Docket Number _____

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

BRENDON GARNER,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth and Sixth Amendments prohibit a federal court from basing a criminal defendant's sentence on conduct for which a jury has acquitted the defendant.

Whether the court of appeals thus erred by affirming the district court sentence of 100 months imprisonment where the district court relied upon acquitted conduct in determining the applicable advisory guideline range.

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OPINION BELOW

On August 30, 2023, the United States Court of Appeals for the Fourth Circuit entered an unpublished opinion and a judgment order in case number 22-4622, affirming the conviction and sentence imposed upon Mr. Garner by the United States District Court for the Southern District of West Virginia. (WVSD, 3:21CR00140-001) This opinion and the judgment are included in the attached appendix.

BASIS FOR JURISDICTION IN THIS COURT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). On August 30, 2023, the United States Court of Appeals for the Fourth Circuit denied Mr. Garner's appeal and entered a judgment affirming the 100 month sentence imposed by the district court. On February 24, 2024, the appeals court denied petitioner's motion for rehearing.

The United States Court of Appeals for the Fourth Circuit properly exercised jurisdiction in this matter, involving a criminal appeal from the United States District Court for the Southern District of West Virginia, pursuant to 28 U.S.C. § 1291, which grants the United States Circuit Courts of Appeals jurisdiction over appeals from United States District Courts within the appropriate judicial circuit. Mr. Garner filed a Notice of Appeal

less than ten days from entry of the Judgment Order entered by the district court.

Subject matter jurisdiction existed in the district court because Garner was charged with criminal offenses against the United States of America, specifically a violation of 18 U.S.C. §§ 922 (g)(1) and 924 (a)(2) (2022).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb; ... nor be deprived of life, liberty, or property, without due process of law .... U.S. Const. Amend. V.

The Sixth Amendment to the United States Constitution provides, in relevant part: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.... U.S. Const. Amend. VI.

STATUTORY PROVISIONS INVOLVED IN THE CASE

18 U.S.C. § 922 (g)(1):

It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by

imprisonment for a term exceeding one year ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(c)(1)(A):

(A)Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i)be sentenced to a term of imprisonment of not less than 5 years;

(ii)if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii)if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 1512(a)(1)(C):

(a)(1) Whoever kills or attempts to kill another person, with intent to—

....

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

STATEMENT OF THE CASE

Introduction

This Court should grant certiorari in this case because it presents an important question of federal law which has not been settled by this Court. Additionally, the circuit courts of appeals which have addressed this question have misinterpreted this Court's prior decisions. This case challenges the constitutionality of a court using acquitted conduct as relevant conduct in determining the proper offense level within the United States Sentencing Guidelines, a common sentencing practice that has long troubled jurists.

This Court has never squarely addressed the question. In *United*

States v. Watts, 519 U.S. 148 (1997) (per curiam), a divided Court in a summary disposition held that use of acquitted conduct at sentencing does not offend the Double Jeopardy Clause of the Fifth Amendment. But lower courts—including the Fourth Circuit have long misinterpreted *Watts* to foreclose all constitutional challenges to the use of acquitted conduct at sentencing, including under the Fifth Amendment's Due Process Clause and the Sixth Amendment's right to trial by jury.

The issue has divided the lower courts and prompted calls for this Court's review. See, e.g., *Watts*, 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, 929 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc); *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring).

This case perfectly illustrates how acquitted-conduct sentencing "guts the role of the jury in preserving individual liberty and preventing oppression by the government," *United States v. Brown*, 892 F.3d 385, 408 (D.C. Cir. 2018) (Millett, J., concurring), because the facts at issue involve not just traditional "facts enhancing the crime of conviction, like the presence of a gun or the vulnerability of a victim. Rather, they are facts

comprising [a] different crime[] ...." *United States v. Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass. 2005). Here, the jury convicted Mr. Garner only of possessing ammunition as a prohibited person but he received a sentence applicable to a defendant who unlawfully discharged a firearm with intent to kill a potential witness.

In *Blakely v. Washington*, 542 U.S. 296 (2004), this Court called "absurd" the idea "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." *Id*. at 306. That is directly analogous to what happened here. A jury convicted petitioner Mr. Garner only of possessing ammunition as a prohibited person. The jury, however acquitted Mr. Garner of the more serious offenses— using and discharging a firearm in connection with a crime of violence and witness tampering by attempt to kill. The jury clearly rejected the government's evidence that Mr. Garner unlawfully used and discharged a firearm yet he was sentenced as though he had acted unlawfully. The jury also plainly rejected the government's contention that Mr. Garner attempted to kill with intent to prevent the communication by any person to a law enforcement officer or judge of the United States, and yet his punishment was enhanced as if he had been found guilty of that offense.

By refusing to convict Mr. Garner of either attempting to kill a witness

or of using and discharging a firearm in connection with a crime of violence, the jury plainly credited the defense's theory that the government failed to prove that the discharge of the gun was unlawful. The sentencing judge nevertheless enhanced Garner's sentence as if the discharge had been unlawful, roughly tripling his sentence from a guideline range of 33-41 months to a guideline range of 92-115 months and imposed a sentence of 100 months.

Unless this Court resolves this issue, countless future criminal defendants will continue to be sentenced using sentencing practices that are impossible to square with the Constitution. As Justice Scalia (joined by Justices Thomas and Ginsburg) wrote in 2014, "[t]his has gone on long enough." *Jones*, 574 U.S. at 949 (Scalia, J., dissenting from denial of cert.). Review is urgently warranted.

Brief Procedural History

A grand jury in the Southern District of West Virginia indicted Mr. Garner on August 11, 2021. This single count indictment charged Mr. Garner with witness tampering by attempted killing with the intent to prevent a person from communicating information related to a ferderal offense to law enforcement, in violation of 18 U.S.C. § 1512 (a)(1)(c) and

1512 (a)(3)(B)(I). Mr. Garner pleaded not guilty.

Then on January 26, 2022, the government obtained a superseding indictment. The superseding indictment retained the witness tampering count as Count One and added: Count Two which charged Mr. Garner with using and discharging a firearm in relation to a crime of violence (the offense charged in Count One), in violation of 18 U.S.C. § 924 (c)(1)(A); and Count Three which charged Mr. Garner with being a felon in possession of ammunition, in violation of 18 U.S.C. §§ 922 (g)(1) and 924 (a)(2). Mr. Garner again entered pleas of not guilty. Subsequently, on April 5, 2022, the government obtained a second superseding indictment. This version essentially alleged the same charges as in the first superseding indictment with some minor modification of the language not relevant to this petition. Mr. Garner again pleaded not guilty to all counts.

Mr. Garner proceeded to trial which was held on May 10-12, 2022. The jury acquitted Mr. Garner of both Count One (witness tampering by attempted killing) and Count Two (using and discharging a firearm in relation to a crime of violence). The jury convicted Mr. Garner only of being felon in possession of ammunition as alleged in Count Three.

Prior to sentencing a presentence investigation report (hereinafter "PSR) was prepared and both parties submitted objections. Relevant to this

petition, Mr. Garner objected to the use of conduct for which Mr. Garner was acquitted at trial to enhance or increase his sentence for the sole offense of conviction, being a felon in possession of ammunition in violation of 18 U.S.C. §§ 922 (g)(1). Essentially, Mr. Garner argued that the district court should not apply the cross reference provision in U.S.S.G. § 2K2.1 (c) because the jury had acquitted him both of witness tampering by attempted killing and of use and discharge of a firearm in relation to a crime of violence.

The district court denied the objection and used the conduct of which Mr. Garner had been acquitted in finding the cross reference provision applied and calculating his offense level. This cross reference resulted in the guideline applicable to aggravated assault (U.S.S.G. § 2A2.2) being used to calculate the offense level rather than § 2K2.1, the guideline otherwise applicable to the possession of ammunition by a prohibited person. The net effect of using the acquitted conduct to apply the aggravated assault guideline was to increase Mr. Garner's offense level by 10 levels.

The sentencing court found that pursuant to § 2A2.2, the base offense level was 14, and that the specific offense characteristic in § 2A2.2 (b)(2)(A) for the discharge of a firearm increased the offense level by five (5) levels despite Mr. Garner being acquitted of the count expressly charging him with

discharging a firearm in connection to a crime of violence and of the count charging him with attempting to kill a witness. Likewise, the district court found that the specific offense characteristic found at § 2A2.2 (b)(3)(B) for inflicting "serious bodily injury" also applied despite the jury acquitting hm of both counts encompassing the alleged conduct used to drastically increase his guideline sentencing range to 92-115 months (total offense level 24 and criminal history category V).

Had the acquitted conduct not been used at sentencing and Mr. Garner had been sentenced on the basis of the only conduct for which he was convicted, § 2K2.1 would have been used to calculate the advisory guideline sentencing range which provides for a base offense level of 14, and the specific offense characteristic found at § 2K2.1 (b)(6)(B) would not have applied because it is also based on the use of ammunition in connection with another felony offense and Mr. Garner was acquitted of all other felony offenses in the case. Thus, without use of acquitted conduct to increase Mr. Garner's guideline sentencing range, he would be in total offense level 14, which combined with criminal history category V would have resulted in a sentencing range 33-41 months. Therefore, the use of acquitted conduct in this matter roughly tripled the sentence under the guidelines.

Mr. Garner then appealed to United States Court of Appeals for the

Fourth Circuit, asking the court of appeals to vacate the sentence and remand this matter to the district court for resentencing. The Fourth Circuit denied Mr. Garner's appeal. The appeals court found that the use of acquitted conduct to increase the offense level by applying the cross reference to aggravated assault is required, citing this Court's opinion in *United States v. Watts*, 519 U.S. 148, 157 (1997). (" [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."). In its unpublished opinion the Fourth Circuit panel stated: [w]hether or not we agree or disagree with the precedent from the Supreme Court and this Court, we are bound to follow it." Appendix A, p.4.

Mr. Garner asserts now that the decision in *Watts* and its apparent assent, or even mandate, to the use of acquitted conduct to increase prison sentences should be revisited and overturned. Numerous scholars and jurists, including members of this Court, have questioned the holding in *Watts*, the United States Sentencing Commission has proposed an amendment to the sentencing guidelines that, in the absence of congressional action will become effective November 1, 2024, and the growing consensus is that the use of acquitted conduct to increase sentences

is repugnant to our system of justice.

Facts Relating To Alleged Offense

On June 14, 2021, Austin Jeffreys and Daniel Coubert traveled to a residence in Marcum Terrace, a public housing complex in Huntington, West Virginia. Coubert and Jeffreys went to pick up drugs supposedly on behalf of unidentified third party who owned the drugs. JA41-JA43. [1] At the residence Coubert was told that the drugs had been "flushed" and were no longer present. JA42. As a result, an altercation ensued. According to Coubert's trial testimony he and Jeffreys had brought a gun with them and Jeffreys used the gun during the altercation. JA43. According to Coubert, Jeffreys fired multiple shots, one of which struck a man identified as Richie Gibbs, who according to Coubert was firing his gun as Coubert was driving his vehicle away and Gibbs was returning fire. JA43.

On June 18, 2021, Jeffreys and Coubert were arrested in connection with the Marcum Terrace shooting. Coubert posted a bond and was released from jail. Jeffreys remained jailed because he had been on parole at the time of the shooting. JA47. Upon being released, on June 29, 2021, Coubert contacted Mr. Garner, at the request of Jeffreys according to Coubert's trial

[1] References to the evidence are from the joint appendix filed by the parties in Fourth Circuit case number 22-4622 and use the pagination therein.

testimony. JA48. Coubert claimed that Jeffreys wanted Coubert to talk to Garner to explain "the situation that he [Jeffreys] was in dealing with the Marcum Terrace shooting." JA49. Following the initial contact by Coubert, Garner and Coubert engaged in a series of electronic communications attempting to arrange a meeting to discuss matters. JA49-JA55. Garner and Coubert each testified at trial and were rather vague about the intended purpose of the meeting but each expressed distrust and fear of the other. Each also suggested that they worried the other might discuss the shootout at Marcus Terrace with law enforcement and get them in trouble.

Eventually, Garner and Coubert met at Charleston Avenue and 17th Street in Huntington. JA58. The testimony as to what occurred was conflicting. Both did agree though that Coubert was in a pickup truck and parked on the side of the road when he saw Garner and that Garner approached the driver's side window of the truck while Coubert remained at the wheel. JA58, JA124. At this point the two men's testimony diverges.

Coubert essentially alleged that he believed Garner thought he was telling on Jeffreys and Garner testified essentially that Coubert became angry when Garner refused to tell Coubert that he would "have his back." JA59, JA126. Coubert claimed Garner shot him without provocation. Garner testified that as the conversation became heated he "saw a flash" and feared

that Coubert was drawing a gun, so he pulled his gun and fired one round, striking Coubert and then ducked to avoid possible return fire before fleeing. JA128.

After hearing the conflicting accounts of what transpired prior to Mr. Garner shooting Mr. Coubert, the jury acquitted Mr. Garner of both witness tampering by attempted killing and use and discharge of a firearm in relation to a crime of violence.

Indisputably, the government failed to convince the jury that Mr. Garner unlawfully shot Mr. Coubert because Garner admitted firing the shot that struck Coubert and had the jury believed the government had proven Garner acted unlawfully in doing so it would at the very least have convicted him of the use and discharge of a firearm in connection with a crime of violence. The only explanation for the acquittal on that count is that the jury was not persuaded shooting Mr. Coubert was a crime under the circumstances.

Only if this Court continues to countenance the use of acquitted conduct at sentencing to increase sentences can the sentence in this matter be permitted to stand. Mr. Garner now asks this Court to hold that punishing defendants for conduct which a jury has entered an acquittal

violates the Sixth Amendment right to trial by jury and due process under the Fifth Amendment.

ARGUMENT

Standard of Review

This petition presents a pure question of law which is subject to *de novo* review. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

Discussion of Issues

I. The Constitutionality Of Considering Acquitted Conduct At Sentencing Is An Important And Recurring Question That Only This Court Can Resolve

This Court has never squarely addressed whether a sentencing judge's consideration of acquitted conduct to enhance a defendant's sentence violates the Due Process Clause of the Fifth Amendment or the Sixth Amendment's guarantee of trial by jury. In *Watts*, a divided Court held in a summary disposition that considering acquitted conduct at sentencing does not offend the Double Jeopardy Clause of the Fifth Amendment. *Watts*, 519 U.S. at 154. This Court later emphasized that *Watts* "presented a very narrow question regarding the interaction of the [U.S. Sentencing] Guidelines with

the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." *United States v. Booker*, 543 U.S. 220, 240, n.4. (2005). The *Watts* Court did not address whether the Due Process Clause of the Fifth Amendment or the Sixth Amendment's jury-trial guarantee forbid the use of acquitted conduct at sentencing. Yet for decades, "[n]umerous courts of appeals have assume[d] that Watts controls the outcome of both the Fifth and Sixth Amendment challenges to the use of acquitted conduct," *United States v. White*, 551 F.3d 381, 392 n.2 (6th Cir. 2008) (en banc) (Merritt, J., dissenting, joined by five others).

II. Distinguished Jurists Have Long Criticized Acquitted-Conduct Sentencing

Beginning with the dissents in that very case, Justices of this Court have consistently questioned the holding in *Watts*, as well as its summary disposition of such an important issue. Justice Stevens decried the idea "that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved" as "repugnant" to the Constitution. *Watts*, 519 U.S. at 170 (Stevens, J., dissenting).

In his dissent, Justice Kennedy criticized the Court for failing to

clearly "confront[ ] the distinction between uncharged conduct and [acquitted] conduct," which he called a "question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system" and which "ought to be confronted by a reasoned course of argument, not by shrugging it off." *Id*. at 170 (Kennedy, J., dissenting). "At the least it ought to be said that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal." *Id*. In the years since *Watts*, a growing number of jurists have expressed grave doubts about the fairness and constitutionality of allowing and even mandating courts to factor acquitted conduct into sentencing calculations.

For example, in *Jones v. United States*, petitioners convicted by a jury of distributing small amounts of crack cocaine, but acquitted of conspiring to distribute drugs, challenged the constitutionality of the sentencing judge imposing sentencing enhancements based on the acquitted conduct. Justice Scalia, joined by Justices Thomas and Ginsburg, dissented from the Court's denial of *certiorari*, explaining that "[t]he Sixth Amendment, together with the Fifth Amendment's Due Process Clause, requires that each element of a crime be either admitted by the defendant, or proved to the jury beyond a reasonable doubt." *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial

of cert.) (quotation marks omitted). Accordingly, "[a]ny fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, and must be found by a jury, not a judge." *Id*. at 949 (citation and quotation marks omitted). The dissenters noted that "the Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution does permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range." *Id*. The dissenters protested that "[t]his has gone on long enough," and urged the Court to "grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment." *Id*. at 950.

After *Jones* decision, then Circuit Judge Gorsuch questioned the lawfulness of imposing sentences based on judge-found facts, writing that "[i]t is far from certain whether the Constitution allows... a district judge [to] ... increase a defendant's sentence ... based on facts the judge finds without the aid of a jury." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (*citing, Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial of cert.)).

Justice Kavanaugh has also repeatedly and consistently questioned the fairness and constitutionality of using acquitted conduct to increase sentences. Seventeen years ago, while serving on the United States Court of

Appeals for the District of Columbia, following the 2005 Supreme Court decision in *Booker,* Justice Kavanaugh noted, :

> "The oddity of all this 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."

United States v. Henry, 472 F.3d 910, 920 (D.C. Cir. 2007)

In *United States v. Bell*, 808 F.3d 926 (D.C. Cir. 2015), where the sentencing judge increased the defendant's sentence by more than 300% based on acquitted conduct, then Circuit Judge Kavanaugh wrote: "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." *Id.* at 928 (Kavanaugh, J., concurring in denial of rehearing *en banc*). He observed though that "resolving that concern as a constitutional matter would likely require" Supreme Court review. *Id.* at 927.

Justice Kavanaugh again criticized the use of acquitted conduct at sentencing in *United States v. Brown*, 892 F.3d 385 (D.C. Cir. 2018). In *Brown,* a defendant was acquitted on most counts but "then sentenced in

essence as if he had been convicted on all of the counts." *Id*. at 415 (Kavanaugh, J., dissenting in part). In his partial dissent, Kavanaugh called acquitted-conduct sentencing "unsound," and noted "good reasons to be concerned about [it]." *Id*.

In addition to current members of this Court, a substantial number of federal appeals court judges have written that using acquitted conduct to calculate a criminal defendant's sentence is unconstitutional. For example Judge Millett of the D.C. Circuit, has repeatedly expressed the view that "allowing a judge to dramatically increase a defendant's sentence based on jury-acquitted conduct is at war with the fundamental purpose of the Sixth Amendment's jury-trial guarantee" because "it considers facts of which the jury expressly disapproved." *United States v. Bell*, 808 F.3d 926, 929-930 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc) (quotation marks omitted). Judge Millett has written that the practice "guts the role of the jury in preserving individual liberty and preventing oppression by the government." *Brown*, 892 F.3d at 408 (Millett, J., concurring). Judge Millett has observed that "only the Supreme Court can resolve the contradictions in the current state of the law," and urged the Court "to take up this important, frequently recurring, and troubling contradiction in sentencing law." *Bell*, 808 F.3d at 932 (Millett, J.,

concurring in the denial of rehearing en banc).

Judge Bright has likewise argued "that the consideration of 'acquitted conduct' to enhance a defendant's sentence is unconstitutional" under both the Due Process Clause of the Fifth Amendment and the Sixth Amendment. *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring). Judge Bright cogently argued 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."

Id. at 776-777.

Judge Bright continued:

> I also believe that the use of "acquitted conduct" to enhance a sentence violates the Due Process Clause of the Fifth Amendment. As I noted above, the consideration of "acquitted conduct" undermines the notice requirement that is at the heart of any criminal proceeding. A defendant should have fair notice to know the precise effect a jury's verdict will have on his punishment. It cannot possibly satisfy due process to permit the nullification of a jury's not guilty verdict, with respect to any given charge, by allowing a judge to thereafter use the same conduct underlying that charge to enhance a defendant's sentence.

Id. At 777.

Similarly, Judge Fletcher of the Ninth Circuit deemed acquitted-conduct sentencing a practice that "defies logic" and that plainly violates the Fifth and Sixth Amendments because it "allows the jury's role to

be circumvented by the prosecutor and usurped by the judge." *United States v. Mercado*, 474 F.3d 654, 658, 664 (9th Cir. 2007) (Fletcher, J., dissenting). Numerous other federal judges have reached the same conclusion. See, *e.g.*, *White*, 551 F.3d at 392 (Merritt, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) ("sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment").

III. The Decision Below Is Wrong

The Fourth Circuit expressly and solely relied on *Watts* to affirm Mr. Garner's sentence. App. A, p 4. *Watts*, however, did not actually decide the issue of whether using acquitted conduct to increase sentences violates the Sixth Amendment right to trial by jury or a defgendan't right to due process as guaranteed by the Fifth Amendment. As this Court has explained, Watts presented only a "very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause," and did not consider whether a judge's "sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment" or the implications of acquitted-conduct sentencing for the Due Process Clause. *Booker*, 543 U.S.

at 240 & n.4.

Lower courts' reliance on Watts to resolve different constitutional arguments is therefore "misplaced." *United States v. Mercado*, 474 F.3d 654, 661 (9th Cir. 2007) (Fletcher, J.,dissenting); *accord*, e.g., *United States v. White*, 551 F.3d 381, 392 (6th Cir. 2008) (Merritt, J., dissenting, joined by five others) ("reliance on Watts as authority for enhancements based on acquitted conduct is obviously a mistake"). This Court should be particularly reluctant to read *Watts* broadly because the Court decided the case by summary disposition and "did not even have the benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 n.4. Justice Kennedy dissented in *Watts* on this basis. *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting).

Giving *Watts* a "very narrow" reading is likewise warranted, because a broader reading cannot be squared with the Court's more recent sentencing precedents. *Booker*, 543 U.S. at 240 n.4. In the quarter century since *Watts*, this Court has issued numerous decisions emphasizing the essential importance of jury factfinding under the Sixth Amendment in determining sentences. See, *e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (jury must find all facts affecting statutory maximum); *Ring v. Arizona*, 536 U.S. 584 (2002) (jury must find aggravating factors permitting death penalty); *Blakely*, 542 U.S. 296 (jury must find all facts essential to sentence); *Booker*,

543 U.S. 220 (Sentencing Guidelines are subject to Sixth Amendment); *Cunningham v. California*, 549 U.S. 270 (2007) (jury must find facts exposing defendant to longer sentence); *S. Union Co. v. United States*, 567 U.S. 343 (2012) (jury must find facts permitting imposition of criminal fine); *Alleyne v. United States*, 570 U.S. 99 (2013) (jury must find facts increasing mandatory minimum); *Hurst v. Florida*, 577 U.S. 92 (2016) (jury must make critical findings needed for imposition of death sentence).

From those cases, "[i]t unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element [of the crime] that must be either admitted by the defendant or found by the jury. It may not be found by a judge." *Jones*, 574 U.S. at 949 (Scalia, J., joined by Thomas, J., and Ginsburg, J., dissenting from denial of cert.).

Many of those decisions have emphasized that the jury trial right works "in conjunction with the Due Process Clause" because a court's authority to sentence a defendant fundamentally flows from jury findings regarding facts essential to punishment, which are elements of the offense. *Alleyne*, 570 U.S. at 104; *accord, Hurst*, 577 U.S. At 98 (2016). These cases have thus "emphasized the central role of the jury in the criminal justice system." *United States v. Lasley*, 832 F.3d 910, 921 (8th Cir. 2016) (Bright,

J., dissenting). This series of cases provides a compelling reason to at least limit *Watts* to the Double Jeopardy context, if not to overrule it entirely. See *United States v. Faust*, 456 F.3d 1342, 1349 (11th cir. 2006) (Barkett, J., specially concurring) ("Watts ... has no bearing on this case in light of the Court's more recent and relevant rulings in *Apprendi v. New Jersey*, *Ring v. Arizona*, *Blakely*, and *Booker*." (citations omitted)).

Because it was a summary disposition, the Court's reasoning in *Watts* was superficial and limited. This Court has long recognized that it is "less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument." *Hohn v. United States*, 524 U.S. 236, 251 (1998); *Connecticut v. Doehr*, 501 U.S. 1, 12 n.4 (1991) ("A summary disposition does not enjoy the full precedential value of a case argued on the merits....").

IV. The Sixth Amendment Prohibits Courts From Relying On Acquitted Conduct At Sentencing

The Sixth Amendment's jury-trial right is one of the most "fundamental reservation[s] of power in our constitutional structure." *Blakely*, 542 U.S. at 305-306. It not only gives citizens a voice in the courtroom but also guarantees them "control in the judiciary." *Id*. at 306. A

primary purpose of the Sixth Amendment is to "safeguard a person accused of a crime against the arbitrary exercise of power by prosecutor or judge." *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). Accordingly, the right to a trial by jury is a right "of surpassing importance," *Apprendi*, 530 U.S. at 476. It cannot be questioned that the right to trial by a jury of peers "occupie[s] a central position in our system of justice." *Batson*, 476 U.S. at 86.

The Sixth Amendment right-to-jury trial grew out of "several centuries" of Anglo-American common-law tradition, under which the right to trial by jury was an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Historically, juries acted as the conscience of the community not only through "flat-out acquittals," but also "indirectly check[ing]" the "severity of sentences" by issuing "what today we would call verdicts of guilty to lesser included offenses." *Jones v. United States*, 526 U.S. 227, 245 (1999); see also Matthew P. Harrington, The Law-Finding Function of the American Jury, 1999 Wis. L. Rev. 377, 393-394 (1999).

Through partial acquittals, juries determined not only guilt but also the defendant's sentence. *See* Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, 152

U. Pa. L. Rev. 33, 70-71 (2003). The common law system "left judges with little sentencing discretion: once the facts of the offense were determined by the jury, the 'judge was meant simply to impose [the prescribed] sentence.'" *Alleyne*, 570 U.S. at 108 (36-37; citing 3 William Blackstone, Commentaries on the Laws of England *396 (1768)). Consistent with this history, in the decades since *Watts*, this Court has again focused on the importance of jury factfinding in sentencing.

Beginning with *Apprendi*, this Court's sentencing cases have "carrie[d] out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict," because "[w]ithout that restriction, the jury would not exercise the control that the Framers intended." *Blakely*, 542 U.S. at 306. When courts consider acquitted conduct as a basis for enhancing a defendant's sentence, it undermines the "jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." *S. Union Co.*, 567 U.S. at 350. Traditionally, "[a]n acquittal is accorded special weight." *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980). Acquitted-conduct sentencing is repugnant to principles of fairness, justice and the Constitution because it affords the government a "second bite at the apple," in which "the Government almost always wins by needing only to prove its (lost) case to a judge by a preponderance of the evidence." *Canania*,

532 F.3d at 776 (Bright, J., concurring). This "diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment." *Mercado*, 474 F.3d at 658 (Fletcher, J., dissenting).

Moreover, "[m]any judges and commentators" have observed that "using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system. " *United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (Kavanaugh, J., for the court). Permitting the use of acquitted conduct to punish defendants undermines public perception of the importance of jury service and discourages jurors from taking their duties seriously. See *Canania*, 532 F.3d at 778 & n.4 (quoting letter from juror to judge calling imposition of sentence based on conduct of which jury had acquitted the defendant a "tragedy" that denigrates "our contribution as jurors"). Only this Court can end this abridgement of the fundamental right to a jury trial and restore the jury's role as the "circuitbreaker in the State's machinery of justice." *Blakely*, 542 U.S. at 306-307.

V. The Fifth Amendment Prohibits Courts From Relying On Acquitted Conduct At Sentencing

This Court has held that the Due Process Clause works in conjunction with the Sixth Amendment to guarantee fair sentencing procedures. "Any

fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, and must be found by a jury, not a judge," *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial of cert.) (citation and quotation marks omitted). Thus, due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *In re Winship*, 397 U.S. 358, 364 (1970). The beyond-a-reasonable-doubt "standard provides concrete substance for the presumption of innocence." *Id.*

Considering acquitted conduct at sentencing offends the Due Process Clause in several related ways. To begin with, the Clause does not permit courts to treat acquitted conduct as a sentencing factor that can be imposed based on facts found by a preponderance of the evidence, thereby eliminating the core procedural protection of proof beyond a reasonable doubt. A court's reliance on acquitted conduct also implicates due process concerns because it increases the risk of inaccurate sentencing. Even when a defendant has previously been convicted of a crime, this Court has cautioned that reliance on facts underlying those prior convictions may raise concerns about "unfairness" and lead to "error." *Mathis v. United States*, 579 U.S. 500, 501 (2016). Those same accuracy concerns obviously apply when the court relies on facts underlying prior jury acquittals, *i.e.*, facts that the jury determined

the prosecution had failed to prove. See *Townsend v. Burke*, 334 U.S. 736, 740-741 (1948) (saying of person whose sentence was enhanced because of acquitted conduct, "this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result ... is inconsistent with due process of law, and such a conviction cannot stand.").

Lastly, some jurists have written that the consideration of acquitted conduct undermines "the notice requirement that is at the heart of any criminal proceeding." *Canania*, 532 F.3d at 777 (Bright, J., concurring). If the court is permitted to consider acquitted conduct during sentencing, "a defendant can never reasonably know what his possible punishment will be"; after all, "[i]t is not unreasonable for a defendant to expect that conduct underlying a charge of which he's been acquitted to play no determinative role in his sentencing." *Id*.

This case thus presents the issue of acquitted-conduct sentencing particularly starkly. The sentencing court roughly tripled Mr. Garner's sentence, disregarding the jury verdicts of not guilty, based on its finding that petitioner had in its lone view unlawfully discharged a firearm in connection with a crime of violence and attempted to kill a person to prevent that person from communicating with law enforcement. The jury, however

found both that Mr. Garner did not unlawfully discharge a firearm in connection with a crime of violence and that he, in fact, did not commit the alleged underlying crime of violence of attempting to kill Mr. Coubert to prevent communication with law enforcement. Yet, Mr. Garner was still punished for crimes a jury found he did not commit.

Therefore, Mr. Garner asks the Court to vacate the judgment of The United States Court of Appeals for the Fourth Circuit, which denied Mr. Stevenson's appeal and affirmed the 100 month sentence imposed by the district court. Mr. Garner respectfully requests that this matter be remanded for further proceedings consistent with the ruling of this court.

CONCLUSION AND RELIEF SOUGHT

Brendon Garner respectfully requests that this Court grant his petition for a writ of *certiorari.*

Respectfully submitted this 21st Day of May, 2024.

BRENDON GARNER

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