

No. \_\_\_\_\_

---

**In the Supreme Court of the United States**

**October Term, 2021**

GARY PAUL KARR, *PETITIONER*,

v.

UNITED STATES OF AMERICA

---

**PETITION FOR WRIT OF CERTIORARI  
TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH  
CIRCUIT**

---

MAUREEN SCOTT FRANCO  
Federal Public Defender

JUDY FULMER MADEWELL  
First Assistant Federal Public Defender  
Western District of Texas  
727 E. César E. Chávez Blvd., B-207  
San Antonio, Texas 78206-1205  
(210) 472-6700  
(210) 472-4454 (Fax)

*Counsel of Record for Petitioner*

---

**QUESTIONS PRESENTED FOR REVIEW**

1. Whether the Fifth and Sixth Amendments prohibit a federal court from basing a criminal defendant's sentence on conduct underlying a charge for which the defendant was acquitted by a jury.
2. Whether it violated the Due Process Clause of the Fifth Amendment for the district court to sentence Karr based on a 20-year-old, out-of-court statement, never subjected to cross-examination, made by the more-culpable but now-deceased coconspirator, who had been attempting to obtain, and did obtain, a more-favorable resolution to the same criminal charges Karr faced.

No. \_\_\_\_\_

**In the Supreme Court of the United States**

**October Term, 2021**

---

GARY PAUL KARR, *PETITIONER*,

v.

UNITED STATES OF AMERICA

---

**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT**

---

Petitioner Gary Paul Karr asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on May 12, 2022.

**PARTIES TO THE PROCEEDING**

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

**RELATED PROCEEDINGS**

All proceedings directly related to the case are as follows:

- *United States v. Karr*, No. 1-99-CR-274-1-SS (W.D. Tex. Aug. 21, 2000) (judgment)

- *United States v. Karr*, No. 21-50219 (5th Cir. May 12, 2022)  
(unpublished opinion)

## TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW .....	i
PARTIES TO THE PROCEEDING .....	ii
RELATED PROCEEDINGS.....	ii
OPINION BELOW.....	1
JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES .....	1
CONSTITUTIONAL PROVISIONS INVOLVED .....	1
UNITED STATES SENTENCING GUIDELINE INVOLVED.....	1
STATEMENT .....	2
REASONS FOR GRANTING THE WRIT .....	16
I. The Court should grant certiorari to resolve the problematic use of acquitted conduct at sentencing, which violates the Fifth and Sixth Amendments.....	16
II. Karr’s Due Process rights were violated by the district court relying upon an untrustworthy 20-year-old statement at sentencing. ....	21
CONCLUSION.....	27
APPENDIX A <i>United States v. Karr,</i> No. 21-50219, unpub. op. (5th Cir. May 12, 2022)	
APPENDIX B      U.S.S.G. §2A1.1	
APPENDIX C      U.S.S.G. §2B3.1	

## TABLE OF AUTHORITIES

### Cases

<i>Apprendi v. New Jersey</i> , 530 U.S. 460 (2000) .....	19, 20
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986) .....	19
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004) .....	20
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004) .....	25
<i>Cunningham v. California</i> , 549 U.S. 270 (2007) .....	20
<i>Davis v. United States</i> , 139 S. Ct. 2319 (2019) .....	3
<i>In re Winship</i> , 397 U.S. 358 (1970) .....	20
<i>People v. Beck</i> , 939 N.W.2d 213 (Mich. 2019) .....	19
<i>United States v. Acosta</i> , 85 F.3d 275 (7th Cir. 1996) .....	22
<i>United States v. Bell</i> , 808 F.3d 926 (D.C. Cir. 2015) .....	16, 18
<i>United States v. Booker</i> , 543 U.S. 220 (2005) .....	17
<i>United States v. Brown</i> , 892 F.3d 385 (D.C. Cir. 2018) .....	18

<i>United States v. Browning</i> , 61 F.3d (10th Cir. 1995) .....	25
<i>United States v. Darby</i> , 744 F.2d 1508 (11th Cir 1984) .....	24
<i>United States v. Garcia</i> , 78 F.3d 1457 (10th Cir. 1996) .....	25
<i>United States v. Gentry</i> , 941 F.3d 767 (5th Cir. 2019) .....	24
<i>United States v. Givan</i> , 320 F.3d 452 (3d Cir. 2003) .....	21
<i>United States v. Holding</i> , 948 F.3d 864 (7th Cir. 2020) .....	26
<i>United States v. Jones</i> , 135 S. Ct. 8 (2014) .....	17, 18
<i>United States v. Karr</i> , No. 21-50219, 2022 WL 1499288, (5th Cir. 2022).....	1, 15, 16
<i>United States v. Lasley</i> , 832 F.3d 910 (8th Cir. 2016) .....	19
<i>United States v. Lee</i> , 68 F.3d 1267 (11th Cir. 1995).....	22
<i>United States v. McGowan</i> , 668 F.3d 601 (9th Cir. 2012) .....	22
<i>United States v. Pimental</i> , 367 F. Supp. 2d 143 (D. Mass. 2005) .....	20
<i>United States v. Sabillon-Umana</i> , 772 F.3d 1328 (10th Cir. 2014) .....	18
<i>United States v. Tobias</i> , 662 F.2d 381 (5th Cir. 1981) .....	24

*United States v. Watts*,  
519 U.S. 148 (1997) .....*passim*

*United States v. White*,  
551 F.3d 381 (6th Cir. 2008) ..... 17, 20

*United States v. Williams*,  
41 F.3d 496 (9th Cir. 1994) ..... 26

*United States v. Zuniga*,  
720 F.3d 587 (5th Cir. 2013) ..... 22

### **Constitutional Provisions**

U.S. Const. amend. V .....*passim*

U.S. Const. amend. VI .....*passim*

### **Statutes**

18 U.S.C. § 3559(c) ..... 3

18 U.S.C. § 3661 ..... 21

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 2255 ..... 3

### **Rules**

Fed. R. Crim. P. 32 ..... 26

Sup. Ct. R. 13.1 ..... 1

### **United States Sentencing Guidelines**

U.S.S.G. §2A1.1 ..... 1, 2, 3, 13

U.S.S.G. §2B3.1 ..... 1

U.S.S.G. §2B3.1(c) ..... 2, 3, 13



U.S.S.G. §6A1.3.....	21
----------------------	----

## **OPINION BELOW**

A copy of the opinion of the court of appeals, *United States v. Karr*, No. 21-50219, unpub. op. (5th Cir. May 12, 2022), is attached to this petition as Appendix A.

## **JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES**

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on May 12, 2022. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL PROVISIONS INVOLVED**

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

No person shall ... be deprived of life, liberty, or property, without due process of law[.]

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[.]

## **UNITED STATES SENTENCING GUIDELINE INVOLVED**

The text of guidelines §2A1.1 and §2B3.1 are attached as Appendices B and C.

## STATEMENT

Gary Karr's sentence was increased by more than 30 years because the district court applied the cross-reference in the robbery guideline, §2B3.1(c), to the murder guideline in §2A1.1. The court applied the murder guideline because of factual findings it made based on acquitted conduct and an unreliable 20-year-old coconspirator statement. Karr objected to the cross-reference as violating the Fifth Amendment Due Process Clause and the Sixth Amendment right to a jury trial. On appeal, the Fifth Circuit Court of Appeals held that *United States v. Watts*, 519 U.S. 148 (1997), foreclosed Karr's constitutional argument on acquitted conduct. The court of appeals also held that, even if the coconspirator statement was unreliable, as is required by due process, the other evidence—including the acquitted conduct—was sufficient to support the cross-reference. Because Karr's sentence was increased based on acquitted conduct and an unreliable statement, it violated his due process rights and his right to a jury trial.

**The procedural history:** In 2000, Gary Karr went to trial on charges of conspiracy to kidnap (Count One), conspiracy to interfere with commerce by robbery and extortion (Count Two), interstate travel to commit a crime of violence (Count Three), conspiracy to engage in a monetary transaction in criminally derived property (Count Four), and interstate transportation of stolen

property (Count Five). The jury acquitted Karr of Count One but convicted him of Counts Two, Three, Four, and Five, and found, as to Count Three, that his conduct had not resulted in the death of another person. Karr was sentenced to mandatory life imprisonment on Counts Two and Three, 115 months' imprisonment on Counts Four and Five, with all to run concurrently.

In early 2020, Karr filed a 28 U.S.C. § 2255 motion alleging that the mandatory life sentences on Counts Two and Three, imposed under 18 U.S.C. § 3559(c), were unconstitutional under *Davis v. United States*, 139 S. Ct. 2319 (2019). The motion was granted, and the sentences were vacated on those two counts. The case was transferred to another district court for resentencing.

At the resentencing hearing, in March 2021, the district court applied the cross-reference in guideline §2B3.1(c) to the murder guideline in §2A1.1 and sentenced Karr to two consecutive terms of 240 months' imprisonment on Counts Two and Three to run consecutively to the 115-month concurrent sentences on Counts Four and Five, for a total sentence of 595 months' imprisonment.

In sentencing Karr, the district court considered the evidence before the jury—including acquitted conduct—and the original sentencing court. It also considered evidence the Government had not presented in the earlier proceedings.

**Evidence known at the 2000 trial and sentencing:** Gary Karr knew David Waters from the time they had spent together in prison. After Waters was released from prison, he worked as the office manager for American Atheists, Inc., a business in Austin, Texas, owned and operated by Madalyn Murray O'Hair, her son Jon Murray, and her granddaughter Robin Murray O'Hair.<sup>1</sup> When Waters embezzled from the O'Hairs, he was convicted of theft and required to pay restitution. Madalyn told employees she was frightened of Waters. The O'Hairs published a newsletter describing Waters' criminal history and conduct. Angry about the unflattering newsletter, Waters developed a scheme to abduct the O'Hairs and steal their money. Waters asked Karr to come to Austin, after he was released from prison, to assist him in the scheme. Another friend of Waters, Danny Fry, was already there.

The last time the O'Hair family was seen by the outside world was on August 27, 1995. On that day, an employee of the O'Hairs saw a van, which Karr had rented, at the American Atheists location. The next day, employees found a note on the door that the

---

<sup>1</sup> In this petition, the O'Hair family will be referred to as "the O'Hairs." The individual family members will be referred to by either their first name, e.g., Madalyn, or by their full name, e.g., Madalyn Murray O'Hair.

O'Hairs had been called out of town on an emergency. Robin's Porsche was later found at the Austin airport, where Karr had parked it.

From August 28 until September 30, 1995, Karr and Waters rented an apartment at the Warren Inn in San Antonio, Texas. At the end of September, they moved to a first-floor room at a La Quinta Inn.

During the months of August, September, and October 1995, there were numerous financial transactions from O'Hair accounts, totaling over \$90,000. Waters and Karr were spending money and sending some to family and friends as well.

In September, over \$600,000 was wired from the O'Hairs' bank account in New Zealand to their account in New Jersey. On September 21, Karr, traveling under an alias, flew with Jon Murray to New Jersey. Jon went to the bank to transfer the \$600,000 to a jeweler's account at a San Antonio bank. The jeweler was to purchase gold coins with the money. About a week later, Jon went to the bank to pick up the gold coins. He was alone, looked disheveled, wore rumpled clothes, and smelled bad. At that time, only \$500,000 had been converted to gold coins. Jon Murray took those coins; he never returned for the remaining \$100,000.

In the meantime, Waters had instructed his girlfriend, Patti Jo Steffens, and a friend to rent storage units at Burnet Self-Storage and at Public Storage.

Waters placed the O'Hairs' gold coins in the Burnet Self-Storage unit on September 29.<sup>2</sup> The next day, the Public Storage unit was accessed repeatedly. The manager of Public Storage reported seeing three men with 55-gallon barrels and two pickup trucks around the unit.

That same day, Steffens noticed that Waters, Karr, and Fry seemed worn out. Waters also had a lot of money and expensive items. Waters appeared angry at Fry, who looked sick and horror-stricken. Steffens also saw a bag containing three pairs of bloody tennis shoes.

Steffens helped pack Fry's possessions because he planned to travel to Florida for his daughter's birthday. That day, September 30, was the last time Steffens saw Fry. Later, she noticed that Fry's belongings, including gifts for his daughter, had been unpacked and some items thrown away.

For the next two days, October 1 and 2, the storage unit at Public Storage was accessed multiple times. On October 2, Fry's body,

---

<sup>2</sup> Days later, three men, who were burglarizing storage facilities, broke into the storage unit, discovered the gold coins, and took them.

missing its head and hands, was found by the Trinity River near Dallas, Texas.

Later that month, Waters went to Florida to see Danny Fry's brother Bob. Bob Fry had received a letter from his brother that said, "do not open until October 5th." Bob Fry opened the letter, which implicated Waters and another person in Danny's possible death. When Danny did not return to Florida, Bob Fry contacted Waters and told him about the letter. A few days later, Waters and Karr showed up at Bob Fry's residence and threatened him. Bob Fry assured them that he had destroyed the letter. Danny Fry's body was not identified until 1999.

*Karr's statement to the FBI:* When Karr was arrested in 1999, he made a statement to law enforcement. Karr said that Waters had contacted him and offered him \$7,000 to guard the O'Hairs. Waters said it would not involve Karr violating any laws. Karr did what he was told and did not ask questions.

Karr went with Waters to Madalyn Murray O'Hair's residence in August 1995. Everyone went to a motel together but the O'Hairs drove separately. Waters, Karr, Fry, and the O'Hairs all stayed in the motel that night. The next day, they moved the O'Hairs to the Warren Inn in San Antonio, to an apartment registered to Waters



and Karr. At all times, either Waters, Karr, or Fry were standing guard at the apartment.

Karr acknowledged that he went with Jon Murray to New Jersey. Karr said that Jon made the arrangements and came up with the alias. Waters said it would be better for Karr to travel under a different name so that his real name would not be connected to the O'Hairs. In New Jersey, Jon went to a bank while Karr sat in the car. Jon did not tell Karr what he did in the bank.

In late September, Karr rented a cargo van and gave it to Waters. He did not know what Waters did with the van. On October 2, Karr rented another cargo van. Waters told Karr he would pay him \$70,000 to assist with something. Karr understood this to mean something illegal and he turned Waters down.

Karr accompanied Waters to Burnet Road Self Storage but stayed in the car. Karr said he had no knowledge of the unit at Public Storage.

Later in October, Karr accompanied Waters to Bob Fry's residence in Florida. Waters confronted Bob Fry about a letter from Danny Fry. Waters had a gun and told Karr he wanted to shoot Bob Fry. Karr told Waters that he was not having any part of that.

That same month, Waters told Karr that he had killed the O'Hairs. Waters asked Karr to come to Austin because he was concerned about the bodies. Karr and Waters went into the hill country west of Austin. When they got to the location, Waters got out of the car, but Karr did not. Karr provided the FBI agents with directions and a hand-drawn map to the burial site.<sup>3</sup>

Karr told law enforcement that he was afraid of Waters and feared for his family.

*Inmate testimony at trial:* Jason Cross, Karr's former cell mate, testified that Karr confided his role in kidnapping and extorting the O'Hairs out of \$500,000. Karr said that he, Waters, and Fry killed the O'Hairs. They cut up the bodies and put them in barrels in a storage unit. He said it was very bloody, very messy. Because Fry was squeamish, Waters and Karr ended up shooting him and cutting off his head and hands. Karr told Cross they had buried the bodies on a ranch in Texas.

**Jury verdict:** After hearing all the evidence, the jury acquitted Karr of Count One—conspiracy to commit kidnapping—but convicted him of Counts Two, Three, Four, and Five. As to Count Three—traveling in interstate commerce with intent to commit a

---

<sup>3</sup> Law enforcement repeatedly searched for the bodies but were unable to find them.

crime of violence—the jury did not find that the offense resulted in the death of another person.

**Additional evidence introduced at 2021 resentencing:** At Karr’s resentencing hearing, Agent Edmond Martin testified about his investigation of the O’Hair case and his interview of Waters, which took place in 2001. Waters gave the statement in negotiation of a plea agreement. In the agreement, Waters pled guilty to only the Hobbs Act count, and the Government agreed to a maximum sentence of 20 years’ imprisonment.

Karr’s counsel objected to consideration of Waters’ statement, arguing that it violated due process, the Sixth Amendment right to a jury trial, and the confrontation clause.

*Waters’ Statement:* According to Waters, the scheme was for him, Karr, and Fry to abduct the O’Hairs, get their money in New Zealand, and kill them.

To abduct the O’Hairs from their business, Karr and Fry drove up in a passenger van with courier signs on it. They approached the door with a package and, when the door opened, pulled guns on the O’Hairs. Waters then joined them inside. They all left the business and went to the O’Hairs’ house. Later, they took the O’Hairs to the Warren Inn in San Antonio.

During that time, Jon Murray was forced to cash checks and withdraw money from ATMs. Waters, Karr, and Fry split the money. Waters had planned for the O'Hairs' money in New Zealand to be transferred to New Jersey and then to Texas. Because the New Jersey bank required someone be present for the transfer, Jon had to go there. Karr went with him as a reminder that his family was in danger—Madalyn and Robin would be killed if he tried anything.

After the money was transferred to San Antonio and \$500,000 was converted to gold coins, Waters sent Jon Murray to the bank to pick it up. Waters and Karr followed him and took up a position where they could see the parking lot. After they got the gold coins, Waters placed them in the Burnet Storage unit.

Waters said the purpose of the Burnet Road Storage unit was to store the gold coins, and the purpose of the Public Storage unit was to “process the bodies.” The purpose of the cargo van was to move the bodies to the storage unit. Waters said that they moved from the Warren Inn to the La Quinta Inn, on September 28, because it would be easier to move the bodies from the first floor.

At the La Quinta, the O'Hairs were restrained with ties around their wrists and ankles. Waters, Karr, and Fry killed the O'Hairs by strangling them. The next day, September 30, they moved the

bodies to the Public Storage unit where they dismembered them. Waters said he paid Karr extra to do the dismembering. Karr had brought barrels to put the bodies in. Fry helped Karr put the body parts into the barrels.

Afterward, Waters, Karr, and Fry returned to Waters' apartment in Austin. Waters said that Fry was squeamish and upset. Waters and Karr decided to kill him. Waters shot Fry in the head. Karr removed Fry's head and hands so the body could not be identified. They left Fry's body by the Trinity River but put his clothes, head, and hands with the O'Hairs' remains in the barrels.

Waters and Karr loaded the barrels from the Public Storage unit into a cargo van and drove out to Camp Wood, Texas, late at night. They entered the property, dug a hole, emptied the barrels into it, and burned the remains.

Later in October, Waters had Karr come to Texas to help him locate and move the bodies. They drove together to the burial site. Upon inspecting the site, Waters wanted to move the bodies, but Karr did not think it was necessary. They left the bodies where they were.

After Waters gave his statement, he took the investigators to the location where the bodies were buried. With the help of a cadaver dog, they found the burial site and the remains of the

O'Hairs and Fry. Agent Martin testified that the site was about 50 feet from where Karr had indicated the O'Hairs were buried.

**The 2021 revised presentence report and objections:** In preparation for the resentencing hearing, the presentence report was revised, and it recommended applying the cross-reference in the robbery guideline, §2B3.1(c), to the murder guideline in §2A1.1. With an offense level of 43 and Criminal History Category V, the advisory guideline range was life imprisonment. Because the maximum statutory sentences were less than life, however, the total guideline term of imprisonment for Counts Two and Three was 480 months.

Counsel for Karr objected to the application of the cross-reference to the murder guideline. Counsel argued, among other things, that it violated the Due Process Clause and the Sixth Amendment right to a jury trial and that the Government's evidence was factually insufficient to support the cross-reference.

On the constitutional issue, defense counsel argued that the jury had ample evidence of the O'Hairs' deaths but had found the evidence did not prove the deaths were a result of Karr's conduct. Therefore, applying the murder cross-reference was contrary to the jury's verdict. Counsel acknowledged that this argument was foreclosed by *United States v. Watts*, 519 U.S. 148 (1997).

On the factual insufficiency claim, Karr's counsel argued that the district court should not rely on Waters' 20-year-old statement because it was unreliable. It had not been subject to cross-examination, and there had been no attempt at corroboration. Waters had been dead for 18 years and so there was no chance to confront him on it. Waters was not credible for many reasons including that, during the interview, he admitted to another murder in Illinois and was suspected of two other murders, one of which was his ex-wife. Counsel argued that the correct guideline range was 84 to 105 months' imprisonment.

**District court's rulings:** The district court adopted the revised presentence report. The court denied the constitutional objection based on *Watts*. On the factual insufficiency objection, the court held that the facts that had been before the jury were sufficient to apply the cross-reference. Additionally, the court pointed out that it had information on the deaths that the jury did not have. Waters' statement, which the court considered, satisfied the cross-reference. The court overruled Karr's objections.

**The appeal:** On appeal, Karr argued that the district court had erred by applying the murder cross-reference because 1) it had considered conduct on which the jury had acquitted him, in violation of the Fifth and Sixth Amendments, and 2) it had relied upon

Waters’ unreliable 20-year-old statement. The Fifth Circuit held that Karr’s constitutional argument was foreclosed by *Watts*, while noting that “[d]istinguished jurists have called *Watts* into question.” *United States v. Karr*, No. 21-50219, 2022 WL 1499288, \*1 n.1 (5th Cir. 2022). The court of appeals held that because the district court had also found the cross-reference applicable without considering Waters’ statement, even if the statement was unreliable, Karr would not be entitled to relief. *Id.*



## REASONS FOR GRANTING THE WRIT

### **I. The Court should grant certiorari to resolve the problematic use of acquitted conduct at sentencing, which violates the Fifth and Sixth Amendments.**

Gary Paul Karr asks this Court to grant certiorari to “take up” the use of acquitted conduct to increase a criminal defendant’s sentence, which is an “important, frequently recurring, and troubling contradiction in sentencing law.” *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millet, J., concurring in denial of rehearing en banc). At Karr’s trial, the jury acquitted him of kidnapping and found that his conduct had not resulted in the victims’ deaths. At sentencing, the district court found that Karr’s conduct had resulted in the victims’ death. As a result of this judicial finding, Karr’s sentence was increased by more than 30 years’ imprisonment. The use of acquitted conduct to increase Karr’s sentence violated the Fifth Amendment’s Due Process Clause and the Sixth Amendment’s right to a jury trial. The Fifth Circuit rejected Karr’s constitutional arguments, holding that *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), foreclosed the issue. *United States v. Karr*, No. 21-50219, 2022 WL 1499288, \*1 n.1 (5th Cir. 2022). But *Watts* does not control this issue.

In *Watts*, the Court addressed whether a sentencing court’s reliance on acquitted conduct violated the Double Jeopardy Clause.

519 U.S. at 154–55, 157. It decided that issue by summary reversal, based solely on the petition for certiorari briefing, without the benefit of full briefing on the merits or oral argument. As this Court later recognized, *Watts* “presented a very narrow question.” *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005). *Watts* did not determine whether considering acquitted conduct at sentencing would violate the right to due process under the Fifth Amendment or the right to a jury trial under the Sixth Amendment. *See id.* at 240 (recognizing that *Watts* did not address any “contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment”). Even so, the federal courts have adopted the view that *Watts* forecloses challenges to the use of acquitted conduct under the Due Process Clause and the Sixth Amendment. *See United States v. White*, 551 F.3d 381, 392 n.2 (6th Cir. 2008) (Merritt, J., dissenting) (collecting cases). Only this Court can clarify or overrule *Watts*.

The decision in *Watts* has been questioned repeatedly by judges throughout the United States. In *United States v. Jones*, Justice Scalia, joined by Justices Thomas and Ginsberg, called upon the Court to resolve whether the Due Process Clause and the Sixth Amendment’s jury-trial right permit judges to sentence defendants based on acquitted conduct. 135 S. Ct. 8, 8–9 (2014). Soon after,

then-Judge Gorsuch cited to Justice Scalia’s dissent in *Jones*, when observing that “[i]t is far from certain whether the Constitution allows” a defendant’s sentence to be increased “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). The next year, then-Judge Kavanaugh similarly observed that “[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of rights to due process and to a jury trial.” *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc); *see also* *United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part) (noting “good reasons to be concerned about the use of acquitted conduct at sentencing”).

Numerous lower-court judges have opined that using acquitted conduct at sentencing should be prohibited under the Fifth and Sixth Amendments. Judge Millett has stated that “allowing a judge to dramatically increase a defendant’s sentence based on jury-acquitted conduct is at war with the fundamental purpose of the Sixth Amendment’s jury-trial guarantee.” *Bell*, 808 F.3d at 929 (Millett, J., concurring in denial of rehearing en banc). Judge Bright has argued that “the use of acquitted conduct to enhance a

defendant's sentence should be deemed unconstitutional under both the Sixth Amendment and the Due Process Clause of the Fifth Amendment." *United States v. Lasley*, 832 F.3d 910, 920–21 (8th Cir. 2016) (Bright, J., dissenting).

Recently the Michigan Supreme Court held that due process precludes increasing a defendant's sentence based on acquitted conduct. *People v. Beck*, 939 N.W.2d 213, 216, 227 (Mich. 2019). The court explained that "when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent," and "conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process." *Id.* at 225. The Michigan Supreme Court limited *Watts* to the Double Jeopardy Clause. *Id.* at 224.

This Court has frequently emphasized the "surpassing importance" of the Sixth Amendment right to a jury trial. *Apprendi v. New Jersey*, 530 U.S. 460, 476–77 (2000). The jury occupies "a central position in our system of justice by safeguarding a person accused of a crime against the arbitrary exercise of power by prosecutor or judge." *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). The Fifth Amendment's Due Process Clause "protects the accused

against conviction except upon proof beyond a reasonable doubt.” *In re Winship*, 397 U.S. 358, 364 (1970). Together, the Fifth and Sixth Amendments require that “any fact that increases the penalty for a crime” must be found by a jury, not a judge. *Apprendi*, 530 U.S. at 490; *see also Blakely v. Washington*, 542 U.S. 296, 303–04 (2004); *Cunningham v. California*, 549 U.S. 270, 281 (2007).

When courts sentence defendants based on acquitted conduct, they diminish the important right to trial by jury. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts that the law makes essential to the punishment. *Blakely*, 542 U.S. at 304; *see also White*, 551 F.3d at 393 (Merritt, J., dissenting) (“To permit facts rejected by the jury to serve as the basis for the sentence would sever the invariable linkage of punishment with crime.”) (internal quotation omitted). But when a judge increases a defendant’s sentence based on acquitted conduct “it is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved.” *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005).

The Court should grant certiorari in Karr's case to squarely address whether the use of acquitted conduct at sentencing violates the Fifth Amendment Due Process Clause and/or the Sixth Amendment right to a jury trial.

**II. Karr's Due Process rights were violated by the district court relying upon an untrustworthy 20-year-old statement at sentencing.**

The district court applied the murder guideline based, in part, on a 20-year-old statement made by Waters, the more-culpable co-conspirator and mastermind of the scheme, after Karr's trial and initial sentencing, to obtain a more favorable sentence for himself on the same charges. By the time this statement was used at Karr's resentencing, Waters was dead. The statement had never been subject to cross-examination.

While district courts have wide latitude on the information they consider at sentencing, that information must have "sufficient indicia of reliability to support its probable accuracy." 18 U.S.C. § 3661; U.S.S.G. §6A1.3. Many factors are considered in determining whether coconspirator evidence has sufficient indicia of reliability, including whether the declarant testified, and the sentencing court was able to observe the declarant, *see, e.g., United States v. Givan*, 320 F.3d 452, 464 (3d Cir. 2003); whether the evidence was corroborated, *id.*; whether the evidence was internally consistent, *see*,

*e.g.*, *United States v. Acosta*, 85 F.3d 275, 282–83 (7th Cir. 1996); whether the coconspirator was motivated by self-interest, *see, e.g.*, *United States v. McGowan*, 668 F.3d 601, 608 (9th Cir. 2012). An incriminating statement by a coconspirator, while not categorically unreliable, can, in a particular case, fail to have sufficient indicia of reliability. *See United States v. Zuniga*, 720 F.3d 587, 591–92 (5th Cir. 2013); *see also United States v. Lee*, 68 F.3d 1267, 1275 (11th Cir. 1995). That is the case here.

Waters’ 20-year-old statement was uniquely unreliable. Waters, who was more culpable and had a motive to minimize his role, was himself not credible. He was the mastermind of the scheme to abduct, steal from, and kill the O’Hairs. He had been the O’Hairs’ office manager, had embezzled from them, and was prosecuted for it. When Madalyn Murray O’Hair published an article about Waters’ crime and his criminal history, Waters was furious and planned for revenge. Madalyn was afraid of him—and rightfully so. At the time of his interview, Waters admitted to another killing in Illinois, and was suspected of two other murders.

Waters recruited the others to participate in his scheme. Waters determined where and how the scheme would take place. He directed the others to rent storage units, rent vans, rent apartments and hotel rooms. Waters forced Jon Murray to cash checks,

withdraw money from ATMs, and get advances from credit cards. Waters came up with the idea to transfer the O'Hairs' money from New Zealand to the United States. It was his idea to convert the cash to gold coins.

But the Government chose to prosecute Karr first. After Karr had been convicted and sentenced, the Government went after Waters for the same charges. But Waters negotiated for a favorable deal. As part of the negotiations, Waters gave the Government a statement and led law enforcement to the bodies. Waters was promised immunity from both federal and state prosecution for his statement. In return, Waters pleaded guilty to one count—not five counts. He faced a maximum sentence of 20 years—not life.

Waters' statement incriminated Karr about things that only he and Karr could have known—who strangled the O'Hairs, who dismembered the bodies, who put the bodies in the barrels, who killed Fry, who dismembered his body, and who buried the bodies. At the time of Waters' statement, only he and Karr knew what had occurred. So, Waters laid the blame on Karr. According to Waters, Karr was the loose cannon; Karr strangled the O'Hairs; Karr alone cut up the bodies; Karr bought the barrels; Karr loaded the bodies into the barrels. To get the desired plea agreement, Waters had to



accept some of the blame but not the majority of it. For that, Karr would be the fall guy.

And because of Karr's earlier jury trial, Waters knew much of the Government's evidence. During the interview, Waters remarked that he had heard about certain evidence at trial. Knowing the trial evidence, Waters could tailor his statement to fit it.

But Waters' statement had many inconsistencies and contradictions. "Sentences based upon erroneous and material information or assumptions violate due process." *United States v. Gentry*, 941 F.3d 767, 788 (5th Cir. 2019) (quoting *United States v. Tobias*, 662 F.2d 381, 388 (5th Cir. 1981); see also *United States v. Darby*, 744 F.2d 1508, 1532 (11th Cir. 1984). Agent Martin admitted that Waters had lied during his interview. Waters made things up and later admitted he had. He was inconsistent on material details—how and when Robin was killed. His statement about the killing of Fry did not match the evidence at trial. Waters' timelines were not accurate—claiming O'Hairs were dead by September 26 when Jon was seen alive three days later. Waters admitted making up parts of his story because he was resentful of Steffens and angry at Karr. Waters' anger resulted in him casting most of the blame on Karr.

The Government argued that, although there were inconsistencies in Waters' statement, it was sufficiently reliable because circumstantial evidence supported it. The circumstantial evidence supported the scheme, but not Karr's role in it. Waters was attempting to get a favorable plea deal to these charges. Minimizing his role and maximizing Karr's was conducive to that motivation. The most damaging part of Waters' statement, in terms of Karr's alleged conduct, occurred when there were no other witnesses. Hence, no one could corroborate, for example, Waters' claim that Karr strangled Robin or alone dismembered the bodies.

Waters' statement had never been subjected to cross-examination, and the declarant was dead. This Court has stressed the importance of "testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004). Questioning a codefendant or informant, challenging the answers, and watching the facial expressions and body language is essential to determining the credibility of the witness and the statements. *See United States v. Garcia*, 78 F.3d 1457, 1466–67 (10th Cir. 1996) (holding informants were reliable given that they testified at sentencing, were subject to cross-examination, and the court was able to observe their demeanor); *see also United States v. Browning*, 61 F.3d 752, (10th Cir. 1995) (codefendants were reliable given their personal knowledge

of specific facts, their demeanor in court, and their clear and responsive answers to questioning). While the rules of evidence do not apply at sentencing, “a central purpose of Federal Rule of Criminal Procedure 32 is to guarantee ‘a defendant adequate opportunity to challenge the information used against him at the time of sentencing.’” *United States v. Williams*, 41 F.3d 496, 501 (9th Cir. 1994).

Here, Karr did not have an adequate opportunity to challenge Waters’ newly-revealed 20-year-old hearsay statement. These crimes occurred in 1995, Karr was indicted in 1999, and he was convicted and sentenced in 2000. The Government brought charges against Waters in 2001, and his statement was made at that time. The resentencing took place 20 years later. The resentencing hearing was the first time Karr heard Waters’ statement made to law enforcement in 2001. By this time, Waters was dead and could not testify.

Evidence considered at sentencing must be reliable. A criminal defendant has a due process right to be sentenced on accurate information. *United States v. Holding*, 948 F.3d 864, 870 (7th Cir. 2020). The 20-year-old out-of-court statement made by a more-culpable coconspirator motivated to get a more favorable deal on the same charges did not bear sufficient indicia of reliability to support

its probable accuracy. The district court increasing Karr's sentence in reliance on that statement violated his due process rights.

This Court should grant certiorari to correct this error.

### **CONCLUSION**

FOR THESE REASONS, Karr asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

MAUREEN SCOTT FRANCO  
Federal Public Defender  
Western District of Texas  
727 E. César E. Chávez Blvd., B-207  
San Antonio, Texas 78206  
Tel.: (210) 472-6700  
Fax: (210) 472-4454

s/Judy Fulmer Madewell  
JUDY FULMER MADEWELL  
First Assistant  
Federal Public Defender

*Attorney for Defendant-Appellant*

DATED: August 10, 2022