No. ____

IN THE

Supreme Court of the United States

RICHARD LANGSTON,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

On Petition for a Writ of Certiorari to the
Connecticut Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth and Fourteenth Amendments to the Constitution of the United States prohibit a state court from basing a criminal defendant's sentence on conduct for which a jury acquitted the defendant in the same proceeding.

PARTIES TO THE PROCEEDINGS

The petitioner is an individual, Richard Langston, the defendant-appellant below. The respondent is the State of Connecticut, the appellee below.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii).

Connecticut Superior Court

State of Connecticut v. Richard Langston, HHD-CR-98-0519429-T, Judicial District of Hartford

Judgment Dates:

Sentencing: June 30, 1999

Denial of Motion to Correct Illegal Sentence: March 30, 2021

Connecticut Appellate Court

State of Connecticut v. Richard Langston, AC 44724

Transferred to Connecticut Supreme Court: July 27, 2022

Connecticut Supreme Court

State of Connecticut v. Richard Langston, SC 20734

Judgment Date (Opinion Officially Released): June 6, 2023

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Langston respectfully petitions for a writ of certiorari to review the judgment of the Connecticut Supreme Court.

OPINIONS BELOW

The Connecticut Supreme Court's decision is published at *State v. Langston*, 346 Conn. 605, 294 A.3d 1002 (2023). The Connecticut Superior Court's denial of petitioner's Motion to Correct Illegal Sentence is unreported.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on June 6, 2023. On August 12, petitioner timely submitted an application (23A135) to extend the time to file a petition for a writ of certiorari from September 4, 2023, to November 3, 2023, which Justice Sotomayor granted on August 16, 2023. The petitioner is timely filing this Petition within the period of time thus extended. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a), which authorizes this Court to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution, § 1 provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1.

The substantive criminal statutes under which petitioner was charged and sentenced are set forth in Appendix F.

STATEMENT OF THE CASE

This case concerns the widely-criticized practice of so-called "acquitted-conduct sentencing." Specifically, the question presented here is whether a state judge, sentencing a criminal defendant convicted of some charges but acquitted of another factually distinct charge in the same jury trial, may consider the defendant to have committed the acquitted conduct in determining the defendant's sentence, or whether such practice violates a defendant's constitutional rights to trial by jury and due process.

This Court has yet to resolve whether acquitted-conduct sentencing violates the rights to a jury trial and to due process. Although courts have frequently cited

United States v. Watts, 519 U.S. 148 (1997) (per curiam), as controlling on the issue, *Watts* is not in fact on point. In *Watts*, this Court resolved only whether acquitted-conduct sentencing offends the Double Jeopardy Clause of the Fifth Amendment and held "that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." Id., 157. This Court has itself recognized the limited scope of *Watts*, noting in *United States v. Booker*, 543 U.S. 220 (2005), that "*Watts* . . . presented a very narrow question regarding the interaction of the [federal Sentencing] Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." Id., 240 n.4.

Courts have questioned whether *Watts* has any force outside of its limited Double Jeopardy context. See, e.g., *State v. Melvin*, 248 N.J. 321, 346, 258 A.3d 1075 (2021); *People v. Beck*, 504 Mich. 605, 624-625, 939 N.W.2d 213 (2019); *United States v. Coleman*, 370 F. Supp. 2d 661, 669 (S.D. Ohio 2005); *United States v. Pimental*, 367 F. Supp. 2d 143, 150 (D. Mass. 2005). Additionally, the practice of acquitted-conduct sentencing has been extensively criticized by significant voices troubled by the notion that a sentencing court may simply ignore a jury's verdict of not guilty, make its own findings as to the defendant's responsibility for the acquitted conduct, and sentence based on those findings. E.g., *Watts*, supra, 519 U.S. at 170 (Kennedy, J., dissenting); *Jones v. United States*, 574 U.S. 948, 948 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of cert.); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J.,

concurring); *United States v. Bell*, supra, 808 F.3d 930 (Millett, J., concurring); *United States v. Henry*, 472 F.3d 910, 920 (D.C. Cir.) (Kavanaugh, J., concurring), cert. denied, 552 U.S. 888 (2007).

In denying certiorari in *McClinton v. United States*, No. 21-1557, earlier this year, Justice Sotomayor wrote that acquitted-conduct sentencing in the federal sentencing system "raises important questions that go to the fairness and perceived fairness of the criminal justice system." *McClinton v. United States*, 143 S. Ct. 2400, 2401 (2023) (Sotomayor, J., statement re denial of certiorari). Justice Kavanaugh, joined by Justice Gorsuch and Justice Barrett, wrote separately, agreeing that the practice "raises important questions." Id., 2403 (Kavanaugh, J., statement re denial of certiorari). Finally, Justice Alito found the issue sufficiently important to author a concurring statement countering some of the substantive points made in the other Justices' statements. See id., 2403-2406 (Alito, J., concurring in denial of certiorari). Despite this keen interest in the issue by at least a five-Justice majority of this Court, the Court ultimately denied petitioner McClinton's petition, deferring the issue so that the federal Sentencing Commission may, in the words of Justice Sotomayor, "resolve questions around acquitted-conduct sentencing in the coming year." Id., 2403.

The present case, unlike *McClinton*, arises from a criminal prosecution in state court, where the federal Sentencing Guidelines do not apply, and, thus, where any action by the federal Sentencing Commission cannot afford defendants any remedy from the unconstitutional effects of acquitted-conduct sentencing. Indeed,

Connecticut does not even have a sentencing guidelines system. Instead, it employs a sentencing procedure in which the statutes set forth a statutory range for each offense, within which the sentencing judge has discretion. Id., 633. The reasons that compelled deferral of the issue in *McClinton* have no application here.

Moreover, the present case involves exactly the kind of scenario that makes acquitted-conduct sentencing so troubling to many jurists. The offenses for which petitioner was actually convicted were robbery and gun-related charges. Those offenses did not require any proof that the defendant actually fired a gun. The assault charge of which the jury acquitted petitioner, however, was specifically premised on a theory that petitioner shot the victim. The jury's acquittal on that charge, thus, removed from the case any finding that petitioner (as opposed to another person present at the scene) was the victim's shooter. Nevertheless, in explaining the rationale for the twenty-five year sentence imposed on the robbery and gun charges, the sentencing judge expounded at length on his view that petitioner had in fact shot the victim and the extensive effects of the shooting on the victim. Id., 610-11. While petitioner's sentence was within the sentencing range permitted by Connecticut's statutes, the extent and force of the sentencing judge's statements on the acquitted conduct leave no doubt that it played a significant role in determining the length of the sentence. This case, therefore, presents the acquitted-conduct sentencing question distilled to its purist form: whether a sentencing judge's finding that a defendant committed the same conduct for which the jury acquitted him, and the judge's consideration of that conduct in arriving at

the defendant's sentence, violates the defendant's constitutional rights to trial by jury and due process.

This question strikes at the heart of the foundational rights and protections fundamental to the fairness of all criminal trials. Among these are the right to have one's guilt or innocence adjudicated by a jury of one's peers, and the right to be presumed innocent of any charge unless and until convicted of that charge by such a jury. When a judge, on the basis of the very conduct for which a jury has determined the defendant is not criminally responsible, decides to impose a more severe sentence of imprisonment than the judge otherwise would have imposed, the defendant *in actuality* spends time incarcerated for the very conduct of which he was acquitted. This cannot comport with our Constitution's guarantee of each defendant's right to have a jury determine whether he or she has committed conduct from which criminal consequences should result, nor with the right to due process. Because some jurisdictions have concluded that acquitted-conduct sentencing does indeed run afoul of constitutional guarantees, defendants' practical constitutional protections in this regard differ widely from jurisdiction to jurisdiction, a state of affairs only this Court may remedy. Review is therefore urgently needed to bring relief to those like the petitioner who are forced to serve additional time in prison for offenses juries found were unproven.

Petitioner "was arrested on March 25, 1998, in connection with an armed robbery and shooting that occurred on March 4, 1998, during a drug transaction in a parking lot on Garden Street in Hartford. [Petitioner] was charged with assault in

the first degree in violation of General Statutes § 53a-59 (a) (5), commission of a class A, B or C felony with a firearm in violation of General Statutes § 53-202k, criminal possession of a firearm in violation of General Statutes § 53a-217 and robbery in the first degree in violation of General Statutes § 53a-134(a) (2). The jury found the petitioner not guilty of assault in the first degree, but guilty of the other charges. The petitioner's conviction was upheld summarily on direct appeal. See *State v. Langston*, 67 Conn. App. 903, 786 A.2d 547 (2001), cert. denied, 259 Conn. 916, 792 A.2d 852 (2002)." *Langston v. Commissioner of Correction*, 104 Conn. App. 210, 211, 931 A.2d 967, cert. denied, 284 Conn. 941, 937 A.2d 697 (2007).

At petitioner's sentencing, the prosecutor asked the trial court to find by a preponderance of the evidence that petitioner had shot the victim, Richard Middleton, in his legs, the very assault the jury had acquitted him of, and to make that a factor in the sentencing. Specifically, the prosecutor argued:

> I think that the offenses in this case, which are of a very serious nature, certainly demand a serious sentence. And while he was found not guilty of the assault charges [sic], there is that U.S. Supreme Court case: [*United States v. Watts*, supra, 519 U.S. 148], which allows the Court to take into consideration conduct for which a defendant was acquitted if the Court finds that that conduct was proven by a preponderance of the evidence. I would certainly submit to the Court that the assault on Mr. Middleton was proven by a preponderance of the evidence and would ask the Court to take that into account in setting its sentence in this matter. . . . As the Court heard, he'll be carrying around pieces of lead in the back of his knees for the rest of his life.

Appx, 5a. Defense counsel argued that the court should respect the jury's verdict of acquittal on the assault charge:

> I want to make it clear to the Court, first of all, that [the defendant] was acquitted on the shooting. A jury felt that Mr. Langston, although [he] had committed the robbery and was in possession of a firearm, might not have

> been the shooter. There was a second shooter there. So there is some doubt that remains. I would ask this Court to take that into consideration, what the jury's decision was, and in spite of [the prosecutor's] citing of a Supreme Court case, whether by preponderance of the evidence or reasonable doubt, the fact remains that he does not stand convicted of the assault for which he was charged.

Appx., 6a-7a.

In announcing petitioner's sentence, the court first reviewed what it found were the factual underpinnings of the case. Despite the jury's acquittal on the assault charge, the court found that petitioner had shot Middleton. The court went on to comment at length on the lingering effects that Middleton's shooting had, and would continue to have, on both Middleton himself and on taxpayers:

> The circumstances resulting in this tragic mishap arose from a drug sale gone bad. The victim testified that in negotiating to buy an eight ball of cocaine from the defendant, after displaying his money or approximately $100.00, the defendant opened his exterior clothing to expose a handgun tucked into his belt. That seeing the gun, the victim, Mr. Middleton, turned about, started to walk away and was shot in the back of both legs by the defendant. Middleton, to this day, carries one of the bullets in his leg. He is effectively crippled and denied from enjoying the full quality of his life. All because this defendant elected to fire a handgun for the sake of stealing $100.00 from an unsuspecting victim. Further, Mr. Middleton has been denied the opportunity to pursue a meaningful vocational career. He is essentially unable to secure employment and must now, for the remainder of his life, be dependent on the public dole for his support and sustenance. Mr. Middleton is currently on social security disability payments and these will likely continue for the rest of his life. These payments, of course, are shouldered by the taxpayers of this country and these payments will likely total in the hundreds-of-thousands of dollars.
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> We learned at trial that Middleton underwent four days of hospitalization and major surgeries on both of his legs. He now requires, as a relatively young man, the use of a cane to walk. In effect, his life has been stolen from him.

Appx., 9a-11a. The sentencing court's comments regarding its reasons for the sentence imposed take up approximately three and one-half transcript total pages, of which twenty-seven lines, or the equivalent of one full page, are about the shooting and its effects. See Appx., 9a-12a.

The court sentenced petitioner to a period of fifteen years of imprisonment on the first-degree robbery conviction, five years of imprisonment on the conviction of a class A, B, or C felony with a firearm, to run consecutively to the sentence on the robbery conviction, and a period of five years of imprisonment on the criminal possession of a firearm charge, to run consecutively with the other two sentences, for a total effective sentence of twenty-five years. Appx, 12a-13a. The court took judicial notice of a sentence of ten years imposed by another judge the previous day in a separate case and ordered that the sentence in this case was to run consecutively to that sentence, for a total combined effective sentence of thirty-five years in the two cases. Appx., 13a.

Petitioner filed a Revised Motion to Correct Illegal Sentence on February 16, 2021, asserting that the sentencing court, by taking into consideration the assault charge on which he had been acquitted, violated his rights to trial by jury and to due process under the Sixth and Fourteenth Amendments to the United States Constitution. Appx., 17a. The Connecticut Superior Court heard the motion on March 30, 2021, and delivered an oral decision denying the motion, concluding that the sentencing court's consideration of the acquitted conduct was not improper and that, accordingly, "the defendant has failed to demonstrate a constitutional

violation or other basis to grant the motion to correct . . . ." Appx., 34a. The court subsequently filed a signed transcript of its oral decision. Appx., 30a. Petitioner appealed to the Connecticut Appellate Court, and the Connecticut Supreme Court transferred the appeal to itself. Appx., 36a.

The Connecticut Supreme Court affirmed the Superior Court's judgment denying the motion to correct petitioner's sentence. It concluded that *Watts* is controlling on the issue of acquitted-conduct sentencing and "nearly every federal court of appeals has held that considering acquitted conduct at sentencing does not violate a criminal defendant's constitutional rights, including the right to trial by jury or due process, so long as the conduct has been proven by a preponderance of the evidence and the sentence imposed does not exceed the statutory maximum for the conviction." Appx., 50a. While acknowledging that *Watts* "did not explicitly address the constitutional provisions or the conduct at issue in the present case," the court concluded that "the rationale supporting *Watts* extends to a sentencing court's consideration of acquitted conduct, so long as it meets the requisite standard." Appx., 54a. Although the court advised that "sentencing judges should undertake every effort to refrain from basing a sentence on facts that case doubt, either directly or indirectly, on any aspect of the jury's verdict," thus recognizing that acquitted-conduct sentencing puts a court-imposed sentence at odds with the jury's verdict, the court ultimately found no constitutional violation. Appx., 71a.

REASONS FOR GRANTING THE PETITION

I. Whether Acquitted-Conduct Sentencing Comports With The United States Constitution Presents A Pressing Question That Will Continue To Arise And Which Only This Court Can Resolve.

Whether acquitted-conduct sentencing violates a defendant's rights to trial by jury and due process remains an open question. *Watts* simply did not resolve it, because only the double jeopardy implications of the practice were at issue there. Nevertheless, the Connecticut Supreme Court, in the present case, like so many other courts, including the various circuits of the United States Court of Appeals, erroneously concluded that *Watts* is controlling on this issue. Meanwhile, other courts including, most recently, the high courts of both Michigan and New Jersey, have found, notwithstanding *Watts*, that the practice of acquitted-conduct sentencing is constitutionally objectionable precisely because it interferes with the jury's exclusive role as arbiter of whether a defendant has committed conduct on the basis of which a judge may sentence. Several Justices of this Court have already recognized the importance of this issue in their statements on the denial of certiorari in *McClinton*. The time is ripe for this Court to settle this vital constitutional controversy.

A. *Watts* Did Not Address The Full Constitutional Implications Of Acquitted-Conduct Sentencing.

In *Watts*, supra, 519 U.S. 148, this Court held "that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." Id., 157. Nevertheless, a closer examination of *Watts*, as well as its later treatment by this Court, reveals that its holding is considerably more limited than appears at first glance. Specifically, the Court decided *Watts* on double jeopardy grounds and did not consider whether a sentencing court's reliance on

acquitted conduct violates a defendant's rights to trial by jury under the Sixth Amendment and due process under the Fourteenth Amendment. This becomes apparent when several factors are taken into account.

First, a close examination of *Watts* itself reveals that the right against double jeopardy was the sole constitutional consideration encompassed by its holding. *Watts* was a consolidated appeal from two different cases. In the first case, the jury convicted the defendant of possessing cocaine with intent to distribute, but acquitted him of using a firearm in relation to that offense. Id., 149-50. Nevertheless, the sentencing court found by a preponderance of the evidence that the defendant had possessed guns in connection with the drug offense. Id., 150. In the other case, the defendant was charged with two counts related to separate drug transactions. Id. The jury convicted her on the first count, but acquitted her on the second. Id. The sentencing judge nevertheless found by a preponderance of the evidence that the defendant had been involved in the incident underlying the acquitted count and took that into account in calculating her sentence. Id., 150-51. In both cases, the Court of Appeals reversed the defendants' convictions, concluding that the District Court had improperly considered the acquitted conduct. Id.

The *Watts* Court examined whether the District Court's consideration of acquitted conduct violated the double jeopardy clause, focusing in particular on its previous holding in *Witte v. United States*, 515 U.S. 389 (1995):

> The Court of Appeals [in *Watts*] asserted that, when a sentencing court considers facts underlying a charge on which the jury returned a verdict of not guilty, the defendant suffer[s] punishment for a criminal charge for which he or she was acquitted. . . . As we explained in *Witte*, however, sentencing

> enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction. [Id.,] 402-403. In *Witte*, we held that a sentencing court could, consistent with the Double Jeopardy Clause, consider uncharged cocaine importation in imposing a sentence on marijuana charges that was within the statutory range, without precluding the defendant's subsequent prosecution for the cocaine offense. We concluded that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." Id., 401. Rather, the defendant is "punished only for the fact that the present offense was carried out in a manner that warrants increased punishment . . . ." Id., 403; see also [*Nichols v. United States*, 511 U.S. 738, 747 (1994)].

United States v. Watts, supra, 519 U.S. 154-55.

In other words, rather than conducting a full examination of the constitutionality of a sentencing court's reliance on acquitted conduct, the *Watts* Court examined only whether such reliance runs afoul of the prohibition against double jeopardy and concluded that it did not. And that conclusion was based simply on the general proposition that, notwithstanding a sentencing court's consideration of other conduct, the defendant is "punished," for purposes of the double jeopardy clause, only for the conduct upon which he was convicted. *Watts* makes clear that this rule, specific to the double jeopardy context, holds even where the additional conduct considered by the sentencing court is acquitted conduct. This says nothing, however, about the significance of an acquittal outside of the narrow double jeopardy context and, in particular, whether a defendant's due process and jury trial rights are violated when a sentencing judge, notwithstanding a defendant's acquittal on a charge, finds that he committed the conduct underlying that charge for purposes of sentencing. Those constitutional provisions not having

been raised in *Watts*, it would be a mistake to read this Court's opinion as implicitly passing on their impact on acquitted-conduct sentencing. This is particularly true because acquittal by a jury so clearly and closely relates to the Sixth Amendment right to trial by jury; any analysis of the constitutional implications of acquitted-conduct sentencing that fails to consider the Sixth Amendment implications is necessarily incomplete.

Second, *Watts* was a summary reversal with a short per curiam opinion without the benefit of either briefing or oral argument. See E. Hartnett, "Summary Reversals in the Roberts Court," 38 Cardozo L. R. 591, 591-92 (2016). As both members of this Court and outside commentators have observed, such decisions lack the benefit of the normal measures—full briefing and oral argument—designed to ensure well-considered and sound precedent. See *Montana v. Hall*, 481 U.S. 400, 409-10 (1987) (Marshall, J., dissenting) ("I can think of no compelling reason, and to date none has been suggested, why we should nurture a practice that can only foster resentment, uncertainty, and error. Rather, I believe that when the Court contemplates a summary disposition it should, at the very least, invite the parties to file supplemental briefs on the merits, at their option." [Emphasis in original.]); E. Brown, "Foreword: Process of Law," 72 Harv. L. Rev. 77, 94 (1958) ("[I]f the Court exercises its discretionary jurisdiction to deal with issues of national significance, almost by definition those issues warrant, if they do not require, more than summary consideration. If the Court chooses to exercise a more individualized function with respect to selected cases, it is not thereby relieved of following

procedures which provide both fairness to litigants and conditions conducive to informed and considered decision.") In any event, looking at *Watts* in particular, the lack of in-depth briefing and oral argument provides ample reason to conclude that the Court did not seriously consider the impact of constitutional rights apart from the stated issue of double jeopardy.

Third, this Court itself has confirmed these very points—that the holding in *Watts* is a very limited one confined to the realm of double jeopardy law and that it was made in a summary reversal opinion without briefing or oral argument. In *United States v. Booker*, supra, 543 U.S. 220 (2005), the Court evaluated both *Witte* and *Watts* to determine whether, as precedent, they prevented a conclusion that the Federal Sentencing Guidelines were unconstitutional to the extent that they required a judge to impose a sentence above the normal range for the offense of conviction based on the judge's finding, by a preponderance of the evidence, of an additional fact. The Court suggested that *Watts*, as a summary reversal, may not have been as thoroughly explored as it might have been: "*Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. . . . See [*Watts*, supra, 519 U.S. 171] (KENNEDY, J., dissenting)." *United States v. Booker*, supra, 240 n.4. In short, the *Booker* Court confirmed that *Watts* was limited to the double jeopardy context.

Other courts have increasingly recognized the limited scope of the holding in *Watts*. See *State v. Melvin*, supra, 248 N.J. 346 ("[a]s clarified in *Booker*, *Watts* was

cabined specifically to the question of whether the practice of using acquitted conduct at sentencing was inconsistent with double jeopardy"); *People v. Beck*, supra, 504 Mich. 624-625 ("Five justices gave [*Watts*] side-eye treatment in *Booker* and explicitly limited it to the double-jeopardy context. . . . As we must, we take the Court at its word. We therefore find *Watts* unhelpful in resolving whether the use of acquitted conduct at sentencing violates due process."), cert. denied, 140 S. Ct. 1243, 206 L. Ed. 2d 240 (2020); *United States v. Coleman*, supra, 370 F. Supp. 2d 669 ("[t]he viability of *Watts* . . . was questioned by Justice Stevens' constitutional majority opinion in *Booker*"); *United States v. Pimental*, supra, 367 F. Supp. 2d. 150 ("*Booker* substantially undermines the continued vitality of *United States v. Watts* both by its logic and by its words" [footnote omitted]).

Regardless of whether *Watts* remains good law with regard to double jeopardy, it is apparent that this Court did not decide there whether use of acquitted conduct in sentencing violates the constitutional provisions that were raised and adjudicated in the Connecticut courts in the present case. *Watts* simply does not answer the constitutional issue presented here. In any event, the ongoing controversy over the scope of *Watts* is itself a compelling reason for this Court to take up the issue and provide guidance to both federal and state courts on this important issue.

B. This Court's Post-*Apprendi* Jurisprudence Has Substantially Altered The Understanding Of The Jury Trial Right.

The impact of *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000), and the line of cases following in its wake, on the law governing the right to a jury trial and the

respective roles of jury and judge in sentencing cannot be overstated. As the Michigan Supreme Court has observed, *Apprendi* and its progeny marked a "sea change" in "the United States Supreme Court's jurisprudence analyzing a defendant's due process and Sixth Amendment rights." *People v. Beck*, supra, 504 Mich. 616. These cases collectively have consolidated the factfinding supremacy of the jury in our constitutional scheme and have increasingly placed constitutional limitations on the ability of judges to usurp the jury's factfinding role. See *United States v. Haymond*, 139 S. Ct. 2369 (2019); *Alleyne v. United States*, 570 U.S. 99, 108 (2013); *Southern Union Co. v. United States*, 567 U.S. 343 (2012); *United States v. Booker*, supra, 543 U.S. 220; *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002). While not directly dispositive of the present issue, this line of cases has steadily rolled back a judge's role as factfinder in sentencing, placing limits that had not been established or even deeply explored at the time this Court decided *Watts*.

How the principles underlying those decision may affect acquitted-conduct sentencing is most clearly reflected in the cogent observations in the majority opinion in *Blakely v. Washington*, authored by Justice Scalia. As explained there, the right to a jury trial is an embodiment of the founders' conviction that the will of the people is democratically embodied in our court system in the institution of the jury, which retains a check over the power of judges. Consequently, in our constitutional system, a judge's authority to sentence derives entirely from, and is limited by, the jury's verdict:

> Th[e] right [to trial by jury] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed.1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative"); *Jones v. United States*, 526 U.S. 227, 244-248, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). *Apprendi* carries out this design by ensuring that *the judge's authority to sentence derives wholly from the jury's verdict*. Without that restriction, the jury would not exercise the control that the Framers intended.

(Emphasis added.) *Blakely v. Washington*, supra, 542 U.S. 305-306.

These principles were more recently reiterated in Justice Gorsuch's plurality opinion in *Haymond*:

> Together with the right to vote, those who wrote our Constitution considered the right to trial by jury "the heart and lungs, the mainspring and the center wheel" of our liberties, without which "the body must die; the watch must run down; the government must become arbitrary." Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977). Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions. J. Adams, Diary Entry (Feb. 12, 1771), in 2 Diary and Autobiography of John Adams 3 (L. Butterfield ed. 1961); see also 2 J. Story, Commentaries on the Constitution § 1779, pp. 540–541 (4th ed. 1873).
>
> Toward that end, the Framers adopted the Sixth Amendment's promise that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury." In the Fifth Amendment, they added that no one may be deprived of liberty without "due process of law." Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an

> ancient rule that has "extend[ed] down centuries." *Apprendi v. New Jersey*, [supra, 530 U.S. 477].
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> *Consistent with these understandings, juries in our constitutional order exercise supervisory authority over the judicial function by limiting the judge's power to punish. A judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct*. In the early Republic, if an indictment or "accusation ... lack[ed] any particular fact which the laws ma[d]e essential to the punishment," it was treated as "no accusation" at all. 1 Bishop § 87, at 55; see also 2 M. Hale, Pleas of the Crown *170 (1736); Archbold *106. And the "truth of every accusation" that was brought against a person had to "be confirmed by the unanimous suffrage of twelve of his equals and neighbours." 4 Blackstone 343.

(Emphasis added.) *United States v. Haymond*, supra, 139 S. Ct. 2369.

These important principles—that the judge's authority to sentence is entirely derived from the jury's verdict and that the jury's verdict limits the judge's power to punish—illuminate why a sentencing judge's reliance on acquitted conduct violates the constitutional guarantees of due process and the right to a jury trial. If the judge's authority to sentence exists only as a result of the jury's verdict, and that verdict places a limit on the judge's power to punish, then a sentence only has validity to the extent that it remains within the limits set by the jury. Consequently, the jury's acquittal of the defendant on a charged offense must place that charge out of bounds at sentencing. In other words, the framers of the constitution conferred exclusively upon juries, not judges, the power to determine the defendant's guilt or innocence on the various charges and, by extension, which charged conduct may be looked to as a basis for a sentence. Id.

Also instructive is this Court's precedent on the related issue of the effect of an acquittal following a defendant's retrial upon successful appeal from a

conviction. In *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), the Court held that, under those circumstances, the state is obligated to refund to the acquittee the fees, court costs, and restitution that were exacted from the now-acquitted defendant upon his earlier conviction. Id., 1252. The Court observed:

> [O]nce th[e] convictions were erased, the presumption of their innocence was restored. See, e.g., *Johnson v. Mississippi*, 486 U.S. 578, 585, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988) (After a "conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge."). "[A]xiomatic and elementary," the presumption of innocence "lies at the foundation of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895). Colorado may not retain funds taken from [the defendants] solely because of their now-invalidated convictions . . . for Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions.

(Emphasis in original.) *Nelson v. Colorado*, supra, 137 S. Ct. 1255-56. In the words of another appellate court, "If this 'presumption of innocence' still constitutes a bedrock constitutional principle, then it must mean that once acquitted, the accused must be viewed as innocent—not just not guilty—of the acquitted charge." *State v. Paden-Battle*, 464 N.J. Super. 125, 147, 234 A.3d 332 (App. Div. 2020), aff'd sub nom. *State v. Melvin*, supra, 248 N.J. 321.

The *Nelson* Court's reasoning that a state "may not presume [an acquittee] guilty *enough* for monetary extractions"; (emphasis in original) id., 1256; has a logical extension here. If the state cannot, consistent with due process, presume a person, acquitted following reversal of his conviction, guilty enough for the state to keep his money, it is difficult to see how a state may presume an acquittee is guilty enough of an acquitted charge to use it as a basis to extend his prison sentence on other charges.

C. Acquitted-Conduct Sentencing Has Been Broadly Criticized By Members Of This Court, The Academy, And Other Distinguished Jurists.

There has long been a significant chorus of dissent from the view that the constitution is not offended by a sentencing court's consideration of acquitted conduct sentencing. Among these is now-Justice Kavanaugh, who, while on the Court of Appeals for the District of Columbia Circuit, repeatedly expressed his concerns about sentencing based on acquitted conduct, most recently observing 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 the rights to due process and to a jury trial. If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20-year sentence?" *United States v. Bell*, supra, 808 F.3d 928 (Kavanaugh, J., concurring); see also *United States v. Henry*, 472 F.3d 910, 920 (D.C. Cir.) (Kavanaugh, J., concurring) ("The oddity of [federal sentencing practices] is perhaps best highlighted by the fact that courts are still using acquitted conduct to increase sentences beyond what the defendant otherwise could have received—notwithstanding that five Justices in the Booker constitutional opinion stated that the Constitution requires that facts used to increase a sentence beyond what the defendant otherwise could have received be proved to a jury beyond a reasonable doubt." [Emphasis in original.]), cert. denied, 552 U.S. 888 (2007).

Additional compelling points were made by Judge Patricia A. Millett in the same District of Columbia Circuit case in which Justice Kavanaugh made his most recent observations. Responding to the suggestion that reliance on acquitted conduct is constitutionally sound because a sentencing judge finds facts by a lower standard of proof than the jury's "beyond a reasonable doubt" standard, Judge Millett observed:

> The problem with relying on that distinction in this setting is that the 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." In re Winship, [supra, 397 U.S. 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*. 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.

(Emphasis added.) *United States v. Bell*, supra, 808 F.3d 930 (Millett, J., concurring). For other examples of judges of the federal Court of Appeals expressing concerns about acquitted-conduct sentencing, see *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir.) (Barkett, J., concurring specially), cert. denied, 549 U.S. 1046 (2006); *United States v. Canania*, 532 F.3d 764, 778 (8th Cir.) (Bright, J., concurring), cert. denied, 555 U.S. 1037 (2008); *United States v. Mercado*, 474 F.3d 654, 662 (9th Cir. 2007) (Fletcher, J., dissenting), cert. denied, 552 U.S. 1297 (2008); *United States v. White*, 551 F.3d 381, 392 (6th Cir. 2008) (Merritt, J., dissenting),

cert. denied, 556, U.S. 1215 (2009); *United States v. Brown*, 892 F.3d 385, 408 (D.C. Cir. 2018) (Millett, J., concurring); id., 415 (Kavanaugh, J., dissenting in part).

Acquitted-conduct sentencing has also received considerable criticism from academic commentators, who have pointed to several concerns presented by the practice. One has observed that, in addition to undercutting the finality of verdicts and circumventing the jury's constitutional role in determining the defendant's guilt or innocence, allowing sentencing judges to consider acquitted conduct "frustrates the role of citizen participation in the criminal justice system, robbing that system of the democratic legitimacy conferred by the jury's role, and diminishing the civic value of juror participation in the criminal justice process." B. Johnson, "The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It," 49 Suffolk U. L. Rev. 1, 26 (2016). It "conveys a message to the jury that the fruit of their service is unimportant. Instead of instilling notions of democratic accountability in the criminal justice system, the message conveyed to jurors is that their fact-finding was trivial." Id. Because all citizens are potential jurors, sending this message should not be taken lightly.

Another policy concern is that acquitted-conduct sentencing gives the prosecution a second bite at the apple. Coupled with this is a related concern over the lower procedural safeguards in place at a sentencing hearing. "This does not violate Double Jeopardy principles because the defendant is being punished for the offense of conviction, not for offense of acquittal; however, it implicates as a policy matter the interests of the defendant in being free from prosecutors' repeated efforts

to establish that the defendant was responsible for the sentence-enhancing behavior. This 'second bite' problem is particularly troubling because the defendant is offered fewer procedural protections at sentencing than at trial." Id. As another commentator has observed: "Not only is the government excused from the rigors of proof beyond a reasonable doubt, but the government is also excused from the rules of evidence customarily attendant at trial. Hearsay, double hearsay, and even triple hearsay is permissible as long as there is an 'indicia of reliability.' Finally . . . the right to confront witnesses, one of the basic rights at trial, is not recognized at sentencing." (Footnotes omitted.) E. Ngov, "Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing," 76 Tenn. L. Rev. 235, 238-39 (2009).

Allowing judges to second-guess the jury's verdict also constitutes a kind of "judge nullification," which turns the concept of jury nullification on its head and undermines the jury's important role in our system as a check on state power. "The use of acquitted conduct at sentencing invites courts to nullify juries and risks undermining the vital roles that juries serve in the justice system. Juries are essential to the checks and balance system built into our democratic government. The Supreme Court has recognized that the jury was 'designed to guard against a spirit of oppression and tyranny on the part of rulers, and was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'" Id., 275, quoting *United States v. Gaudin*, 515 U.S. 506, 510-11 (1995).

D. State Courts Have Increasingly Challenged The Federal Courts' Notion That *Watts* Is Dispositive Of The Constitutionality Of Acquitted-Conduct Sentencing.

All the foregoing concerns are at the heart of the decisions of the Supreme Courts of Michigan and New Jersey declaring acquitted-conduct sentencing unconstitutional. These decisions from two states' high courts highlights the inconsistency between the rights of defendants in some jurisdiction and those in others, as well as in the federal system. This Court should resolve that conflict by granting certiorari in this case.

In its 2019 decision in *People v. Beck*, supra, 504 Mich. 605, the Supreme Court of Michigan found a violation of the right of due process under the United States Constitution and remanded for resentencing where the sentencing judge relied on acquitted conduct in sentencing. Id., 629-30. The defendant in *Beck* was convicted as a fourth-offense habitual offender of being a felon in possession of a firearm and a second offense of carrying a firearm during the commission of a felony, but was acquitted of open murder, carrying a firearm with unlawful intent, and other charges. Id., 610. While observing that the jury found that the defendant did not commit a homicide beyond a reasonable doubt, the sentencing judge nonetheless found by a preponderance of the evidence that the defendant did shoot the victim, causing his death. *People v. Beck*, supra, 504 Mich. 611-12. The sentencing judge then imposed a sentence of 240 to 400 months. Id., 610. The defendant appealed, challenging his sentence on the ground that the sentencing court had increased his sentence based on conduct of which he had been acquitted. Id., 612.

On appeal, the Supreme Court of Michigan reviewed the developments occasioned by *Apprendi* and its progeny; id., 616; and also concluded that *Watts* was "unhelpful in resolving whether the use of acquitted conduct at sentencing violates due process," due to its limitation to the double jeopardy realm. Id., 625. Accordingly, the *Beck* court went on to "address this question on a clean slate." Id. It reasoned that the presumption of innocence is violated when a sentencing judge makes findings contradicting the jury's verdict of acquittal:

> When a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard. But 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. . . .
>
> Unlike . . . uncharged conduct . . . conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process.

(Citation omitted.) Id., 626-27.

Following the Michigan court's decision in *Beck*, the New Jersey Supreme Court also recently held that the use of acquitted conduct in sentencing constitutes a violation of due process in *State v. Melvin*, 248 N.J. 321, 258 A.3d 1075 (2021). *Melvin* was an appeal from two cases with different defendants. In the first, the jury found the defendant guilty of second-degree unlawful possession of a handgun and not guilty of more serious charges including first-degree murder and first-degree attempted murder. Id., 326. Despite the defendant's acquittal on the murder and attempted murder charges, the sentencing court determined that the defendant shot the three victims, citing *Watts* as authority for making such a finding. Id. In

the second case, presided over by the same judge, the jury found the defendant guilty of kidnapping, conspiracy to commit kidnapping, and felony murder, but acquitted her of seven other counts including first-degree murder and conspiracy to commit murder. Id. The sentencing judge, again relying on *Watts*, found that, despite the jury's verdict, the defendant "was the mastermind who orchestrated the victim's murder." Id.

On appeal, the Supreme Court of New Jersey agreed with the Michigan Supreme Court that *Watts* was limited to the double jeopardy context and therefore is not controlling on the issue of due process. Id., 346. The New Jersey court then turned to engaging in its own analysis of the rights to due process and trial by jury. Observing the importance of the right to a criminal trial by jury, the court went on to conclude that it would be fundamentally unfair to permit a sentencing judge to make findings contrary to a jury verdict of acquittal. *State v. Melvin*, supra, 248 N.J. 349-50. While the New Jersey court ultimately decided the issue as one of state constitutional law, its reliance on the Michigan court's federal analysis and this Court's precedents is significant, as it highlights the diversity of views on the federal issue.

Michigan and New Jersey, through these recent decisions, have joined a number of other jurisdictions that earlier prohibited acquitted-conduct sentencing. See *State v. Koch*, 107 Haw. 215, 224-25, 112 P.3d 69 (2005) (sentencing court committed error in considering acquitted conduct); *State v. Cote*, 129 N.H. 358, 372-76, 530 A.2d 775 (1987) (where defendant was acquitted of five of eight charges and

convicted of three others, which occurred at one date and time, sentencing court abused its discretion by finding defendant's acts were not isolated incidents); cf. *State v. Marley*, 321 N.C. 415, 423-25, 364 S.E.2d 133 (1988) (due process and fundamental fairness precluded trial court from aggravating defendant's sentence for lesser-included offense with element of greater offense of which defendant had been acquitted). As a result, there is a growing split, largely along federal-state lines, as to whether this practice is constitutionally permissible. This Court should take up the issue in order to provide clarity and uniformity.

II. The Present Case Was Wrongly Decided And Presents An Ideal Case For Resolution Of This Important Constitutional Issue.

In the present case, the Connecticut Supreme Court's analysis of the permissibility of acquitted-conduct sentencing under the Sixth and Fourteenth Amendments was based on its interpretation of *Watts* as controlling on the issue. See Appx., 46a-55a. Specifically, the Connecticut court concluded that *Watts* addressed the constitutionality of acquitted-conduct sentencing broadly and was not limited to the double jeopardy realm; it also put great weight on the consistency of the federal Court of Appeals decisions following *Watts*. But as has been discussed, there is a diverse chorus of disagreement with that reading of *Watts* from sources including Justices of this Court, vocal judges in the federal circuits, academic voices, and state Supreme Courts, which the Connecticut Supreme Court gave short shrift in its federal constitutional analysis.

The conclusion of the Connecticut court that the trial court in the present case did not violate petitioner's rights cannot be reconciled with fundamental

notions of fairness, nor with the supremacy of the jury on questions of guilt and innocence. The jury in petitioner's case rejected the state's assertion that petitioner was guilty of assaulting Middleton by shooting him. The presumption of innocence on that assault charge therefore remained, and the sentencing judge was not permitted to consider the acquitted conduct as a factor in crafting the sentence. The judge, however, not only relied on the acquitted conduct, but specifically found that petitioner committed it, stating that "this defendant elected to fire a handgun for the sake of stealing $100.00 from an unsuspecting victim." Appx., 10a. The sentencing judge then went on to elaborate at length on how the victim, and even the government, were harmed, not by the armed robbery of which petitioner was convicted, but specifically by the shooting that petitioner committed in the eyes of the judge (but not the jury). Under these circumstances, where the sentencing judge was so preoccupied with the acquitted conduct, almost to the exclusion of the convicted conduct, it is apparent that some substantial proportion of petitioner's prison term is the result of the judge's view that he committed the acquitted conduct. Such a result—a person deprived of his fundamental liberty because of conduct of which a jury acquitted him—is not and cannot be what the founders envisioned when they guaranteed the rights to trial by jury and due process.

This case presents an ideal vehicle for this court to resolve the ultimate issue of whether acquitted-conduct sentencing is categorically unconstitutional. Because this is not a case arising under the federal Sentencing Guidelines, there is no basis for waiting to see what actions the federal Commission may take on the issue; its

action will not affect state court sentencing. Several Justices of this Court have already acknowledged the importance of this issue while denying certiorari in *McClinton*. This case affords an opportunity to resolve the question definitively free from the complications presented by possible pending action by the Guidelines Commission.

Additionally, Connecticut does not employ sentencing guidelines, and the facts of this case do not involve application of a sentence *enhancement*; it is a simple case of a judge's consideration of acquitted-conduct sentencing in the process of exercising the discretion Connecticut's statutes afford in sentencing within a designated range. This case, therefore, presents the question of acquitted-conduct sentencing distilled to its purest form. Put differently, the question in this case is whether any sentencing proceeding in which a judge makes a finding that the defendant committed acquitted conduct, and then relies on that finding in arriving at the defendant's sentence, violates that defendant's constitutional rights to trial by jury and due process, irrespective of the type of sentencing scheme employed by the jurisdiction.

Finally, the record in this case fully and clearly presents the constitutional issue for review. The sentencing judge's reliance on the acquitted conduct is clear from the record. Furthermore, the issue was distinctly raised in petitioner's Motion to Correct Illegal Sentence, and was fully litigated and decided at both the Connecticut Superior Court and Connecticut Supreme Court levels.

In short, this case presents an ideal opportunity for this Court to address a constitutional issue that several of its Justices have already identified as one of vital importance. Criminal defendants are spending substantial extra time behind bars because sentencing judges are ignoring acquittals and finding that those defendants committed the conduct underlying the acquitted charges. In the face of growing division among the courts and commentators on this issue, this Court is presented here with an ideal case to finally provide much-needed guidance on this highly disputed, weighty issue. Accordingly, this Court should grant certiorari in the present case.

Respectfully submitted,

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