No. _____

In the Supreme Court of the United States

SETH ELRED PERRICONE, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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

RELATED PROCEEDINGS

United States District Court for the Western District of Texas:

United States v. Perricone, No. 5:18-cr-00095 (Feb. 6. 2023)

United States Court of Appeals for the Fifth Circuit:

United States v. Perricone, No. 22-51127 (May 17, 2024) (per curiam)

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OPINION BELOW

A copy of the unpublished opinion, *United States v. Perricone* (5th Cir. May 17, 2024) (per curiam), is reproduced at Pet. App. 1a–17a.

JURISDICTION

The Fifth Circuit entered its judgment on May 17, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides: "No person shall be … deprived of life, liberty, or property, without due process of law …."

The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury …."

STATEMENT

This case raises an "important" and unresolved question: whether the Constitution permits "the use of acquitted conduct to increase a defendant's Sentencing Guidelines range." *McClinton v. United States*, 143 S. Ct. 2400, 2401 (2023) (Sotomayor, J., respecting the denial of certiorari); *see id*. at 2403 (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., respecting the denial of certiorari). This question goes to the "fairness and perceived fairness of the

criminal justice system." *Id.* at 2401 (Sotomayor, J., respecting the denial of certiorari).

Last year, five Justices identified "arguments" and "countervailing arguments" related to using acquitted conduct at sentencing. *See id.* (Sotomayor, J., respecting the denial of certiorari); *id.* at 2403 (Kavanaugh J., joined by Gorsuch and Barrett, JJ., respecting denial of certiorari); *id.* at 2406 (Alito, J., concurring in the denial of certiorari). But the Court denied certiorari based on the Sentencing Commission's representation that it would "resolve questions around acquitted-conduct sentencing in the coming year." *Id.* at 2403 (Sotomayor, J. respecting the denial of certiorari).

While the Sentencing Commission has adopted an amendment, effective November 1, 2024, the amendment does not resolve the constitutional issues. The amendment addresses only *some* acquitted conduct: "conduct for which the defendant was criminally charged and acquitted in *federal* court." U.S. Sent'g Comm'n, *Amendments to the Sentencing Guidelines* 1, 3 (April 2024) (emphasis added). For federal criminal defendants, like Perricone, whose punishment was enhanced based on conduct they were acquitted of in *state* court, the amendment does not resolve the important constitutional issues that acquitted-conduct sentencing

presents. And the amendment to the federal Sentencing Guidelines does not resolve these constitutional issues for defendants in *state* court. *McClinton*, 143 S. Ct. at 2404. (Alito, J., concurring in the denial of certiorari) (noting that the Sentencing Commission's "decision will not affect state courts, and therefore the constitutional issue will remain").

Even though this Court has never addressed the constitutional questions Perricone raises, lower courts—including the Fifth Circuit—continue to misplace reliance on *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), by interpreting it to foreclose constitutional challenges under the Fifth Amendment's Due Process Clause and the Sixth Amendment's right to trial by jury. But in *Watts*, 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. *Id*. at 154–56. *Watts* did not decide, nor was the Court asked to decide, whether the Fifth Amendment's due-process right or the jury-trial right under the Sixth Amendment are violated by using acquitted conduct. *See United States v. Booker*, 543 U.S. 220, 240 & n.4 (2005) ("*Watts* … presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause"); *see also Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947) ("For adjudication of

constitutional issues concrete legal issues, presented in actual cases, not abstractions are requisite.") (cleaned up).

This case illustrates how, even after the Sentencing Commission's proposed amendment, acquitted-conduct sentencing will continue to "gut[ ] 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). Perricone's sentence was enhanced based on acquitted conduct from a different crime, from a different court, from a different time, and not the facts arising from the crime of conviction.

The Court's intervention is necessary to course correct an unconstitutional sentencing practice that the Sentencing Commission recognizes as a "persistent concern" that impacts the perceived fairness of the criminal justice system, but that will continue to plague federal criminal defendants whose punishments are enhanced by state acquittals and that will continue to divide state courts. *See* U.S. Sent'g Comm'n, *Amendments to the Sentencing Guidelines* 2. Because the important constitutional questions arising from acquitted-conduct sentencing remain unresolved by the Sentencing Commission's proposed amendment, this Court should "take up the constitutional issues presented." *McClinton*,

143 S. Ct. at 2403 (Sotomayor, J., respecting the denial of certiorari).

1. In July 2017, the FBI used peer-to-peer software and the internet to download child pornography from a house in Canyon Lake, Texas, during an undercover investigation. While three adults lived at that home, Perricone became the target of the investigation when the agents learned that he had been acquitted of state charges for sexual abuse of a child in 2009 and 2011.

The FBI secured a warrant that let them search the house for computers and other electronic devices, as well as Perricone's person and car. While some agents searched the home, where they found a computer and four hard drives containing images of downloaded child pornography, other agents interviewed Perricone. Perricone ultimately admitted that he was the sole user of the computer, he explained how he used the peer-to-peer software to share files, and he admitted to downloading child pornography stored on his computer.

2. Perricone was indicted on seven counts involving online child pornography—six counts of distribution and one count of receipt. The jury convicted him of all counts.

3. The probation officer prepared a presentence investigation report concluding that Perricone's Guidelines total offense level

was 42, which, given his criminal history category of I, carried a Guidelines imprisonment range of 360 months to life. Included in the offense level calculation was a five-level enhancement that applies when "the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." U.S.S.G. § 2G2.2(b)(5) (2021). The guideline commentary defines "pattern of activity involving the sexual abuse of exploitation of a minor" to mean "any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct." *Id*. cmt. (n.1).[1] In support of the enhancement, the probation officer cited the allegations in court records from charges brought against Perricone in 2009 and 2011

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[1] The scope of this enhancement is broader than the "relevant conduct" that is typically considered under U.S.S.G. § 1B1.3, because a pattern of activity does not need any temporal or factual relationship with the offense of conviction. *See United States v. Lovaas*, 241 F.3d 900, 904 (7th Cir. 2001) ("[T]he Sentencing Commission itself has explained that 'the conduct considered for purposes of the 'pattern of activity' enhancement is broader than the scope of relevant conduct typically considered under § 1B1.3.") (quoting U.S.S.G. App. C at 373); *see also* U.S.S.G. § 1B1.3(a)(1), (a)(2) & cmt. (n.5(B)) (defining "relevant conduct").

for the sexual assault of a minor.[2] The cases were tried at the same time in 2011, and Perricone was acquitted of both charges. The officer also cited a polygraph examiner's report, ordered by Perricone's attorney in 2009, that agents found among his papers during the search of his home under the warrant issued for this offense. According to the examiner, Perricone had shown a high probability of deception and had admitted to touching the alleged victim.

Perricone objected to using acquitted conduct to calculate his sentence and argued that the evidence in the presentence report was insufficient to support the enhancement.

4. At sentencing, Perricone renewed his objection to the enhancement based on the acquitted conduct. To support the enhancement, the government offered parts of a trial transcript from the alleged victim in the earlier criminal proceedings in 2011, the

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[2] Based on court records summarized in the presentence report, the 2009 charges were based on statements by Perricone's sister-in-law that he sexually assaulted her on or about August 14, 2004, as well as on several occasions between the ages of 7 and 14 years old. The 2011 charges were brought based on statements from the same sister-in-law that Perricone had sexually assaulted her on July 1, 1998, as well as on several occasions between the ages of 7 and 16.

transcript of a deposition of the alleged victim in 2017, and the polygraph examiner's report from 2009.

The district court rejected the transcripts as unreliable evidence and relied on only the polygraph examiner's 2009 report in overruling Perricone's objection. The court adopted the presentence report and imposed the statutory maximum sentence of 240 months on count one to run consecutively to 120-month, concurrent sentences on counts two through seven, for a total sentence of 360 months, the bottom of the adopted Guidelines range.

5. Perricone appealed his conviction and sentence. In his challenge to the sentence, he argued that the district court's reliance on acquitted conduct violated his Fifth and Sixth Amendment rights to due process and a jury trial. He argued that, while the Fifth Circuit has upheld acquitted-conduct sentencing, the court's reliance on *Watts* was mistaken because *Watts* was a double jeopardy case. 519 U.S. at 154. Yet he acknowledged that the issue was foreclosed by Fifth Circuit precedent. *See United States v. Landreneau*, 967 F.3d 443, 454 (5th Cir. 2020) (citing *Watts* as letting court consider acquitted conduct "as long as it finds that the conduct occurred by a preponderance of the evidence").

Perricone also argued that the district court erred in applying the enhancement because the 2009 polygrapher's report was not

reliable evidence. That is because "there is simply no consensus that polygraph evidence is reliable," *United States v. Scheffer*, 523 U.S. 303, 309 (1998), and most courts of appeals to have considered the issue have rejected polygraph evidence at sentencing.[3] He argued that the 2009 polygraph report lacked any indicia of reliability and could not corroborate the 2009 allegations by a preponderance of the evidence. And even if the Court considered the polygraph report, Perricone argued that there was insufficient evidence to support a combination of "two or more" instances of abuse to constitute a "pattern." *See* § 2G2.2(b)(5) cmt. (n.1).

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[3] *See, e.g., United States v. Ortega,* 270 F.3d 540, 548 (8th Cir. 2001) (rejecting polygraph evidence to support sentencing enhancement); *United States v. Thomas*, 167 F.3d 299, 307–08 (6th Cir. 1996) (affirming exclusion of polygraph evidence offered by defendant in support of role reduction); *United States v. Messina*, 131 F.3d 36, 42 (2d Cir. 1997) (defendant's "polygraph evidence ... was unworthy of credit"), *cert. denied*, 523 U.S. 1088 (1998); *United States v. Stein*, 127 F.3d 777, 781 (9th Cir. 1997) (polygraph evidence was "too conclusory to be probative"); *cf. United States v. Pitz*, 2 F.3d 723, 729 (7th Cir. 1993) (no plain error in sentencing court's reliance on witness's polygraph because it was only one factor in court's credibility assessment and court "recognized that polygraph tests are not an entirely reliable indication of veracity").

The court of appeals affirmed. Pet. App. 1a–17a. It agreed that Perricone's constitutional challenge to the district court's use of acquitted conduct was foreclosed by its precedent. Pet. App. 13a (citing *Landreneau*, 967 F.3d at 454). The court of appeals doubted whether the objection to the polygraph report's reliability had been adequately preserved at sentencing or whether there was evidence that showed why the report was unreliable. Pet. App. 16a. But it acknowledged that "[t]he post-polygraph statements [from 2009] are ambiguous for the frequency of abuse." Pet. App. 17a. It ultimately held that, because the presentence report summarized the allegations from the 2009 and 2011 charges for which Perricone was acquitted, there was sufficient evidence to support the enhancement. Pet. App.17a.

REASONS FOR GRANTING THE WRIT

I. The constitutionality of using acquitted conduct to increase a defendant's sentence remains an important and recurring question that only this Court can resolve.

Despite the important constitutional issues at stake, this Court has not decided whether a sentencing judge's reliance on 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. *McClinton*, 143 S. Ct. at 2401 & n.2 (Sotomayor, J., respecting the denial of certiorari); *see Jones v. United*

States, 574 U.S. 948, 949–50 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari) ("We should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment"); *see also United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of reh'g en banc); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.).

Lower courts—including the Fifth Circuit—continue to misplace reliance on *Watts* by interpreting it to foreclose all constitutional challenges to using acquitted conduct at sentencing, including under the Fifth Amendment's Due Process Clause and the Sixth Amendment's right to trial by jury. But in *Watts*, 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. 519 U.S. at 154–56. *Watts* did not decide, nor was the Court asked to decide, whether the Fifth Amendment's due-process right or the jury-trial right under the Sixth Amendment are violated using acquitted conduct. *See Booker*, 543 U.S. at 240 & n.4 ("*Watts* … presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause").

From the outset, members of the Court and distinguished jurists have questioned whether *Watts* reached the Fifth Amendment's Due Process Clause or the jury-trial right of the Sixth Amendment. *See Watts*, 519 U.S. at 170 (Stevens, J., dissenting) (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); *id.* at 170 (Kennedy, J. dissenting) (criticizing the Court for not confronting "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"); *see also, e.g., Jones*, 574 U.S. at 949–50 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari); *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of reh'g en banc); *Sabillon-Umana*, 772 F.3d at 1331 (Gorsuch, J.); *United States v. Mercado*, 474 F.3d 654, 663 (9th Cir. 2007) (Fletcher, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring).

These issues remain unresolved. In *McClinton*, five Justices acknowledged the "important" constitutional questions that acquitted-conduct sentencing raises but denied review while waiting for the Sentencing Commission's proposed amendment. *See* 143 S.

Ct. 2400. The amendment provides little resolution because it precludes from "relevant conduct" only conduct "criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction." U.S. Sent'g Comm'n, *Amendments to the Sentencing Guidelines* 1. The amendment fails to address federal defendants, like Perricone, whose sentences were enhanced by acquitted *state* conduct that bears no temporal or factual relationship to the federal offense of conviction. *See id*.

And the amendment inadequately addresses the Fifth and Sixth Amendment concerns of using acquitted conduct when the acquitted conduct may overlap with an offense of conviction. *See id*. The Sentencing Commission acknowledged that it provides no "specific boundaries" between "acquitted conduct" and "convicted conduct," in deference to the courts, and that "federal courts may have a greater difficulty making this determination if it involves proceedings that occurred in another jurisdiction and at different times." *Id*. at 3–4.

Thus, the Sentencing Commission's proposed amendment fails to adequately address, let alone resolve, the Fifth and Sixth Amendment concerns of using acquitted conduct to enhance the sentence imposed on a separate crime of conviction. *See McClinton*,

143 S. Ct. at 2403 (Sotomayor, J., respecting the denial of certiorari) ("If the Commission does not act expeditiously or chooses not to act, however, this Court may need to take up the constitutional issues presented.").

The Sentencing Commission's amendment also provides no constitutional guidance to divided state courts on the role of acquitted-conduct sentencing in their criminal justice systems. *See McClinton*, 143 S. Ct. at 2404 (Alito, J., concurring in the denial of certiorari) (noting that any action by the Commission "will not affect state courts, and therefore the constitutional issue will remain.").

Some states have held that the Constitution lets sentencing courts consider acquitted conduct. *E.g., State v. Witmer*, 10 A.3d 728, 733 (Me. 2011) (identifying California, Colorado, Florida, Missouri, Ohio, and Wisconsin). But at least four states—Georgia, Michigan, New Hampshire, and North Carolina—have "gone without acquitted conduct" or have "expressly limited such consideration for decades." *McClinton*, 143 S. Ct. 2402 n.4 (Sotomayor, J., respecting the denial of certiorari) (collecting cases); *see also State v. Cote*, 530 A.2d 775, 785 (N.H. 1987); *State v. Cobb*, 732 A.2d 425, 442 (N.H. 1999) (reaffirming *Cote* post-*Watts*); *State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988); *Bishop v. State*, 486 S.E.2d 887, 897

(Ga. 1997) ("In aggravation of the sentence, the State may prove the defendant's commission of another crime, despite the lack of conviction, so long as there has not been a previous acquittal." (cleaned up); *People v. Beck*, 939 N.W.2d 213, 225–226 (Mich. 2019) ("we do not believe existing United States Supreme Court jurisprudence prevents us from holding that reliance on acquitted conduct at sentencing is barred by the Fourteenth Amendment"); *State v. Melvin*, 258 A.3d 1075, 1086, 1090 (N.J. 2021) (agreeing "with the Michigan Supreme Court that *Watts* is not dispositive of the due process" issue because, "[a]s clarified in *Booker*, *Watts* was cabined specifically to the question of whether the practice of using acquitted conduct at sentencing was inconsistent with double jeopardy").

* * * *

No other mechanism but this Court's decision will resolve these important and unresolved Fifth and Sixth Amendment concerns.

II. The Fifth Circuit's decision below is wrong.

A. The narrow holding of *Watts* does not answer the important questions of whether the Due Process Clause or Sixth Amendment jury-trial right prohibits consideration of acquitted conduct at sentencing.

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. 519 U.S. at 154.

And for decades, "[n]umerous courts of appeals"—including the Fifth Circuit below, Pet. App. 13a—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). Such reliance is misplaced.

Watts did not pass on the issues at hand. As this Court has explained, *Watts* presented 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." *Mercado*, 474 F.3d at 661 (Fletcher, J., dissenting); *accord, e.g., White*, 551 F.3d at 392 (Merritt, J., dissenting, joined by five others) ("reliance on *Watts* as authority for enhancements based on acquitted conduct is obviously a mistake"); *Melvin*, 258 A.3d at 1090 ("*Watts* is not dispositive of the due process challenge presently before this Court"); *Beck*, 939 N.W.2d at 224 ("find[ing] *Watts* unhelpful in resolving whether the use of acquitted conduct at sentencing violates due

process" because "*Watts* addressed only a double-jeopardy challenge").

This Court should be 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; *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting); *see also Mitchell*, 330 U.S. at 89 (this Court is vested with the power to decide only the "actual cas[e]" before it, "not abstractions"). As this Court has long recognized, 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 ….").

Giving *Watts* a "very narrow" reading, *Booker*, 543 U.S. at 240 n.4, is also justified because a broader reading is hard to square with the Court's more recent sentencing precedents. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466, 490 (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 v. Washington*, 542 U.S. 296 (2004) (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); *United States v. Haymond*, 588 U.S. 534 (2019) (judge cannot make findings to increase sentence during supervised release term).

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 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 97–98. These cases provide a compelling reason that *Watts* is limited to the Double Jeopardy context. *See Faust*, 456 F.3d at 1349 (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)).

B. Acquitted-conduct sentencing conflicts with Sixth Amendment jurisprudence prohibiting courts from finding facts that enhance punishment.

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. And by giving citizens a voice, it "safeguard[s] 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). The right to a trial by jury is a right "of surpassing importance," *Apprendi*, 530 U.S. at 476, and "occupie[s] a central position in our system of justice." *Batson*, 476 U.S. at 86.

The Sixth Amendment right to trial by jury grew out of "several centuries" of common-law tradition, under which the right 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). And, through partial acquittals, juries determined not only

guilt but also the defendant's sentence. That is because, at common law, "[t]he substantive criminal law tended to be sanction-specific," which left judges with little sentencing discretion once the facts of the offense were determined by the jury. *Alleyne*, 570 U.S. at 108–09 (cleaned up).

Thus, a jury acquittal must be given "special weight." *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *see also Yeager v. United States*, 557 U.S. 110, 122–123 (2009) (a "jury verdict's finality is unassailable," "[e]ven if the verdict is based upon an egregiously erroneous foundation"). Through an acquittal, the jury does not authorize the defendant's punishment, and thus exercises the people's "control in the judiciary," as required by the Sixth Amendment. *Blakely*, 542 U.S. at 306. Acquitted-conduct sentencing whittles away this right, *see Jones*, 526 U.S. at 247–48 (citing the fear of Blackstone and the Framers "that the jury right could be lost not only by gross denial, but by erosion"); *Apprendi*, 530 U.S. at 483 (same), and leaves defendants at the mercy of judge and prosecutor—the very same entities against whom the jury was supposed to protect the defendant.

Consistent with this history, and in the decades since *Watts*, this Court has focused on the importance of *jury* factfinding in sentencing. In *Apprendi*, 530 U.S. at 490, this Court held that "[o]ther

than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Court has applied this "bright-line rule" to a "variety of sentencing schemes that allowed judges to find facts that increased a defendant's maximum authorized sentence." *S. Union Co.*, 567 U.S. at 348. The Court has held that a jury must find any fact necessary to increase the sentencing range under mandatory sentencing guidelines, *Blakely*, 542 U.S. at 303–04; that a jury must find any fact necessary to establish a statutory minimum, *Alleyne*, 570 U.S. at 116; that a jury must find any fact necessary to impose a death sentence, *Ring*, 536 U.S. at 609; that a jury must find any fact necessary to determine the allowable amount of a criminal fine, *S. Union Co.*, 567 U.S. at 348; and, most recently, that a jury must find any fact necessary to increase the statutory maximum and minimum sentences, *Erlinger v. United States*, 144 S. Ct. 1840, 1852 (2024).

Acquitted-conduct sentencing 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. 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." *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (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).

Many 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), and undermines public perceptions of the importance of jury service by discouraging 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 for which jury had acquitted the defendant a "tragedy" that denigrates "our contribution as jurors").

C. The Fifth Amendment similarly 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 "place[] the jury at the heart of our criminal justice system" to guarantee fair sentencing procedures. *See Erlinger*, 144 S. Ct at 1489. Just as any fact that increases the penalty to which a defendant is exposed is an element of a crime, and must be found by a jury, not a judge, *id.* at

1850, 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 and the right to be presumed innocent. Treating acquitted conduct as a sentencing factor based on facts found by a judge by a preponderance of the evidence eliminates the core procedural protection of proof beyond a reasonable doubt. Several courts have held that revisiting facts the jury rejected under a preponderance standard deprives the accused of the full benefit of the presumption of innocence. *See Beck*, 939 N.W.2d at 225 ("conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process"); *Marley*, 364 S.E.2d at 139; *Cote*, 530 A.2d at 785.

Even *Apprendi* skeptics acknowledge that basing enhancements that drastically increase sentences on findings made by a preponderance could cause "unusual and serious procedural unfairness" that could give rise to due process violations. 530 U.S. at 562–563 (Breyer, J., dissenting). In his *Apprendi* dissent, Justice

Breyer posited an "egregious" hypothetical in which a prosecutor asks the judge, after a jury convicts a defendant for embezzlement, "to impose maximum and consecutive sentences because the embezzler murdered his employer." *Id*. at 562. Justice Breyer acknowledged that the unfairness of such a ploy could be remedied by "use of a 'reasonable doubt' standard … and invocation of the Due Process Clause." *Id*. at 562–563; *accord Blakely*, 542 U.S. at 344 (Breyer, J., dissenting) (similar).

This case implicates the concerns Justice Breyer identified. *See Apprendi*, 530 U.S. at 562–63 (Breyer, J., dissenting). Perricone's Sentencing Guidelines range for the federal offenses of distributing and receipt of online child pornography was increased by 150 months based on old and unrelated accusations for which Perricone was acquitted. Although the jury decided that the government was not authorized to punish Perricone for the alleged conduct, the federal sentencing judge did so anyway.

A court's reliance on acquitted conduct also raises concerns about "unfairness" and "perceived unfairness" in sentencing. *McClinton*, 143 S. Ct. at 2401 (Sotomayor, J., respecting the denial of certiorari). Those "perceptions of unfairness" are amplified when the court relies on facts underlying prior jury acquittals—facts that the jury determined the prosecution had failed to prove. *See*

Townsend v. Burke, 334 U.S. 736, 740–741 (1948) (explaining that person whose sentence was enhanced because of acquitted conduct was sentenced based on "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." (emphasis added)).

Last, 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 allowed to consider acquitted conduct during sentencing, "a defendant can never reasonably know what his possible punishment will be," and "[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.*

III. This case presents an ideal vehicle to resolve the question presented.

This case presents an excellent vehicle for the Court to consider whether the Fifth and Sixth Amendments prohibit consideration of acquitted conduct at sentencing. The record in this case is straightforward and there are no relevant factual disputes. Perricone challenged the use of acquitted conduct before the district court and court of appeals, and his sentence was indisputably

based on aged state conduct for which he was acquitted. And the acquitted conduct at issue consisted of free-standing offenses unrelated to the instant federal conviction. In other words, the acquitted state conduct (sexual assault) has no bearing on the elements that were necessary to convict Perricone of the instant federal crimes (distribution and receipt of online child pornography). Perricone was prejudiced by the district court's reliance on the acquitted state conduct—the resulting enhancement increases Perricone's Guidelines from 210 to 262 months to 360 to life.

* * * *

This case presents an ideal opportunity for this Court to address the important Fifth and Sixth Amendment concerns about acquitted-conduct sentencing that have long troubled federal and state jurists and remain unresolved by the Sentencing Commission's proposed amendment. Perricone's sentence was enhanced not merely by facts related to the crime of conviction, but because of unrelated conduct for which the jury acquitted Perricone years earlier.

Now "[t]his [really] has gone on long enough." *Jones*, 574 U.S. at 949 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari). The Court "should grant certiorari to put

an end to the unbroken string of cases disregarding" the Constitution and this Court's precedents. *Id*. at 950.

CONCLUSION

FOR THESE REASONS, Perricone asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

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