No. 22-_____

IN THE
SUPREME COURT OF THE UNITED STATES

Ahmed Abu Khatallah,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

i. Does 18 U.S.C. § 924(c) apply extraterritorially?

ii. Do the Fifth and Sixth Amendments prohibit a court from basing a criminal defendant's sentence on conduct of which a jury has acquitted the defendant?

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INTRODUCTION

Despite this Court's repeated exhortations that federal statutes have extraterritorial effect only when "Congress has affirmatively and unmistakably" so "instructed," *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016), the D.C. Circuit has concluded that the most commonly used domestic gun law applies extraterritorially whenever it is "linked to an extraterritorially applying predicate." *United States v. Garcia Sota*, 948 F.3d 356, 362 (D.C. Cir. 2020). So construed, this quintessentially domestic legislation now serves as a tool for law enforcement to punish the possession of guns across the globe—intruding on the sovereignty of other countries where it is lawful, common, and even prudent to possess a gun. This Court should grant certiorari to correct this manifest and far-reaching error.

In addition, as then-Judge Kavanaugh invited district courts to do in appropriate cases, *United States v. Bell*, 808 F.3d 926, 927 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc), the district court sentenced Mr. Khatallah below the applicable guidelines range in order to avoid punishing him for conduct of which jury had acquitted him, as the district court interpreted the jury's verdicts. The D.C. Circuit remanded for resentencing, directing the district court to adjust Mr. Khatallah's sentence upward specifically to account for that acquitted conduct. This case thus raises the important and recurring question raised by a number of currently pending petitions: Whether the Fifth and Sixth Amendments prohibit a court from basing a criminal defendant's sentence on conduct of which a jury has acquitted the defendant. *See McClinton v. United States*, No. 21-1557; *Luczak v. United States*, No. 21-8190; *Shaw v. United States*, No. 22-118; *Karr v. United States*, No. 22-5345; *Bullock v. United States*, No. 22-5828. This Court should grant certiorari on that question for the reasons provided in those petitions.

OPINIONS BELOW

The district court's opinion denying the Mr. Khatallah's motion to dismiss the indictment (App. 76a) is reported at reported at 151 F. Supp. 3d 116 (D.D.C. 2015). The D.C. Circuit's opinion affirming Mr. Khatallah's convictions and remanding for resentencing (App. 1a) is reported at 41 F.4th 608 (D.C. Cir. 2022).

JURISDICTION

The D.C. Circuit issued its opinion and entered judgment on July 26, 2022, and denied a timely petition for rehearing en banc on December 20, 2022. This Court has jurisdiction 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 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 provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury *** .

U.S. Const. amend. VI.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 924(c)(1) provides, in relevant part:

> (A) [A]ny person who, during and in relation to any crime of violence *** for which the person may be prosecuted in a court of the United States, uses or carries a firearm *** shall *** be sentenced to a term of imprisonment of not less than 5 years***.
>
> (B) If the firearm possessed by a person convicted of a violation of this subsection *** is a *** semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years.

STATEMENT

A. The Trial Evidence and Jury Verdicts

Ahmed Abu Khatallah was charged with a host of crimes in connection with an attack on a United States diplomatic outpost ("the Mission") in Benghazi, Libya, on the evening of September 11, 2012, and an attack on a nearby intelligence outpost ("the Annex") in the early morning hours the following day. A1-A21. The attack on the Mission occurred in two phases. During the first phase, a group of armed men breached the Mission compound and then attacked and destroyed buildings there. A361:8-A362:7, A365:10-16, A367:14-A370:1. They set fire to a building in which U.S. Ambassador J. Christopher Stevens, Officer Sean Smith, and Officer Scott Wickland were taking shelter, and that fire ultimately killed Ambassador Stevens and Officer Smith. A325:4-A328:20, A424:4-14, A484:12-A485:2. After the first wave of attackers withdrew from the Mission, the second phase of the attack began when another wave of attackers entered the compound and caused further property damage. A356:20-A357, A375:14-18, A452:11-A456:13, A985 (disc: Govt. Ex. 304-1).

Shortly thereafter, in the early morning hours of September 12, armed men commenced an attack on the Annex. A382:19-24, A447:19-A448:18. While guarding the Annex, Officers Glen Doherty and Tyrone Woods were killed, and Officers Mark Geist and David Ubben were gravely wounded. A336:15-A346:8, A424:15-24.

Before trial, Mr. Khatallah moved to dismiss the charge of carrying a firearm in connection with a crime of violence, in violation of 18 U.S.C. § 924(c), on the ground that § 924(c) lacked extraterritorial application. The district court denied the motion (App. 76a) and Mr. Khatallah proceeded to trial.

After a seven-week trial, the jury acquitted Mr. Khatallah of nearly all the charges against him. It acquitted him of all charges relating to the first phase of the Mission attack, including the killings of Ambassador Stevens and Officer Smith and the attempted killing of Officer Wickland. A163-A65. And it acquitted him of all charges relating to the attack on the Annex, including the killings and attempted killings of Officers Doherty, Woods, Ubben and Geist. *Id.* The jury convicted Mr. Khatallah only of the charges relating to the second phase of the Mission attack: carrying a firearm during a crime of violence, under 18 U.S.C. § 924(c); conspiring to provide or providing material support and resources to injure a building, under 29 U.S.C. § 2339A; and conspiring to injure or injuring a building, under 18 U.S.C. § 1363. *Id.*

B. The Sentencing

Following the verdicts, the district court calculated the applicable guidelines range. The court concluded that multiple sentencing enhancements applied and determined that, with those enhancements, the applicable guidelines range was life imprisonment. A283-84.

The district court then held a lengthy sentencing hearing. After hearing presentations by both sides, the court began by describing the "3553 factors." SA945:1-5. It addressed the sentencing guidelines, which it had "calculated … to be life imprisonment," SA945:12-13; "the nature and the seriousness of the defendant's conduct," SA946:5-6; Mr. Khatallah's "particular characteristics and history," SA948:3-4; and "deterrence, both generally and specifically as to" Mr. Khatallah, SA949:2-3.

Next, and "most important," the court considered the "jury's acquittals in this case," which were "not illogical or unreasonable based on the evidence that they saw." SA949:24-SA951:22. Former and current members of the court, like the district judge, had "reservations about using acquitted conduct to significantly … increase[] a defendant's sentence beyond what the jury

actually found." SA952:18-22. The court then described an approach suggested by then-Judge Kavanaugh in *United States v. Bell*, 808 F.3d 926, 927 (D.C. Cir. 2015) (concurring in denial of rehearing en banc): "[T]he way that … Judge Kavanaugh … has suggested dealing with this concern in appropriate cases—not every case, but in appropriate cases—is varying downward from the sentencing guidelines range to avoid reliance on acquitted conduct, and that makes sense to me in this case." SA952:23-SA953:3.

The court then proceeded to analyze the jury's verdicts. SA953:4-22. The court acknowledged that it was *possible* to view the jury's acquittals as consistent with the court's determination that certain guidelines enhancements applied. SA953:7-11. That is, the court believed the "jury did not *necessarily* reject" facts that would make those enhancements applicable. SA953:7-11 (emphasis added). But what the jury "actually found" was another matter. SA953:6-7. "[S]tepping back a minute, it's clear enough to me in this case that the jury explicitly found that the defendant's conduct did not result in death, that it rejected many of the facts that tied him to direct participation in the first wave of the attacks and to the attack on the Annex, *and that what it convicted him of was essentially a property crime*." SA953:12-18 (emphasis added). The district court thus "c[a]me, somewhat reluctantly, to the conclusion that a life sentence overestimates the defendant's criminal conduct and culpability *as it was determined by the jury*." SA953:23-954:1 (emphasis added).

In light of all the factors, the district court concluded that a total sentence of 22 years was sufficient but not greater than necessary to satisfy the purposes of sentencing. SA954:18-24. The sentence consisted of 12-year concurrent sentences on the property-related convictions, and a consecutive 10-year mandatory-minimum sentence on the § 924(c) conviction. SA954:18-SA955:23.

C. The Decision Below

The D.C. Circuit affirmed Mr. Khatallah's convictions. App. 1a. While Mr. Khatallah's appeal was pending, it had held in another case that 18 U.S.C. § 924(c) reaches extraterritorially whenever the underlying offense does so. *United States v. Garcia Sota*, 948 F.3d 356 (D.C. Cir. 2020). The Circuit thus noted that, in light of that binding precedent, Mr. "Khatallah presses his extraterritoriality claim only to preserve it for further review." App. 28a-29a n.12.

The court of appeals also reversed Mr. Khatallah's sentence on the ground that it was unreasonably short, and it remanded for resentencing. While the panel assumed *arguendo* that the district court had the power to vary downward from the applicable guidelines range based on "acquitted conduct," it concluded that the court could only vary downward based on facts that the "jury *necessarily* determined … were not proved beyond a reasonable doubt." App. 62a (emphasis added). Given that Mr. Khatallah was charged with participating in a complex scheme involving numerous participants and acts, the pattern of convictions and acquittals did not *logically compel* the conclusion that the jury had acquitted Mr. Khatallah of the conduct on which two of his sentencing enhancements were based. But the district court believed that the jury had *actually* acquitted Mr. Khatallah of that conduct, and had varied downward based on its interpretation of the jury's verdicts. The court of appeals held that, on remand, the district court could not vary downward from the guidelines range to account for the effect that such actually-acquitted conduct had on Mr. Khatallah's guidelines calculation. App. 63a.

REASONS FOR GRANTING THE WRIT

I. THE D.C. CIRCUIT'S HOLDING THAT 18 U.S.C. § 924(C) APPLIES EXTRATERRITORIALLY IS FAR-REACHING AND WRONG

This Court should step in to correct the D.C. Circuit's consequential and erroneous ruling that 18 U.S.C. § 924(c) applies extraterritorially. The Court has repeatedly admonished that, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). Unless "Congress has affirmatively and unmistakably instructed" otherwise, a statute has only domestic application. *RJR Nabisco*, 136 S. Ct. at 2100.

Section 924(c)'s prohibition on possessing a firearm during a crime of violence has only domestic application because Congress has given no clear and unmistakable contrary instruction. The statute provides in relevant part:

> (A) [A]ny person who, during and in relation to any crime of violence … for which the person may be prosecuted in a court of the United States, uses or carries a firearm … shall … be sentenced to a term of imprisonment of not less than 5 years….
>
> (B) If the firearm possessed by a person convicted of a violation of this subsection … is a … semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1).

"To begin, nothing in the text of the statute suggests that Congress intended … it to have extraterritorial reach." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 118 (2013). Most obviously, § 924(c) does not say that it regulates foreign conduct. *Cf., e.g.*, 49 U.S.C. § 46501(2)(D) (regulating certain "aircraft outside the United States"). And the kind of offense it creates—the carrying or use of a firearm during a crime of violence—"does not imply extraterritorial reach" because "such violations … can occur either within or outside the United States." *Kiobel*, 569 U.S. at 118. "Nor does the fact that the text reaches *any* [person] suggest

application … abroad; it is well established that generic terms like 'any' or 'every' do not rebut the presumption against territoriality." *Id.*

The statute's "historical background" similarly provides no indication of extraterritoriality. *Kiobel*, 569 U.S. at 119. To the contrary, Congress first enacted § 924(c) as part of the Omnibus Crime Control and Safe Street Act of 1968 in response to the "high incidence of crime *in the United States*." Pub. L. 90-351 tit. I, 82 Stat. 197 (1968) (emphasis added); *see id.* § 902, 92 Stat. 233 (authorizing the forfeiture of "[a]ny firearm involved in … any violation of this chapter"). Congress specifically found that "crime is essentially a *local* problem," and thus passed the act in order to "assist State and local governments" in combatting crime. *Id.* tit. I, 82 Stat. 197 (emphasis added); *see also* S. Rep. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2113 ("The principal purposes of title IV are to aid in making it possible to keep firearms out of the hands of those not legally entitled to possess them … , and to assist law enforcement authorities *in the States* and their subdivisions in combating the increasing prevalence of crime *in the United States*." (emphases added)).

Shortly thereafter, in the wake of the assassinations of Martin Luther King Jr. and Senator Robert F. Kennedy, Congress added a new, stronger § 924(c) through the Gun Control Act of 1968—again with domestic concerns in mind. Pub. L. 90-618 tit. I, § 102, 82 Stat. 1213, 1224 (1968) (imposing up to 10 years' imprisonment for "us[ing]" or "carr[ying] a firearm" during "any felony which may be prosecuted in a court of the United States"). In passing the act, Congress "declare[d]" that its "purpose" was "to provide support to *Federal, State, and local* law enforcement officials in their fight against crime and violence." *Id.* § 101, 82 Stat. 1213 (emphasis added). And Congress made clear that the act was not intended to "place any undue or unnecessary Federal restrictions or burdens on law-abiding *citizens*." *Id.* (emphasis added). The backdrop of

domestic crime and gun violence against which § 924(c) was passed thus provides affirmative evidence to support the presumption against extraterritoriality.

Nonetheless, the D.C. Circuit held that § 924(c) has extraterritorial application whenever the underlying offense does. The court recognized that, for § 924(c) to "apply to conduct overseas, an absolute minimum is that 'the predicates alleged in a particular case themselves apply extraterritorially.'" *Garcia Sota*, 948 F.3d at 361 (quoting *RJR Nabisco*, 579 U.S. at 339). And it correctly concluded that this Court in *RJR Nabisco* "insisted on more: affirmative evidence of congressional intent that the umbrella crime itself (RICO there, § 924(c) here) should apply to conduct overseas." *Id*. But it went astray when it determined that there *was* affirmative evidence of congressional intent here. According to the D.C. Circuit, that evidence was supplied by the fact that one can commit a § 924(c) offense by possessing a firearm in connection with *either* a "crime of violence" *or* a "drug trafficking crime," and that the statute defines "drug trafficking crime" to include one particular offense that by its terms applies extraterritorially. *Id.*

Even accepting the lower court's reasoning insofar as it applies to § 924(c) offenses predicated on drug trafficking crimes, the court had no basis to conclude that § 924(c) offenses predicated on crimes of violence may apply extraterritorially. Indeed, as the court itself recognized, § 924(c) in its original form "referenced only crimes of violence as predicates." *Id.* At that time, the statutory prohibition on possessing a firearm during a crime of violence plainly had no extraterritorial reach. *See id.* ("We assume that such incorporation of a mass of crimes of violence, of which we may assume only a handful reflect a congressional intent of application abroad, would not satisfy *RJR Nabisco*."). Congress subsequently amended § 924(c) to *also* prohibit possessing a firearm in connection with a drug trafficking crime—and to define "drug

trafficking crime" in such a way as to (according to the D.C. Circuit) give that new offense extraterritorial application. *Id.*

In creating that new offense with extraterritorial application (possessing a gun in connection with a drug trafficking crime), Congress did not render the pre-existing offense (possessing a gun in connection with a crime of violence) extraterritorial as well. Nothing about Congress's addition of the "drug trafficking crime" language and definition changed the meaning or scope of "crime of violence." Congress did not, for example, change the definition of a "crime of violence" to *include* "drug trafficking crimes," so as to communicate that it intended to regulate possessing guns in connection with crimes of violence abroad. As Congress actually amended § 924(c), there is no "affirmative[] and *unmistak[able]* instruct[ion]" that the prohibition on possessing a gun during "crimes of violence" has extraterritorial application. *RJR*, 579 U.S. at 335 (emphasis added). Accordingly, under this Court's precedents, it does not.

This Court should grant certiorari to course-correct the courts of appeals on this important and consequential issue, as only this Court can. The presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). Allowing the D.C. Circuit's watered-down presumption against extraterritoriality to persist will fuel possibilities for international discord, inviting the unwarranted expansion of any number of other domestic laws. This Court's intervention is necessary.

II. WHETHER ACQUITTED CONDUCT MAY BE CONSIDERED AT SENTENCING IS AN IMPORTANT AND RECURRING QUESTION

This Court should grant certiorari to resolve whether acquitted conduct may be considered at sentencing consistent with the Fifth and Sixth Amendments. This question has been presented by numerous petitions currently pending before the Court, and Mr. Khatallah respectfully urges

the Court to grant certiorari for the reasons set out in those petitions. *See McClinton v. United States*, No. 21-1557; *Luczak v. United States*, No. 21-8190; *Shaw v. United States*, No. 22-118; *Karr v. United States*, No. 22-5345; *Bullock v. United States*, No. 22-5828. In the alternative, Mr. Khatallah asks this Court to hold this petition in light of those petitions.

Mr. Khatallah's case presents an additional wrinkle. Generally, it is clear when a defendant is sentenced based on acquitted conduct. For example, suppose a defendant is charged with one count of gun possession and one count of drug possession, the jury acquits him of the gun possession but convicts him of the drug possession, and the guidelines range is increased based on the judge's conclusion that the defendant possessed a gun. In that case, the acquitted conduct is clear (gun possession) and there is perfect alignment between that acquitted conduct and the defendant's increased guidelines range (the defendant's guidelines range is increased because of the gun possession). In this case, in contrast, Mr. Khatallah was charged with participating in a complex scheme involving multiple acts and alleged participants, the jury acquitted Mr. Khatallah of 14 out of 18 charges against him, and two of the sentencing enhancements that the district court applied do not align with the charges against Mr. Khatallah. Because of the factual complexity of the alleged scheme, and the lack of alignment between the charges and the sentencing guidelines, it is not *necessarily true as a matter of logic* that the jury acquitted Mr. Khatallah of the conduct upon which two of his sentencing enhancements were based. Nonetheless, the district found that the jury *actually* acquitted Mr. Khatallah of that conduct. The district court's interpretation of the jury's verdicts, as informed by its assessment of the trial evidence, should define the bounds of "acquitted conduct" when those bounds are unclear.

CONCLUSION

For the reasons set forth above, this Court should grant the petition.

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