No. 22-5993

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IN THE SUPREME COURT OF THE UNITED STATES

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MALIK ROSS, PETITIONER

v.

UNITED STATES OF AMERICA

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

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the district court violated petitioner's Fifth Amendment rights in considering relevant conduct that the court found by a preponderance of the evidence in determining his sentence.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Mo.):

United States v. Ross, No. 19-cr-740 (Mar. 2, 2021)

United States Court of Appeals (8th Cir.):

United States v. Ross, No. 21-1578 (Apr. 4, 2022)

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 29 F.4th 1003.

## JURISDICTION

The judgment of the court of appeals was entered on April 4, 2022. A petition for rehearing was denied on June 3, 2022 (Pet. App. 10). On August 28, 2022, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including October 31, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Missouri, petitioner was convicted of embezzling funds from a federally insured bank, in violation of 18 U.S.C. 656, and conspiring to embezzle funds from a federally insured bank, in violation of 18 U.S.C. 371. Judgment 1. He was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-9.

1. On August 12, 2019, petitioner encountered two teenagers as he was leaving a convenience store in St. Louis, Missouri. Sentencing Tr. 23-27. Petitioner took a firearm from his waistband and shot at them a total of 14 times. Id. at 25, 28, 31-32, 38. One of the shots hit one of the teenagers, who survived after being treated at an area hospital. Id. at 15, 29. One of petitioner's errant shots struck and killed a seven-year-old boy who happened to be nearby. Id. at 34-35, 49, 55-56.

After the shootings, petitioner called his aunt, Shamekia Jackson, and told her that "he had just been involved in a shoot-out and he needed her to pick him up." Sentencing Tr. 102. After Jackson picked him up, petitioner told her "that he had killed the boy on the news and he needed to get out of town." Id. at 103. At the time, petitioner was employed by a cash-management company that transported United States currency in armored vehicles. Presentence Investigation Report (PSR) ¶ 13. Petitioner and

Jackson agreed on a plan for petitioner to leave town the next day after stealing money in his employer's custody. Sentencing Tr. 103-104; Plea Agreement 4.

The following day at work, while dropping off and picking up currency at various stops along his assigned route in an armored truck, petitioner took a black bag off the truck and placed it in the middle of the road. PSR ¶ 16; Plea Agreement 4. Shortly after petitioner left, Jackson drove up and retrieved the bag from the middle of the road. PSR ¶ 17. The bag contained $50,000 belonging to Midwest Regional Bank, a federally insured bank. PSR ¶¶ 12, 19; Plea Agreement 4-5. Petitioner and Jackson split the proceeds. Plea Agreement 5.

2. A grand jury in the Eastern District of Missouri returned a superseding indictment charging petitioner with embezzling funds from a federally insured bank, in violation of 18 U.S.C. 656, and conspiring to embezzle funds from a federally insured bank, in violation of 18 U.S.C. 371. Superseding Indictment 1-3. Petitioner pleaded guilty to both counts pursuant to a plea agreement. Judgment 2; Plea Agreement 1-12. In the agreement, both parties retained the right to request a sentence outside the applicable advisory Sentencing Guidelines range. Plea Agreement 2. The Probation Office's presentence report recommended a total offense level of 11, which resulted in an advisory range of 8 to 14 months of imprisonment. PSR ¶¶ 35, 67. The district court adopted that recommendation. See Sentencing Tr. 5.

The government moved for an upward variance based on petitioner's involvement in the shooting that injured the teenager and killed the seven-year-old boy. D. Ct. Doc. 139 (Feb. 12, 2021). Petitioner objected, arguing that petitioner had "not [been] charged with that [shooting]" and that "[t]here ha[d] been no determination made even of probable cause." Sentencing Tr. 6. Petitioner asserted that "[t]he standard here before [the district court] is 'preponderance of the evidence,'" and that "because [petitioner] has not been charged with that offense," it would "constitute[] a due process violation to consider evidence when a threshold of probable cause has not been determined." Ibid.

The district court overruled the objection, explaining that under circuit precedent, a defendant's "prior criminal conduct, whether or not related to the offense of conviction, is part of the history and characteristics of the defendant" and "may be relevant in [a] particular case to the factors set forth in [Section] 3553(a)(2)." Sentencing Tr. 7. The court further explained that "[s]uch criminal conduct may be considered regardless of whether the defendant has been charged or convicted for that conduct." Ibid. And the court explained that if it were to "find by a preponderance of the evidence that [petitioner] committed the crime at issue," that would enable the "conduct properly to be considered in connection with the broad analysis and inclusive [18 U.S.C.] 3553(a) factors." Ibid.

After hearing evidence of the shooting, including live testimony, the district court found that the government had "prove[d] by a preponderance of the evidence" that petitioner fired 14 shots in a "short a period of time, clearly at different locations, in a residential street, [which is] evidence of reckless disregard." Sentencing Tr. 131. The court further found that petitioner "attempted to evade responsibility, and that goes to a danger to the community." Ibid. And the court additionally found that petitioner's conduct "result[ed] in a death and serious injury to another person." Id. at 133.

The district court accordingly determined that "it [wa]s appropriate to vary upward" because of "the reckless nature of [petitioner's] conduct" and because "he committed the offense for which he pled guilty" (the embezzlement and conspiracy to embezzle offenses) "in order to avoid criminal liability in another crime" (the shooting). Sentencing Tr. 132. The court therefore determined that "the recommended guideline range for the" offense of conviction "of 8 to 14 months does not reflect the seriousness of [petitioner's] conduct." Id. at 131-132. The court reasoned that "a sentence between th[e] guideline ranges for involuntary manslaughter and second-degree murder [would be] appropriate." Id. at 133. And the court imposed a sentence of 120 months of imprisonment, to be followed by five years of supervised release. Ibid.; Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1-9. On appeal, petitioner argued that the district court violated the Due Process Clause of the Fifth Amendment because it did not apply a beyond-a-reasonable-doubt standard when making its findings that petitioner recklessly discharged his firearm, injured the teenager, and killed the seven-year-old boy. Pet. C.A. Br. 20-23. The court of appeals rejected petitioner's argument, observing that it "ha[d] repeatedly held that a district court may vary upward based on uncharged conduct that it finds by a preponderance of the evidence, so long as the sentence does not exceed the statutory maximum." Pet. App. 5 n.2.

Judge Erickson filed a concurring opinion in which he expressed disagreement with that precedent and urged district judges to exercise their discretion to eschew reliance on acquitted or uncharged conduct in deciding on the appropriate sentence. Pet. App. 8-9.

ARGUMENT

Petitioner renews his contention (Pet. 16-21) that the district court violated the Fifth Amendment by sentencing him within the statutory range based on conduct that the court found by a preponderance of the evidence rather than beyond a reasonable doubt. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. This Court should deny the petition, just as it has the many other petitions raising the same claim.

1. The court of appeals correctly recognized, in accord with this Court's precedents, that a sentencing court may rely on conduct it finds by a preponderance of the evidence in determining a sentence within the prescribed statutory range. For example, in McMillan v. Pennsylvania, 477 U.S. 79 (1986), the defendant contended that a sentencing factor that raised the minimum term of imprisonment required proof by at least clear and convincing evidence. Id. at 91. This Court had "little difficulty concluding that * * * the preponderance standard satisfies due process." Ibid. Similarly, in United States v. Watts, 519 U.S. 148 (1997) (per curiam), the Court held that, at least absent "extreme circumstances," a court may base a sentence even on conduct of which the defendant has been acquitted "so long as that conduct has been proved by a preponderance of the evidence," and reiterated that "application of the preponderance standard at sentencing generally satisfies due process." Id. at 156-157 (citing McMillan, 477 U.S. at 91-92); see Edwards v. United States, 523 U.S. 511, 513-514 (1998) (concluding that a sentencing judge was authorized to determine that the offense involved crack cocaine even if the jury had found the defendants guilty of a conspiracy involving only cocaine).

McMillan and Watts reflect the general principle that sentencing courts have wide discretion to find and consider facts when determining a sentence to impose within the authorized sentencing range. Federal law expressly provides that "[n]o

limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661. And this Court has repeatedly recognized that "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." Williams v. New York, 337 U.S. 241, 246 (1949); see Alleyne v. United States, 570 U.S. 99, 116 (2013) ("[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."); Dillon v. United States, 560 U.S. 817, 828 (2010) (observing that "[j]udges in this country have long exercised discretion of this nature in imposing sentence within established limits in the individual case") (brackets, citation, and emphasis omitted); Rita v. United States, 551 U.S. 338, 352 (2007) (stating that "a sentencing court [may] take account of factual matters not determined by a jury and to increase the sentence in consequence"); United States v. Booker, 543 U.S. 220, 233 (2005) ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.").

Petitioner asserts (Pet. 18) that "[t]his Court repudiated McMillan in Alleyne," but Alleyne rejected only "McMillan's holding that facts found to increase the mandatory minimum sentence are sentencing factors and not elements of the crime." Alleyne, 570 U.S. at 106 (plurality opinion). The Court did not call into question McMillan's premise that a sentencing factor -- as distinguished from an element of the crime -- need only be found by a preponderance of the evidence. See McMillan, 477 U.S. at 91-92. Indeed, Alleyne itself distinguishes (for Sixth Amendment purposes) between "facts that increase either the statutory maximum or minimum," which must be found beyond a reasonable doubt by the jury, and "factfinding used to guide judicial discretion in punishment 'within limits fixed by law,'" which does not. Alleyne, 570 U.S. at 113 n.2 (quoting Williams, 337 U.S. at 246).

Alleyne also made clear that its holding that a fact increasing the mandatory minimum is an element of the crime was compelled by "the logic of Apprendi [v. New Jersey, 530 U.S. 466 (2000)]." Alleyne, 570 U.S. at 106 (plurality opinion); see id. at 123 (Breyer, J., concurring in part) (explaining that "apply[ing] Apprendi's basic jury-determination rule to mandatory minimum sentences would erase [an] anomaly" in the Court's case law). But even after Apprendi, this Court has reiterated that while "[e]lements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt," "[s]entencing factors * * * can be proved to a judge at sentencing by a preponderance

of the evidence." United States v. O'Brien, 560 U.S. 218, 224 (2010).

Petitioner's direct reliance (Pet. 15) on Apprendi and Blakely v. Washington, 542 U.S. 296 (2004), is likewise unsound. Apprendi held that under the Sixth Amendment, "[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." 530 U.S. at 490 (emphasis added). Blakely applied that holding to sentences exceeding the "statutory maximum of the standard [sentencing] range" that would be applicable based solely on the jury's verdict or on facts admitted in a guilty plea. 542 U.S. at 303 (emphasis added). The district court here, however, did not impose a sentence beyond the statutory maximum applicable to a conviction for embezzlement. See 18 U.S.C. 656 (specifying a 30-year maximum sentence).

Petitioner's reliance (Pet. 15-18) on Justice Scalia's concurrence in Rita v. United States, supra, and dissent from the denial of certiorari in Jones v. United States, 574 U.S. 948 (2014), is similarly misplaced. There, Justice Scalia suggested that the Sixth Amendment would require a jury to find any facts without which the sentence would be substantively unreasonable. See Rita, 551 U.S. at 372 (Scalia, J., concurring in part and concurring in the judgment); Jones, 574 U.S. at 950 (Scalia, J., dissenting from the denial of certiorari). Petitioner, however,

does not argue that a jury must find such facts; instead, his argument focuses on the standard of proof that the sentencing court must apply in finding such facts. See, e.g., Pet. 20 ("The issue Petitioner presents focuses on the constitutionality of a federal court finding disputed facts only by a preponderance of evidence."). Although Justice Scalia would apparently have agreed with that argument, see Jones, 574 U.S. at 948 (dissenting from denial of certiorari), petitioner has not raised the Sixth Amendment contention about the factfinder's identity that was the principal focus of Justice Scalia's separate opinions, see, e.g., ibid., but instead appears to accept for present purposes that the district judge was entitled to find the facts about his prior conduct, so long as he did so under a permissible evidentiary standard.

In any event, the argument set forth in those separate opinions has not been endorsed by a majority of this Court, and every court of appeals to have considered it has rejected it. See United States v. Crosby, 397 F.3d 103, 109 n.6 (2d Cir. 2005), cert. denied, 549 U.S. 915 (2006); United States v. Grier, 475 F.3d 556, 566 (3d Cir.) (en banc), cert. denied, 552 U.S. 848 (2007); United States v. Benkahla, 530 F.3d 300, 312 (4th Cir. 2008), cert. denied, 555 U.S. 1120 (2009); United States v. Hernandez, 633 F.3d 370, 373-374 (5th Cir.), cert. denied, 564 U.S. 1010 (2011); United States v. McCormick, 401 Fed. Appx. 29, 33-34 (6th Cir. 2010); United States v. Ashqar, 582 F.3d 819, 825

(7th Cir. 2009), cert. denied, 559 U.S. 974 (2010); United States v. Treadwell, 593 F.3d 990, 1017-1018 (9th Cir.), cert. denied, 562 U.S. 916 and 562 U.S. 973 (2010); United States v. Redcorn, 528 F.3d 727, 745-746 (10th Cir. 2008); United States v. Smith, 741 F.3d 1211, 1226-1227 & n.5 (11th Cir. 2013), cert. denied, 135 S. Ct. 704 (2014); United States v. Settles, 530 F.3d 920, 923 (D.C. Cir. 2008), cert. denied, 555 U.S. 1140 (2009).

More broadly, this Court has repeatedly and recently declined to review claims similar to petitioner's. E.g., McCray v. United States, 142 S. Ct. 1373 (2022) (No. 21-6077); Parlor v. United States, 142 S. Ct. 623 (2021) (No. 21-6148); Siegelman v. United States, 577 U.S. 1092 (2016) (No. 15-353); O'Bryant v. United States, 577 U.S. 987 (2015) (No. 15-5171); Chandia v. United States, 568 U.S. 1011 (2012) (No. 12-5093); Butler v. United States, 565 U.S. 1063 (2011) (No. 11-5952); Lee v. United States, 565 U.S. 829 (2011) (No. 10-9512); Culberson v. United States, 562 U.S. 1289 (2011) (No. 10-7097); Gibson v. United States, 559 U.S. 906 (2010) (No. 09-6907). It should follow the same course here.*

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* Several pending petitions for writs of certiorari raise the distinct argument that even if a sentencing court may rely as a general matter on relevant conduct that it finds by a preponderance of the evidence, it may not do so when a jury has declined to find that conduct beyond a reasonable doubt. See, e.g., McClinton v. United States, No. 21-1557 (filed June 10, 2022); Luczak v. United States, No. 21-8190 (filed May 12, 2022); Shaw v. United States, No. 22-118 (filed Aug. 1, 2022); Karr v. United States, No. 22-5345 (filed Aug. 10, 2022); Bullock v. United States, No. 22-5828 (filed Oct. 11, 2022); Cain v. United States, No. 22-6212 (filed Nov. 28, 2022); Sanchez v. United States, No. 22-6386 (filed Dec. 20, 2022).

2. Petitioner does not contend that the decision below conflicts with any decision of this Court or another court of appeals. To the contrary, the courts of appeals have recognized that a sentencing judge may generally find facts relevant to the determination of the sentencing range under the post-Booker advisory federal Sentencing Guidelines by a preponderance of the evidence, so long as the judge imposes a sentence within the statutory range. See, e.g., United States v. Sanchez-Badillo, 540 F.3d 24, 34 (1st Cir. 2008), cert. denied, 555 U.S. 1121 (2009); United States v. Vaughn, 430 F.3d 518, 525 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); United States v. Grier, 475 F.3d 556, 568 (3d Cir.) (en banc), cert. denied, 552 U.S. 848 (2007); United States v. Grubbs, 585 F.3d 793, 803 (4th Cir. 2009), cert. denied, 559 U.S. 1022 (2010); United States v. Mares, 402 F.3d 511, 519 (5th Cir.), cert. denied, 546 U.S. 828 (2005); United States v. Sexton, 512 F.3d 326, 329-330 (6th Cir.), cert. denied, 555 U.S. 928 (2008); United States v. Garcia, 439 F.3d 363, 369 (7th Cir. 2006); United States v. Villareal-Amarillas, 562 F.3d 892, 897-898 (8th Cir. 2009); United States v. Kilby, 443 F.3d 1135, 1140-1141 (9th Cir. 2006); United States v. Magallanez, 408 F.3d 672, 684-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); United States v. Culver, 598 F.3d 740, 752-753 (11th Cir.), cert.

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That issue is not presented in this case, however, because no jury has acquitted petitioner of the shootings that the district court found to be relevant conduct here.

denied, 562 U.S. 896 (2010); United States v. Bras, 483 F.3d 103, 107-108 (D.C. Cir. 2007).

The Ninth Circuit has suggested that facts may need to be established by "clear and convincing evidence" if they have "an extremely disproportionate effect on the sentence relative to the conviction," United States v. Staten, 466 F.3d 708, 717 (2006) (citations omitted), but the degree to which it views that suggestion as binding is unclear, see United States v. Berger, 587 F.3d 1038, 1048 & n.14 (9th Cir. 2009) (questioning Staten); but see, e.g., United States v. Hymas, 789 F.3d 1285, 1289-1293 (9th Cir. 2015) (remanding for application of heightened standard of proof without analyzing precedential value of Staten or this Court's post-Booker precedents). In any event, no court of appeals has adopted petitioner's view that a court must apply a beyond-a-reasonable-doubt standard to any of its sentencing determinations, and he does not assert otherwise.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2023