No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

CESAR MARTINEZ, *Petitioner*

v.

UNITED STATES, *Respondent*

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

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether basing a criminal defendant's sentence on conduct underlying a charge for which the jury acquitted him violates his rights to due process and to trial by jury under the Fifth and Sixth Amendments to the United States Constitution.

Parties to the Proceedings

The parties to the proceeding below are contained in the caption of the case.

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ON PETITION FOR A WRIT OF CERTIORARI
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Cesar Martinez respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in his case.[1]

Opinion Below

The opinion of the United States Court of Appeals for the First Circuit in this case remains under seal. The sealed opinion is included in the Sealed Supplemental Appendix. The public version of the opinion is included in the appendix and has

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[1] References to the Appendix to this petition will be cited by page number as "App. Page". The Sealed Supplemental Appendix will be cited by page number as "SApp. Page".

been reported in the Federal Reporter as United States v. Sandoval, 6 F.4th 63 (1st Cir. 2021).

Jurisdiction

The United States Court of Appeals for the First Circuit entered its judgment on June 8, 2021. Pursuant to this Court's orders of March 19, 2020 and July 19, 2021, the time to file this petition was extended to 150 days, to November 5, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Constitutional Provisions Involved

The relevant federal constitutional provisions that are involved in this case are the Fifth Amendment and the Sixth Amendment.

The Fifth Amendment 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[.]

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]

Statement of the Case

Relevant Procedural History

The Petitioner was indicted in connection with the activities of an organization known as La Mara Salvatrucha ("MS-13") in the greater Boston area. The indictment charged the Petitioner with conspiring to violate the Racketeer Influenced and Corrupt Organization Act, in violation of 18 U.S.C. § 1962(d). The indictment also charged the Petitioner with conspiracy to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B).

The Petitioner's jury trial in the District Court began on January 30, 2018 and spanned various portions of 19 trial days. The Petitioner was tried with three codefendants, Herzzon Sandoval, Edwin Guzman, and Erick Argueta Larios.

On February 26, 2018, the jury returned a guilty verdict against the Petitioner on the indictment charging him with conspiracy to distribute 500 grams or more of cocaine. The jury found the Petitioner not guilty on indictment accusing him of conspiring to violate the Racketeer Influenced and Corrupt Organization Act.[2]

Judge F. Dennis Saylor sentenced the Petitioner on December 18, 2018. He imposed a sentence of 72 months of incarceration.

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[2] The Petitioner's three codefendants were all convicted of conspiring to violate the Racketeer Influenced and Corrupt Organization Act.

Facts Relevant to the Issues Presented for Review

The FBI's Investigation of MS-13 in Boston

In this case, the FBI's investigation of La Mara Salvatrucha, otherwise known as the MS-13 gang, commenced around 2012. The gang was initially formed in 1979 in California and was comprised of El Salvadorian immigrants who came to the United States fleeing El Salvador's civil war. In the United States, chapters of the MS-13 gang or groups of MS-13 gang members are called "cliques".

The mission of the MS-13 is to kill rivals and to be in control of its territory; MS-13 seeks to be the predominant, if not the only gang in its territory. If there is no question of the person's identity, there is a standing order in MS-13 to kill rival gang members.

Over the course of the FBI's investigation, the requirements to become a "homeboy", a full member of MS-13, became more stringent. In 2012, gang members would commit violent crimes (serious assaults including murder) against rivals and suspected law enforcement cooperators to become a homeboy. By 2015 or 2016, gang members were required to kill a rival or a law enforcement cooperator to become a homeboy.

The FBI brought a cooperating witness from El Salvador to the United States in the 2012 to 2013 timeframe to assist them in their investigation of the MS-13 gang in the Boston area. This

cooperating witness was referred to at trial as "CW-1".

The FBI directed CW-1 to pose as a drug dealer, to attempt to purchase illegal narcotics from MS-13 gang members, and to gather evidence of criminal activity committed by MS-13 gang members. CW1 met a homeboy of the Eastside Locos Salvatrucha (ESLS) clique of MS-13 named Muerto around 2013; CW-1 became friendly and socialized with him.[3] Muerto hung around with CW-1 who was buying and selling drugs. Muerto provided protection for CW-1's drug trafficking.

Muerto introduced CW-1 to the members of his MS-13 clique. In 2014, CW-1 became a member of the Eastside Locos Salvatrucha clique of MS-13. This enabled CW-1 to gather intelligence and evidence of the criminal activities conducted by the gang.

The Eastside Locos Salvatrucha clique held their meetings in an auto repair garage located in Everett, Massachusetts. The Petitioner operated a tow truck business and did mechanical work in this garage. Eventually, CW-1 was able to make video and audio recordings for the FBI of some of those meetings inside the garage.

The Drug Protection Details

The FBI directed CW-1 to create undercover scenarios, called "protection details".[4] CW-1 solicited volunteers to participate

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[3] "Muerto" is the street name of Jose Hernandez-Miguel.

[4] A drug protection detail is an investigative technique where one undercover officer provides a significant amount of

in illegal drug transactions where they would help to protect drug shipments between Massachusetts and New Hampshire ostensibly for different drug traffickers.

On January 21, 2014, at the suggestion of Muerto, CW-1 invited the Petitioner to participate in one such drug protection detail. CW-1 asked the Petitioner to follow CW-1 in a car the Petitioner would himself drive behind CW-1 in order to distract the police if the police tried to pull CW-1 over on a trip from Massachusetts to New Hampshire with the drugs.

The Petitioner participated in the drug protection detail on February 14, 2014. The Petitioner drove behind CW-1, who was in the car with Muerto, from Massachusetts to New Hampshire to protect one kilogram of cocaine. When they arrived in New Hampshire, CW-1 and Muerto pulled into a hotel parking lot where they delivered the one kilogram of cocaine to someone already waiting there. That person, an undercover officer, gave them money. The Petitioner had parked across the street.

After CW-1 and Muerto left the parking lot, the person who received the cocaine called them to complain that the Petitioner was tailing him. CW-1 and Muerto called the Petitioner to ask him what he was doing; the Petitioner said he was only protecting

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narcotics to a confidential witness playing the role of a drug courier; those drugs are then escorted and protected by gang members while being brought to another undercover officer. The movement of the drugs is done under the surveillance of law enforcement.

the person until he reached the highway just to make sure the police were not following him.

The Petitioner and Muerto were each paid $500 for their services.

The Sentencing of the Petitioner

The Government's Sentencing Memorandum

The Government argued "the evidence presented at trial" demonstrated the Petitioner was more dangerous than otherwise suggested by his advisory guidelines sentencing range of 60 to 63 months. App. 120, 121. The Government requested a 120-month sentence, a significant upward departure, based upon evidence of the Petitioner's commission of serious crimes of violence in connection with his involvement with MS-13. App. 120, 121.

The Government recited evidence it offered at trial relating to the racketeering charge of the Petitioner's participation in crimes of violence and gang-related activities:

- The Petitioner went with Muerto to the Maverick Square T Station to hunt for rival gang members. The Petitioner, Muerto, and two other MS-13 members attacked a group of rival gang members with a machete, a baseball bat, and knives before retreating to the Petitioner's home. App. 121.
- The Petitioner drove two MS-13 members to Chelsea where one of them delivered a gun to a third gang member who

used it to commit a murder and to shoot a second victim. The other gang member the Petitioner drove to Chelsea provided armed backup for the crimes. App. 121.

- The Petitioner went to MS-13 meetings where clique business was discussed and where he paid dues used, for among other purposes, to purchase clique firearms. App. 122.
- The Petitioner went to a gang meeting where the members considered whether to promote "Animal", who had previously murdered a gang rival, to become a full member. The Petitioner was at the violent initiation ceremony where Animal was welcomed into MS-13. App. 122.
- The Petitioner participated in a conspiracy to murder CW-1, who was suspected of being a government informant. App. 122.

The Government urged that sentencing the Petitioner to 120 months in prison "is the only sentence that serves general and specific deterrence, promotes respect for the law, and protects the public." App. 5.

The Petitioner's Sentencing Memorandum

The Petitioner objected to the inclusion of activities detailed in his presentence report that were unrelated to the

Petitioner's conviction on the drug offense. App. 125. The Petitioner argued the Government was asking the Court to adopt as aggravating factors the evidence the jury explicitly rejected in returning its verdict of not guilty on the racketeering indictment. App. 128.

The Sentencing of the Petitioner

Judge Saylor stated the law permits him to consider acquitted conduct in sentencing. App. 143. Judge Saylor acknowledged considerable caution was advisable with respect to sentencing based upon acquitted conduct so as not to undermine public confidence in the sentencing process. App. 143. But he indicated he would consider some of the acquitted conduct to some degree. App. 143.[5]

The Government essentially reiterated the same arguments it offered in its Sentencing Memorandum. App. 144-150, 158-159. The Petitioner challenged the credibility of the Government's witnesses and argued that relevant conduct considerations for sentencing on the drug conviction did not encompass any of the racketeering aspects of the case. App. 151-158.

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[5] The Petitioner did not dispute the calculation of the guidelines sentencing range of 60 to 63 months after consideration of the applicable five-year mandatory minimum sentence. App. 144. As Judge Saylor noted, it was "basically a drug guideline calculation without regard to anything else." App. 144.

Judge Saylor reviewed some of the conduct underlying the acquitted racketeering charge; he virtually ignored the evidence relating to the Petitioner's conviction for participating in the drug protection detail. App. 159-161. Judge Saylor concluded:

> So, again, I'm concerned about undermining the jury verdict entirely. I don't know what the jury verdict meant exactly. I don't know what they had trouble with. I don't have to accept it, but I want to give it, again, considerable degree of deference under the circumstances.
>
> I'm going to at the end of the day depart upward but only to 72 months. I think that I'm essentially adding a year to the mandatory minimum. I think that reflects the fact that I think it's clear to me anyway that Mr. Martinez is more dangerous an individual than the guidelines or his criminal record suggest.
>
> I certainly have the power to give more. Mr. Pohl makes a credible effort that he deserves more, and he may well be right, but, again, I am troubled by the acquittal, and I think under the circumstances that's what I'm going to do, and I will, of course, give the four-year term of supervised release.

App. 162.

The Decision of the Court of Appeals

The United States Court of Appeals for the First Circuit affirmed the Petitioner's conviction and sentence. The Petitioner argued Judge Saylor's consideration of acquitted conduct violated the Fifth Amendment's Due Process Clause and Sixth Amendment's right to trial by jury. The Court of Appeals declined to revisit its existing precedent upholding the use of acquitted conduct at sentencing. App. 115-118; SApp. 114-117.

Reasons for Granting the Petition

I. Introduction

The sentencing court considered conduct underlying a charge for which the jury acquitted the Petitioner. The use of acquitted conduct at sentencing violates fundamental principles of due process and the right to a jury trial. Certiorari should be granted because the time has come for this Court to end the constitutionally intolerable use of acquitted conduct at sentencing.

II. The Supreme Court has never foreclosed challenges to the use of acquitted conduct at sentencing under the Fifth Amendment's Due Process Clause or the Sixth Amendment's right to a trial by jury. The issue of using acquitted conduct at sentencing is ripe for review by this Court.

This Court has never squarely considered whether the use of acquitted conduct at sentencing is forbidden by the Due Process Clause of the Fifth Amendment or by the jury trial guarantee of the Sixth Amendment. In United States v. Watts, 519 U.S. 148, 154-157 (1997)(per curiam), a divided Court held in a summary disposition that the use of acquitted conduct at sentencing does not offend the Double Jeopardy Clause of the Fifth Amendment. Subsequently, in United States v. Booker, 543 U.S. 220, 240 & n.4 (2005), the Court recognized that Watts was irrelevant to the use of acquitted conduct at sentencing under the Sixth Amendment as

it "presented a very narrow question" regarding the Double Jeopardy Clause of the Fifth Amendment.

The courts of appeals have interpreted Watts to foreclose all constitutional challenges to the use of acquitted conduct grounded on due process and the right to trial by jury. See United States v. White, 551 F.2d 381, 392 n.2 (6th Cir. 2008)(en banc)(Merritt, J. dissenting, jointed by five others)("Numerous courts of appeals assume that *Watts* controls the outcome of both the Fifth *and* Sixth Amendment challenges to the use of acquitted conduct, even after *Booker* explicitly limited *Watts's* reach to the Fifth Amendment double jeopardy question presented in that case and made it clear that *Watts* does not decide any issue other than double jeopardy.").[6]

In the years since the Watts decision, other Justices have called for the Supreme Court to examine the continuing use of acquitted conduct at sentencing, demonstrating that this

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[6] Every federal court of appeals with criminal jurisdiction has sanctioned the use of acquitted conduct for sentencing purposes. See, e.g., United States v. Gobbi, 471 F.3d 302, 313-314 (1st Cir. 2006); United States v. Vaughn, 430 F.3d 518, 526-527 (2d Cir. 2005); United States v. Ciavarella, 716 F.3d 705, 735-736 (3rd Cir. 2013); United States v. Grubbs, 585 F.3d 793, 798-799 (4th Cir. 2009); United States v. Farias, 469 F.3d 393, 399-400 & n.17 (5th Cir. 2006); United States v. White, 551 F.3d 381, 386 (6th Cir. 2008)(en banc); United States v. Waltower, 643 F.3d 572, 575-578 (7th Cir. 2011); United States v. High Elk, 442 F.3d 622, 626 (8th Cir. 2008); United States v. Mercado, 474 F.3d 654, 656-658 (9th Cir. 2007); United States v. Magallanez, 408 F.3d 672, 683-685 (10th Cir. 2005); United States v. Siegelman, 786 F.3d 1322, 1332-1333 & n.12 (11th Cir. 2015); United States v. Settles, 530 F.3d 920, 923-924 (D.C. Cir. 2008).

constitutional issue remains very much an open question in Fifth Amendment and Sixth Amendment jurisprudence.

In Jones v. United States, 574 U.S. 948 (2014), Justice Scalia, dissenting from the denial of certiorari and joined by Justices Thomas and Ginsburg, addressed the need for the Court resolve whether sentencing based on acquitted conduct is permissible under the Fifth Amendment's Due Process Clause and the Sixth Amendment's right to a jury trial. That same year, in United States v. Sabillion-Umana, 772 F.3d 1328, 1331 (10th Cir. 2014), then-Judge Gorsuch, citing Justice Scalia's dissent in Jones, suggested "[i]t is far from certain whether the Constitution allows" a judge to increase a defendant's sentence "based on facts the judge finds without the aid of a jury or the defendant's consent", which would certainly include sentencing based upon facts presented to a jury and for which the defendant was acquitted.

The following year, in United States v. Bell, 808 F.3d 926 (D.C. Cir. 2015), then-Judge Kavanaugh wrote, "Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." 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)(recognizing "there are good reasons to be concerned" about acquitted conduct sentencing).

In short, this Court has never foreclosed challenges to the use of acquitted conduct at sentencing under the Due Process Clause and the Sixth Amendment's right to a trial by jury. Only this Court can clarify Watts. The issue of acquitted conduct sentencing is ripe for reexamination.

III. The Supreme Court's sentencing decisions since Watts emphasize the central role of the jury in the criminal justice system.

In the more than twenty years since Watts was decided, the Supreme Court has issued numerous opinions addressing the role of the Sixth Amendment in criminal sentencing. See e.g., Apprendi v. New Jersey, 530 U.S. 466 (2000)(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 v. Washington, 542 U.S. 296 (2004)(jury must find all facts legally essential to sentence); United States v. Booker, 543 U.S. 220 (2005)(Sentencing Guidelines subject to Sixth Amendment); Rita v. United States, 551 U.S. 338 (2007) (presumption of reasonableness for Guidelines sentences comports with Sixth Amendment); Cunningham v. California, 549 U.S. 270 (2007)(jury must find facts exposing defendant to longer sentence); Southern 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 sentence); 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 period of supervised release).

Some of these cases also cite the Due Process Clause in emphasizing that the power of the court to sentence a defendant flows from the authorization given by the jury's verdict. See e.g., Hurst v. Florida, 577 U.S. at 97; Alleyne v. United States, 570 U.S. 103-104. But collectively, it is clear these cases, all decided since Watts, "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).

IV. The Sixth Amendment's right to trial by jury prohibits a judge from relying on acquitted conduct in sentencing a defendant.

The right to a jury trial and the right to vote are the two fundamental reservations of power to the citizenry in our constitutional system. See Blakely v. Washington, 542 U.S. 296, 305-306 (2004)(explaining "[j]ust as suffrage ensures the people's ultimate control in the legislature and executive branches, jury trial is meant to ensure their control in the judiciary."). This design ensures "the judge's authority to

sentence derives wholly from the jury's verdict" because "without that restriction, the jury would not exercise the control that the Framers intended." Id. at 306. "[A]llowing 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." United States v. Bell, 808 F.3d at 929 (Millett, J. concurring in denial of rehearing en banc).

Just as important, "[a]n acquittal is accorded special weight", United States v. Di Francesco, 499 U.S. 117, 129 (1980), even if "the acquittal was based upon an egregiously erroneous foundation." Fong Foo v. United States, 369 U.S. 141, 143 (1962). "A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it" and "its finality is unassailable." Yeager v. United States, 557 U.S. 110, 122-123 (2009).

The consideration of acquitted conduct in sentencing denies the jury its constitutionally protected role as the "circuitbreaker in the State's machinery of justice." Blakely v. Washington, 542 U.S. at 306-307. Since Apprendi, where the Court held any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's verdict" is an "element" that must be submitted to a jury, the entire focus at sentencing for constitutional purposes has been on whether a

given sentence exceeds what the jury verdict (or plea) authorizes. Apprendi v. New Jersey, 530 U.S. at 494. See e.g., Hurst v. Florida, 577 U.S. at 102-103 (sentence violates Sixth Amendment where judge increased the punishment authorized by jury based upon her own factfinding); Alleyne v. United States, 570 U.S. at 103 ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt."); United States v. Booker, 543 U.S. at 244 ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."); Blakely v. Washington, 524 U.S. at 303 (defining the "statutory maximum" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*)(emphasis in original); Ring v. Arizona, 536 U.S. at 604 (judge's factual finding of aggravating circumstance exposed defendant to a greater punishment than authorized by jury's verdict in violation of Sixth Amendment).

When an acquittal does not preclude the sentencing judge from relying on the very same facts that the jury already rejected, the acquittal becomes merely advisory. Cf. Hurst v. Florida, 577 U.S. at 94, 100 (holding the Sixth Amendment

requires a jury, not a judge, to find each fact necessary to impose a death sentence and the jury's mere recommendation regarding imposing a death sentence is not the necessary factual finding the constitution requires). "[A]llowing judges to materially increase the length of imprisonment based on facts that were *submitted directly to and rejected by* the jury in the same criminal case is too deep of an incursion into the jury's constitutional role." United States v. Bell, 808 F.3d 926, 930 (2015)(Millett, J., concurring in denial of rehearing en banc)(emphasis in original). See also United States v. Pimental, 367 F. Supp. 2d 143, 152 (D. Mass. 2005) ("[W]hen a court considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize, it considers facts of which the jury expressly disapproved."). The use of acquitted conduct in fashioning a defendant's sentence for his crime of conviction invades the province of the jury, undermines the finality of the jury's verdict, and violates the defendant's Sixth Amendment right to trial by jury.

V. The Fifth Amendment's Due Process Clause prohibits a judge from relying on acquitted conduct in sentencing a defendant.

Sentencing procedures are not "immune from scrutiny" from the constitutional requirements of due process. Beckles v. United States, 137 S. Ct. 886, 896 (2017); Williams v. New York,

337 241, 252 n.18 (1949).[7] The use of acquitted conduct at sentencing also offends the Due Process Clause since, as the Apprendi line of cases demonstrates, the Due Process Clause of the Fifth Amendment works in conjunction with the Sixth Amendment in sentencing. See Jones v. United States, 526 U.S. 227, 243 n.6 (1999)("[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."). See also Alleyne v. United States, 570 U.S. at 104 (same).

"The Due Process Clause 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."

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[7] Principles of due process limit the types of information the court may consider when sentencing the criminal defendant. See Zant v. Stephens, 462 U.S. 862, 885 (1983)(noting due process prohibits sentencing based on race, religion, political affiliation, or other factors that are constitutionally impermissible or irrelevant to the sentencing process); United States v. Tucker, 404 U.S. 443, 447 (1972)(due process prohibits sentencing based upon misinformation regarding defendant's prior convictions which were obtained without counsel); North Carolina v. Pierce, 395 U.S. 711, 725 (1969)(due process prohibits vindictiveness in resentencing after the defendant successfully attacks the conviction by appeal or through collateral proceedings); United States v. Jackson, 390 U.S. 570, 581-583 (1968)(sentencing provisions of federal statute which penalizes defendant's assertion of right to seek jury trial violate due process); Townsend v. Burke, 334 U.S. 736, 741 (1948)(due process prohibits sentencing based upon materially false assumptions regarding criminal record).

In re Winship, 397 U.S. 358, 364 (1970). The reasonable doubt standard also "provides concrete substance for the presumption of innocence". Id. at 363. The use of acquitted conduct at sentencing offends due process because "[a]bsent conviction of a crime, one is presumed innocent" of that crime. Nelson v. Colorado, 137 S. Ct. 1249, 1252 (2017). That presumption of innocence historically "lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895).

Once a defendant is acquitted of a crime, he forever remains entitled to a presumption of innocence with respect to that formerly *alleged* crime. See Nelson v. Colorado, 137 S. Ct. at 1256 (state may not presume consistent with due process that a person adjudged guilty of no crime is "guilty *enough*" for state to retain costs, fees, and restitution paid pursuant to invalid conviction) (emphasis in original). See also Johnson v. Mississippi, 486 U.S. 578, 585 (1988)(once defendant's conviction reversed, unless and until he is retried and convicted, he is presumed innocent of that charge).

The judge's discretion in sentencing should not extend to making factual findings that conflict with a jury's acquittal. The use of acquitted conduct in sentencing a defendant amounts to an egregious circumvention of the constitutional protections afforded by the Due Process Clause.

VI. The enhanced sentence imposed on the Petitioner was based upon acquitted conduct, conduct that was submitted to and rejected by the jury.

At sentencing, the Government continued to insist the Petitioner participated in the crimes of violence and gang-related activity underlying the racketeering indictment despite his acquittal. The Government made a sentencing argument as if it had prevailed at trial on the allegations underlying the racketeering charge.[8] The Government effectively took the opportunity to take a proverbial "second bite at the apple"; that "trivialize[ed]" the jury's principal role because the Government had lost at trial but was still permitted to submit the acquitted conduct to the judge for consideration at sentencing. United States v. Canania, 532 F.3d 764, 776 (8th Cir. 2008)(Bright, J., concurring).

Judge Saylor indicated he would consider some of the acquitted conduct to some degree. App. 143. And he plainly did, although he expressed his reservations about "undermining the jury verdict entirely." App. 162.[9] Nonetheless, there was no other evidence offered at trial (or at sentencing) to indicate

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[8] In its sentencing memorandum, the Government asked the Court to impose a 120-month prison sentence. App. 120, 123. At sentencing, the Government asked the Court for "a sentence that is above the guideline range". App. 144.

[9] Judge Saylor stated, "I don't know what the jury verdict meant exactly. I don't know what they had trouble with. I don't have to accept it, but I want to give it, again, considerable degree of deference under the circumstances." App. 162.

"Mr. Martinez is more dangerous an individual than the guidelines or his criminal record suggest." App. 162.[10]

The Petitioner was prejudiced by Judge Saylor's consideration of acquitted conduct at sentencing when he gave the Defendant an upward departure from 60-63 months to 72 months in prison, or, as Judge Saylor said, "essentially adding a year to the mandatory minimum." App. 162.

The jury's verdict of acquittal on the racketeering charge was its moral determination that the Petitioner should not be punished for that conduct. See Horning v. District of Columbia, 254 U.S. 135, 139 (1920)(Holmes, J.)("[T]he jury were allowed the technical right, if it can be called so, to decide against the law and the facts."); United States ex rel. McCann v. Adams, 126 F.2d 774, 776 (2d Cir. 1942)(L. Hand, J.)("[S]ince if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove.").

The prison sentence Judge Saylor gave the Petitioner based on acquitted conduct overrode the jury's moral determination with respect to that conduct which was its prerogative by constitutional design. See Blakely v. Washington, 542 U.S. 296, 308 (2004)("*Apprendi* carries out this design by ensuring the judge's authority to sentence derives wholly from the jury's

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[10] There was no evidence of violence involved in the Defendant's crime of conviction. Judge Saylor acknowledged the Defendant's criminal history score was zero. App. 144.

verdict. Without that restriction, the jury would not exercise the control the Framer's intended.").

VII. The question presented in this Petition warrants review by this Court. This case is an appropriate vehicle to examine the constitutionality of sentencing based on acquitted conduct.

The record in this case is straightforward. The only issue in dispute at sentencing on the drug conviction was the use of the conduct underlying the racketeering charge for which the Petitioner was acquitted. Judge Saylor said he was "troubled" by the acquittal; the acquitted conduct was plainly dispositive in the resulting above-Guidelines sentence he imposed on the drug conviction.

This Court has declined to examine sentencing based on acquitted conduct. But now there is a clear split in authority between the federal and state appellate courts with respect to this federal constitutional question. See People v. Beck, 504 Mich. 605, 629, 939 N.W.2d 213, 227 (2019)(holding "due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted.").

This question is likely to arise again and again in the future whenever a jury returns a mixed verdict potentially exposing a defendant to an increased sentence on the charge of

conviction based upon the conduct the jury rejected by its not guilty verdict.

The perverse use of acquitted conduct in sentencing undermines the legitimacy of our criminal justice system and diminishes public trust in the courts. The time has come for the Supreme Court to squarely address the important constitutional question presented in this petition.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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