No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

HENRY CERVANTES and JAIME CERVANTES,

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondent.

_____

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

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Questions Presented

As to both petitioners,

1. Whether the federal obstruction of justice statute, 18 U.S.C. §1512(c)(2) (obstruction of an official proceeding), can be applied to street level criminal activity when the activity is unrelated to the administration of other federal laws or interests and no official proceeding is pending?

As to petitioner Henry Cervantes only:

2. Whether the Sixth Amendment right to a jury trial allows a judge to base or enhance a criminal defendant's sentence on conduct underlying a charge for which a jury acquitted the defendant.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Petitioners Henry Cervantes and Jaime Cervantes respectfully petition this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered on June 29, 2021, affirming the judgment of the District Court for the Northern District of California as to petitioner Henry Cervantes, and vacating the sentence of petitioner Jaime Cervantes. Appx. A.

Opinion Below

The decision of the United States Court of Appeals for the Ninth Circuit, affirming petitioners' convictions and Henry Cervantes' sentence is unpublished and is attached as Appendix A to this petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit, affirming petitioners' convictions and Henry Cervantes' sentence was entered on June 29, 2021. Appx. A. This Petition is filed within 90 days of August 26, 2021, the date on which the Ninth Circuit

denied a timely filed petition for rehearing. Appx. B. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii).

The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231. The jurisdiction of the court below was invoked under 28 U.S.C. § 1291.

Statutes, Rules And Constitutional Provisions Involved

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

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed…..

Title 18 U.S.C. § 1512, provides in relevant part:

> . . . .
>
> (c) Whoever corruptly—
>
> (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

> (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,
> shall be fined under this title or imprisoned not more than 20 years, or both.

Statement Of The Case

This case requires the Court's review in two respects. First, the panel decision of the United States Court of Appeals for the Ninth Circuit wrongly extended the breadth of the nexus requirement under 18 U.S.C. § 1512(c)(2), imputing knowledge of non-existent grand jury proceedings to two defendants who attempted to cover up evidence of a violent street crime. The Ninth Circuit's decision violates the principles established by this Court in *United States v. Aguilar,* 515 U.S. 593 (1995) and affirmed in *Marinello v. United States*, 138 S. Ct. 1101 (2018). The Ninth Circuit's decision extends the breadth of section 1512(c)(2) so far that the statute now risks substantial numbers of federal obstruction of justice prosecutions for street level criminal activity unrelated to other federal interests.

Second, the time has come for the Court to review an oft-repeated sentencing practice that undermines both the right to a jury trial and

the integrity of the legal system: the sentencing court's consideration of conduct underlying a charge for which a jury has acquitted the defendant. Current and former Supreme Court Justices have questioned the constitutionality of this practice, while federal circuit judges have commented on its problematic nature. *E.g.*, *Jones v. United States,* 574 U.S. 948, 949 (2014) (Scalia, J., dissenting from denial of certiorari); *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in denial of rehearing en banc); *United States v. Settles,* 530 F.3d 920, 923-24 (D.C. Cir. 2008)(Kavanaugh, J.). This case is an appropriate vehicle to address whether the Sixth Amendment prohibits this practice.

Statement of Relevant Facts

A jury of twelve persons convicted petitioners Henry Cervantes, Jaime Cervantes and two others of a racketeering conspiracy (18 U.S.C. § 1962(d)), which carried, without additional jury findings, a maximum sentence of 20 years.[1] The racketeering conspiracy alleged that the four

1 Henry Cervantes and Jaime Cervantes (who are not related) are two of four defendants who were tried jointly for a variety of federal

defendants and others conspired to conduct the affairs of the Nuestra Familia gang enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1961(1) and (5). The pattern of racketeering activity alleged consisted of murder, extortion and robbery affecting interstate commerce, and obstruction of justice.

Count 1 also alleged several special sentencing factors. In particular, the charging document, the Third Superseding Indictment, alleged that all of the defendants conspired, with malice aforethought, to kill "actual and suspected members of rival gangs, individuals suspected of cooperating with law enforcement, and individuals who defied the will of Nuestra Familia." The indictment specifically alleged that on or about September 9, 2011, Henry Cervantes willfully and intentionally murdered victims 1 and 2, with premeditation and malice, in violation of Cal. Pen. Code §§ 187, 188, and 189.

The indictment also charged and the jury convicted petitioners of obstruction of justice, conspiracy to obstruct justice, the use of fire to

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offenses related to their participation in a gang known as Nuestra Familia.

commit a felony, and a conspiracy to distribute less than 5 grams of methamphetamine, in violation of 21 U.S.C. § 846. The jury was not able to reach a verdict on two VICAR murder charges alleged against petitioner Henry Cervantes.

The facts relating to the acquittal of the special sentencing factor and the conviction of the obstruction charges are closely related. The Third Superseding Indictment alleged that Henry Cervantes killed two people in an Oakland apartment on September 9, 2011.[2] Immediately after the homicides, Henry and a female companion returned to his residence located in an apartment complex he managed where petitioner Jaime Cervantes and cooperating defendants Fernando Rangel and Shane Bowman also lived. Government witnesses testified that when Henry arrived, he was disoriented, injured, and appeared mentally unhinged. He repeatedly told Rangel that "they threw his sister out of the window and if it did happen to me, I would do the same thing."

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2 The jury rejected the conclusion that these murders were committed in aid of racketeering, acquitting Henry of the special sentencing factor.

Rangel testified that Henry told him there was an apartment off Coolidge, where Henry's blood and two dead bodies were present that needed to be cleaned up. The next day, Rangel asked Bowman if he was willing to assist a "homey" – namely Henry - and told him and Jaime that there were two dead bodies in an apartment. Henry gave them directions to the location and the apartment keys. They were supposed to light the bodies on fire.

Jaime Cervantes and Bowman went to the apartment, poured gasoline on the two bodies, and lit them on fire. They left the apartment, threw the gas can out of the window as well as a beanie, gloves and the apartment keys.

Throughout the trial, the government consistently contended that petitioner Henry Cervantes killed two people as part of the racketeering conspiracy charged in the indictment, which killings also comprised the basis for two VICAR murder charges. The jury, however, disagreed. Although the jury convicted Henry Cervantes of the charged racketeering conspiracy, the jury acquitted him of the special sentencing factor which asked for a finding whether the conspiracy he

joined included an agreement to commit murder. The jury rejected the sentencing factor, concluding that Henry Cervantes did not conspire "*with malice aforethought, to commit the murders of the actual and suspected members of rival gangs, individuals suspected of cooperating with law enforcement, and individuals who defied the will of Nuestra Familia.*" The jury also acquitted petitioner Henry Cervantes of a separate conspiracy to commit murder in aid of racketeering, as well as a conspiracy to commit assault with a deadly weapon in aid of racketeering and a related gun charge. The jury convicted both petitioners of conspiracy to and obstruction of justice, and use of fire in the commission of a felony.

Despite the jury's verdict, the district court calculated petitioner Henry Cervantes' guideline sentence based on its conclusion that he had committed two first-degree murders—the very two murders that the jury rejected as the basis for conspiracy to commit murder in aid of racketeering charged in Count 1. The court's finding led to a guideline sentence of life imprisonment. Because petitioner faced a statutory maximum term of 75 years, the court imposed that sentence, achieved

by stacking the statutory maximum sentence for each count of conviction. Had the court not found that petitioner committed two first-degree murders, using a standard of less than beyond a reasonable doubt, the guideline sentence would have been substantially lower, under 20 years. The court thus rendered the multiple jury acquittals a nullity, instead sentencing petitioner as though he had been convicted of first-degree murder and as if his conspiratorial agreement included the agreement to commit murder.

On appeal, petitioners challenged de novo the sufficiency of the evidence to support their convictions for conspiracy to obstruct and obstruction of justice, in violation of 18 U.S.C. §§ 371 and 1512(c)(2). The Court of Appeals affirmed the obstruction convictions, and the related conviction for use of fire to commit obstruction. Appx. A at 20 n.6. The panel found sufficient evidence that petitioners reasonably foresaw they would obstruct an official proceeding, in this case a grand jury, by burning the bodies because Henry had previously been convicted of federal crimes, was on supervised release, and was aware of a pole camera near his residence. Appx. A at 20. The court concluded

that Jaime reasonably should have foreseen he was obstructing a grand jury because, despite never being convicted of a federal crime, he lived in an apartment complex with Henry Cervantes and another gang member who had previously been federally convicted, and because a search disclosed a shoebox in Jaime's apartment containing a stack of documents, a few of which mentioned federal grand juries. Otherwise, the Court of Appeals commented that there was sufficient evidence because the court felt free to assume "that members of a sophisticated prison gang with knowledge of, or personal experience in, the federal criminal justice system would be aware of the use of grand juries." Appx. A at 20.

The Ninth Circuit also affirmed petitioner Henry Cervantes' 75 year sentence which was based on the conclusion that he had committed first-degree murder. The panel wrote

> Even assuming that the special verdict means that the jury acquitted Henry of conspiracy to commit murder as a predicate act in the overall RICO conspiracy charge on which he was convicted, the Sixth Amendment did not preclude the district court from considering Henry's double murder in sentencing him for the RICO conspiracy. We have squarely held that, in sentencing a

> defendant on a RICO conspiracy charge, a district court does not violate the Sixth Amendment by considering relevant conduct associated with other counts on which the defendant was acquitted (such as VICAR acts of violence and conspiracy to commit murder). *United States v. Mercado*, 474 F.3d 654, 656–58 (9th Cir. 2007).

Appx. A at 32. The panel's decision demonstrates the need for this Court to address the constitutionality of using acquitted conduct as the basis for a federal criminal sentence.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit Has Stretched The Statutory Meaning Of Obstructing An Official Proceeding to Allow The Federalization of Any Attempt to Conceal any Street Crime, a Ruling That Conflicts Squarely With Previous Decisions Of This Court.

Title 18 U.S.C. § 1512(c) provides that "whoever corruptly- (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so," is guilty of obstruction of justice. An "official proceeding" includes a federal grand jury. 18 U.S.C. § 1515(a)(1). The official proceeding "need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(f)(1).

As consistently construed by this Court federal obstruction statutes that protect "official proceedings" require an adequate nexus between the defendant's corrupt intent and the proceeding sought to be obstructed. *E.g., Marinello v. United States*, 138 S. Ct. 1101, 1110 (2018); *United States v. Aguilar*, 515 U.S. 593, 599 (1995). As the Court has said: "It is, however, one thing to say that a proceeding 'need not be pending or about to be instituted at the time of the offense,' and quite another to say a proceeding need not even be foreseen." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707-08 (2005). Stated another way, "[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *Aguilar*, 515 U.S. at 599.

This Court declined to impute knowledge of grand jury proceedings to a federal judge, holding that a sitting United States district judge did not obstruct a grand jury under 18 U.S.C. § 1503 by lying to an FBI agent, a potential grand jury witness, even though the judge *knew* of the pending grand jury proceeding. *Aguilar,* 515 U.S. at 599; *see also Arthur Andersen,* 544 U.S. at 707-08. Following *Aguilar's*

requirement, a circuit court has refused to impute knowledge of a grand jury proceeding to a law enforcement officer defendant. *United States v. Young*, 916 F.3d 368, 388 (4th Cir. 2019). In *Young,* the Fourth Circuit vacated the law enforcement officer defendant's conviction, ruling that "the Government's evidence failed to establish that [the defendant] was routinely involved in grand jury proceedings—or, for that matter, had ever testified in such a proceeding." *Id.* Therefore, it was not foreseeable he would obstruct a grand jury by misleading FBI agents. The Seventh Circuit has similarly interpreted section 1512(c)(2). *United States v. Friske*, 640 F.3d 1288, 1292-93 (11th Cir. 2011) (hiding cash did not allow for an interference that a federal forfeiture proceeding was reasonably foreseeable).

In contrast, the Ninth Circuit's conclusion that there were sufficient facts for a jury to infer that petitioners knew they were likely to obstruct a federal grand jury – by setting a fire to cover up a murder – extends a long arm of federal jurisdiction to the point that any cover up of a serious criminal act could result in federal obstruction of justice charges and conviction because a federal prosecutor might bring the

acts before a grand jury for investigation. Under the Ninth Circuit's standard, any criminal defendant is held to know that in the future, a federal prosecutor might bring the acts before a grand jury for investigation. The Ninth Circuit's extension is not dependent on a defendant's cover up of a federal offense, the pendency of a grand jury investigation, or even that the perpetrator worked in the criminal justice system and was familiar with grand juries, such as a police officer. The broad extension instead is based on the supposition that if a crime is bad enough a defendant necessarily foresees a federal grand jury might be convened regardless whether the underlying offense was ordinarily subject to federal grand jury processes.[3] The Ninth Circuit rule leads to what Judge J. Harvie Wilkinson III has characterized as "statutory sprawl" which expands the type of conduct that lays the groundwork for a potential obstruction charge. *United States v. Sutherland*, 921 F.3d 421, 426 (4th Cir. 2019).

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[3] The government made this clear during closing argument at trial: "Well, when you kill two people, a grand jury convenes. So of course they had to know. Of course they had to know. They were destroying the evidence."

The evidence of knowledge relied on by the Ninth Circuit is particularly thin, illustrating how far the court extended the reach of section 1512(c)(2). Neither Henry Cervantes nor Jaime Cervantes were lawyers or trained in the law, unlike District Judge Robert Aguilar. Although there was evidence Henry Cervantes previously served time in prison, there was no mention at trial of a prior grand jury proceeding or the court process that led to his conviction. Nonetheless, because Henry Cervantes had been federally prosecuted previously and was on supervised release, he was charged with knowing that burning bodies would obstruct a future grand jury, not just a criminal investigation. The panel further concluded that because authorities had installed a pole camera outside his residence, petitioner Henry Cervantes should have made the speculative jump from surveillance to grand jury.

There is even less evidence of a nexus with respect to petitioner Jaime Cervantes. He had never been involved in the federal criminal justice system. Yet, the panel approved attributing to him knowledge of a grand jury because he lived in the same apartment complex as Henry and another gang member and because a shoebox found under his bed

contained a few papers that mentioned grand juries and Henry Cervantes's criminal case. Appx. A at 20. No evidence at trial showed Jaime Cervantes had read these materials or that he was even aware of them.

Essentially, the Ninth Circuit assumed that persons such as Henry Cervantes and Jaime Cervantes are expected to know that the grand jury is an element of the criminal justice system to which they could be subjected and thus that the attempt to conceal any crime would subject them to a grand jury. *Compare United States v. Smith*, 831 F.3d 1207, 1215 (9th Cir. 2016) (evidence showed there was ongoing grand jury investigation into civil rights violations at the jail when the defendants - law enforcement officers - committed the relevant acts). Viewed another way, the Ninth Circuit held that because both defendants were members of a prison-based gang they necessarily knew a grand jury was likely. Appx. A at 20. This reasoning conflicts with *Aguilar*. If a federal judge who makes a false statement to an FBI agent cannot be held to have reasonably foreseen his statement would go to a federal grand jury, then how can a gang member reasonably foresee

that an attempt to cover up a street crime, even a particularly gruesome one, will end up before a grand jury?

Petitioners may have heard the term "grand jury." But whether they can be expected to foresee that a grand jury might investigate a local arson that destroyed evidence of homicide cannot and should not be assumed. This is particularly so given the nature of the California criminal justice system, with which the petitioners would more likely be familiar. Most California criminal cases are prosecuted in the state courts, where prosecution can proceed by grand jury indictment or by information. *See* CAL. CONST. art. 1, § 14 ("[f]elonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information"); Cal. Pen. Code §§ 682, 737. California grand jury proceedings are rare. "The vast majority of felony prosecutions in California are begun by information with an attendant preliminary hearing." *Johnson v. Superior Court*, 15 Cal. 3d 248, 269 (1975); *see e.g., People v. Hillery,* 62 Cal. 2d 692, 710 (1965) (four out of more than 1,000 cases in one county over a decade prosecuted by grand jury indictment).

The secrecy of federal grand jury proceedings diminishes the foreseeability of a grand jury proceeding, at least to the run of the mill criminal defendant. Federal grand jury proceedings are secret and their workings mysterious. Fed. R. Crim. P. 6(e). Unlike "white collar" crimes in which a relatively sophisticated perpetrator might have some knowledge of the federal criminal justice system, a street crime and its coverup hardly imply the foreseeability of a grand jury. At most, Henry and Jaime likely assumed that there would be a local investigation of the killings and used the fire to cover up the crime.

The breadth of the obstruction statutes requires intervention to prevent further expansion. "The statutory words 'obstruct or impede' are broad. They can refer to anything that 'block[s],' 'make[s] difficult,' or 'hinder[s].'" *Marinello v. United States,* 138 S. Ct. at 1108. Applying a federal obstruction of justice statute, such as section 1512(c)(2), in this context risks what the Court constrained in *Marinello*: an expansive reading of obstruction to encompass almost any offense that affects a government process. The Ninth Circuit's broad interpretation ignores what *Marinello* condemned, "the lack of fair warning and related kinds

of unfairness that led this Court in *Aguilar* to 'exercise' interpretive 'restraint.'" *Id.*; *see Arthur Andersen*, 544 U.S. at 703 .

When a "defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *Aguilar*, 515 U.S. at 599. Finding that section 1512(c)(2) includes every effort to conceal a homicide and any conspiracy to do so, because "when you kill two people, a grand jury convenes," obliterates the requirement of a nexus between a defendant's corrupt intention and the official proceeding said to be obstructed. *Aguilar,* 515 U.S. at 600. Obstruction statutes must not become roving commissions for the imposition of federal authority. *See id.* ([addressing § 1503, "we have traditionally exercised restraint in assessing the reach of a federal criminal statute"); *Arthur Andersen LLP,* 544 U.S. at 703 ("restraint is particularly appropriate here"); *Fowler v. United States*, 563 U.S. 668, 675 (2011)("to allow the Government to show no more than the broad indefinite intent we have described (the intent to prevent communications to law enforcement officers in general) would bring within the scope of this statute many instances of witness tampering in

purely state investigations and proceedings, thus extending the scope of this federal statute well beyond the primarily federal area that Congress had in mind."); *Marinello,* 138 S.Ct. at 1106 (restraint equally necessary in interpreting the breadth of IRS obstruction statute).

The Ninth Circuit's expansion of section 1512(c) requires intervention by this Court.

2. The Use of Acquitted Conduct to Enhance a Criminal Sentence Violates the Sixth Amendment Right to a Jury Trial and Undermines the Legitimacy of the Criminal Justice System.

The use of acquitted conduct to enhance a federal criminal sentence presents a recurring problem that must be addressed by Court. The use of acquitted conduct to determine a sentence and the harm to the integrity of the judicial system resulting therefrom "has gone on long enough." *Jones v. United States,* 135 S. Ct. 8, 9 (2014) (Scalia, J., dissenting from denial of certiorari). The continued use of conduct of which a criminal defendant is directly or impliedly acquitted fundamentally undermines the jury system and the integrity of the legal process as a whole. At a minimum, the use of acquitted conduct in

sentencing divorces the criminal sentence from the jury verdict: the resulting sentence denigrates the integrity of the jury system, making irrelevant all jury findings short of a complete acquittal on all counts.

The right to trial by jury is central to our system of due process. The Framers of the Constitution viewed the right to jury trial as fundamental: it is the only right that appears both in the Bill of Rights and in Article III itself. U.S. CONST. art. III, § 2; *Neder v. United States,* 527 U.S. 1, 30 (1999)(Scalia, J., concurring in part, dissenting in part). At common law, the jury trial was viewed as a bulwark against oppression by the state. *Duncan v. Louisiana,* 391 U.S. 145, 155-56 (1968).

The jury trial is not merely a procedural device, "but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington,* 542 U.S. 296, 305-06 (2004). The 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 v. New Jersey,* 530 U.S. 466, 499 (2000)(Scalia, J., concurring). Accordingly, the prosecuting authority

must prove to the jury all facts legally necessary to support the term of incarceration. *Id.*

Giving meaning to the right to a jury trial equally requires treating an acquittal as the jury's final word on matters within its rubric. A jury acquittal and the government's concomitant failure to secure a conviction must bar punishment from being based on judicial findings reliant on evidence underlying the acquitted charge. Facts underlying or part of the failed government case cannot be used to determine punishment for another, separate offense of conviction. When a judicial finding is based on facts underlying acquitted conduct, the resulting sentence is a rejection of the jury's verdict.

This case illustrates the problem resulting from the continued use of acquitted conduct. Petitioner Henry Cervantes, acquitted of the most serious charges against him, was nonetheless sentenced as though he had been convicted of those charges through the device of the sentencing guidelines. The Court of Appeals explicitly approved of the judge reaching behind the jury verdict, which acquitted petitioner of conspiring to commit murder in aid of racketeering, and sentencing him

as though he had been convicted of two first-degree murders. The district court imposed the maximum possible sentence on petitioner, using the first-degree murder sentencing guideline, although the jury did not convict him of first-degree murder and acquitted him of conspiracy to commit the murders of the very two victims who provided the basis for the sentencing judge's determination that petitioner committed first-degree murder. It is time for this Court to address the serious harms inflicted on the legal system caused by disregarding a jury acquittal.

A. The U.S. Sentencing Guidelines are Central to the Imposition of a Federal Criminal Sentence.

While the sentencing guidelines are termed "advisory," they have an outsize effect on federal criminal sentencing. The guidelines began life as a mandatory system and remained so for approximately 20 years. The U.S. Sentencing Guidelines remain the starting point for any sentence, and often the end point as well. *Molina-Martinez v. United States,* 136 S. Ct. 1338, 1346-48, 194 L. Ed.2d 444 (2016). The guidelines are so significant that a sentencing guideline error almost

always affects a defendant's substantial rights. *Id.* (citing *United States v. Sabillon-Umana,* 772 F.3d 1328, 1333 (10th Cir. 2014)). While *United States v. Booker,* 543 U.S. 220 (2005) rendered the guidelines advisory as a means of saving the guideline structure, the guidelines remain critical to the imposition of every federal criminal sentence. *Booker* did not restore the pre-guideline system of unfettered discretion. Even after *Booker,* "district courts have in the vast majority of cases imposed either within-Guideline sentences or sentences that depart downward from the Guidelines on the Government's motion." *Peugh v. United States,* 569 U.S. 530, 543-44 (2013). Any variation from the guidelines must be justified: the greater the variation, the greater the justification required. *Gall v. United States,* 552 U.S. 36, 50, 51 (2007).

As enacted, the sentencing guidelines expressly allow for, indeed mandate, consideration of all "relevant conduct," including conduct of which the defendant has been acquitted. U.S.S.G. §1B1.3. Federal circuit courts have uniformly approved of using acquitted conduct to determine the guideline range, relying on *United States v. Watts,* 519 U.S. 148, 157 (1997) a per curiam opinion. *Watts* held that the

consideration of acquitted conduct to enhance a defendant's sentence did not violate the Double Jeopardy Clause. *Watts* did not address, however, whether the Sixth Amendment permitted this practice. Notwithstanding *Watts'* limited holding, the federal circuit courts have interpreted it to mean that there is no constitutional bar to consideration of acquitted conduct at sentencing. *E.g., United States v. Lasley,* 832 F.3d 910, 914 (8th Cir. 2016); *United States v. Bell,* 795 F.3d 88, 105 (D.C. Cir. 2015); *United States v. Mercado,* 474 F.3d 654, 657 (9th Cir. 2007); *United States v. Faust,* 456 F.3d 1342, 1347 (11th Cir. 2006).

This Court's Sixth Amendment jurisprudence post-*Watts* undermines the circuit courts' conclusion that there is no bar to the use of acquitted conduct. More than 20 years ago and three years after the *Watts* per curiam decision, this Court held that facts necessary to punishment must be admitted by the defendant or found by a jury beyond a reasonable doubt. *Apprendi v. New Jersey,* 530 U.S. 466. The *Apprendi* decision recognized the substance of the Sixth Amendment presupposed a relationship between the jury verdict and the

punishment that may be imposed. *Blakely v. Washington,* 542 U.S. at 305. *Apprendi* itself involved a statutory scheme in which the statutory maximum sentence could be increased based upon judge-found facts.

Initially, the Court limited the *Apprendi* principle to sentences above the statutory maximum. *Harris v. United States,* 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002). *Harris* distinguished between judicial factfinding that increased the maximum sentence provided by statute from one that merely increased the minimum. In 2013, the Court rejected that distinction, overruling *Harris* in the recognition that any facts that "increase the prescribed range of penalties to which a criminal defendant is exposed" are elements of the crime. *Alleyne v. United States,* 570 U.S. 99, 133 S. Ct. 2151, 2163, 186 L. Ed. 2d 314 (2013). *Alleyne* held that the floor of a sentencing range could not be dissociated from a crime's penalty. *Id.* at 2162-63.

The guidelines themselves set both a floor and a ceiling for a sentence, a prescribed range of penalties. Thus, while termed advisory, the guidelines set the parameters for the federal sentence. At a minimum, the guidelines remain central to federal sentencing. Using

acquitted conduct to determine the offense level or aggravate a sentence can elevate the applicable sentencing range by years.

B. The Use of Acquitted Conduct Undermines the Sixth Amendment Right to a Jury Trial.

The American criminal justice system is founded on the right to a jury trial. *See e.g.,* The Federalist No. 83 (Alexander Hamilton).[3] The jury trial is central to the United States Constitution: it is the only right that is mentioned twice, in both Article III and the Bill of Rights. Article III states that "[t]he Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed." U.S. CONST. art. III, § 2. The Sixth Amendment not only guarantees the right to a jury trial, but identifies specific matters necessary to a fair trial. *See Faretta v. California*, 422 U.S. 806, 818 (1975) ("The rights to notice, confrontation, and compulsory process,

3 "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."

when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice . . . .").

The jury trial is not merely a procedural entitlement. The right to a jury trial has a substantive meaning and effect. *Blakely,* 542 U.S. at 305-06. The jury trial right is "designed to guard against a spirit of oppression and tyranny on the part of rulers." *United States v. Gaudin,* 515 U.S. 506, 510-11 (1995) (quoting 2 J. Story, Commentaries on the Constitution of the United States 540-41 (4th Ed. 1873)).

"It has long been required that all offense-related facts underlying the sentence first be 'stated with . . . certainty and precision' in the indictment and then proved beyond a reasonable doubt to the jury." *United States v. White,* 551 F.3d 381 393 (6th Cir. 2008)(Merritt, J., dissenting)(internal quotation omitted). Once a defendant is acquitted of a particular charge, he cannot be retried, even if the jury was manifestly wrong, or acquitted the defendant on improper grounds. 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). This principle contains a necessary corollary: "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, 202 L. Ed. 2d 627 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

It logically follows that the sentence of a defendant who is acquitted on some charges but convicted on others may not be increased based on judicially found facts underlying the acquittal(s). To permit facts rejected by the jury to serve as the basis for the sentence severs "the invariable linkage of punishment with crime." *White, supra,* 551 F.3d at 393 (Merritt, J., dissenting). When judges impose a criminal sentence based on acquitted conduct, they substantially undermine the jury system in several ways.

First, the judicial use of acquitted conduct diminishes the jury's role, relegating it to deciding whether the defendant violated the law in some way, and if so, allowing the court to punish the defendant based on all of the prosecution's accusations. Allowing facts which a jury does

not find to comprise the basis for punishment marginalizes the jury's role and significance. Only the fact of a conviction matters, as opposed to the jury's refusal to convict on particular counts or even on specific sentencing factors. To make matters worse, the court uses a lower standard, that of a preponderance of the evidence, for its findings. Using the lower standard applicable to civil cases to imprison a defendant for years is constitutionally intolerable. *In re Winship,* 397 U.S. 358, 364 (1970). "[L]umping acquitted conduct in with those traditional [sentencing] factors *and* then using that acquitted conduct to single a defendant out for distinctively severe punishment –an above-Guidelines sentence—renders the jury a sideshow." *United States v. Brown,* 892 F.3d 385, 408-09 (D.C. Cir. 2018)(Millett, J., concurring).

Second, the use of acquitted conduct undermines the presumption of innocence, a critical aspect of due process. For the presumption of innocence to have force, there must be a consequence to an acquittal, just as there is for a conviction. The requirement that proof beyond a reasonable doubt be adduced to overcome the presumption of innocence "is bottomed on a fundamental value determination of our society that

it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship,* 397 U.S. at 372 (Harlan, J., concurring). If conduct underlying a charge results in an acquittal, allowing a judge to base a criminal sentence on that conduct reduces, if not eliminates, the value of the presumption of innocence.

Acquitted conduct sentencing further undermines the jury system by rendering not guilty verdicts and the presumption of innocence irrelevant. A jury acquits a defendant – for whatever reason—but judges are permitted to make contrary factual findings using the preponderance standard to punish defendants for conduct upon which the jury did not find guilt. Punishment in this system "trivializes 'legal guilt' or 'legal innocence' – which is what a jury decides." *United States v. Faust*, 456 F.3d at 1351 (Barkett, J., specially concurring) (quoting *United States v. Pimental,* 367 F. Supp.2d 143, 152 (D. Mass. 2005). "To allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is

fundamentally inconsistent with the presumption of innocence itself." *State v. Marley,* 321 N.C. 415, 425, 364 S.E.2d 133 (N.C. 1988).

Third, imposing a sentence based upon acquitted conduct fundamentally undermines the community's duty and prerogative to oversee the administration of criminal justice. "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." *Blakely v. Washington*, 542 U.S. at 306. By providing an "opportunity for ordinary citizens to participate in the administration of justice," the jury trial "preserves the democratic element of the law," *Powers v. Ohio*, 499 U.S. 400, 406-07 (1991).

Equally important, sentencing a defendant based on acquitted conduct undermines the legitimacy of the criminal justice system, decimating respect for the law and the jury system. *United States v. Settles,* 530 F.3d 920, 924 (D.C. Cir. 2008)(Kavanaugh, J., concurring). It is difficult to imagine a practice that invites more criticism of the sentencing process, particularly among laypersons not versed in the

philosophical compromise on which the Sentencing Guidelines scheme was based. *United States v. Catania,* 532 F.3d 764, 778 (8th Cir. 2008)(Bright, J., concurring)(wondering "what the man on the street might say about …allowing a prosecutor and judge to say that a jury verdict of 'not guilty'…may not mean a thing); *United States v. Lombard,* 102 F.3d 1, 5 (1st Cir. 1996)(Boudin, J.,); *see also United States v. McReynolds,* 964 F.3d 555, 569 (6th Cir. 2020)(court's calculation of base offense level using its own amounts after jury found defendant was guilty for conspiring to distribute less than 100 grams of heroin and less than 500 grams of cocaine has "devastating consequences for the actual and perceived fairness of our criminal justice system."). Unjust procedures undermine public perception that criminal proceedings are fair. *See Rosales-Mireles v. United States,* 138 S. Ct. 1897, 1910, 201 L.Ed. 2d 376 (2018).

Numerous jurists, both current members of the Supreme Court and circuit court judges, have criticized the continuing use of acquitted conduct in sentencing. *E.g., Jones v. United States,* 574 U.S. 948, 949, 135 S. Ct. 8, 190 L. Ed. 2d 279 (2014)(Scalia, J., joined by Thomas &

Ginsburg, JJ., dissenting from denial of certiorari); *United States v. Lasley,* 832 F.3d at 920-22 (Bright, J., dissenting); *United States v. Bell,* 808 F.3d at 927-28, 929-30 (Kavanaugh, J., concurring in the denial of rehearing en banc), (Millett, J., concurring in the denial of rehearing en banc); *United States v. White,* 551 F.3d at 386-97 (Merritt, J., dissenting). Judges have commented that using acquitted conduct to enhance a defendant's sentence disregards the jury's verdict regardless which standard of proof is used and undermines the Sixth Amendment right to a jury trial. *Mercado, supra,* 474 F.3d at 659-65 (B. Fletcher, J., dissenting). This is true regardless whether the acquitted conduct is used for an upward departure or variance, or to calculate the offense level in the first instance.

Using acquitted conduct either to determine a sentencing guideline range or to vary upward therefrom diminishes the Sixth Amendment right to jury trial, diverges from the substantive meaning of the Sixth Amendment, and undermines the appearance of fairness in the criminal justice system. These factors strongly support a grant of certiorari here.

C. The Split Between The Federal Circuits And The Highest Court Of Three States On The Constitutional Question Whether Sentencing A Defendant Based On Acquitted Conduct Violates The Sixth Amendment Demonstrates The Need For This Court To Address The Question.

The federal circuits have uniformly concluded that using evidence of conduct of which the defendant was acquitted does not violate the Sixth Amendment. Three state supreme courts have reached a contrary conclusion. Most recently, the Supreme Court of Michigan held that "due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted" and "sentenc[ing] the defendant as if he committed that very same crime." *People v. Beck*, 939 N.W.2d 313, 504 Mich. 605 (Mich. 2019). The Michigan Supreme Court based its decision on federal constitutional law, not on its state constitution. Earlier, the New Hampshire Supreme Court ruled similarly, *State v. Cote,* 129 N.H. 358, 375, 530 A.2d 775, 785 (1987), as did the North Carolina Supreme Court. *State v. Marley,* 321 N.C. 415, 425, 364 S.E.2d 133 (1988); *see also People v. Burns*, 2021 Mich. App. LEXIS 4993 (Mich. App. Aug. 19, 2021).

Certiorari should be granted to resolve the split between state Supreme courts and the federal circuits and hold that a sentence cannot be increased or based on conduct of which the defendant has been acquitted.

Conclusion

For all the reasons discussed in this petition, the Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming petitioners' judgment of conviction and petitioner Henry Cervantes' sentence.

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Respectfully submitted,

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