No._____

IN THE SUPREME COURT OF THE UNITED STATES

TERRANCE STINSON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether sentencing based on acquitted conduct violates the Sixth Amendment jury guarantee and the Fifth Amendment Due Process Clause.

INTERESTED PARTIES

Petitioner submits that there are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (W.D.N.Y.):

United States of America v. Murphy, et al.,
No. 01-cr-06087-CJS (October 21, 2020)

United States of America v. Terrance Stinson
No. 03-cr-06176-CJS (May 23, 2005)

Terrance Stinson v. United States of America
No. 08-cv-06041-CJS (August 15, 2012)

Terrance Stinson v. United States of America
No. 16-cv-06323-MAT (November 20, 2019)

United States Court of Appeals (2d Cir.):

United States of America v. Stinson
No. 04-0477 (August 4, 2006)

Terrance Stinson v. United States of America
No. 12-3527 (July 19, 2013)

Stinson v. United States of America
No. 16-1491 (November 1, 2019)

United States of America v. Murphy (Stinson)
No. 20-3744 (November 24, 2021)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Terrance Stinson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals under review (App. A-12) is unreported. The district court's order granting Petitioner's 28 U.S.C. § 2255 motion to vacate sentence is also unreported (App. A-1). The district court's amended judgment upon resentencing is unreported (App. A-4).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the Court of Appeals was entered on November 24, 2021. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The lower court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1291, 2253, and 2255.

CONSTITUTIONAL PROVISIONS INVOLVED

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. . . ." U.S. Const. amend. VI.

The Fifth Amendment provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. Const. amend. V.

STATEMENT OF THE CASE

Petitioner proceeded to jury trial on charges that he conspired to traffic in cocaine, cocaine base, heroin and marijuana from 1993 to January of 2002, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846. The trafficking count included, among other conduct, possessing with the intent to distribute and distributing ½ kilo of cocaine, the proceeds from a 1994 robbery of drug dealer Shawn Battle [the "Battle robbery"]. The jury also considered counts of conspiracy to commit Hobbs Act robberies of other drug dealers, including Rosemary Inostroza, from September 1997 to February 2001, in violation of 18 U.S.C. § 1951 [the "Inostroza robbery count"], and one count each of possessing a firearm in furtherance of the drug trafficking conspiracy, and

using and carrying a firearm in furtherance of the Inostroza robbery, both in violation of 18 U.S.C. § 924(c). The jury found Petitioner guilty of the two § 924(c) firearm counts, the Inostroza robbery count, and conspiring to traffic in cocaine base but acquitted him of trafficking in cocaine, heroin and marijuana. Recognizing the jury had acquitted him of the conduct and relying on *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), the trial court engaged in fact finding, applied a preponderance of the evidence standard and concluded that Petitioner was responsible for the Battle robbery. The court imposed a 720 months sentence based, in part, on the acquitted conduct.

More than fifteen years later, the district court vacated and dismissed the second § 924(c) count. At a resentencing hearing and over his Fifth and Sixth Amendment-based objections, the court adhered to its earlier sentencing determination, again finding Petitioner responsible for the Battle robbery, and imposing a 322-months sentence (less 23 months credit for the service of a prior state sentence that was related to his counts of conviction). On appeal, the Second Circuit affirmed, holding that his Fifth and Sixth Amendment claims were foreclosed by *Watts*.

For the reasons stated below, the petition should be granted.

Petitioner was charged along with several others with conspiring to traffic in 5 kilograms or more of cocaine, 50 grams or more of cocaine base, heroin and marijuana from 1993 to 2002 and, during that time, possessing a firearm in furtherance of that activity, all in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846 and 18 U.S.C. § 924(c). He was also charged with a 1997 - 2001 Hobbs Act conspiracy, as well as using and carrying a firearm in furtherance of a crime of violence in violation of 18 U.S.C. §§

1951 and 924(c). At a month-long, 2003 jury trial, the government produced evidence that Petitioner engaged in drug trafficking – chiefly cocaine base – during the charged timeframe, along with evidence that, in 1994, Petitioner and the others robbed drug dealer Shawn Battle of ½ kilogram of cocaine for the purpose of selling it. The Battle robbery allegation was particularly egregious. The government alleged that Stinson and several others restrained and kidnapped Battle, shot him in the face, robbed him of ½ kilogram of cocaine and money, and left him for dead. In conjunction with the Hobbs Act conspiracy and related § 924(c) count, the government presented proof that in 1999 the group robbed and beat up drug dealer Rosemary Inostroza, stealing jewelry. The government also presented evidence that the group robbed another drug dealer, Mark Imes, of money.

After deliberating for several days, the jury found Petitioner guilty of conspiring to traffic in 50 grams or more of cocaine base and the related § 924(c) count, along with the Inostroza robbery count and its related § 924(c) count. However, the jury acquitted Petitioner of conspiring to traffic in cocaine, heroin or marijuana. Recognizing that the jury had acquitted Petitioner of involvement in the Battle robbery, the trial court sentenced Petitioner to a cumulative term of 720 months: concurrent terms of 360 months on the cocaine base conspiracy count and 240 months on the Inostroza robbery count, and terms of 60 and 300 months on the two § 924(c) counts to be served consecutively to each other and to the remaining counts. Based on this Court's holding in *United States v. Watts*, 519 U.S. 148, and despite Petitioner's Fifth and Sixth Amendment objections, the trial court relied on the Battle robbery allegations to arrive at its sentence after finding that a preponderance of the evidence established

Petitioner's culpability for that offense.[1]

Petitioner's direct appeal and initial § 2255 collateral attack of his conviction were unsuccessful.[2] In response to this Court's decisions in *Johnson v. United States*, 576 U.S. 591 (2015), and *United States v. Davis*, __ U.S. __, 139 S. Ct. 2319 (2019), striking down the residual clause of 18 U.S.C. § 924(c)(3) as unconstitutionally vague, Petitioner was granted leave to file a successive § 2255 motion. In 2019, the trial court granted the motion, vacated the judgment of conviction and dismissed the second § 924(c) count relating to the Inostroza robbery, along with its 300-months consecutive sentence, and ordered a resentencing hearing on the remaining three counts: the cocaine base conspiracy and related § 924(c) count and the Inostroza robbery count.

Petitioner was resentenced in 2020 to an aggregate term of 322 months taking account of a 23-months downward departure to award him credit for a related state sentence that he had previously served. At the resentencing hearing, and again over Petitioner's Fifth and Sixth Amendment-related objections to its consideration of the acquitted Battle robbery allegations, the trial court adhered to the findings it had made at the 2004 sentencing that, in spite of the acquittal, Petitioner was responsible for the Battle robbery. The district court again imposed a sentence that explicitly took

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[1]On May 17, 2005, in connection with his trial conviction for retaliation against a witness in *United States of America v. Terrance Stinson,* No. 03-cr-06176-CJS, the court imposed an additional 78 months sentence, 39 months of which was to run concurrently with the 720 months sentence in the federal conspiracy case.

[2]While the initial collateral attack was pending, the trial court granted two motions pursuant to 18 U.S.C. § 3582(c)(2) and reduced Petitioner's sentence for the retroactive application of two amendments to U.S.S.G. § 2D1.1(c) that reduced base offense levels for some cocaine base offenses; by 2012, Petitioner's aggregate sentence had been reduced from 720 months to 622 months.

account of the acquitted conduct relating to the Battle robbery. Petitioner appealed.

The Second Circuit Court of Appeals affirmed Petitioner's sentence, summarily rejecting as foreclosed his Fifth and Sixth Amendment arguments relating to the acquitted Battle robbery conduct. That court adhered to its decision in *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005), that interpreted this Court's decision in *Watts* as approving sentencing courts' use of acquitted conduct as consistent with the Sixth Amendment's jury trial guarantee and Fifth Amendment Due Process Clause.

REASONS FOR GRANTING THE WRIT

Jury verdicts –and the rarer subset of acquittals – are special and entitled to deference. The Sixth Amendment's jury trial guarantee in criminal cases is so "fundamental to the American scheme of justice" that our Constitution guarantees it in all criminal cases whether in state or federal court. *Duncan v. State of Louisiana*, 391 U.S. 145, 149 (1968). "The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (emphasis in original).

More than 250 years ago, William Blackstone wrote that "the trial by jury ever has been, and I trust ever will be looked upon as the glory of the English law, and it has so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases!" Blackstone, Commentaries on the Laws of England (1769) Vol. 3, pp. 378-79. Legal

scholars believe that, as of the time of Magna Carta, civil and criminal juries were already "regular parts of the administration of justice" in England. McSweeney, Thomas J., *Magna Carta and the Right to Trial by Jury*, William & Mary Law School (2014), Faculty Publications, 1722, 145 (2014). Reflecting this support for the right to a jury trial in criminal cases, the founders ensured that the Constitution provided that "[t]rial of all crimes, except in case of impeachment, shall be by jury". U.S. Const. art. III, § 2. It is, therefore, no empty ritual when a jury, like Petitioner's, comprised of an accused's peers listens carefully to a month's worth of evidence at a trial, deliberates over the course of several days, and unanimously decides that the government failed to prove the accused's guilt on a criminal count. "[T]he public legitimacy of our justice system relies on procedures that are neutral, accurate, consistent, trustworthy, and fair, and that provide opportunities for error correction." *Rosales-Mireles v. United States*, __ U.S. __, __, 138 S.Ct. 1897, 1908 (2018). When a sentencing judge nullifies the jury's verdict by sentencing the defendant based on conduct the jury found to be unproven, the legitimacy of our justice system is undercut in the eyes of the public. In light of discord over this issue among the state and federal courts, this Court's attention is needed to make clear that acquitted conduct sentencing violates the Sixth Amendment's jury trial right and the Fifth Amendment's Due Process Clause.

This Court Should Address Whether Sentencing Based on Acquitted Conduct Violates the Sixth Amendment Jury Guarantee and the Fifth Amendment Due Process Clause.

Federal courts have consistently affirmed acquitted conduct sentencing based on *United States v. Watts*, 519 U.S. 148 (1997) (per curiam). Federal and state courts disagree, however, whether the *Watts* holding is limited to the Double Jeopardy context or, instead, it also applies to overrule objections under the Fifth Amendment's Due Process Clause and the Sixth Amendment's jury trial right. Further, a split has developed between some states and the federal courts over whether the Fifth and Sixth Amendments permit acquitted conduct sentencing in the first place. The Court's guidance is needed to resolve this discord over the application of *Watts* and whether acquitted conduct sentencing is consistent with the Sixth Amendment jury trial right and the Fifth Amendment's Due Process Clause.

Nearly 25 years ago, this Court held, in *Watts*, that Title 18 § 3661 and the Federal Sentencing Guidelines empower sentencing judges to base a federal defendant's sentence on criminal conduct for which he was acquitted. The Court did not conduct its analysis under the Sixth Amendment jury trial right or the Fifth Amendment's Due Process Clause. Then Justice Kennedy faulted the majority for failing to distinguish between a sentencing court's consideration of uncharged versus acquitted conduct and for determining the issue without full briefing or oral argument. *Watts*, 519 U.S. at 171 (Kennedy, J., dissenting).

Leading up to *Watts*, this Court had not addressed the constitutionality of acquitted conduct sentencing. Roughly ten years earlier, in *McMillan v. Pennsylvania*, 477 U.S.

79, 81 (1986), the Court analyzed whether the due process clause and Sixth Amendment jury trial right permitted a state trial court to find facts not submitted to a jury that would trigger a mandatory minimum prison term. Saying that there was no reason to "constitutionaliz[e] burdens of proof at sentencing", *id*. at 92, the Court held that preponderance of the evidence sentencing fact finding did not create due process concerns or run afoul of the Sixth Amendment. *Id.* at 91-93. The Court followed *McMillan* with *Watts* in 1997. Although *Watts* dealt with a sentencing court's consideration of acquitted conduct, it did so in a limited way by determining whether the reliance on such conduct violated the Double Jeopardy Clause of the Fifth Amendment. Relating its holding to its earlier work in *McMillan*, the Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Watts* at 157.

Over the next ten years, the foundations of federal sentencing shifted dramatically. Through a series of landmark holdings grounded in the Fifth Amendment's Due Process Clause and the Sixth Amendment's jury trial right the Court made clear that the Constitution guaranteed in federal and state criminal prosecutions that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476, 490 (2000). Five years later, in *United States v. Booker*, 543 U.S. 220 (2005), the Court rendered the federal sentencing guidelines advisory. In doing so, a majority of the Court removed all doubt that the "very narrow" holding of *Watts* was limited to the

interaction of the sentencing guidelines with the Double Jeopardy Clause and no Sixth Amendment claim had been presented. *Booker*, 543 U.S. at 240 and n.4. The Court further took the wind out of *Watts'* sails by emphasizing Justice Kennedy's *Watts* dissent along with his point that it "did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us in these cases." *Id*. Most recently, in *Alleyne v. United States*, 570 U.S. 99, 114 (2013), the Court emphasized that requiring a jury verdict "preserves the historical role of the jury as an intermediary between the State and criminal defendants." *Alleyne* hobbled *Watts* when it overruled *McMillan* and determined that "[a]ny 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." *Alleyne* at 102.

In contrast to the apparent waning significance of *Watts* in this Court's jurisprudence, over the intervening years all of the federal courts of appeals have held that *Watts*-type acquitted conduct sentencing is constitutional, with some also concluding that *Watts* was not undermined by *Booker*.[3] One court, in *United States v. Ibanga*, 271 F. App'x. 298, 301 (4th Cir. 2008) (unpublished), further concluded that a

[3]*See, e.g., United States v. Ciavarella*, 716 F.3d 705, 735 (3d Cir. 2013) (constitutional); *United States v. Waltower*, 643 F.3d 572, 574-76 (7th Cir. 2011) (constitutional and *Booker* did not undermine *Watts*); *United States v. Grubbs*, 585 F.3d 793, 798-99 (4th Cir. 2009) (same); *United States v White*, 551 F.3d 381, 383 (6th Cir. 2008) (*en banc*) (same); *United States v. Tyndall*, 521 F.3d 877, 883 (8th Cir. 2008) (constitutional); *United States v. Mercado*, 474 F.3d 654, 657-58 (9th Cir. 2007) (Constitutional and *Booker* did not undermine *Watts*); *United States v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006) (superseded on unrelated issue) (same); *United States v. Farias*, 469 F.3d 393, 399 (5th Cir. 2006) (same); *United States v. Dorcely*, 454 F.3d 366, 371-74 (D.C. Cir. 2006) (same); *United States v. Vaughn*, 430 F.3d 518, 525-26 (2d Cir. 2005) (same); *United States v. Magallanez*, 408 F.3d 672, 684-85 (10th Cir. 2005) (same); *United States v. Duncan*, 400 F.3d 1297, 1304-5 (11th Cir. 2005) (same).

district court committed procedural error when it refused to consider acquitted conduct evidence at sentencing. At least nine of the states have also relied on *Watts* in their approval of acquitted conduct sentencing under the federal Constitution.[4]

Five states, on the other hand, take the position that the reliance on acquitted conduct violates the Constitution.[5] Still other states have recognized the disagreement among courts on the issue but have avoided weighing in on the question.[6]

Two recent state supreme court holdings in *People v. Beck*, 939 N.W.2d 213 (Mich. 2019), and *State v. Melvin*, 258 A.3d 1075 (N.J. 2021), stand in sharp relief against federal courts' adoption of acquitted conduct sentencing as constitutional. In *Beck*, 939 N.W.2d 213, 216, 226, the Michigan Supreme Court emphasized that "[t]his ends here" and "[o]nce acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime." The *Beck* court cited with

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[4]*See, e.g.*, *State v. Hampton*, 2016-50,561-KA, p. 22-23 (La. App. 2 Cir. 5/18/16), 195 So. 3d 548, 561; *Simpson v. Commonwealth*, No. 2012–SC–000605–MR, 2014 WL 2809840, *9 (Ky. 2014) (unpublished); *In re Coley*, 283 P.3d 1252, 1274-76 (Cal. 2012); *Commonwealth v. Stokes*, 38 A.3d 846, 861 (Pa. Super. Ct. 2011) (abrogated on other basis); *State v. Flowers*, 249 P.3d 367, 373 (Idaho 2011) (dicta); *Harmon v. State*, 248 P.3d 918, 939-40 (Okla. Crim. App. 2011); *Laux v. State*, 821 N.E.2d 816 (Ind. 2005) (double jeopardy context only); *State v. Oldenburg*, 628 N.W.2d 278, 286 (Neb. Ct. App. 2001); *State v. Longo*, 608 N.W.2d 471 (Iowa 2000).

[5]*See, e.g.*, *State v. Melvin*, 258 A.3d 1075, 1093-94 (N.J. 2021) (Sixth and Fourteenth Amendments); *People v. Beck*, 939 N.W.2d 213, 225-27 (Mich. 2019), *cert. den'd*, __U.S. __, 140 S.Ct. 1243 (2020) (Sixth and Fourteenth Amendments); *Doty v. State*, 884 So.2d 547, 549 (Fla. Dist. Ct. App. 2004) (due process); *State v. Marley*, 364 S.E.2d 133, 138-39 (N.C. 1988) (presumption of innocence and due process); *State v. Cote*, 530 A.2d 775, 374-75 (N.H. 1987) (presumption of innocence and due process).

[6]*See, e.g.*, *State v. Koons*, 2011 VT 22, ¶11 n. 2, 189 Vt. 285, 289 n. 2, 20 A.3d 662, 665 n. 2 (2011) (recognizing disagreement but "defer[ring decision on the issue] to another day."), *see also State v. Witmer*, 2011 ME 7, ¶¶ 21-24, 10 A.3d 728, 733-34 (Me. 2011) (recognizing disagreement); *State v. Desirey*, 909 S.W.2d 20, 31-32 (Tenn. Crim. App. 1995) (same).

approval the opinion of the North Carolina Supreme Court in *State v. Marley* that acquitted conduct sentencing "is fundamentally inconsistent with the presumption of innocence itself." *Beck* at 225, quoting *State v. Marley*, 364 S.E.2d 133, 139. Recognizing that its opinion was in the minority, the *Beck* court observed that its conclusion was in part bolstered by "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 226. Last year, in *State v. Melvin*, 258 A.3d 1075, 1093, the New Jersey Supreme Court reviewed a state trial court's reliance on *Watts* in sentencing Melvin for acquitted conduct. As in *Beck*, the *Melvin* court concluded that the practice violated the federal Constitution's due process and jury trial rights as incorporated in the Fourteenth Amendment: "[w]e hold that the findings of juries cannot be nullified through lower-standard fact findings at sentencing." *Id.* Relying in part on Justice Scalia's hypothetical from *Blakely* relating to the absurdity of a man being sentenced for murder when he was convicted only of possessing the firearm used, the *Melvin* court called "absurd" the result that Melvin was sentenced for using a firearm to shoot others when the jury had acquitted him of all charges associated with using or having the gun for an unlawful purpose. *Id.* at 1092. Like the *Beck* court, the court in *Melvin* recognized the consistent and vigorous disagreement over the use of acquitted conduct sentencing both among federal and state judges and legal commentators. *Id.* at 1089-90.

In the face of widespread acceptance of the *Watts* holding as endorsing the constitutionality of acquitted conduct sentencing, members of this Court and others have also cautioned that acquitted conduct sentencing may be inconsistent with the

Fifth Amendment Due Process Clause and the Sixth Amendment's jury trial guarantee. Complaining that "[t]his has gone on long enough," then Justice Scalia, joined by Justices Thomas and Ginsburg, dissented from the denial of certiorari in *Jones v. United States*, 574 U.S. 948 (2014), on the issue of whether the Sixth Amendment permits acquitted conduct sentencing in light of *Alleyne*. Citing the *Jones* dissent in the even broader context of a sentencing court's general fact finding, then Tenth Circuit Court of Appeals Judge Gorsuch acknowledged as "questionable" the assumption "that a district judge may either decrease or increase a defendant's sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant's consent." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014). Other federal appellate judges have expressed similar concerns with acquitted conduct sentencing.[7] As recently as last month, in

[7]*See, e.g.*, *United States v. Martinez*, 769 F. App'x. 12, 17 (2d Cir. 2019) (unpublished) (Pooler, J., concurring) ("[D]eeply troubling" and "fundamentally unfair" that trial court used "acquitted conduct to enhance a defendant's sentence – here, to life imprisonment".); *United States v. Brown*, 892 F.3d 385, 408 (D.C. Cir. 2018) (Millett, J., concurring) ("[A]llowing courts at sentencing to materially increase the length of imprisonment based on conduct for which the jury acquitted the defendant guts the role of the jury in preserving individual liberty and preventing oppression by the government.") (cleaned up); *id*. at 415 (Kavanaugh, J., dissenting in part) ("[T]here are 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 ...."); *United States v. Jackson*, 862 F.3d 365, 415 (3rd Cir. 2017) (McKee, J., dissenting) (Court "unwilling" to require the district court to resentence defendants according to guidelines intended to guide sentences imposed for the very offense defendants were acquitted of."); *United States v. Lasley*, 832 F.3d 910, 922 (8th Cir. 2016) (Bright, J., dissenting) ("The time has come to . . . overrule existing precedent permitting the use of acquitted conduct to enhance a defendant's sentence."); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing *en banc*) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); *id*., at 929 (Millet, J., concurring) ("[L]iberty-protecting bulwark [of the jury] becomes

United States v. McClinton, 23 F.4th 732, 735 (7th Cir. 2022), the Seventh Circuit Court of Appeals said of a criminal defendant's foreclosed acquitted conduct challenge

> McClinton's contention is not frivolous. It preserves for Supreme Court review an argument that has garnered increasing support among many circuit court judges and Supreme Court Justices, who in dissenting and concurring opinions, have questioned the fairness and constitutionality of allowing courts to factor acquitted conduct into sentencing calculations. . . Until such time as the Supreme Court alters its holding, we must follow its precedent.

Last year, in an effort to bar federal judges from increasing criminal defendants' sentences based on acquitted conduct, Congress introduced the bicameral Prohibiting Punishment of Acquitted Conduct Act of 2021 [the "Act"] that would amend Title 18 U.S.C. § 3661 to prohibit federal courts from relying on acquitted conduct from federal, state or tribal courts to increase a defendant's sentence. *See* S. 601, 117th Cong. § 2

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little more than a speed bump at sentencing."); *United States v. Reese*, No. CR 11-2294 RB (D. N.M. 2014) (unpublished) 2014 WL 12785114, *5 ("Court shares Justice Scalia's discomfort with the current state of the law and agrees that the Supreme Court should clarify this legal issue."); *United States v. White*, 551 F.3d 381, 392 (Merritt, J., dissenting) ("[T]he use of acquitted conduct at sentencing defies the Constitution, our common law heritage, the Sentencing Reform Act, and common sense."); *United States v. Canania*, 532 F.3d 764, 778 (8th Cir. 2008) (Bright, J., concurring) ("I wonder what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing."); *United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (Kavanaugh, J.) (noting disagreement among jurists including Justice Kennedy's dissent in *Watts*); *United States v. Grier*, 475 F.3d 556, 586 n. 34 (3d Cir. 2007) (Ambro, J., concurring) (Acquitted conduct practice in *Watts* "might still violate the jury right of the Sixth Amendment as expounded by *Apprendi* and its progeny."); *United States v. Mercado*, 474 F.3d 654, 658 (Fletcher, J., dissenting) ("When a jury refuses to convict defendants of several counts, but the trial court nonetheless relies on that same acquitted conduct to increase the defendants' sentences sevenfold, the jury has not authorized the resulting sentences in any meaningful sense."); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring specially) ("I strongly believe ... that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment").

(2021) and H.R. 1621, 117th Cong. § 2 (2021). The Act has not yet been ratified by Congress; if ratified in its present form, the bill would not have retroactive effect and would not resolve the current split on the issue among the states. *Id*.

In spite of the efforts of Congress to address this persistent problem, this Court should answer the call of so many jurists on the issue of the constitutionality of acquitted conduct sentencing. Unlike Congress by way of the Act, this Court is empowered to bring consistency to both federal and state courts in their interpretation of the reach of the *Watts* holding and the constitutionality of acquitted conduct sentencing. Further, despite its narrow Double Jeopardy holding, many federal and state courts have expanded the application of *Watts* to permit acquitted conduct sentencing under the Fifth and Sixth Amendments.[8] Dissenting federal jurists have

[8]*See e.g., United States v. Cabrera-Rangel*, 730 F. App'x. 227, 228 (5th Cir. 2018) (unpublished) (Sixth Amendment); *United States v. Thurman*, 889 F.3d 356, 371 (7th Cir. 2018) (Sixth Amendment); *Simpson v. Commonwealth*, No. 2012–SC–000605–MR, 2014 WL 2809840, *9 (due process); *United States v. Jones*, 744 F.3d 1362, 1369 (D.C. Cir. 2014) (Sixth Amendment and due process); *In re Coley*, 283 P.3d 1252, 1274-76 (Sixth Amendment); *Commonwealth v. Stokes*, 38 A.3d 846, 861-62 (consistent with due process and Sixth Amendment, citing *Watts and McMillan*); *United States v. Waltower*, 643 F.3d 572, 575 (due process); *People v. Zowaski*, 916 N.Y.S.2d 909, 916-17 (N.Y. Crim. Ct. 2011) (consistent with Sixth Amendment, citing *Watts*); *United States v. White*, 551 F.3d 381, 383-84 (Sixth Amendment); *United States v. Hurn*, 496 F.3d 784, 788 (7th Cir. 2007) (due process and Sixth Amendment); *United States v. Grier*, 475 F.3d 556, 562 (due process and Sixth Amendment); *United States v. Mercado*, 474 F.3d 654, 661 (Fletcher, J., dissenting) ("Despite [the] clear limitation of *Watts'*s holding, the majority here applies *Watts* to the Sixth Amendment issue before us, ignoring *Booker*'s requirement that the jury's verdict alone must authorize a defendant's sentence."); *United States v. Gobbi*, 471 F.3d 302, 314 (Sixth Amendment and due process); *United States v. Farias*, 469 F.3d 393, 399; *United States v. Dorcely*, 454 F.3d 366, 371-73 (Sixth Amendment and due process); *United States v. Magallanez*, 408 F.3d 672, 684-85 (Sixth Amendment); *United States v. Vaughn*, 430 F.3d 518, 525-26 (Sixth Amendment and due process); *United States v. Price*, 418 F.3d 771, 787-88 (7th Cir. 2005) (Sixth Amendment); *United States v. Duncan*, 400 F.3d

pointed out that a legion of state and federal courts interpret *Watts* as applying in the Fifth Amendment due process and Sixth Amendment jury guarantee context.[9] The Court's guidance would clarify the scope and continued application of *Watts* and thereby resolve this dispute.

The Supreme Court's decisions in *Apprendi*, *Booker*, *Blakely* and *Alleyne* all emphasize the essential role of the Sixth Amendment right to a jury trial. In *Apprendi* the Court examined the "historical foundation" for the right to a jury trial to "guard against a spirit of oppression and tyranny on the part of rulers." The Court also noted the "Framers' fears 'that the jury right could be lost not only by gross denial, but by erosion.'" *Apprendi*, 530 U.S. at 483 (quoting *Jones v. United States*, 526 U.S. 227, 248 (1999)). In *Booker*, the Court recognized the need to preserve the jury trial right "in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government." *Booker*, 543 U.S. at 237. The number of federal jury trials are already dwindling at an astonishing rate. *See* Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 80 GEO. WASH. L. REV. 99, 103 (2018) (Compare 3258 federal criminal jury trials nationwide in 2006 with only 1713 such trials in 2016). Not only does the use of acquitted conduct at sentencing undermine core Fifth and Sixth Amendment

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1297, 1304 (Sixth Amendment); *United States v. Mankowski*, 111 F.3d 130 (4th Cir. 1997) (Sixth Amendment).

[9]*See, e.g.*, *United States v. White*, 551 F.3d 381, 392 (Merritt, J., dissenting) (Faulting "majority's simple and single-minded reliance on *Watts*" as to Sixth Amendment claim.) *United States v. Mercado*, 474 F.3d 654, 661 (Fletcher, J., dissenting) ("Despite [the] clear limitation of *Watts'*s holding, the majority here applies *Watts* to the Sixth Amendment issue before us, ignoring *Booker*'s requirement that the jury's verdict alone must authorize a defendant's sentence.").

principles,[10] it invariably has a chilling effect on a criminal defendant's exercise of his or her Sixth Amendment right where a sentencing court is free to ignore a jury's verdict of acquittal in imposing sentence.[11]

As then Judge Kavanaugh queried in *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing *en banc*) "[i]f you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five year sentence to, say, a 20-year sentence?" *Id*.

The jury in this case attempted to fulfill its role as "circuitbreaker in the State's machinery of justice"[12] finding Petitioner not guilty of the Shawn Battle robbery. And yet the district court relied on that acquitted conduct in imposing the sentence. This significant "erosion"[13] of the right to due process and a trial jury is unconstitutional.

This Court should address the "important, frequently recurring, and troubling contradiction in sentencing law"[14] of whether the Sixth Amendment's jury guarantee

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[10]*See*, Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing and What Can be Done About it*, 49 Suffolk U. L. Rev 1, 25-26 (2016); *see also* Orhun Hakan Yalinçak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-esque," "Repugnant," "Uniquely Malevolent," and "Pernicious,"* 54 Santa Clara L. Rev. 675, 679 (2014).

[11]*See, Cowart v. State*, 178 So. 3d 651, 674 (Miss. 2015) (King, J., dissenting) (In acquitted conduct case imposing increased sentence in whole or in part due to exercise of jury trial right "casts a chill over the exercise of guaranteed fundamental constitutional rights.") (internal quote and cite omitted).

[12]*Blakely v. Washington*, 542 U.S. 296, 306.

[13]*Apprendi v. New Jersey*, 530 U.S. 466, 483 (quoting *Jones v. United States*, 526 U.S. 466, 248).

[14]*United States v. Bell*, 808 F.3d 926, 932 (Millett, J., concurring in the denial of rehearing *en banc*).

and Fifth Amendment's Due Process Clause permit a court to rely on acquitted conduct to increase its sentence. The large scale disagreement among state and federal courts over such a "dubious infringement of the rights to due process and to a jury trial"[15] deserves this Court's attention.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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[15] *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing *en banc*).