No. 22-____

In the Supreme Court of the United States

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Phillip Robinson, Petitioner,

v.

United States of America, Respondent.

———

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

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Petition for a Writ of Certiorari

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Question Presented

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

Parties to the Proceeding

All parties to the proceeding in the court whose judgment is sought to be reviewed are set forth in the caption.

Corporate Disclosure Statement

No party to this case is a nongovernmental corporation.

Related Proceedings

The following proceedings are directly related to this case:

United States v. Robinson, No. 1:19-cr-933-2 (N.D. Ill.) (judgment entered March 11, 2022).

United States v. Robinson, No. 22-1472 (7th Cir.) (judgment entered March 9, 2023).

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Petition for a Writ of Certiorari

Petitioner Phillip Robinson respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

Opinions Below

The opinion of the court of appeals is reported at *United States v. Robinson*, 62 F.4th 318 (7th Cir. Mar. 9, 2023). The opinion is included in the Appendix at 1a–6a.

The opinion of the district court is not reported and can be found at *United States v. Robinson*, No. 1:19-cr-933-2, ECF No. 179 at 12–13 (N.D. Ill. Mar. 9, 2022). The opinion is included in the Appendix at 7a–9a.

Jurisdiction

The court of appeals entered a final judgment on March 9, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

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

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

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution states, 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.

Introduction

This petition squarely presents the important and recurring issue of whether "acquitted-conduct sentencing" violates the Fifth and Sixth Amendments of the United States Constitution. This issue is the subject of the pending petition for certiorari in *McClinton v. United States*, Case No. 21-1557, and a growing number of similar petitions. Here, the district court enhanced Mr. Robinson's sentence by several years based on alleged conduct for which the jury acquitted him. This Court should grant review to decide the legality of acquitted-conduct sentencing—and declare it unconstitutional.

In this case, the jury convicted Mr. Robinson of participating in a drug conspiracy and possessing a firearm as a felon, but the same jury acquitted Mr. Robinson of possessing the firearm *in furtherance of* that conspiracy. At sentencing, however, the district judge re-weighed the same evidence the jury rejected as to the latter charge and based on the jury-rejected evidence and charge, enhanced Mr. Robinson's sentence by nearly 50% over the sentence he received for the charges for which the jury convicted him.

This practice is so common that it has developed a revealing moniker: "acquitted-conduct sentencing." Acquitted-conduct sentencing violates a defendant's Sixth Amendment right to a jury trial and Fifth Amendment right to due process. Once a defendant successfully defends herself in the eyes of her peers as to a given crime, she should not then face punishment for that same crime based on a judge's re-weighing of the same evidence under a lower burden of proof. Indeed, the mere threat that an acquitted charge will

resurface after trial, at sentencing, devalues the right to have one's fate decided by the jury; defendants charged with multiple crimes may be faced with the Hobson's choice of defending each charge before a judge (not a jury) under a preponderance standard or wholly foregoing their Fifth and Sixth Amendment rights to a jury trial under a reasonable-doubt standard for fear of the judge's (not the jury's) potential decision.

This case particularly highlights the unfairness of acquitted-conduct sentencing because of the disparity between Mr. Robinson's sentence and that of his co-defendant. Mr. Robinson's co-defendant had a bigger role in the conspiracy but struck a deal with the government that resulted in a sentence less than half the length of Mr. Robinson's. Meanwhile, Mr. Robinson submitted himself to the jury, won a partial acquittal, and then suffered the very harm the Fifth and Sixth Amendments seek to prevent when he was punished by the district court for the very conduct of which he was acquitted.

The Court should grant review, and if necessary, consolidate this case with one or more of the other pending cases that raise a similar issue. *E.g.*, *McClinton v. United States*, Case No. 21-1557. Alternatively, should the Court find another case a more suitable vehicle for review of this issue, Mr. Robinson requests that the Court withhold its decision on this petition until the Court decides that other case and apply its ruling in that case to this one.

Statement

Following a jury trial in the United States District Court for the Northern District of Illinois, Phillip Robinson was convicted on one count of conspiring to

possess cocaine with intent to distribute under 21 U.S.C. § 841(a)(1) and one count of possessing a firearm as a felon under 18 U.S.C. 922(g)(1). ECF No. 129. The jury acquitted him of possessing cocaine with intent to distribute under 21 U.S.C. § 841(a)(1) and possessing a firearm in furtherance of a drug trafficking crime under 18 U.S.C. § 924(c)(1)(A). *Id.* The district court sentenced Mr. Robinson to 115 months of imprisonment, to be followed by three years of supervised release. ECF No. 146. But for a four-level enhancement for possessing the firearm in connection with another felony, the applicable guidelines sentence range would have been only 63 to 78 months. *See* USSG § 5A. The court of appeals affirmed. *United States v. Robinson*, 62 F.4th 318 (7th Cir. 2023).

1. In late 2019, José Solorzano had been unwittingly communicating with an undercover officer to arrange a sale of cocaine in Chicago. ECF No. 177 at 247:17–248:2. After Mr. Solorzano met with the officer in person, a local law enforcement team observed him enter a house. *Id.* at 241:5–15. The officers conducted an online investigative check and identified Mr. Robinson as a possible tenant of the house. *Id.* at 439:6–15. On December 12, 2019, officers surveilled the house and observed the men place a canvas bag in the trunk of a car outside the house and drive away. *Id.* at 250:3–16. The officers relocated to a parking lot where Mr. Solorzano had arranged for the transaction to take place. *Id.* at 374:23–375:20.

When the officers spotted the car enter the parking lot, they moved in for an arrest and took Mr. Solorzano into custody. *Id.* at 376:6–377:3. Since Mr. Robinson did not exit immediately, one of the officers attempted to break the car window by kicking it in. *Id.* at 377:4–22. Mr. Robinson then exited the car, and several

officers took him to the ground to handcuff him. *Id.* at 377:23–25. One officer felt what he thought was a gun in Mr. Robinson's waistband, pulled it out, and tossed it away. *Id.* at 392:12–20. Another officer inventoried the gun and performed an ATF e-trace on it, which revealed that Mr. Robinson was not its original purchaser. *Id.* at 428:17–21, 436:16–25.

After the arrest, the officers took Mr. Robinson to the police station for questioning. *Id.* at 464:5–7, 466:9–19. Mr. Robinson explained he was "watch[ing] over" Mr. Solorzano for a friend in exchange for money during Mr. Solorzano's trip to Chicago. *Id.* 468:9–14. When Mr. Solorzano arrived, Mr. Robinson met up with him and offered to let him stay at his house and drive him around the city. *Id.* at 468:18–469:1.

Mr. Robinson said that a few days before the arrest, Mr. Solorzano travelled alone to a casino in Indiana to sell cocaine there but was robbed. *Id.* at 469:4–9. Mr. Solorzano called Mr. Robinson to let him know about the robbery and request a ride back to Chicago. *Id.* at 469:9–11. Mr. Robinson obliged and told Mr. Solorzano he would go with him in the future as "security" to prevent another robbery. *Id.* at 469:12–16. On the day of the arrest, Mr. Solorzano had asked Mr. Robinson for a "ride to go meet with somebody," prompting Mr. Robinson to grab his girlfriend's gun before driving Mr. Solorzano to the meetup. *Id.* at 469:17–20.

2. The government charged Mr. Solorzano and Mr. Robinson by criminal complaint with conspiring to possess cocaine with intent to distribute. ECF No. 1; 21 U.S.C. § 846; 21 U.S.C. § 841(a)(1). The government later filed an indictment containing the same charge and adding another for possessing cocaine with intent to distribute. ECF No. 19. The indictment also

charged Mr. Solorzano individually with distributing cocaine and charged Mr. Robinson individually with being a felon in possession of a firearm and possessing a firearm in furtherance of a drug trafficking crime. *Id.*; 21 U.S.C. § 841(a)(1); 18 U.S.C. § 922(g)(1); 18 U.S.C. § 924(c)(1)(A). Mr. Solorzano and Mr. Robinson each pleaded not guilty to all charges. ECF Nos. 27–28.

Mr. Solorzano later withdrew his plea of not guilty and pleaded guilty to conspiring to possess cocaine with intent to distribute in exchange for dismissal of the other charges against him. ECF Nos. 63–65. The district court sentenced Mr. Solorzano to 48 months of imprisonment. ECF No. 101. Mr. Robinson maintained his plea of not guilty and proceeded to trial. ECF No. 62.

During a two-day jury trial, the government called four officers involved in the arrest as well as a DEA drug trafficking expert. *See generally* ECF No. 177. The government also read into the record text messages between Mr. Robinson and Mr. Solorzano. In one of them, sent the day after the robbery, Mr. Robinson said: "I'm glad they didn't hurt you… they made a mistake with the robbery, you should have taken me to watch your back. the cars can be replaced, but I wouldn't want anything to happen to you." ECF No. 178 at 530:1–5. The government relied on its expert to establish that people engaged in drug dealing sometimes use code words like "cars" to refer to drugs. ECF No. 177 at 322:24–323:11. Mr. Robinson exercised his right not to testify and called no witnesses. *Id.*

The jury found Mr. Robinson guilty of conspiring to possess cocaine with intent to distribute and of being a felon in possession of a firearm. ECF No. 178 at

611:10–11, 611:18–20; *see* 21 U.S.C. § 846; 21 U.S.C. § 841(a)(1); 18 U.S.C. § 922(g)(1). The jury found Mr. Robinson not guilty of possessing cocaine with intent to distribute and not guilty of possessing the firearm in furtherance of the conspiracy. ECF No. 178 at 611:12–17; *see* 21 U.S.C. § 841(a)(1); 18 U.S.C. § 924(c)(1)(A).

3. The Probation Office filed its presentence investigation report (PSR), and Mr. Robinson objected to its recommendation that he receive a sentencing enhancement to the firearm possession conviction for possessing the firearm in connection with another felony. ECF No. 136; *see* USSG § 2K2.1(b)(6)(B). He argued that the enhancement disregarded the will of the jury in violation of his due process rights. *Id.* at 2–3.

At the sentencing hearing, the district court overruled Mr. Robinson's objection. 8a–9a. It explained that "a different burden of proof applies at sentencing" and that it did not "disrespect the jury's verdict that it had not been prove[n] that the firearm was possessed in furtherance of a drug trafficking crime beyond a reasonable doubt to conclude that that proposition ha[d] been prove[n] by a preponderance of the evidence." *Id.* at 12:24–13:5. The district court reasoned that the enhancement applied because Mr. Robinson had the firearm on his person, the firearm was loaded, and Mr. Robinson volunteered to provide security for Mr. Solorzano after the robbery in Indiana. *Id.* at 13:7–22.

The district court calculated the base offense level for the drug conspiracy conviction as 20, based on the quantity of cocaine. *Id.* at 14:13–15; *see* USSG § 2D1.1(a)(5), § 2D1.1(c)(10). It increased the level by two to 22 based on a finding that Mr. Robinson possessed a firearm in connection with the offense. 8a–9a;

see USSG § 2D1.1(b)(1).

The district court calculated the base offense level for the felon-in-possession conviction as 20, based on Mr. Robinson's prior conviction for a crime of violence. ECF No. 179 at 19:21–23; *see* USSG § 2K2.1(a)(4)(A). It increased the level by two to 22 because the firearm was stolen and by another four levels to 26 for possessing the firearm in connection with another felony (the drug conspiracy). ECF No. 179 at 19:24–20:6; *see* USSG § 2K2.1(b)(4)(A); § 2K2.1(b)(6)(B).

The district court grouped Mr. Robinson's convictions because the drug conspiracy conviction embodied conduct treated as a specific offense characteristic in the gun possession conviction. ECF No. 179 at 20:7–13; *see* USSG § 3D1.2(c). Based on the offense level of 26 and Mr. Robinson's criminal history category of IV, the district court calculated a guidelines sentence range of 92 to 115 months. ECF No. 179 at 20:14–17. But for the four-level enhancement for possessing the firearm in connection with another felony, the applicable guideline range would have been only 63 to 78 months. *See* USSG § 5A.

After balancing the factors as required under 18 U.S.C. § 3553(a), the district court imposed a sentence of 115 months of imprisonment, the high end of the guidelines sentence range. ECF No. 179 at 56:12–17. Mr. Robinson appealed, arguing that the district court's use of acquitted conduct to enhance his sentence violated the Sixth Amendment's jury trial right and the Fifth Amendment's due process guarantee.

4. The court of appeals affirmed. *Robinson*, 62 F.4th at 321. It relied primarily on this Court's decision in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), which as this Court later explained

"presented a very narrow question regarding the interaction of the [United States Sentencing] Guidelines with the Double Jeopardy Clause" and lacked "the benefit of full briefing or oral argument," *United States v. Booker*, 543 U.S. 220, 241 n.4 (2005). The court of appeals acknowledged that *Watts* could be read as "confined to the Fifth Amendment's Double Jeopardy Clause" rather than addressing the Sixth Amendment and due process challenges Mr. Robinson raised. *Robinson*, 62 F.4th at 320 n.2. However, it cited circuit precedent rejecting arguments based on "different constitutional provision[s]" that "war with the logic of *Watts* and 'miss[] the distinction between elements of an offense and facts relevant to sentencing.'" *Id.* (quoting *United States v. Waltower*, 643 F.3d 572, 577 n.2 (7th Cir. 2011)).

None of this Court's post-*Watts* Sixth Amendment decisions that Mr. Robinson cited "convince[d] [the court of appeals] to change course." *Id.* It concluded that "although the Supreme Court may someday revisit *Watts*, . . . [t]he most [the court of appeals] could offer under currently controlling precedent" was an acknowledgment that Mr. Robinson "preserved his argument for further review." *Id.*

Argument

This Court has never addressed whether acquitted-conduct sentencing violates the Sixth Amendment's jury trial right or the Fifth Amendment's due process guarantee. The only time it addressed the legality of acquitted-conduct sentencing at all was in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), a peculiar case that did not answer the question presented here, as numerous post-*Watts* precedents confirm.

Watts resolved a single cert petition asking the Court to reverse two Ninth Circuit decisions that rejected sentences that had been increased based on acquitted conduct. *Id.* at 149. The Court granted the petition and reversed in both cases without merits briefing or oral argument. *Id.* at 164 (Stevens, J., dissenting). The per curiam opinion concluded that the Ninth Circuit decisions "conflict[ed] with the clear implications of 18 U.S.C. § 3661, the Sentencing Guidelines," and prior cases. *Id.* at 149 (per curiam). It reasoned that nothing in 18 U.S.C. § 3661 or the Guidelines authorized the Ninth Circuit to "invent a blanket prohibition against considering certain types of evidence at sentencing." *Id.* at 152. It also faulted the Ninth Circuit for its "erroneous views of [the Court's] double jeopardy jurisprudence," as the jury's inability to find beyond reasonable doubt that a defendant committed a crime does not logically foreclose the same finding under a preponderance standard. *Id.* at 154–55. Finally, the Court noted that "application of the preponderance standard at sentencing generally satisfies due process." *Id.*

As the Court noted later, *Watts* "presented a very narrow question." *United States v. Booker*, 543 U.S. 220, 241 n.4 (2005). Notably, *Watts* involved no "contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment." *Id.* at 240. The phrases "Sixth Amendment" or "right to a jury trial" do not even appear in the per curiam opinion. That absence matters because the Court ushered in a "sea change" in Sixth Amendment sentencing law beginning three years after *Watts*. *Id.* at 329 (Breyer, J., dissenting) (cleaned up).

First, *Apprendi v. New Jersey*, 530 U.S. 466, 490

(2000), held under the Sixth Amendment 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." Next, *Blakely v. Washington*, 542 U.S. 296, 303 (2004), clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," which may be less than the maximum sentence permitted by the statute defining the elements of the offense. Then, *United States v. Booker*, 543 U.S. at 226–27, confirmed that *Apprendi* and *Blakely* apply to the federal Sentencing Guidelines and invalidated a statute making the Guidelines binding on district court judges in order to bring them in compliance with the Sixth Amendment.

More recently, *Alleyne v. United States*, 570 U.S. 99, 112 (2013), held that *Apprendi* applies to facts triggering mandatory minimum sentences because mandatory minimums, like statutory maximums, "alter the prescribed range of sentences to which a criminal defendant is exposed." *Alleyne* explicitly rejected the principal dissent's argument that "the jury's finding already authorized" a sentence above the mandatory minimum, finding the very fact that the mandatory minimum "aggravate[d] the legally prescribed range of allowable sentences" based on judicial factfinding a violation of the Sixth Amendment. *Id.* at 114–15.

Finally, *United States v. Haymond*, 139 S. Ct. 2369 (2019), applied *Alleyne* to invalidate a federal statute that imposed a mandatory minimum sentence if a judge found that the defendant violated the terms of his supervised release. As the plurality put it, "[a] judge's authority to issue a sentence derives from, and

is limited by, the jury's factual findings of criminal conduct," and this limitation persists "until a final sentence is imposed." *Id.* at 2376, 2379. Thus, the statute at issue was unconstitutional because it "require[d] a substantial increase in the minimum sentence to which a defendant may be exposed based only on judge-found facts under a preponderance standard." *Id.* at 2382.

Given the sea change wrought by *Apprendi* and its progeny, it is an "oddity" that lower "courts are still using *acquitted* conduct to increase sentences beyond what the defendant otherwise could have received." *See United States v. Henry*, 472 U.S. 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring). The Court should grant review to address whether that practice is consistent with the principle that "[a] judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct." *See Haymond*, 139 S. Ct. at 2376 (plurality opinion).

I. This case presents an important, recurring question that only this Court can resolve.

"For multiple reasons, the time is ripe for the Supreme Court to resolve the contradictions in Sixth Amendment and sentencing precedent, and to do so in a manner that ensures that a jury's judgment of acquittal will safeguard individual liberty as certainly as a jury's judgment of conviction permits its deprivation." *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc).

1. First, this Court's review is needed to address a deepening conflict between the federal courts of appeals and state courts of last resort regarding the

constitutionality of acquitted-conduct sentencing. Most recently, the Supreme Court of Michigan concluded as a matter of federal constitutional law that the practice is unconstitutional. *People v. Beck*, 939 N.W.2d 213 (Mich. 2019). Importantly, unlike all the federal courts of appeals, it addressed the issue without prior contrary precedent and with the benefit of this Court's guidance in *Apprendi*, *Blakely*, *Booker*, *Alleyne*, and *Haymond*. *Id.* at 220. It also explicitly addressed *Watts*, finding it "unhelpful in resolving whether the use of acquitted conduct at sentencing violates due process." *Id.* at 625. The Supreme Court of New Jersey, while deciding the question as a matter of state constitutional law, also "agree[d] with the Michigan Supreme Court that *Watts* [was] not dispositive" and "cabined specifically to the question of whether the practice of using acquitted conduct at sentencing was inconsistent with double jeopardy." *State v. Melvin*, 258 A.3d 1075, 1090 (N.J. 2021). Two other state supreme courts have concluded that acquitted-conduct sentencing violates the federal Constitution. *See State v. Cobb*, 732 A.2d 425, 442 (N.H. 1999); *State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988).

A conflict between state courts of last resort and federal courts of appeals on an "important federal question" supplies an independent basis to grant certiorari, regardless of whether a circuit split exists. *See* U.S. Sup. Ct. R. 10(b); *Braxton v. United States*, 500 U.S. 344, 347 (1991) (explaining that a "principal purpose" of certiorari jurisdiction is "to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law"). Many landmark Sixth Amendment sentencing cases were decided without a pre-existing circuit split. *See, e.g.*, *Alleyne*, 570 U.S. at 103 (cert granted to consider whether [contrary precedent]

should be overruled); *Oregon v. Ice*, 555 U.S. 160, 167 (2009) (granted because "[s]tate high courts have divided over whether the rule of *Apprendi* governs consecutive sentencing decisions"); *Ring v. Arizona*, 536 U.S. 584, 596 (2002) (granted "to allay uncertainty in the lower courts caused by the manifest tension between [contrary precedent] and the reasoning of *Apprendi*"). Thus, the lack of a federal circuit split on this issue is of no consequence.

Moreover, the lack of a circuit split does not even tell the full story *within* the federal courts of appeals. Judges on a majority of them have registered objections to acquitted-conduct sentencing in concurring or dissenting opinions, some explicitly calling for this Court to address the question. *See United States v. Alejandro-Montañez*, 778 F.3d 352, 362–63 (1st Cir. 2015) (Torruella, J., concurring) ("[I]t is inappropriate and constitutionally suspect to enhance a defendant's sentence based on conduct that the defendant was . . . acquitted of."); *United States v. Martinez*, 769 F. App'x 12, 17 (2d Cir. 2019) (Pooler, J., concurring) (finding "the district court's practice of using acquitted conduct to enhance a defendant's sentence . . . fundamentally unfair" and "deeply troubling"); *United States v. White*, 551 F.3d 381, 392 (6th Cir. 2008) (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. Lasley*, 832 F.3d 910, 920–21, 923 (8th Cir. 2016) (Bright, J., dissenting) (stating that "the use of acquitted conduct to enhance a defendant's sentence should be deemed unconstitutional under both the Sixth Amendment and the Due Process Clause of the Fifth Amendment" and "suggest[ing] that Supreme Court review of these important sentencing issues may be appropriate"); *United States v.*

Mercado, 474 F.3d 654, 658 (9th Cir. 2007) (B. Fletcher, J., dissenting) (stating that "[b]oth *Booker* and the clear import of the Sixth Amendment prohibit" a judge from "rel[ying] on acquitted conduct in sentencing"); *United States v. Faust*, 456 F.3d 1342, 1353 (11th Cir. 2006) (Barkett, J., specially concurring) ("I do not believe the Constitution permits this cruel and perverse result."); *Bell*, 808 F.3d at 932 (Millett, J., concurring in denial of rehearing en banc) ("Going en banc would only delay affording the Supreme Court another opportunity to take up this important, frequently recurring, and troubling contradiction in sentencing law.").

Multiple now-sitting Justices of this Court have signed opinions expressing similar views. *See Jones v. United States*, 574 U.S. 948, 949 (2014) (Scalia, joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari) ("Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime . . . that must be either admitted by the defendant or found by the jury."); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (finding it "far from certain whether the Constitution allows" a judge to "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"); *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing en banc) ("Allowing judges to rely on acquitted . . . 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.").

2. This Court's review is also needed because *Watts* dissuades the courts of appeals from fully considering the constitutionality of acquitted-conduct sentencing

despite this Court's intervening precedents suggesting *Watts* should not be read so broadly. The Seventh Circuit, for example, has repeatedly expressed the view that *Watts* precludes it from sustaining a Sixth Amendment challenge to acquitted-conduct sentencing notwithstanding this Court's intervening precedents. *See, e.g.*, *United States v. Price*, 418 F.3d 771, 788 n.7 (7th Cir. 2005) ("[O]verruling a precedent of the Supreme Court . . . is the province of the Supreme Court alone."); *United States v. Waltower*, 643 F.3d 572, 577 (7th Cir. 2011) ("If *Watts* is infirm, it must be based on a more direct attack—not *Apprendi* and its progeny."); *United States v. McClinton*, 23 F.4th 732, 735 (7th Cir. 2022) ("Until such time as the Supreme Court alters its holding [in *Watts*], we must follow its precedent.").

3. Finally, this Court's review is needed because administrative and legislative solutions have proven ineffective. The United States Sentencing Commission, for example, considered a proposal this year to amend the Sentencing Guidelines to limit (but not eliminate) district judges' use of acquitted conduct at sentencing. *See* 88 Fed. Reg. 7180, 7224–25 (Feb. 2, 2023). However, the United States Department of Justice urged the Court not to adopt it. Ltr. from Jonathan J. Wroblewski to Hon. Carlton W. Reeves (Feb. 15, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ3.pdf. The Sentencing Commission ultimately decided against adopting the amendment, stating that it would not consider the issue again until next year. *Remarks as Prepared for Delivery by Chair Carlton W. Reeves* (Apr. 5, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230405/20230405_remarks.pdf.

Though administrative action can sometimes obviate the need for this Court to issue constitutional decisions, that is not the case with the Sentencing Commission's proposed amendment to limit acquitted-conduct sentencing. There is no guarantee the Sentencing Commission will adopt the amendment next year or even consider it. And as the Department of Justice pointed out in opposing it, federal law may actually *prohibit* such an amendment. *See also Watts*, 519 U.S. at 158 (Scalia, J., concurring) (expressing this view). If it were passed, there would be a very real possibility that this Court would eventually be asked to review its validity. Moreover, even the amendment that was proposed this year would not have fully prohibited district judges from considering acquitted conduct in the discretionary phase of sentencing. *See* 88 Fed. Reg. 7180, 7224–25 (Feb. 2, 2023). Thus, even if it were adopted, the amendment would not stop criminal defendants whose sentences were enhanced by acquitted conduct in the discretionary phase of sentencing from raising Sixth Amendment challenges to those sentences in this Court. And regardless, no amendment to the *federal* Guidelines can stop criminal defendants sentenced based on acquitted conduct in *state* court from continuing to ask this Court to take up the issue.

The Congressional proposal to eliminate acquitted-conduct sentencing, *see* H.R. 1621, 117th Cong. (1st Sess. 2021), is no more likely to avoid this Court having to eventually address the constitutionality of the practice. Like the Sentencing Commission, Congress is powerless to eliminate acquitted-conduct sentencing in state courts. And the Senate has not even acted on the proposal since it was introduced there over a year ago. Even still, this Court has not hesitated to address important constitutional issues despite pending legislation that might have obviated the need for

its intervention. *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 795–96 (2010) (Scalia, J., concurring).

Finally, simply leaving it to individual judges to decide whether to consider acquitted conduct invites arbitrary disparities in criminal punishment. *Compare, e.g.*, *United States v. Khatallah*, 41 F.4th 608, 653–64 (D.C. Cir. 2022) (Millett, J., concurring) (agreeing with majority that judge's downward variance to avoid reliance on acquitted conduct was permissible and calling it "a sound and commendable exercise of discretion") *with United States v. Ibanga*, 271 F. App'x 298, 299 (4th Cir. 2008) (reversing district court for varying downward to avoid reliance on acquitted conduct). The Sixth Amendment's fundamental meaning should not change depending on where the defendant is charged or which judge is assigned to the case.

II. The decision below is wrong.

Though the jury found Mr. Robinson not guilty of possessing a firearm in furtherance of a drug conspiracy, ECF No. 178 at 611:12–17, the district court nonetheless increased his sentence based on a preponderance finding that he possessed the firearm in connection with the conspiracy, 8a–9a. The court of appeals affirmed, concluding that neither the Sixth nor Fifth Amendment prohibits such acquitted-conduct sentencing. *United States v. Robinson*, 62 F.4th 318 (7th Cir. 2023). For the reasons below, that conclusion was wrong.

A. Acquitted-conduct sentencing violates the Sixth Amendment right to a jury trial.

The Sixth Amendment states, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. *Apprendi*

interpreted this text to mean 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" or admitted by the defendant in a plea agreement. 530 U.S. at 490. The relevant "statutory maximum" for "*Apprendi* purposes" is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S. at 303.

Apprendi's rule guards against "judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow." *S. Union Co. v. United States*, 567 U.S. 343, 352 (2012); *see Haymond*, 139 S. Ct. 2369, 2376 (2019) (Gorsuch, J.) (plurality opinion) (explaining that juries "exercise supervisory authority over the judicial function by limiting the judge's power to punish"). As a plurality of this Court stated in its most recent *Apprendi* case, "[a] judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct." *Haymond*, 139 S. Ct. at 2376 (Gorsuch, J.).

Imposing a sentence based on *acquitted* conduct—unlike imposing a sentence based on *uncharged* conduct—violates *Apprendi*'s rule because the judge necessarily relies on "facts that the jury verdict not only failed to authorize" but also "expressly disapproved." *Faust*, 456 F.3d at 1351 (Barkett, J., specially concurring) (quoting *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005) (Gertner, J.)). "The fact that a jury has not authorized a particular punishment is never more clear than when the jury is asked for, yet specifically withholds, that authorization." *Mercado*, 474 F.3d at 664 (B. Fletcher, J.,

dissenting).

Acquitted-conduct sentencing also undermines the "historic jury function" in which *Apprendi* is "rooted." *Ice*, 555 U.S. at 163. The jury is a "bulwark of [our] civil and political liberties." *Apprendi*, 530 U.S. at 477 (quoting 2 J. Story, Commentaries on the Constitution of the United States 540–41 (4th ed. 1873)). The right to a jury trial is not about procedure but a "fundamental reservation of power." *Blakely*, 542 U.S. at 305–06. And the jury retains that power even after it is discharged "until the final sentence is imposed." *Haymond*, 139 S. Ct. at 2379 (Gorsuch, J.) (plurality opinion). Acquitted-conduct sentencing thus relegates the jury from a "bulwark" at trial to "little more than a speed bump at sentencing." *Bell*, 808 F.3d at 929 (Millett, J., concurring in denial of rehearing en banc).

Though our contemporary sentencing regime would have been alien to the Framers, this "tension between jury powers and powers exclusively judicial would likely have been very much to the fore in [their] conception of the jury right." *See Jones v. United States*, 526 U.S. 227, 244 (1999). At the founding, the jury's "power to thwart Parliament and Crown" was understood to include not just "flat-out acquittals" but also "what today we would call verdicts of guilty to lesser included offenses" or what Blackstone called "pious perjury." *Id.* at 245 (quoting 4 Blackstone 238–39). In other words, when the Sixth Amendment was written, the jury influenced not just *whether* a defendant would be sentenced but also the *severity* of the sentence. Blackstone warned in the 1760s that threats to the jury trial right came not just from "open attacks" but also innovative new trial procedures that "sap and undermine" it. *Id.* at 246. It is "beyond question that Americans of the period perfectly well understood the

lesson that the jury trial right could be lost not only by gross denial, but by erosion." *Id.* at 247–48. Acquitted-conduct sentencing is precisely the kind of procedural innovation the Sixth Amendment's drafters would have viewed as such an "erosion" because it marginalizes the jury's role in influencing the severity of sentences.

Finally, acquitted conduct sentencing shrinks the jury's role by giving the government a "second bite at the apple" to "essentially retry those counts on which it lost" at trial. *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring). Moreover, this "second bite" happens at a procedural stage with a lower standard of proof and fewer procedural protections for the defendant. *See Bell*, 808 F.3d at 930 (Millett, J., concurring in denial of rehearing en banc) ("Constructing a regime in which the judge deprives the defendant of liberty on the basis of the very same factual allegations that the jury specifically found did not meet our constitutional standard for a deprivation of liberty puts the guilt and sentencing halves of a criminal case at war with each other.").

Booker does not shield acquitted-conduct sentencing from constitutional scrutiny in federal cases. Though *Booker* made the federal Sentencing Guidelines advisory rather than mandatory, 543 U.S. at 267–68, the Guidelines have "force as the framework for sentencing," *Peugh v. United States*, 569 U.S. 530, 542 (2013). They "demark the de facto boundaries of a legally authorized sentence in the mine run of cases." *Bell*, 808 F.3d at 931 (Millett, J., concurring in denial of rehearing en banc). Thus, even under the advisory Guidelines, acquitted-conduct sentencing still violates the Sixth Amendment by "alter[ing] the prescribed range of sentences to which" the defendant "is

exposed," *see Alleyne*, 570 U.S. at 112 (Thomas, J.) (plurality opinion) (discussing *Apprendi* challenge to mandatory minimum sentence).

B. Acquitted-conduct sentencing violates the Fifth Amendment right to due process.

Acquitted-conduct sentencing also violates the Fifth Amendment right to due process. *See* U.S. Const. amend. V. Due process requires the government to prove "every fact necessary to constitute" a crime "beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 364 (1970). The reasonable doubt standard "provides concrete substance for the presumption of innocence." *Id.* at 363. Due process also requires that any "deprivation of life, liberty or property . . . be preceded by notice." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

The court of appeals deemed acquitted-conduct sentencing constitutionally permissible because the burden of proof at sentencing is lower than the burden of proof at trial. But sentencing enhancements based on acquitted conduct are "unconstitutional precisely *because* they derive[d] from findings based on a preponderance of the evidence." *Faust*, 466 F.3d at 1351 (Barkett, J., specially concurring). "[T]he whole reason the Constitution imposes that strict beyond-a-reasonable-doubt standard is that it would be constitutionally intolerable, amounting 'to a lack of fundamental fairness,' for an individual to be convicted and then 'imprisoned for years on the strength of the same evidence as would suffice in a civil case.'" *Bell*, 808 F.3d at 930 (Millett, J., concurring in denial of rehearing en banc) (quoting *Winship*, 397 U.S. at 364). "In other words, proof beyond a reasonable doubt is what we demand from the government as an indispensable precondition to *depriving an individual of liberty for the*

alleged conduct." *Id.* The lower standard of proof that applies at sentencing does not fix the constitutional problem with acquitted-conduct sentencing—it exacerbates it.

Acquitted-conduct sentencing also deprives the defendant of the fair-notice guarantee inherent in due process. *Beck*, 939 N.W.2d at 222. The Fifth Amendment guarantees that the defendant is "entitled to fair notice of the precise effect a jury's verdict will have on his punishment." *Lasley*, 832 F.3d at 922 (Bright, J., dissenting). That fair-notice guarantee is violated by the "nullification of a jury's not guilty verdict" that occurs when a judge "use[s] the *same* conduct underlying [an acquitted] charge to enhance a defendant's sentence." *Canania*, 532 F.3d at 777 (Bright, J. concurring).

III. This case is an ideal vehicle to resolve the question presented.

This case highlights how acquitted-conduct sentencing harms the jury's role because of the disparity between Mr. Robinson's sentence and that of his co-defendant, Mr. Solorzano, who had a bigger role in the conspiracy but received a lesser sentence after pleading out.

Mr. Solorzano was the one who brought the cocaine from Mexico. ECF No. 178 at 536:10–11. Mr. Solorzano was the one who had been texting the undercover officer to arrange the sale at which he and Mr. Robinson were arrested. ECF No. 177 at 247:17–248:2. Mr. Solorzano was the one who met with the officer—alone—to bring a sample of the cocaine the day before the arrest. *Id.* at 241:5–15. Mr. Solorzano was the one who attempted to sell the cocaine—also alone—several days before the arrest. *Id.* at 469:4–9. Yet

Mr. Solorzano was sentenced to only 48 months of imprisonment after pleading guilty and foregoing his right to a jury trial. ECF No. 101.

Mr. Robinson, on the other hand, was sentenced to over *twice* that amount (115 months) despite submitting himself to the jury and the jury acquitting him on half the charges. *See* ECF No. 178 at 611:10–20; ECF No. 179 at 56:12–17. Had the district court not relied on acquitted conduct to calculate Mr. Robinson's guideline sentence range, the applicable range would have been only 63 to 78 months. *See* USSG § 5A. That range still would have reflected that Mr. Robinson's involvement in the conspiracy included possessing a firearm and Mr. Solorzano's did not because it still would have included the jury's conviction on the gun possession charge. It also would have reflected the reality that a defendant always faces the risk of a higher sentence by holding the government to its burden of proof and proceeding to trial. However, that lower range also would have respected the jury's refusal to expose Mr. Robinson to far more severe punishment based on the possession-in-furtherance charge. Instead, the government got a "second bite at the apple" to retry that count, *see Canania*, 532 F.3d at 776 (Bright, J., concurring), without the jury's checking function and under a lower standard of proof, *see Bell*, 808 F.3d at 930 (Millett, J., concurring in denial of rehearing en banc). Neither the Sixth nor Fifth Amendment should tolerate that result.

This case also squarely implicates the question presented. The district court explicitly justified Mr. Robinson's sentence with the fact that "a different burden of proof applies at sentencing" and the assertion that "[i]t does not disrespect the jury's verdict" to rely on that distinction to increase a sentence. 8a–9a.

The court of appeals affirmed, relying on *Watts* to support that acquitted-conduct sentencing is constitutional. *Robinson*, 62 F.4th at 320. This Court should grant review to resolve the growing disagreement over whether that view of *Watts* is correct.

Conclusion

Mr. Robinson respectfully requests that the Court grant the petition, and if necessary, consolidate this case with one or more of the other pending cases that raise the same issue. Alternatively, should the Court find another case a more suitable vehicle, Mr. Robinson respectfully requests that the Court withhold its decision on this petition until it decides that case and then grant this petition depending on the result.

Respectfully submitted,

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June 7, 2023

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED MARCH 9, 2023

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 22-1472

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PHILLIP ROBINSON,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 19-cr-00933-2 — **John J. Tharp, Jr.**, *Judge.*

Argued February 8, 2023 – Decided March 9, 2023

Before FLAUM, SCUDDER, and ST. EVE, *Circuit Judges.*

FLAUM, *Circuit Judge.* Phillip Robinson appeals the district court's application of a sentencing enhancement following a jury trial. Primarily, he raises the familiar challenge that the Constitution prohibits using acquitted conduct for sentencing purposes. He also argues that the district court's factual findings do not support its application of the enhancement. We affirm on both fronts.

Appendix A

I. BACKGROUND

In late 2019, Robinson agreed to let an acquaintance, Jose Solorzano, stay at his home in Chicago. Robinson apparently knew that Solorzano was there to sell cocaine; the two frequently exchanged coded text messages about potential deals. One day, Robinson drove to Indiana to pick up Solorzano after an ill-fated transaction had ended with Solorzano getting robbed. Robinson later texted Solorzano, "You should have taken me to watch your back."

Soon afterwards, Solorzano arranged a deal with an undercover officer. Robinson agreed to drive him, and upon their arrival, authorities approached the vehicle to arrest them. One officer said that, during the arrest, he saw his colleague pull a handgun from Robinson's waistband. The gun was loaded. In addition, the officer who interrogated Robinson following the arrest said that Robinson told him he had brought the gun to avoid being robbed.

Robinson went to trial. The jury found him guilty of conspiring to possess cocaine with intent to distribute and of possessing a firearm as a felon. On the other hand, it found him not guilty of possessing a firearm "in furtherance of" the conspiracy. *See* 18 U.S.C. § 924(c)(1)(A).[1] The government then sought an enhancement to Robinson's sentence for the felon-in-possession conviction on the grounds that he possessed a firearm "in connection

1. The jury also found Robinson not guilty of possessing cocaine with intent to distribute.

with" the cocaine conspiracy. *See* U.S.S.G. § 2K2.1(b)(6)(B). The court applied the enhancement over Robinson's objection, and Robinson appealed.

II. DISCUSSION

Robinson first contends that the district court's use of acquitted conduct to enhance his sentence violated his constitutional rights. Second, he argues that the district court did not make sufficient factual findings to apply the enhancement.

A. Use of Acquitted Conduct

We review a defendant's constitutional challenge to his sentence de novo. *United States v. Castro-Aguirre*, 983 F.3d 927, 942 (7th Cir. 2020). Robinson objects to the district court's conclusion during sentencing that he possessed a firearm "in connection with" the cocaine conspiracy. *See* U.S.S.G. § 2K2.1(b)(6)(B). The jury had already found him not guilty of possessing a firearm "in furtherance of" the conspiracy. *See* 18 U.S.C. § 924(c)(1)(A). According to Robinson, the Constitution does not permit the district court's use of acquitted conduct for sentencing purposes.

The Supreme Court says otherwise. In *United States v. Watts*, it endorsed this practice "so long as [the acquitted] conduct has been proved by a preponderance of the evidence." 519 U.S. 148, 155-57, 117 S. Ct. 633, 136

L. Ed. 2d 554 (1997).[2] Time and again, we have relied on *Watts* to reject the same argument Robinson raises now. *See, e.g., United States v. Jones*, 56 F.4th 455, 514 (7th Cir. 2022); *United States v. Gan*, 54 F.4th 467, 482-83 (7th Cir. 2022); *United States v. Bravo*, 26 F.4th 387, 399 (7th Cir. 2022); *United States v. McClinton*, 23 F.4th 732, 735 (7th Cir. 2022).

None of the cases Robinson cites convinces us to change course. To be sure, the Supreme Court may someday revisit *Watts*. *See McClinton*, 23 F.4th at 735. The most we can offer under currently controlling precedent, however, is that Robinson has preserved his argument for further review.

B. Findings Supporting Enhancement

Robinson next argues that the district court did not make sufficient factual findings to apply the enhancement. Again, the court had to determine whether Robinson possessed a firearm "in connection with" the conspiracy to possess cocaine with intent to distribute. *See* U.S.S.G. § 2K2.1(b)(6)(B); *see also id.*, cmt. n.14(A) (describing the

2. Even assuming *Watts* is best read as confined to the Fifth Amendment's Double Jeopardy Clause, *see United States v. Booker*, 543 U.S. 220, 240, 125 S. Ct. 738, 160 L. Ed. 2d 621 & n.4 (2005), litigants relying on a different constitutional provision must "construct an argument" that does not "war with the logic of *Watts* and 'miss[] the distinction between elements of an offense and facts relevant to sentencing.'" *United States v. Waltower*, 643 F.3d 572, 577 n.2 (7th Cir. 2011) (alteration in original) (quoting *United States v. Vaughn*, 430 F.3d 518, 526 (2d Cir. 2005)).

inquiry as whether "the firearm ... facilitated, or had the potential of facilitating," the cocaine conspiracy).

We review for clear error. *United States v. Clinton*, 825 F.3d 809, 811 (7th Cir. 2016).[3] Although this standard is lenient, the district court must provide enough detail for us to "know what [it] thought" about the facts supporting the enhancement. *See United States v. Briggs*, 919 F.3d 1030, 1033 (7th Cir. 2019). If the court's findings do not illuminate a link between the gun and the drug felony, we will remand. *See Clinton*, 825 F.3d at 813 ("[W]e have essentially no fact findings at all by the district court relevant to this issue."); *Briggs*, 919 F.3d at 1032 ("[T]he district [court] never made any findings about how Briggs's felony cocaine possession was connected to his firearms." (emphasis omitted)).

Here, the district court observed that "Robinson volunteered to provide security for ... Solorzano after Solorzano was robbed" in Indiana. The court also noted that, on the day Robinson drove Solorzano to the prospective drug deal with the undercover officer, he had a loaded "firearm on his person." It surmised that Robinson had brought the gun "to provide assurance that the transaction would take place on the terms expected"—that is, to avoid "being robbed."

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3. The parties dispute whether Robinson forfeited this issue; if he did, plain-error review would apply. *United States v. Foy*, 50 F.4th 616, 622 (7th Cir. 2022). We need not resolve this disagreement because Robinson's challenge would fail even if he preserved it.

This reasoning is far from clear error. We have no doubt about the district court's rationale for connecting the gun to the cocaine conspiracy, and the record supports its findings. Application of the enhancement was thus appropriate.

III. CONCLUSION

For these reasons, we AFFIRM the district court's decision.

APPENDIX B — TRANSCRIPT EXCERPTS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED MARCH 9, 2022

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 19 CR 933-2

Chicago, Illinois
March 9, 2022
1:01 p.m.

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

PHILLIP ROBINSON,

Defendant.

TRANSCRIPT OF PROCEEDINGS - Sentencing
BEFORE THE HONORABLE JOHN J. THARP, JR.

* * *

[12]obviously withdraw the objection. I wasn't factoring in that stipulation. There were a number of them that were put together right before trial, and that's one that I simply forgot about. So I do apologize.

THE COURT: All right. So that objection is overruled. Apart from the stipulation to the -- that the firearm had been stolen, there is no requirement to know that it was stolen in any event as the government's memoranda points out. The enhancement reflects the heightened danger that exist when felons possess stolen firearms that have been -- or possess not just firearms but stolen firearms which are harder to trace, and the inherent danger of firearms possessed by felons is even higher when those firearms have been stolen. So that objection is overruled.

The other defense objection was an objection to the four-level enhancement for possession of the firearm in connection with another crime. That's an enhancement pursuant to Section 2K2.1(b)(6)(B). As I understand the objection there is because the jury acquitted Mr. Robinson on the possession of a firearm in furtherance of a drug trafficking offense charge that the Court should not impose that enhancement based on the jury's verdict; is that correct?

MR. MIRAGLIA: That's in essence, yes.

THE COURT: Okay. The I think simple answer to that objection is that a different burden of proof applies at [13]sentencing. It does not disrespect the jury's verdict that it had not been proved that the firearm was possessed

in furtherance of a drug trafficking crime beyond a reasonable doubt to conclude that that proposition has been proved by a preponderance of the evidence, and I have no difficulty so concluding.

Given the evidence that Mr. Robinson volunteered to provide security for Mr. Solorzano after Solorzano was robbed at the casino, Mr. Robinson's possession of the firearm on the -- during the transaction that was -- he and Mr. Solorzano were going to conduct on December 12th when they were arrested, Mr. Solorzano -- or excuse me -- Mr. Robinson had the firearm on his person. It was loaded. It was clearly possessed to further the drug trafficking crime to provide assurance that the transaction would take place on the terms expected, which is an exchange of drugs for money, rather than providing drugs without getting any payment or, you know, being robbed in the course of the transaction. That's -- I have -- that easily clears the preponderance of the evidence standard for the enhancement for possession of a firearm in connection with a drug trafficking offense. So that objection is overruled as well.

I think those were the only objections to the guideline calculations. Did I miss anything?

(No response.)

* * * *