No. 23-_____

IN THE
SUPREME COURT OF THE UNITED STATES

HARVEY HOLLAND,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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29 December 2023

QUESTIONS PRESENTED FOR REVIEW

A longstanding and durable tradition for federal sentencing in this nation is that judges have broad discretion in the kind of information and sources of information that may be considered at sentencing. *Dean v. United States*, 581 U.S. 62, 66 (2017); *United States v. Tucker*, 404 U. S. 443, 446 (1972); *Williams v. New York*, 337 U. S. 241, 246 (1949). Whether a defendant appears for sentencing or resentencing, the sentencing court considers the defendant on that day, not on the date the offense occurred or the date of conviction. *Pepper v. United States*, 562 U. S. 476, 492 (2011). Due process requires that a defendant's sentence rest on accurate facts. *Koon v. United States*, 518 U. S. 81, 113 (1996); *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

With this backdrop, Congress passed the First Step Act of 2018 which, among other things, gave the Fair Sentencing Act of 2010 retroactive effect, permitting incarcerated persons to petition the district court to impose a reduced sentence as if certain portions of the Fair Sentencing Act were in effect at the time the covered offense was committed. The Act does not require the district court to reduce any sentence. But in *Concepcion v United States*, 142 S. Ct. 2389 (2022), the Court held that the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act. *Id*. at 2396, 2404.

Petitioner had been charged with use of a firearm in relation to a drug sentencing crime resulting in a murder. The jury did not reach a verdict on that count, and the government later dismissed it. Despite that lack of jury finding, the district court ordered Petitioner to serve life in prison largely based on a murder cross-reference. In his First Step Act motion, Petitioner cited changed circumstances including that, after a jury was unable to reach a verdict on murder, the original judge made factual findings that contradicted trial testimony, as later shown when the trial transcripts were prepared. The district court partially granted First Step Act "relief" in name only, agreeing to reduce Petitioner's life sentence to a total sentence of 80 years—effectively re-imposing a life sentence. In failing to grant further relief, the district court agreed that the original sentencing court did not have access to the trial transcripts at sentencing, Pet. App. 23a, but refused to consider intervening facts surrounding the murder cross-reference, stating, "the Court cannot, and will not, review the facts underlying the sentencing court's decision from twenty years ago that the" murder cross-reference applied. Pet. App. 24a.

Accordingly, the first question is whether the district court ruled directly contrary to the Court's direction in *Concepcion* by finding that Petitioner was eligible relief but refusing to consider intervening facts—the availability of a transcript to question the validity of the murder cross-reference. The second question is whether the district court failed to follow the Court's directives to sentence based on accurate information available from a variety of courses. The third question is whether the re-imposition of a life sentence based on a murder cross-reference, following a jury's failure to reach a verdict, violates the Fifth and Sixth Amendment rights to due process, fair trial and trial by jury.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law:

Other Authorities:

PETITION FOR WRIT OF CERTIORARI

Petitioner Harvey Holland respectfully petitions the Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The amended opinion of the U.S. Court of Appeals for the Third Circuit affirming the district court's judgment granting Petitioner's First Step Act motion in part is unpublished. *United States v. Harvey Holland*, No. 22-2764 (3d Cir. Oct. 24, 2023). Pet. App. 1a. This amended opinion did not affect the judgment entry date. The memorandum order of the U.S. District Court for the Middle District of Pennsylvania granting Petitioner's First Step Act motion in part and denying his requested relief in part is also unpublished. *United States v. Harvey Holland*, No. 1:01-cr-00195 (M.D. Pa. Sep. 7, 2022). Pet. App. 12a.

STATEMENT OF THE BASIS FOR JURISDICTION

The district court had jurisdiction over Petitioner's case under 18 U.S.C. § 3231 and jurisdiction to consider his motion under 18 U.S.C. § 3582(c)(1)(B) and § 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5222.

The Third Circuit had jurisdiction 28 U.S.C. § 1291 and 18 U.S.C. § 3742.(a), as Petitioner filed a timely notice of appeal from the district court's order.

This Court has jurisdiction under 28 U.S.C. § 1254(1), as Petitioner is filing this petition within 90 days of the Third Circuit's decision affirming the district court's decision. See Sup. Ct. R. 13.1, 13.3., 29.2.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

U.S. Const. amend. V.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation * * * and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

> Constitutional right to be convicted only on proof of all elements beyond a reasonable doubt.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

The Court has been clear that whether sentencing or resentencing a defendant, the district court has broad discretion in what information to consider from a wide variety of sources. *Dean v. United States*, 581 U.S. 62, 66 (2017); *United States v. Tucker*, 404 U. S. 443, 446 (1972); *Williams v. New York*, 337 U. S. 241, 246 (1949). But in the end, the facts on which the district court relies must be accurate. *Koon v. United States*, 518 U. S. 81, 113 (1996); *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

The Court has held that these tenets remain true following the First Step Act of 2018. *Concepcion v. United States*, 142 S. Ct. 2389, 2401 (2022) ("Congress in the First Step Act simply did not contravene this well-established sentencing practice."). While the district court has no obligation to grant relief, when making its determination on whether to grant relief, it is only limited in what it can consider by the Constitution, the language of the Act or other applicable statutes. *Id.* at 2400-01. And as with other sentencing and resentencing proceedings,

the district court takes the defendant filing a First Step Act motion as the defendant on that day—not on the day of an offense, a conviction, or the original sentencing date. *Pepper v. United States*, 562 U.S. 476, 492 (2011). Accordingly, the district court may consider intervening changes in facts and changes in law when determining whether to grant First Step Act relief and any degree of relief. *Concepcion*, 142 S. Ct. at 2396, 2404.

1. Petitioner was charged with distribution and possession with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. § 841(a)(1), and conspiracy to do so, in violation of 21 U.S.C. § 846. Petitioner was also charged with causing the death of another through the use of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(j).

2. Informants and co-conspirators provided unsworn statements to law enforcement claiming to tie Petitioner to the murder. But under oath at trial, these witnesses' stories were very different. Petitioner was cast as having a limited role in the conspiracy, as being a crack addict, and unable to have a larger role, in line with the evidence that he was intellectually disabled and "functioning in the borderline range of mental retardation."

3. Based on the evidence the government presented, the jury was unable to reach a verdict on the § 924(j) murder charge. The district court declared a mistrial, and the government eventually dismissed that count.

4. The jury found Petitioner guilty of the drug trafficking and drug conspiracy counts. The probation officer's presentence investigation report recommended a finding that a victim was killed during Petitioner's drug trafficking crime under circumstances constituting murder under 18 U.S.C. § 1111. Petitioner objected, noting that in recommending the finding that he was

involved in a murder, the probation officer was relying on the government's version of events and police investigation reports—not trial testimony. At the time, the transcripts of the trial had not been prepared. The sentencing court overruled the objection, applied the cross-referenced murder enhancement, and ordered that Petitioner serve the remainder of his life in prison.

5. Petitioner moved for resentencing under the First Step Act. Petitioner first asserted that, under *Concepcion*, there had been changes in circumstances since the time of his original sentencing hearing, including that the trial transcripts—which had not been available at the time of sentencing—showed that the facts on which the district court relied to impose the murder cross-reference came from pre-trial investigative reports that were flatly contradicted by trial testimony by the same witnesses cited in the reports. Second, beyond simply citing the intervening facts, Petitioner objected to the sentencing court's use of information that the record now showed to be inaccurate or plainly false. Third, Petitioner asserted that his Fifth and Sixth Amendment rights were being violated as a result of being sentenced for an offense (murder) for which the jury could not reach a verdict and was dismissed.

6. The district court granted Petitioner relief in part, although Petitioner will experience no tangible "relief." The court resentenced Petitioner to consecutive terms of 40 years of imprisonment, for a total of 80 years—an effective life sentence now stated in terms of years. Moreover, the district court refused to consider the intervening change of circumstances affecting the original findings, stating "the Court cannot, and will not, review the specific facts underlying the sentencing court's decision from twenty years ago." Pet. App. 24a. The district court also ruled that Petitioner's constitutional rights would not be violated through being sentenced on uncharged or dismissed conduct. Pet. App. 24a ("There are no 'Sixth Amendment [or] due

process' concerns with a sentencing court considering conduct of which a defendant has been acquitted or has not been convicted to determine his or her appropriate guidelines range and sentence.").

REASONS FOR GRANTING THE PETITION FOR WRIT

There is a "long" and "durable" tradition that sentencing judges "enjo[y] discretion in the sort of information they may consider" at an initial sentencing proceeding. *Dean v. United States*, 581 U.S. 62, 66 (2017). See *Williams v. New York*, 337 U. S. 241, 246 (1949) (finding that when a defendant is sentenced or resentenced, federal courts are granted wide discretion in the sources and types of evidence used to craft appropriate sentences). That unbroken tradition includes that a sentencing judge is to consider "every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon v. United States*, 518 U. S. 81, 113 (1996).

Accordingly, a federal judge in deciding to impose a sentence "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Tucker*, 404 U. S. 443, 446 (1972). Due process requires a defendant's sentence to rest on accurate facts. *Townsend v. Burke*, 334 U.S. 736, 741 (1948). When a defendant appears for sentencing, the sentencing court considers the defendant on that day, not on the date the offense occurred or the date of conviction. *Pepper v. United States*, 562 U. S. 476, 492 (2011).

"The discretion federal judges hold at initial sentencings also characterizes sentencing modification hearings." *Concepcion v. United States*, 142 S. Ct. 2389, 2399 (2022). Relying on *Williams* and *Koon*, the *Pepper* Court found it "clear that when a defendant's sentence has been

set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant's rehabilitation since his prior sentencing." *Pepper*, 562 U. S. at 490. "*Pepper* reached that conclusion in light of the "federal sentencing framework" that allows sentencing judges to consider the 'fullest information possible concerning the defendant's life and characteristics.'" *Concepcion*, 142 S.Ct. at 2399 (quoting *Pepper*, 562 U.S. at 488, 490).

With this backdrop, Congress passed the First Step Act of 2018 which, among other things, gave the Fair Sentencing Act of 2010 retroactive effect, permitting incarcerated persons to petition the district court to impose a reduced sentence as if certain portions of the Fair Sentencing Act were in effect at the time the covered offense was committed. The Act does not require the district court to reduce any sentence, of course. But in *Concepcion*, the Court held that the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act. *Concepcion*, 142 S. Ct. at 2396, 2404.

In this case, Petitioner has been granted partial "relief" under the First Step Act of 2018 as a result of the district court vacating Petitioner's life sentence and imposing a new sentence of 80 years in prison—an effective life sentence stated in terms of years. In denying Petitioner any further relief, the district court (1) ignored or refuse to follow the Court's directive in *Concepcion* that courts hearing First Step Act motions consider intervening facts and law, (2) imposed a new sentence based on inaccurate facts by refusing to revisit an earlier finding that Petitioner was responsible for the murder in light of the intervening facts, and (3) imposed a sentence that violated the Fifth and Sixth Amendments by including an increase of the sentence based on the

murder allegation and § 924(j) charge but for which that the jury could not reach a verdict and was subsequently dismissed.

I. The Court Should Grant Certiorari to Address and Resolve the District Court's Refusal to Follow the Court's Precedent in *Concepcion* by Expressly Ruling it Would Not Consider Intervening Changes Since the Original Sentencing Hearing.

Sentencing judges enjoy wide discretion in the sort of information they may consider, and the sources of that information, at an initial sentencing proceeding. *Dean*, 581 U.S. at 66; *Williams*, 337 U.S. at 246. "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon*, 518 U.S. at 113. The same broad, nearly unlimited discretion federal judges hold at initial sentencing proceedings also applies to sentencing modification hearings. *Concepcion*, 142 S. Ct. at 2399; *Pepper*, 562 U.S. at 490. While Congress may set limits on a sentencing court's discretion, the First Step Act did not suggest any attempt to set aside "the established tradition of district court's sentencing discretion." *Concepcion*, 142 S. Ct. at 2401. Accordingly, the Court has held "that the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act." *Id*. at 2404.

When a district court recognizes its sentencing discretion but then denies a reduction or other relief, the appellate courts do not interfere. See, e.g., *United States v. Robertson*, 371 Fed. Appx. 699, 700 (8th Cir. 2010) (involving district court recognizing discretion under *Kimbrough v. United States*, 552 U.S. 85 (2007), and 18 U.S.C. § 3553(a)). But when a district court denies relief based on a ruling that it is not permitted to consider facts when that ruling is contrary to

law, remand is appropriate. See *United States v. Gibbs*, 506 F.3d 479, 488 (6th Cir. 2007) (involving district court's failure to recognize discretion to impose concurrent sentences); *United States v. Gozes-Wagner*, 977 F.3d 323, 393 (5th Cir. 2020) ("A district court commits procedural error when it fails to recognize its discretion to vary from the Guidelines.") (citing *Nelson v. United States*, 555 U.S. 350, 352 (2009) (per curiam)).

In this same vein, the First Step Act does not "require a district court to make a point-by-point rebuttal of the parties' arguments," *id*. at 2404, but the district court must demonstrate that it has considered the factors presented to it in favor of relief. As this Court stated, "All that is required is for a district court to demonstrate that it has considered the arguments before it." *Id*.

In this case, the district court demonstrated the opposite—expressly stating that it was refusing to consider a particular argument. Petitioner's key argument was based on a change in factual circumstances. The district court judge had relied on investigative reports to make a factual finding that Petitioner was one of several people responsible for a murder. At the time, the trial transcripts were not available. Since that time, the transcripts had been prepared and detailed how the same witnesses cited by the presentence report in support of a murder cross-reference testified in conflict to what the investigative reports claimed. Petitioner asked the district court to consider those newly-available details. In response, the probation office once again recommended the court to rely on the inaccurate allegations. The district court conceded that the original sentencing court did not have access to the trial transcripts at sentencing. Pet. App. 23a. But despite the existence of these newly-available details showing that the original sentencing judge's factual basis had been inaccurate, the district court refused to consider them,

stating,"the Court cannot, and will not, review the facts underlying the sentencing court's decision from twenty years ago that the" murder cross-reference applied. Pet. App. 24a.

Petitioner accepts that there is a chance that any court that decides to review the trial transcripts very may well conclude that the transcript supports a finding that the murder cross-reference. But there are very strong reasons to believe that could not and would not happen.[1] As it stands, however, Petitioner will never know if that is the case because the district court refused to even look, ignoring this Court's directive in *Concepcion*. The fact that the original sentencing judge sat in on the trial does not mean the transcripts are irrelevant, as the district court suggested. See Pet. App. 23a-24a.

In sum, the Court's decision in *Concepcion* makes clear that while "[t]he First Step Act does not require a district court to be persuaded by the nonfrivolous arguments raised by the parties before it," "it does require the court to consider them." 142 S. Ct. at 2405, the district court erred in refusing to consider the intervening facts and this nonfrivolous argument. The district court had the discretion to look at this change of circumstances and expressly refused to do so. Thus, the district court's decision conflicts with this Court's precedent, and the Third Circuit affirmed that ruling, so that a decision of a United States court of appeals conflict with a relevant decision of this Court and review on certiorari is appropriate. See Sup. Ct. R. 13(c).

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[1] The unsworn investigative statements portrayed Petitioner as armed, dangerous, centrally engaged in the drug conspiracy, and having admitted involvement in the murder. Presentence Investigation Report at ¶¶ 5-14, 17-25. These are the statements on which the original judge relied to impose the murder cross-reference. But most of the government's witnesses, under oath, cast Petitioner as a crack addict having a limited role in the drug conspiracy, with the prosecutor conceding those points at trial. Third Circuit Appendix at 112, 113, 122, 144, 147, 158, 171, 192. The prosecution conceded these points. *Id*. at 76, 203. Testimony that Petitioner had a limited role corresponded with evidence that Petitioner was intellectually disabled. *Id*. at 36.

II. The Court Should Grant Certiorari to Address and Resolve the District Court's Refusal to Impose a New Sentence based on Accurate Information.

Due process requires a defendant's sentence to rest on accurate facts. *Townsend v. Burke*, 334 U.S. 736, 741 (1948). Circuit courts agree that, when entering a new sentence, including when a new sentence is entered as a result of § 404 of the First Step Act, the new sentence must be procedurally and substantively reasonable. See, e.g., *United States v. Collington*, 995 F.3d 347, 360 (4th Cir. 2021). Reasonableness review includes whether the district court made a procedural error such as "selecting a sentence based on clearly erroneous facts." *Gall v. United States*, 553 U.S. 38, 51 (2007).

In this case, the preparation of the trial transcripts following sentencing demonstrated that the allegations on which the district court relied to increase Petitioner's sentence through a murder cross-reference were simply not accurate. The unsworn hearsay claims in investigative reports on which the district court relied were directly contradicted by sworn testimony before a jury. Only with the preparation of those transcripts was Petitioner able to point to and quote specific testimony of specific witnesses, compare them to what was claimed in the investigative reports, and show that the district court's previous findings were inaccurate and not supported by proof by even a preponderance of the evidence. The fact that the original sentencing judge was present for trial did not somehow negate that the judge's factual findings were based on false allegations. The post-sentencing preparation of the transcripts and what that meant for Petitioner's argument presented an intervening circumstances justifying relief or potential relief.

When Petitioner filed his First Step Act motion and asked the district court to review and consider the intervening facts and impose sentence based on accurate facts, the district court

refused to do so, claiming it was not permitted to do so, and imposed a new sentence that was again based on inaccurate facts in violation of case law including *Townsend* and *Koon*. Pet. App. 24a. Whether this was a violation of Petitioner's right to be sentenced based on accurate information for the first or second time was irrelevant. See *Pepper*, 562 U.S. at 488, 490. Intervening circumstances and new information showed that an increased sentence based on a murder allegation was unconstitutional. Thus, the district court's decision conflicts with this Court's precedent, and the Third Circuit affirmed that ruling, so that a decision of a United States court of appeals conflict with a relevant decision of this Court and review on certiorari is appropriate. See Sup. Ct. R. 13(c). Petitioner asks the Court to grant this petition and either remand the case with instructions to consider the intervening and accurate facts or, in the alternative, order full briefing.

III. The Court Should Grant Certiorari to Address the Unconstitutional Increase of Punishment based on a Charge for which the Jury Could Not Reach a Verdict and that was Dismissed.

The Constitution affords defendants the "right to a speedy and public trial, by an impartial jury." U.S. Const., amend. VI. Our constitutional system relies upon the jury as the "great bulwark of [our] civil and political liberties." *Apprendi v. New Jersey*, 530 U.S. 446, 477 (2000) (quoting 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-541 (4th ed. 1873)). That right is "designed to guard against a spirit of oppression and tyranny on the part of rulers[.]" *United States v. Gaudin*, 515 U.S. 506, 510-511, 115 S. Ct. 2310, 132 (1995) (quotation marks omitted); see also *Duncan v. Louisiana*, 391 U.S. 145, 155, 88 S. Ct. 1444 (1968) ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government."). The Due Process Clause of the Fifth Amendment denies governments the

power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. See *In re Winship*, 397 U.S. 358, 364 (1970) (relating to a state's power and the limitations placed by the Fourteenth Amendment's Due Process Clause).

The Court's case law already strongly suggests that increasing a defendant's sentence based on conduct for which the defendant was not charged, or as is the case here, for which a jury could not reach a verdict, violates the Fifth and Sixth Amendment rights to due process, fair trial, and right to trial by jury. In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court described the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as requiring that the government prove "every accusation" and "any particular fact" "essential to the punishment" to a jury beyond a reasonable doubt:

> This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors," and that "an accusation which lacks any particular fact which the law makes essential to the punishment is * * * no accusation within the requirements of common law, and it is no accusation in reason."

Blakely, 542 U.S. at 301-02 (citing 4 W. Blackston, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769), and 1 J. Bishop, CRIMINAL PROCEDURE § 87, p. 55 (2d ed. 1872). "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*[2]), or *any* aggravating fact (as [in *Blakely*]), it remains the case that the jury's verdict alone does not authorize the sentence." *Id*. at 305 (emphasis supplied).

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[2] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002).

Taking the *Blakely* language at face value appears to lead to the conclusion that the rule of *Apprendi* must apply to the Federal Sentencing Guidelines:

> Those who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene. Not even *Apprendi*'s critics would advocate this absurd result. Cf. 530 U.S., at 552-553 (O'Connor, J., dissenting). The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish.

Blakely, 542 U.S. at 306- 07.

"Taken to its logical conclusion, the *Blakely* approach would require a jury to find beyond a reasonable doubt the conduct used to set or increase a defendant's sentence, at least in structured or guided-discretion sentencing regimes." *United States v. Bell*, 808 F. 3d 926, 927, 420 U.S. App. D.C. 387 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc). A judge "could not rely on uncharged conduct to increase a sentence, even if the judge found the conduct proved by a preponderance of the evidence." *Id*. at 928.

That punishment based on a judge's finding of fact when a jury had not heard or has rejected an allegation is unconstitutional even if the term of incarceration is within the statutory range. This is because the Guidelines remain the lodestar of sentencing. Early commentary suggested that everything had changed after the remedial decision in *United States v. Booker*, 543 U.S. 220 (2005). But as a practical matter, very little changed. The Guidelines remain the law of the land for sentencing. "[T]here is no denying that the post-*Booker* system in substance closely

resembles the pre-*Booker* Guidelines system in constitutionally relevant respects." see *United States v. Henry*, 472 F.3d 910, 919 (D.C. Cir. 2007) (Kavanaugh, J., concurring).[3] Although *Booker* declared the Guidelines advisory, the Guidelines remain what they were before *Booker*—the expected range of punishment and final range of punishment in all but a very small percentage of cases.

To be sure, this Court has so far held otherwise—that increased punishment when a jury has not found guilt beyond a reasonable doubt is constitutional if within the statutory range. In *United States v. Watts*, 519 U.S. 148 (1997), the Court said that there is no "prohibition against considering certain types of evidence at sentencing," including "uncharged or acquitted conduct." *Id*. at 152-55. See *McClinton v. United States*, 143 S. Ct. 2400, 2405 (2023) (Alito, J., concurring in the denial of certiorari). But distinguished jurists have called *Watts* into question. In *Jones v. United States*, 574 U.S. 948 (2014), Justice Scalia encouraged the Court to decide whether the Due Process Clause and the Sixth Amendment's jury trial right permit judges to sentence defendants based on uncharged or acquitted conduct. *Id*. at 949-50 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari); see also *United States v. Bell*, 808 F. 3d

[3] "[T]he current system—in practice—works a lot like the pre-*Booker* system." *Henry*, 472 F.3d at 922 (Kavanaugh, J., concurring). See Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 678 (2006) ("All the things that troubled Sixth Amendment purists about the pre-*Booker* Guidelines system are unchanged."); Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO STATE J. CRIM. L. 37, 53 (2006); Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 347-55 (2006). "Four of the five Justices who joined the *Booker* remedial opinion, including its author Justice Breyer, did not find any constitutional problem with the Guidelines to begin with. So it is understandable that the current system as applied is not a major departure from the pre-*Booker* Guidelines system." *Id*. See *Booker*, 543 U.S. at 312-13 (Scalia, J., dissenting in part) (stating that *Booker* remedial opinion may convey message that "little has changed" from mandatory Guidelines system).

926, 928, 420 U.S. App. D.C. 387 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of reh'g en banc) ("Allowing 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."); *United States v. Sabillon-Umana*, 772 F. 3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.); *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting).

In the end, uncharged conduct should not be used to increase a sentence, and this case involves charged conduct for which the jury could not reach a verdict, for which a mistrial was granted, and the government dismissed the charge, even more of a violation than the decision not to charge in the first place.

Petitioner asks the Court to grant this petition for writ of certiorari on this important legal question that is the subject of a circuit split and an issue that the Court has not addressed but should address.

CONCLUSION

Petitioner Harvey Holland submits that his petition for writ of certiorari should be granted for the compelling reasons noted above and under Supreme Court Rule 10(c). He asks the Court to grant his petition and either (1) remand to a lower court with instructions to re-sentencing him without reference to any murder, murder charge or murder cross-reference or, in the alternative, (2) grant full briefing in this important matter to address and resolve these important legal questions.

Respectfully submitted,

ROBINSON & BRANDT, P.S.C.

Dated: 29 December 2023 by: /s/ Jeffrey M. Brandt

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing petition for writ of certiorari and the following appendix were served by U.S. Priority Mail on the date I reported below upon the Solicitor General's Office, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001 and by email to SupremeCtBriefs@USDOJ.gov; and Assistant U.S. Attorney William A. Behe, Office of the U.S. Attorney, P.O. Box 202, Harrisburg, PA 17102.

Dated: 29 December 2023 /s/ Jeffrey M. Brandt
Jeffrey M. Brandt

APPENDIX