of drugs at that location on March 9, 2016. (ER 82). On March 9, 2016, the CI purportedly went to the southeast window of the apartment complex and purchased two rocks of crack cocaine for $20. (PSR ¶ 45). Following the purchase, police obtained a search warrant for Apartment 3 of the complex. (PSR ¶ 45).

On March 18, 2016, law enforcement engaged in an operation to execute the search warrant at the location. Prior to executing the warrant, the CI again went to the south facing window of unit No. 3 in the apartment complex, and purchased cocaine from Mr. Hector for $40. (PSR ¶ 11). Following the transaction, the CI

[1] "PSR" refers to the Presentence Investigation Report prepared by the U.S. Probation Office in this case which was filed under seal in the Ninth Circuit. "ER" followed by a number refers to the applicable page in the Appellant's Excerpts of Record filed in the Ninth Circuit.

informed law enforcement that he purchased crack cocaine from the same individual as the March 9, 2016 transaction. (PSR ¶¶ 45, 46; ER 41-44). Shortly thereafter, police executed the warrant on the apartment. Police knocked and announced themselves and five seconds later breached the door with ten police officers participating in the search. (PSR ¶12; ER 92). When they entered, Mr. Hector was sitting on the couch in the living room. (ER 92). A search of the residence recovered five rocks of cocaine which were hidden in a magnetic "hide-a-key" box at the back of the microwave in the kitchen. (ER 100).

The crack cocaine purchased by the CI on March 18 had a net weight of 0.33 grams; the crack cocaine found in the hide-a-key during the execution of the search warrant had a net weight of 0.84 grams. (PSR ¶¶ 14, 15). Police also recovered $125 from a drawer in the kitchen of Mr. Hector's apartment. (ER 113).

A gun was found in the living room under a couch cushion together with Mr. Hector's wallet. (ER 95-96, 214-215, 405, 415, 416).

On July 12, 2016, a six-count indictment was filed in the Central District of California charging Mr. Hector with distribution of and possession with intent to distribute cocaine base in the form of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C) [Counts One, Two and Three], possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i) [Count Four], and two counts of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1) [Counts Five and Six]. (ER 56-65). On October 27, 2016, Mr. Hector was found guilty following a jury trial of counts

two (distribution of crack cocaine on March 18, 2016), three (possession with intent to distribute crack cocaine on March 18, 2016), and five (being a felon in possession of a firearm and/or ammunition on March 18, 2016), but he was acquitted of count one (distribution of crack cocaine on March 18, 2016) and count four (possession of a firearm in furtherance of a drug trafficking crime); count six, which had been severed from the trial, was dismissed without prejudice on motion of the government. (PSR ¶¶ 1, 6, 7).

Probation Office Sentencing Recommendation.

The Probation Office calculated a combined adjusted offense level of 24 and a criminal history category of V, resulting in a guideline imprisonment range of 92 to 115 months. (PSR ¶¶ 23-44, 113). The Probation Office expressly recommended against imposition of a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) for possession of a firearm in connection with another felony offense, noting that "the firearm was not found with [Hector] while committing the drug distribution offense," and that the jury had acquitted Mr. Hector of that very conduct. (PSR ¶ 25).

Original Sentencing.

At Mr. Hector's original sentencing, the government argued that a four-level enhancement under § 2K2.1(b)(6)(B)—for possession of a firearm or ammunition in connection with another felony offense—was warranted, and also argued that an obstruction of justice enhancement should also apply. (ER 447-448). It sought a sentence of 151 months imprisonment. (ER 449). Although the court acknowledged

that Mr. Hector was not often in reach of the gun, and that it was "not too persuaded" that what police found when they entered Mr. Hector's apartment was "evidence that [Mr. Hector] may have had a gun," it granted the government's request and imposed the four-level enhancement. (Pet. App. 37a, 39a). But the court rejected the request for an obstruction of justice enhancement. (Pet. App. 39a-41a).

Although Mr. Hector had challenged the court's application of the four-level enhancement given that it was based on acquitted conduct, among other reasons, and sought a sentence of 92 months imprisonment, citing a variety of mitigating factors, including the fact the "overall quantity of crack cocaine that he's distributed over the years" are "incredibly small quantities," "small rock quantities," (Pet. App/ 42a-43a), the district court determined that the advisory guidelines sentencing range was 130 to 162 months, and sentenced Mr. Hector to 130 months imprisonment on each count, all to run concurrently. (Pet. App. 48a, 51a).

Mr. Hector appealed to the Ninth Circuit. On appeal (Ninth Cir. No. 17-50009), the Ninth Circuit vacated Mr. Hector's sentence and remanded for a full resentencing. *United States v. Hector*, 772 Fed. Appx. 547 (9th Cir. 2019) (unpublished).

Re-Sentencing.

Following the Ninth Circuit's remand for a full resentencing, the government "reassert[ed] and submit[ed] on the facts and arguments set forth in its prior sentencing memorandum" and requested a total sentence of 130 months

imprisonment. (ER 436). Mr. Hector again requested a 92 month sentence, focusing on the significant rehabilitative efforts he had made during the past forty months of imprisonment. (ER 451-459). He also "renew[ed] all of [his] prior arguments and objections, including to the four-level enhancement. (Pet. App. 13a).

The court indicated that it previously applied "the four-level enhancement for the firearm, and intend[ed] to employ it, again, for the same reasons that were given." (Pet. App. 12a).

After hearing from Mr. Hector, the court stated that it "adopts the factual finding and the guideline application set forth in the presentence report, finds that the advisory guidelines establish a total offense level of 28, a Criminal History Category of five which results in an advisory sentencing guideline range of 130 to 162 months of incarceration." (Pet. App. 17a). The court then indicated that it "believes that the previous sentence of 130 months of imprisonment was appropriate then, and it's appropriate now." (Pet. App. 19a). It thereafter imposed a total sentence of 130 months imprisonment, consisting of 130 months on counts two and three, and 120 months on court five, all to run concurrently, to be followed by three years of supervised release on each count, all to run concurrently. (Pet. App. 22a).

Ninth Circuit Decision.

On appeal, Mr. Hector again argued, as relevant here, that the district court erred in imposing a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) for possession of a firearm in connection with another felony offense because, among

other things, the jury had acquitted Mr. Hector of that very conduct, which is why the Probation Office had not recommended imposition of the enhancement. Ninth Cir. Appellant's Opening Br., *United States v. Hector*, 2020 WL 1032613, at *15-*21. And while the government insisted that under *United States v. Watts*, 519 U.S. 148, 155 (1997), a judge may consider acquitted conduct at sentencing, Ninth Cir. Gov't's Answering Br., *United States v. Hector*, 2020 WL 3476396, at *26-*27, Mr. Hector maintained that use of such acquitted conduct violates the Fifth Amendment Due Process Clause and the Sixth Amendment jury-trial right, and that the Supreme Court has never squarely addressed 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, Ninth Cir. Appellant's Reply Br., *United States v. Hector*, 2020 WL 6120261, at *12-*14.

The Ninth Circuit affirmed application of the enhancement for possessing a firearm or ammunition in connection with another felony offense. Pet. App. 2a-4a. The court concluded, with respect to the Fifth and Sixth Amendment arguments,

> Even though the jury found Hector not guilty of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(c), the application of the enhancement did not violate Hector's due process and Sixth Amendment rights. "[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." *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam); *see also United States v. Mercado*, 474 F.3d 654, 657 (9th Cir. 2007). The district court found the requisite conduct by clear and convincing evidence.

Pet. App. 3a-4a.

REASONS FOR GRANTING THE WRIT[2]

I. A SPLIT EXISTS BETWEEN THE FEDERAL CIRCUIT COURTS AND MULTIPLE STATE HIGH COURTS OVER WHETHER SENTENCES BASED ON ACQUITTED CONDUCT VIOLATE THE FIFTH AND SIXTH AMENDMENTS.

This Court has never squarely addressed 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. In *United States v. Watts*, 519 U.S. 148, 154 (1997), a divided Court held only that taking acquitted conduct into account at sentencing does not violate the double jeopardy clause of the Fifth Amendment. *See United States v. Booker*, 543 U.S. 220, 240 n.4 (2005) (recognizing that *Watts* decided "a very narrow question"). Nevertheless, since then "[n]umerous courts of appeals [have] assume[d] that *Watts* controls the outcome of both the Fifth and Sixth Amendment challenges to the use of acquitted conduct." *United States v. White*, 551 F.3d 381, 392 n.2 (6th Cir. 2008) (en bane) (Merritt, J., dissenting, joined by five others).[3] But at the same time, multiple state high courts have concluded

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[2] In addition to the arguments below, petitioner adopts by reference the arguments presented by the petitioner in his certiorari petition in *Erick Allen Ogby v. United States*, No. 20-1693, a petition raising the identical question as presented here, along with the arguments by his amici in their briefs supporting the granting of certiorari. The *Ogby* petition is currently pending in this Court (and has currently been distributed for the Court Conference of 9/27/2021).

[3] *See United States v. Gobbi*, 471 F.3d 302, 313-14 (1st Cir. 2006); *United States v. Vaughn*, 430 F.3d 518, 526-27 (2d Cir. 2005), *cert. denied*, 547 U.S. 1060 (2006); *United States v. Ciavarella*, 716 F.3d 705, 735-36 (3d Cir. 2013), *cert. denied*, 571 U.S. 1239 (2014); *United States v. Grubbs*, 585 F.3d 793, 798-99 (4th Cir. 2009); *United States v. Farias*, 469 F.3d 393, 399-400 & n.17 (5th Cir. 2006), *cert. denied*, 549 U.S. 1272 (2007); *United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc), *cert. denied*, 556 U.S. 1215 (2009); *United States v. Waltower*, 643 F.3d 572,

that use of acquitted conduct at sentencing *does* violate the Fifth and Sixth Amendments, including, most recently, the Michigan Supreme Court in 2019. *See People v. Beck*, 939 N.W.2d 213 (Mich. 2019); *State v. Cobb*, 732 A.2d 425, 442 (N.H. 1999); *Bishop v. State*, 486 S.E.2d 887, 897 (Ga. 1997); *State v. Marley*, 364 S.E.2d 133, 138 (N.C. 1988). It is long past time that this Court finally address these unanswered questions and resolve the conflict.

Indeed, for several years, multiple Justices of this Court and other federal judges have questioned whether using acquitted conduct at sentencing comports with due process and the right to a jury trial, urging the Supreme Court to "take up this important, frequently recurring, and troubling contradiction in sentencing law." *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in denial of rehearing en banc); *see also id.* at 929 ("[T]he time is ripe for the Supreme Court to resolve the contradictions in Sixth Amendment and sentencing precedent, and to do so in a manner that ensures that a jury's judgment of acquittal will safeguard liberty as certainly as a jury's judgment of conviction permits its deprivation.") (Millett, J., concurring in denial of rehearing en banc). In 2014, Justice Scalia, joined by Justices Thomas and Ginsburg, argued that it was time for

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575-78 (7th Cir.), *cert. denied*, 565 U.S. 1019 (2011); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States v. Mercado*, 474 F.3d 654, 656-58 (9th Cir. 2007), *cert. denied*, 552 U.S. 1297 (2008); *United States v. Magallanez*, 408 F.3d 672, 683-685 (10th Cir.), *cert. denied*, 546 U.S. 955 (2005); *United States v. Siegelman*, 786 F.3d 1322, 1332-33 & n.12 (11th Cir. 2015), *cert. denied*, 577 U.S. 1092 (2016); *United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1140 (2009).

this Court "to put an end to the unbroken string of cases disregarding the Sixth Amendment" by enhancing sentences based on acquitted conduct, proclaiming, "[t]his has gone on long enough." *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (dissenting from denial of *certiorari*). Similarly, in *Bell*, then-Judge, now-Justice Kavanaugh observed that "[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." *Id.* at 928 (Kavanaugh, J., concurring in denial of rehearing en banc); *see also United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part) (noting "good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness," and that the Supreme Court can "fix it"); *United States v. Henry*, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring) (explaining that it is an "oddity," given the *Apprendi* rule, that "courts are still using *acquitted* conduct to increase sentences beyond what the defendant otherwise could have received"). And then-Judge, now Justice Gorsuch, relying on the *Jones* dissent, observed that "[i]t is far from certain whether the Constitution allows" the use of uncharged or acquitted conduct at sentencing. *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.).

Judge Bright has argued that "the use of acquitted conduct to enhance a defendant's sentence should be deemed unconstitutional under both the Sixth Amendment and the Due Process Clause of the Fifth Amendment." *United States v.*

Lasley, 832 F.3d 910, 920-21 (8th Cir. 2016) (Bright, J., dissenting) (noting also that "consideration of 'acquitted conduct' undermines the notice requirement that is at the heart of any criminal proceeding"). And even in the Ninth Circuit, it's been argued that use of acquitted conduct at sentencing is unconstitutional. *Mercado*, 474 F.3d at 663 (B. Fletcher, J., dissenting). Numerous federal judges agree. *See, e.g.*, *United States v. Frederickson*, 988 F.3d 76, 95 (1st Cir. 2021) (Barron, J., dissenting); *United States v. Sumerour*, No. 3:18-CR-582, 2020 WL 5983202, at *4 (N.D. Tex. Oct. 8, 2020) (Scholer, J.) ("[I]f the Court were to accept the Government's argument . . . the Court would effectively undermine the jury's role and render meaningless its unanimous 'not guilty' verdict . . ."); *United States v. Bertram*, No. 3:15-cr-00014, 2018 WL 993880, at *6 (E.D. Ky. Feb. 21, 2018) (Van Tatenhove, J.) ("[T]he long democratic tradition of using juries as fact finders is central to maintaining confidence in the process. Juries almost always get it right. And judges are wise to respect that . . .") *aff'd in part, vacated in part, remanded*, 900 F.3d 743 (6th Cir. 2018); *United States v. Canania*, 532 F.3d 764, 778 (8th Cir. 2008) (Bright, J., concurring); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring); *United States v. Safavian*, 461 F. Supp. 2d 76, 83 (D.D.C. 2006) (Friedman, J.); *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) (Kelley, J.); *United States v. Coleman*, 370 F. Supp. 2d 661, 671

(S.D. Ohio 2005) (Marbley, J.); *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005) (Gertner, J.).[4] That is the better view.

And that better view has been adopted by multiple state high courts, thus creating a conflict with the federal courts of appeals that have misinterpreted *Watts* and other precedents of this Court as permitting the use of acquitted conduct under the Fifth Amendment's Due Process Clause and the Sixth Amendment's jury-trial guarantee.

In *Beck*, 939 N.W.2d at 225, the Michigan Supreme Court held that the Fifth and Sixth Amendments bars sentencing courts from using acquitted conduct to enhance a defendant's sentence, explaining that "when 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 a lesser standard without violating due process. In so holding, the court concluded that neither this Court's decisions in "*McMillan*[5] nor *Watts* requires us to reject the defendant's argument that the use of acquitted conduct to sentence a

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[4] Even before *Watts*, several judges on the federal courts of appeals expressed doubts about the use of acquitted conduct at sentencing. *See, e.g.*, *United States v. Lombard*, 102 F.3d 1, 5 (1st Cir. 1996); *United States v. Baylor*, 97 F.3d 542, 551 (D.C. Cir. 1996) (Wald, J., concurring specially); *United States v. Silverman*, 976 F.2d 1502, 1527 (6th Cir. 1992) (Merritt, J., dissenting); *id.* at 1533-34 (Martin, J., dissenting); *United States v. Lanoue*, 71 F.3d 966, 984 (1st Cir. 1995); *United States v. Boney*, 977 F.2d 624, 647 (D.C. Cir. 1992) (Randolph, J., dissenting in part, concurring in part).

[5] *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

defendant more harshly violates due process." *Id.* at 224. It explained that some other state courts have similarly concluded that "reliance on acquitted conduct at sentencing violates due process, grounding that conclusion in the guarantees of fundamental fairness and the presumption of innocence." *Id.* at 225 (citing *State v. Cote*, 129 N.H. 358, 375, 530 A.2d 775 (1987) (concluding that "the presumption of innocence is as much ensconced in our due process as the right to counsel" (citing *Coffin v. United States*, 156 U.S. 432 (1895)); *State v. Marley*, 321 N.C. 415, 425, 364 S.E.2d 133 (1988) (also citing *Coffin* in support of its conclusion that "due process and fundamental fairness precluded the trial court from aggravating defendant's second degree murder sentence with the single element—premeditation and deliberation—which, in this case, distinguished first degree murder after the jury had acquitted defendant of first degree murder")).

While recognizing that its holding represents a "minority position," it also relied on the numerous federal judges cited above in reaching its conclusion, citing "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." *Id.* at 225-26.[6]

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[6] Among the commentators relied on by the Michigan court were: Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can be Done About It*, 49 *Suffolk Univ. L. Rev.* 1, 25 (2016) (quoting other sources for the proposition that "[t]he use of acquitted conduct has been characterized as, among other things, 'Kafka-esque, repugnant, uniquely malevolent, and pernicious[,]' 'mak[ing] no sense as a matter of law or logic,' and . . . a 'perver[sion] of our system of justice,' as well as 'bizarre' and 'reminiscent of *Alice in Wonderland*' "); Eang L. Ngov, *Judicial Nullification of Juries: The Use of Acquitted Conduct at Sentencing*, 76 *Tenn. L. Rev.* 235, 261 (2009) ("[T]he jury is

Just as the Michigan Supreme Court concluded that "[t]his ends here," with respect to criminal sentencings in Michigan state courts *id.* at 226, so should this Court hold for the nation.

II. SENTENCES BASED ON ACQUITTED CONDUCT, SUCH AS MR. HECTOR RECEIVED, VIOLATE THE FIFTH AND SIXTH AMENDMENTS.

Mr. Hector's 130-month sentence violates both the Fifth Amendment's Due Process Clause and the Sixth Amendment's jury-trial right. Based solely on the conduct for which he was acquitted, Mr. Hector's advisory guidelines range as calculated by the Probation Office was 92 to 115 months imprisonment (based on a total offense level of 24, in criminal history category V). (PSR ¶ 113). But the district court increased Mr. Hector's guidelines range by adding a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) for possession of a firearm in connection with another felony offense, even though Mr. Hector had been acquitted at trial of that very conduct (and the Probation Office had expressly declined to include that enhancement because it was based on acquitted conduct). (PSR ¶¶ 24-25; Pet. App. 2a-4a, 12a, 32a-39a). As a result, Mr. Hector's advisory guidelines range increased to 130 to 162 months (based on a total offense level of 28, in

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essentially ignored when it disagrees with the prosecution. This outcome is nonsensical and in contravention of the thrust of recent Supreme Court jurisprudence."); Erica K. Beutler, *A Look at the Use of Acquitted Conduct at Sentencing*, 88 *J. Crim. L. & Criminology* 809, 809 (1998) (observing that "[t]he use of acquitted conduct in sentencing raises due process and double jeopardy concerns that deserved far more careful analysis than they received" in *Watts* and noting "the fundamental differences between uncharged and acquitted conduct which trigger these constitutional concerns"). *Beck*, 939 N.W. at 226.

criminal history category V), and the court sentenced Mr. Hector to a total of 130 months imprisonment, the low-end of the adjusted, increased guidelines range. (Pet. App. 21a-22a, 47a-48a). But because a judge, rather than a jury, found facts essential to his punishment—and that sentencing judge expressly rejected the jury's contrary findings which led to Mr. Hector's acquittal for that conduct—Mr. Hector's sentence is unconstitutional.

Indeed, as a group of former federal district court judges and law professors recently explained, "[t]here is little historical support for sentencing courts relying upon acquitted conduct." Br. of Fmr. Fed'l Dist. Ct. Judges & Law Profs. as Amici Curie in Support of Petioner, *Osby v. United States*, No. 20-1693, 2021 WL 2917700, at *4 (citing Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 *St. John's L. Rev.* 1415, 1444, 1452 (2011) (explaining there was no apparent sentencing based on acquitted conduct before 1970, fewer than 10 cases addressed the issue prior to the enactment of the federal Sentencing Guidelines, but there were 93 cases in the decade that followed, and the practice continues)). The right to a jury trial developed as a "check or control" on executive power—an essential "barrier" between "the liberties of the people and the prerogative of the crown." *Duncan v. Louisiana*, 391 U.S. 145, 151, 156 (1968) (trial by jury is an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"); *see also Jones v. United States*, 526 U.S. 227, 246 (1999) (quoting Blackstone's characterization of "trial by jury as 'the grand bulwark' of English liberties"). "Permitting judges to sentence on

the basis of acquitted conduct is deeply at odds with this sacred right as it has been understood and applied throughout our legal and constitutional history." Br. of Cato Institute as Amicus Curie Supporting Petitioner, *Osby v. United States*, No. 20-1693, 2021 WL 2917697, at *3. And "[w]hen judges sentence on the basis of acquitted conduct, they fundamentally undermine the community's duty and prerogative to oversee the administration of criminal justice." *Id.*, Br. of Cato Inst., at *6. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches," the "jury trial is meant to ensure [the people's] control in the judiciary," and constitutes a "fundamental reservation of power in our constitutional structure." *Id.*, Br. of Cato Inst., at *6 (quoting *Blakely v. Washington,* 542 U.S. 296, 306 (2004) (cleaned up)). "By providing an 'opportunity for ordinary citizens to participate in the administration of justice,' the jury trial 'preserves the democratic element of the law,' and "places the real direction of society in the hands of the governed,'" *Id.*, Br. of Cato Inst., at *6-*7 (quoting *Powers v. Ohio,* 499 U.S. 400, 406-07 (1991); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 88 (1998) (quoting Alexis De Tocqueville, *Democracy In America* 293-94 (Phillips Bradley ed. 1945))).

The Ninth Circuit, as every other federal circuit has held, reads this Court's decision in *Watts* as permitting the use of acquitted conduct at sentencing. (Pet. App. 3a-4a). But this Court has never actually addressed the question raised in this petition with respect to the Due Process Clause of the Fifth Amendment or the Sixth Amendment jury-trial right; it only addressed the issue on the limited

question of double jeopardy. *See United States v. Booker*, 543 U.S. 220, 240 n.4 (2005) (recognizing that *Watts* decided "a very narrow question"). Properly considering the question under the due process and jury-trial rights of the Fifth and Sixth Amendments makes clear that use of acquitted conduct at sentencing is unconstitutional.

"[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). The Fifth Amendment's Due Process Clause works in concert with the Sixth Amendment's jury trial right to secure the Constitution's guarantee "that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring); *see also Jones*, 526 U.S. at 243 n.6. The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt." *Winship*, 397 U.S. at 364. And this Court has repeatedly affirmed that the Fifth and Sixth Amendments together require that "any fact that increases the penalty for a crime" must be proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see also Blakely*, 542 U.S. at 303. Those facts may be labeled "sentence enhancements," "aggravating factors," or something else altogether. *See Apprendi*, 530 U.S. at 478; *Ring v. Arizona*, 536 U.S. 584, 602 (2002). They may raise the maximum sentence, raise the minimum sentence, or guideline within an authorized

sentencing range. *See Apprendi*, 530 U.S. at 469; *Alleyne v. United States*, 570 U.S. 99, 103 (2013); *Blakely*, 542 U.S. at 301. What matters is that the fact is "essential to the punishment" of a criminal defendant. *Blakely*, 542 U.S. at 301.

As Justice Scalia has explained, the jury-trial right "has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring). Thus, "[i]f you're charged with a crime, the Sixth Amendment guarantees you the right to a jury trial. From this, it follows the prosecutor must prove to a jury all of the facts *legally necessary* to support your term of incarceration." *Hester v. United States*, 139 S. Ct. 509, 509 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (emphasis added). So, "all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610 (Scalia, J., concurring); *see also Alleyne v. United States*, 570 U.S. 99, 114-15 (2013) ("When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury."). "[A]ny increase in a defendant's authorized punishment contingent on the finding of a fact requires a jury and proof beyond a reasonable doubt no matter what the government chooses to call the exercise." *United States v. Haymond*, 139 S. Ct. 2369, 2379 (2019) (cleaned up).

By permitting the district court to significantly increase Mr. Hector's guidelines sentencing range based on conduct that a jury had expressly acquitted him of, and then sentence him on the basis of that acquitted-conduct-based increase, Mr. Hector's Fifth and Sixth Amendment rights were violated and this Court should grant certiorari to address this issue.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR DECIDING WHETHER USE OF ACQUITTED CONDUCT VIOLATES THE FIFTH OR SIXTH AMENDMENTS.

This case is an excellent vehicle for considering the issues presented. The Ninth Circuit squarely addressed the issues presented, relying on its interpretation of this Court's decision in *Watts*, and applying controlling circuit precedent. Pet. App. 3a-4a (citing *Watts*, 519 U.S. at 157; *Mercado*, 474 F.3d at 657). Mr. Hector's guideline sentencing range was significantly increased as a result of the use of acquitted conduct at sentencing—over the objection of the defendant *and* the United States Probation Office—from 92 to 115 months imprisonment, to 130 to 162 months, and he received a sentence of 130 months imprisonment, a sentence at the low-end of that increased guidelines range.

Given the split between the federal circuits and that of the Michigan Supreme Court and of other state high courts (and multiple federal judges) over the question of whether use of acquitted conduct at sentencing violates the Fifth Amendment due process and the Sixth Amendment jury-trial rights, this Court should grant certiorari to resolve this important and recurring question.

CONCLUSION

For all the foregoing reasons, petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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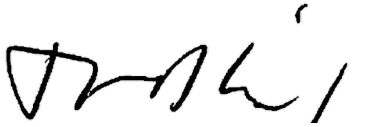

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