No. _____

IN THE
Supreme Court of the United States

JADE LAROCHE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the use of acquitted conduct to determine a defendant's sentence violates the Fifth and Sixth Amendments.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

United States v. LaRoche, No. 3:22-cr-30003-1, United States District Court for the District of South Dakota. Judgment entered September 6, 2022.

United States v. LaRoche, No. 22-2969, United States Court of Appeals for the Eighth Circuit. Judgment entered October 4, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Jade LaRoche respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a) is reported at 83 F.4th 682 (8th Cir. 2023). The district court's relevant ruling is unpublished.

JURISDICTION

The court of appeals entered judgment on October 4, 2023. This petition is timely filed under Rule 13.3. 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 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.

INTRODUCTION

This petition presents an important question of federal law that can only be settled by this Court—does the use of acquitted conduct to enhance a defendant's sentence violate the Sixth Amendment right to trial by jury and the Fifth Amendment right to due process? This Court has never addressed the Sixth Amendment and due process issues raised here.

The United States Sentencing Commission recently released three proposed options for addressing acquitted conduct under the Sentencing Guidelines. *See* U.S. Sentencing Comm'n, *Proposed Amendments to the Sentencing Guidelines (Preliminary)* (Dec. 14, 2023), at Proposed Amendment: Acquitted.[1] None of the Sentencing Commission's proposed options resolves the fundamental constitutional concerns underlying the "acquitted conduct" issue. This case presents an ideal opportunity for the Court to address these issues.

STATEMENT OF THE CASE

Criminal trial: Jade LaRoche was charged with assaulting a federal officer and inflicting bodily injury in violation of 18 U.S.C. §§ 111(a) and 111(b). Dist. Ct. Dkt. 1.[2] He exercised his right to a jury trial and was acquitted of inflicting bodily injury to the officer. Dist. Ct. Dkt. 73. However, the jury found him guilty of the

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[1] *Available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20231214_prelim-RF-proposed.pdf (last accessed Dec. 28, 2023).

[2] All citations to "Dist. Ct. Dkt." are to the docket in *United States v. LaRoche*, No. 3:22-cr-30003 (D.S.D.). All citations to the Sentencing Transcript are to the public transcript, available at Dist. Ct. Dkt. 97 ("Sent. Tr.").

lesser-included offense involving physical contact with the victim. *Id.* In other words, LaRoche was acquitted of the "enhanced penalty" provision of 18 U.S.C. § 111(b).

Pre-sentencing: The government argued that the acquitted conduct should be considered in calculating the Guideline Range. *See* Dist. Ct. Dkt. 90-1, at 2. LaRoche resisted application of the enhancement for bodily injury. *Id.* at 3. Based on the government's objection, the Presentence Investigation Report was modified to add the 2-level sentencing enhancement for bodily injury. *Id.* at 2; *compare* Dist. Ct. Dkt. 87, at 5-6, *with* Dist. Ct. Dkt. 90, at 5-6.

Criminal sentencing: At sentencing, the government argued for application of the 2-level "bodily injury" enhancement. Sent. Tr., at 11-12. The government explicitly argued that "[t]his Court is not bound by the not guilty verdict on inflicting bodily injury." *Id.* at 12. Over LaRoche's objection, the district court applied the 2-level enhancement based on the acquitted conduct. Sent. Tr., at 21; 43 ("The Court finds no inconsistency between applying the bodily injury enhancement under the definition, as it applies in the guidelines, with the determination of the jury that a . . . 20-year max felony ought not to apply. That is the nature and circumstances of the offense.").

The district court calculated the total offense level, including the 2-level enhancement, as 15, and the guideline range as 41 to 51 months. Sent. Tr., at 25. Without the 2-level enhancement, LaRoche's total offense level would have been 13, with a criminal history category of VI, resulting in a guideline range of 33 to 41

months. *See* USSG, ch. 5, pt. A (Table). The district court sentenced LaRoche to 44 months in prison. Sent. Tr., at 46. This sentence was below the midpoint of the calculated guideline range, but above the non-enhanced guideline range.

Appeal: On appeal, LaRoche argued that the use of acquitted conduct to enhance his guideline range and sentence violated his Fifth and Sixth Amendment rights. App. 9a-11a. The court of appeals held that circuit precedent foreclosed this argument. *Id.* at 11a (citing *United States v. Sanchez*, 42 F.4th 970, 976 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 2691 (2023)). The court of appeals had jurisdiction under 28 U.S.C. § 1291.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

The use of acquitted conduct to enhance a defendant's sentence violates the Sixth Amendment right to trial by jury and the Fifth Amendment right to due process. For years, current and former members of this Court and other federal judges have articulated the due process and Sixth Amendment concerns raised by the use of acquitted conduct at sentencing, but this Court has never addressed the full range of constitutional concerns raised by this practice. There is now a deep and fully developed split of authority between the federal courts of appeals, which have rejected constitutional challenges to the use of acquitted conduct at sentencing, and the high courts of several states, which have held that the use of acquitted conduct at sentencing violates the defendant's constitutional rights. This case presents the

ideal opportunity for the Court to finally resolve the constitutionality of the use of acquitted conduct at sentencing.

I. The Fifth and Sixth Amendments prohibit the use of acquitted conduct at sentencing.

A. Sixth Amendment right to trial by jury

The Sixth Amendment right to trial by jury "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). "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." *Id.* at 306. This right is "the heart and lungs, the mainspring and the center wheel of our liberties." *United States v. Haymond*, 139 S. Ct. 2369, 2375 (2019) (plurality opinion) (internal quotation omitted). To allow a sentencing judge to use conduct that was considered and rejected by a jury to increase the defendant's sentence for a different conviction "is at war" with this fundamental right. *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in denial of rehearing *en banc*).

Over the last twenty years, this Court has repeatedly reaffirmed the central role of the jury in the criminal justice system, particularly as it relates to sentencing. *See Haymond*, 139. S. Ct. 2369 (holding that mandatory revocation sentence based on judicial fact-finding violates the Fifth and Sixth Amendments); *Alleyne v. United States*, 570 U.S. 99 (2013) (holding that any fact that increases the mandatory minimum sentence for a crime must be submitted to the jury); *United States v. Booker*, 543 U.S. 220 (2005) (holding that mandatory Federal Sentencing

Guidelines violate the Sixth Amendment); *Blakely*, 542 U.S. 296 (holding that any fact essential to a punishment must be submitted to the jury); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact other than a prior conviction that increases the maximum sentence for a crime must be submitted to the jury).

The clear implication of these cases is that a "judge violates a defendant's Sixth Amendment rights by making findings of fact that either ignore or countermand those made by the jury and then relies on these factual findings to enhance the defendant's sentence." *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring); *see also United States v. Mercado*, 474 F.3d 654, 658-65 (9th Cir. 2007) (Fletcher, J., dissenting). This practice allows the government to try its case twice—first before the jury and then before the judge. *Canania*, 532 F.3d at 776 (Bright, J., concurring). If the government loses its case before the jury, it can retry those counts on the more generous preponderance of the evidence standard before the judge. *Id.* This "amounts to more than mere second-guessing of the jury—it entirely trivializes its principal fact-finding function." *Id.* In other words, it "renders the jury a sideshow." *United States v. Brown*, 892 F.3d 385, 409 (D.C. Cir. 2018) (Millett, J., concurring). "Without so much as a nod to the niceties of constitutional process, the government plows ahead incarcerating its citizens for lengthy terms of imprisonment without the inconvenience of having to convince jurors of facts beyond a reasonable doubt." *Id.* The use of acquitted conduct in this manner violates the Sixth Amendment.

B. Fifth Amendment right to due process

The use of acquitted conduct at sentencing also violates the Due Process Clause of the Fifth Amendment. *See People v. Beck*, 939 N.W.2d 213, 216 (Mich. 2019), *cert. denied sub nom. Michigan v. Beck*, 140 S. Ct. 1243 (2020) ("Once acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime."); *see also State v. Melvin*, 258 A.3d 1075, 1093-94 (N.J. 2021) ("We hold that the findings of juries cannot be nullified through lower-standard fact findings at sentencing. . . . Fundamental fairness simply cannot let stand the perverse result of allowing in through the back door at sentencing conduct that the jury rejected at trial.") (applying state constitution).

The consideration of acquitted conduct undermines the fair notice requirement at the heart of due process. *United States v. Lasley*, 832 F.3d 910, 922 (8th Cir. 2016) (Bright, J., dissenting). "A defendant should have fair notice to know the precise effect a jury's verdict will have on his punishment." *Canania*, 532 F.3d at 777 (Bright, J., concurring). "It cannot possibly satisfy due process to permit the nullification of a jury's not guilty verdict . . . by allowing a judge to thereafter use the *same* conduct underlying that charge to enhance a defendant's sentence." *Id.* (emphasis in original). "In determining guilt or innocence, the jury thus serves not only as a fact-finder but as a means of providing a defendant with notice as to his possible punishment." *Id.* "And a judge's subsequent use of acquitted conduct all but eviscerates this latter notice function." *Id.* (cleaned up). *Cf. Apprendi*, 530 U.S. at 563 (Breyer, J., dissenting) (noting that there may be situations where "unusual

and serious procedural unfairness" in sentencing violates the Due Process Clause). The use of acquitted conduct at sentencing violates the fundamental fairness guaranteed by the Due Process Clause.

II. *Watts* did not resolve the Fifth Amendment due process and Sixth Amendment concerns presented in this case.

In *United States v. Watts*, this Court held that the use of acquitted conduct at sentencing does not violate the Double Jeopardy Clause. 519 U.S. 148, 157 (1997) (per curiam). While the courts of appeals have uniformly interpreted *Watts* as foreclosing *any* constitutional challenge to the use of acquitted conduct,[3] the Court did not address whether this practice violates the Due Process Clause or the Sixth Amendment. Indeed, the Court has emphasized the narrowness of the holding in *Watts*. *Booker*, 543 U.S. at 240 n.4 ("*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."). *Watts* simply did not address whether the use of acquitted conduct violates the Due Process Clause or the Sixth Amendment. *Id.* at 240; *United States v. Papakee*, 573 F.3d 569, 577 n.3 (8th Cir. 2009) (Bright, J., concurring); *United States v. White*, 551

[3] *United States v. Gobbi*, 471 F.3d 302, 313-14 (1st Cir. 2006); *United States v. Vaughn*, 430 F.3d 518, 525-27 (2d Cir. 2005); *United States v. Ciavarella*, 716 F.3d 705, 735-36 (3d Cir. 2013); *United States v. Grubbs*, 585 F.3d 793, 798-99 (4th Cir. 2009); *United States v. Farias*, 469 F.3d 393, 399-400 (5th Cir. 2006); *United States v. White*, 551 F.3d 381, 385-86 (6th Cir. 2008) (en banc); *United States v. Waltower*, 643 F.3d 572, 574-78 (7th Cir. 2011); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States v. Mercado*, 474 F.3d 654, 656-58 (9th Cir. 2007); *United States v. Magallanez*, 408 F.3d 672, 683-85 (10th Cir. 2005); *United States v. Faust*, 456 F.3d 1342, 1347-48 (11th Cir. 2006); *United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008).

F.3d 381, 391-92 (6th Cir. 2008) (en banc) (Merritt, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring). This Court need not overrule *Watts* to answer the question presented in this case.

III. The time has come for the Court to resolve the constitutionality of the use of acquitted conduct at sentencing.

For years, current and former members of this Court have urged the Court to consider the Fifth and Sixth Amendment implications of the use of acquitted conduct at sentencing. *See*, *e.g.*, *Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., joined by Thomas, J. & Ginsburg, J., dissenting from denial of certiorari) (urging the Court to "grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment" by allowing judge-found facts to enhance a sentence); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (stating that "[i]t is far from certain whether the Constitution allows" courts to select a sentence "based on facts the judge finds without the aid of a jury or the defendant's consent"); *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing *en banc*) (noting 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," but stating that resolving this issue would require a significant revamp of the Court's sentencing jurisprudence).

Other federal judges have joined the chorus. *See*, *e.g.*, *Lasley*, 832 F.3d at 920-23 (Bright, J., dissenting); *Bell*, 808 F.3d at 928-32 (Millett, J., concurring); *White*,

551 F.3d at 391-97 (Merritt, J., dissenting); *Mercado*, 474 F.3d at 658-65 (Fletcher, J., dissenting); *Faust*, 456 F.3d at 1349-53 (Barkett, J., specially concurring). They agree that only this Court can resolve the constitutionality of the use of acquitted conduct at sentencing. *See*, *e.g.*, *Bell*, 808 F.3d at 932 (Millett, J., concurring) ("[O]nly the Supreme Court can resolve the contradictions in the current state of the law."); *Papakee*, 573 F.3d at 578 (Bright, J., concurring) ("It is now incumbent on the Supreme Court to correct this injustice.").

The need for this Court's intervention has become more apparent in recent years as the high courts of a number of states have held that the use of acquitted conduct to enhance a defendant's sentence violates the due process and jury trial rights enshrined in state constitutions and the Federal Constitution, demonstrating a deep and fully developed split of authority on this issue. The Supreme Court of New Jersey recently held that sentencing based on acquitted conduct violates the state constitution's fundamental guarantee of due process. *Melvin*, 258 A.3d at 1091, 1093-94. The court concluded:

> We hold that the findings of juries cannot be nullified through lower-standard fact findings at sentencing. The trial court, after presiding over a trial and hearing all the evidence, may well have a different view of the case than the jury. But once the jury has spoken through its verdict of acquittal, that verdict is final and unassailable. The public's confidence in the criminal justice system and the rule of law is premised on that understanding. Fundamental fairness simply cannot let stand the perverse result of allowing in through the back door at sentencing conduct that the jury rejected at trial.

Id. at 1093-94.

Similarly, in 2019, the Supreme Court of Michigan held that the Fourteenth Amendment's due process clause bars the use of acquitted conduct at sentencing. *Beck*, 939 N.W.2d at 227 ("We hold that due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted."). The *Beck* court explained that "when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent," and to allow the sentencing court to use that conduct at sentencing "is fundamentally inconsistent with the presumption of innocence itself." *Id.* at 225 (quoting *State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988)).

New Jersey and Michigan joined three other state high courts in prohibiting the use of acquitted conduct at sentencing. *See Bishop v. State*, 486 S.E.2d 887, 897 (Ga. 1997); *State v. Marley*, 364 S.E.2d 133, 138 (N.C. 1988); *State v. Cote*, 530 A.2d 775, 784-85 (N.H. 1987). With all twelve federal circuits relying on *Watts* to reject constitutional challenges to the use of acquitted conduct at sentencing, there is an established split of authority on this important question of federal law, and only this Court can resolve it.

IV. The Sentencing Commission cannot resolve the constitutional issues raised here.

In June 2023, this Court declined to decide these issues after the United States Sentencing Commission "announced that it [would] resolve questions around acquitted-conduct sentencing in the coming year." *McClinton v. United States*, 143 S. Ct. 2400, 2403 (2023) (Sotomayor, J., respecting the denial of certiorari).

Whatever merit there may be in awaiting action from the United States Sentencing Commission, the Sentencing Guidelines are advisory and not controlling on sentencing. *Booker*, 542 U.S. 220. Therefore, amendments to the Sentencing Guidelines will not resolve the constitutional issues arising in situations where sentencing courts vary or depart from them based on consideration of acquitted conduct.

Moreover, "[e]ven if the Commission eventually decides on policy grounds that such conduct should not be considered in federal sentencing proceedings, that decision will not affect state courts, and therefore the constitutional issue will remain." *McClinton*, 143 S. Ct. at 2403 (Alito, J., concurring). Regardless of the Sentencing Commission's future actions, the Court will continue to be asked to resolve these issues.

V. This case is an ideal vehicle for the question presented.

This case squarely presents the Fifth and Sixth Amendment issues involved in the use of acquitted conduct at sentencing. The sentencing court applied a 2-level enhancement to LaRoche's advisory guideline range—increasing it from 33 to 41 months to 41 to 51 months—based on acquitted conduct. The sentence of 44 months exceeded the guideline range if the enhancement had not been applied. Therefore, the acquitted conduct enhancement directly impacted LaRoche's sentence. This case is an ideal vehicle for the question presented.

The district court's use of the sentencing enhancement under the sentencing guidelines was merely a "second bite" for the government to enhance LaRoche's

punishment and reweigh the credibility of its witnesses. *McClinton*, 143 S. Ct. at 2402 (Sotomayor, J., respecting the denial of certiorari). Effectively, the use of acquitted conduct in sentencing rendered meaningless the jury's determination regarding the infliction of bodily injury. There was no practical difference resulting from the jury's determinations; LaRoche received the same punishment he would have received if convicted of the greater crime. Not only does this diminish Fifth and Sixth Amendment rights, but it also suggests that jury trials are of no value to defendants in these situations. *Id.* Such conclusions may erode the public's confidence in the criminal justice system. *Id.* ("[A]cquitted-conduct sentencing also raises questions about the public's perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system."); *see also Melvin*, 258 A.3d at 1094.

VI. Other pending petitions involve the same question presented.

Finally, in the alternative, the Court could hold this petition in abeyance pending resolution of at least one other petition raising essentially the same question presented. *See O'Bannon v. United States*, No. 23-554 (filed November 20, 2023). The resolution of that case may impact the Court's resolution of the present petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 29th day of December, 2023.

Respectfully submitted,

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