**No. 22-**

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*IN THE*

*SUPREME COURT OF THE UNITED STATES*

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MARQUIS SHAW,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) Do either the Jury Clauses of Article III and the Sixth Amendment or the Due Process Clause of the Fifth Amendment bar a court from imposing a more severe criminal sentence on the basis of conduct that a jury necessarily rejected, given its verdicts of acquittal on other counts at the same trial? If necessary to reach an affirmative answer, should this Court's decision in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), be overruled?

(2) In avoidance of the constitutional question, do the rules of issue preclusion, as applied in federal criminal cases, bar imposition of an aggravated sentence on a factual predicate necessarily rejected by the jury at trial in the same case?

## LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Shaw and respondent United States).

## LIST OF RELATED PROCEEDINGS

In the district court, this case was No. 2:14-CR-338(B)-SJO (C.D.Cal.), *United States v. Martinez et al.* Petitioner's co-defendants on the second superseding indictment were Charles Smith, Joshua Perez, Trayvone Jackson, Anthony Ingram, Antonio Dodds and Mark Keith. All but Ingram pleaded guilty.

In the Ninth Circuit, petitioner's case, *United States v. Marquis Shaw*, bore Dkt. No. 18-50384. Appeals by co-defendants Smith (No. 19-50123), Perez (No. 19-50307) and Dodds (No. 18-50124) were not consolidated or otherwise related to petitioner's. Ingram did not appeal his own misdemeanor verdict and judgment of sentence.

This case is directly related to *People of the State of California v. Marquis Maurice Shaw*, Dkt. No. SA048132 (Super. Ct., Los Angeles Cty.), in that the conduct underlying that case (for which sentence was imposed on April 7, 2004) was used at sentencing in the present federal case to justify an increased punishment. The instant case is also related to *People v. Marquis Maurice Shaw*, Dkt. No. YA089324 (Super. Ct., Los Angeles Cty.), in that the sentence imposed in the present case was made to run concurrently with the undischarged portion of the eight-year sentence in that case, imposed October 30, 2014.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Marquis Shaw petitions this Court for a writ of certiorari to review the judgment and memorandum of the United States Court of Appeals for the Ninth Circuit affirming his convictions and sentence in a federal criminal case.

## OPINIONS BELOW

The Ninth Circuit's non-precedential memorandum opinion (per Schroeder, Tallman and Lee, JJ.), filed March 4, 2022, is Appendix A. It is not yet published in the Federal Appendix, but is available at 2022 WL 636639. There is no published decision of the district court on any question presented.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed March 4, 2022. Appx. A. On April 18, 2022, Shaw filed a petition for rehearing, which was denied as untimely on May 9, 2022. Appx. B.[1] Pursuant to Rule 13.3 this petition was therefore due for filing within 90 days of March 4, that is, on or before June 2, 2022. By order dated May 20, 2022, under Dkt. 21A747, Justice Kagan extended the time for filing a petition for a writ of certiorari until August 1, 2022. This petition is timely filed on or before that extended due date. Rules 13.1, 13.3,

[1] Prior appellate counsel committed an unfortunate one-month calendaring error.

13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## TEXT OF CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES, AND SENTENCING GUIDELINE INVOLVED

Article III, section 2, of the Constitution of the United States provides, in pertinent part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; * * * *.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

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

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to * * * trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * *.

Title 18, U.S. Code (the federal criminal code), provides, in pertinent part:

> **§ 3553. Imposition of a sentence**
>
> **(a) Factors to be considered in imposing a sentence**. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

* * * *

**§ 3661. Use of information for sentencing**

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Title 21, U.S. Code (the Controlled Substances Act), provides, in pertinent part:

**§ 850. Information for sentencing**

Except as otherwise provided in this subchapter or section 242a(a) of title 42, no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which

a court of the United States may receive and consider for the purpose of imposing an appropriate sentence under this subchapter or subchapter II.

The United States Sentencing Guidelines provide, in pertinent part:

**§1B1.3 - Relevant Conduct (Factors that Determine the Guideline Range)**

**(a) Chapters Two (Offense Conduct) and Three (Adjustments)**. Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

**(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence)**. * * * *.

## STATEMENT OF THE CASE

Petitioner Marquis Shaw was named as one of seven co-defendants in a 33-count second superseding indictment filed on November 9, 2017, in the U.S. District Court for the Central District of California. Doc. 2968.[2] He was charged in seven of those counts. The indictment alleged that petitioner held a leadership position in the "Gremlin Riderz," a "violent enforcement clique" of a Los Angeles, California, street gang known as the "Broadway Gangster Crips." The indictment further alleged that he was among the "central drug suppliers to the gang." The indictment also charged that he engaged personally in certain specific transactions involving the sale of drugs worth a few hundred dollars or less.

The formal charges included conspiracy to participate in the affairs of a racketeer-influenced and corrupt organization ("RICO"), 18 U.S.C. § 1962(d) (including a predicate of murder) (Count One); commission of a violent crime, that is, murder, in aid of racketeering ("VICAR"), 18 U.S.C. § 1959(a)(1) (Count Two); controlled substances distribution conspiracy, 21 U.S.C. §§ 846, 841(b)(1)(A) (Count Eleven); and carrying, brandishing and discharging firearms in furtherance of crimes of violence (to wit, the RICO conspiracy and VICAR offense) and the use

[2] In this petition, "Doc." refers to an entry on the district court docket. An initial indictment, charging 72 defendants in 12 counts, in which petitioner Shaw was named fourth, was filed June 11, 2014. Doc. 1.

and discharge of those firearms to commit murder, 18 U.S.C. § 924(c),(j) (Count Twenty).[3]

The remaining three counts (Twelve, Fifteen, and Seventeen) charged petitioner with particular occasions of distribution of crack cocaine in violation of 21 U.S.C. §§ 841(b), 860.[4]

Petitioner stood trial in February 2018 with two co-defendants on seven counts. Trial lasted 18 days, including nearly four days of deliberations.[5] The jury largely disbelieved the testimony of the government's cooperating witnesses and found petitioner Shaw not guilty of all four major counts, including RICO,

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[3] The "murder" referenced in Counts One, Two and Twenty was the same killing for which petitioner had been tried in 2004 in state court, resulting in a hung jury (with the majority for acquittal). *See* Dkt. No. SA048132 (Super. Ct., Los Angeles Cty.); Related Cases, *ante*. That case was thereafter resolved by his negotiated plea to manslaughter.

[4] Before trial, the government filed a notice under 21 U.S.C. § 851 of its intent to invoke increased minimum and maximum terms on the controlled substances counts on account of a single 1994 state court marijuana conviction. Doc. 899. Although the sentence ultimately imposed was within the unenhanced limits of punishment for the most serious count of conviction (5 to 40 years, under 21 U.S.C. § 841(b)(1)(B)), that is, Count Twelve (involving 42.2 grams of crack cocaine), the § 851 recidivist drug offender enhancement had the effect of triggering a higher "career offender" Guidelines range under USSG § 4B1.1(b) (Offense Level 37, rather than Level 34), adding some ten years to petitioner's sentence.

[5] One of the two co-defendants to elect a jury trial (Perez) accepted a plea bargain on the sixth day. Perez later appealed his sentence; that appeal remains pending in the Ninth Circuit. *See* Related Cases *ante*.

VICAR, drug conspiracy and firearms murder. At the same time the jury convicted him on three counts charging instances of selling modest amounts of crack cocaine, two within 1000 feet of a school, in September and August of 2011 and March of 2012, in violation of 21 U.S.C. §§ 841(b)(1)(B) and 860 (Counts 12, 15 and 17).[6]

The trial record, including in particular the closing argument by petitioner's defense counsel and the jury's written verdict sheet, disclose to a reasonable certainty the singular basis for these verdicts. In closing, petitioner's counsel argued to the jury both that petitioner was not shown to have committed (or participated in) the alleged murders, and also that the government had failed to prove he was part of the RICO or violent enterprise (that is, the Broadway Gangster Crips) or of the charged, larger drug conspiracy. Tr. 2/28/18, at 4–40. The verdict shows that the jury did not believe petitioner to have been a violent enforcer (or major drug supplier) for the Broadway Crips street gang, as alleged, but only to have been an independent drug dealer, in an area that was "out of the [gang's] territory." *Id.* 39.[7]

The special verdicts, recorded on a written verdict sheet (Doc. 3321), establish that the jury fully accepted the defense theory. That is, on Count One

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[6] Co-defendant Ingram was acquitted at the same trial of the RICO conspiracy and convicted on the controlled substances charge (Count Eleven), but only of a lesser-included misdemeanor conspiracy simply to possess drugs. Doc. 3310, 3320. He received a 60-day sentence and did not appeal. Doc. 3916, 3917.

[7] Defense counsel conceded the drug-dealing in closing and again at sentencing. Tr. 2/28, at 40; Sent.Tr. 42.

the jury found that petitioner had not conspired to participate in conducting the affairs of the gang through any pattern of racketeering activity. The jury therefore did not reach the further question whether he had agreed to do so by committing murder or any other specific offenses. Likewise, as to VICAR, the jury found that petitioner had not committed the intentional murder of L.R. on March 10, 2003, "for the purpose of gaining entrance to and maintaining or increasing position in the Broadway Crips gang," as charged in Count Two under § 1959(a)(1). Similarly, as to Count Twenty, the jury found that petitioner had not used a firearm in furtherance of either the RICO or VICAR offense; it thus did not reach the follow-up questions posed by the verdict sheet whether in doing so he had discharged the firearm or used it to commit murder.

On October 24, 2018, Judge Otero imposed concurrent sentences of 420 months, that is, 35 years' imprisonment, to be followed by 16 years' supervised release (the enhanced mandatory minimum). The court viewed this aggravated sentence as falling within the applicable "career offender" U.S. Sentencing Guidelines range. Sent.Tr. 56. But the calculation of the range was predicated – over timely objection – on the same conduct which the jury had necessarily rejected when it acquitted petitioner Shaw on Counts One, Two, Eleven and Twenty. The Court stated that it deemed that alleged activity both "relevant" under the Guidelines, USSG § 1B1.3(a), and part of petitioner's "history and characteristics," 18 U.S.C. § 3553(a)(1), or of his "background" and "conduct" under *id.* § 3661 and 21 U.S.C. § 850.[8] The

[8] *See* Statutes and Guidelines Involved *ante*.

three counts of conviction involved sales of crack of only 42.2, 14.0 and 12.4 grams respectively, occurring between August 2011 and March 2012. But the court held petitioner responsible under the Guidelines for the distribution of at least 2.8 kilograms of cocaine base (crack) "dating back to 2002." Sent.Tr. 53. The court found that petitioner "was not only a supplier, but also a manufacturer of cocaine for a number, number of years, and profited significantly in light of the evidence which depicted him with a significant amount of money in his kitchen, which the Court concludes was his money ...." *Id.* 56. The only "course of conduct" (USSG § 1B1.3(a)(2)) encompassing that decade of trafficking would be the RICO and drug distribution conspiracies charged in Counts One and Eleven, of which the jury had acquitted him.

Despite characterizing the jurors as "intelligent," *id.* 61, and "extremely ... bright," *id.* 13, the court expressly disapproved and disagreed with the verdicts of not guilty. *Id.* 13, 14, 46. Thus, the judge further declared that "The sentence imposed by the Court takes into consideration the relevant conduct that the Court believes the defendant should be held responsible for, including the murder of L.R., [and] his involvement in the murder of W.S. ... The defendant's 2003 manslaughter case[9] was especially egregious ...." *Id.* 59–60.

The court's sentencing statement concluded, "I would say for the record, that separate and apart from whether the defendant qualifies as a career offender, and the Court would find the 581s [sic] to have been established, the Court would sentence the

[9] *See* note 3 *ante*.

defendant under the 3553 factors to the same sentence imposed by the Court if it's concluded at a later date that defendant, for technical reasons, does not qualify as a career offender." *Id.* 60–61. At the time of sentencing, petitioner was 43 years old. *Id.* 59. The 35-year term imposed equaled or exceeded the statistical life expectancy at that time for a person of petitioner's age, gender and race.[10]

Petitioner appealed to the Ninth Circuit. He challenged only the sentence, not the convictions. After argument, the panel on March 4, 2022, issued a non-precedential "memorandum" rejecting all of Shaw's contentions. Appx. A. His challenges to sentencing based on "acquitted conduct" were over-ruled based on settled Circuit precedent, as well as on this Court's decision in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam). Appx. A3a.

This petition follows.

***Statement of Lower Court Jurisdiction.*** The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed in the district. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

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[10] Elizabeth Arias & Jiaquan Xu, *United States Life Tables 2018*, 69 NATIONAL VITAL STATISTICS REPORTS, No. 12, table A, at 3 (U.S. Dept. of HHS, CDCP, Nat'l Center for Health Statistics, NVSS, Nov. 17, 2020), available at www.cdc.gov/nchs/data/nvsr/nvsr69/nvsr69-12-508.pdf (last accessed 7/26/22).

## REASONS FOR GRANTING THE PETITION

### 1. The use of acquitted conduct at sentencing poses a recurrent and troubling systemic problem that this Court must resolve.

This Court has never squarely addressed whether the Due Process Clause of the Fifth Amendment or the Sixth Amendment's jury-trial guarantee (or that of Article III, § 2) forbids the use of "acquitted conduct" at sentencing. In *United States v. Watts*, a divided Court held summarily that taking acquitted conduct into account at sentencing does not violate the Double Jeopardy Clause of the Fifth Amendment. 519 U.S. 148, 154 (1997) (per curiam). In the intervening quarter century, "[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). This Court should grant this petition to resolve that due process and the right to jury trial – or traditional, non-constitutional principles of issue preclusion – do not allow a judge to enhance a federal sentence based on factual allegations that a jury specifically or necessarily rejected in its verdicts.

Numerous Justices and judges have questioned whether using acquitted conduct at sentencing comports with due process and the right to a jury trial, urging this Court to "take up this important, frequently recurring, and troubling contradiction in sentencing law." *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in denial of rehearing en banc).

a. As this Court later recognized, *Watts* decided "a very narrow question." *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005). Even contemporaneously, some Justices urged the Court to resolve the broader "question of recurrent importance" that *Watts* did not address: the use at sentencing of "conduct underlying a charge for which the defendant was acquitted." *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting). Justice Stevens's *Watts* dissent went further, denouncing the Court's holding in strong terms. *Id.*

Since then, other members (and future members) of this Court have called for the Court to address whether the use of acquitted conduct at sentencing comports with the Due Process Clause and the Sixth Amendment right to a jury trial. In *Jones v. United States*, 574 U.S. 948 (2014), for example, a jury convicted petitioners on substantive counts of distributing small amounts of cocaine but – as in petitioner Shaw's case – acquitted them of conspiring to distribute. Nevertheless, the sentencing judge found – again, as in the instant case – that they had joined a conspiracy and based their sentences on the large quantity of drugs distributed in the course of it. Dissenting from the denial of certiorari, Justice Scalia, joined by Justices Thomas and Ginsburg, highlighted the pressing need for the Court to resolve the question presented. *Id.*

Shortly thereafter, then-Judge Gorsuch invoked the *Jones* dissent. In *United States v. Sabillon-Umana*, 772 F.3d 1328 (10th Cir. 2014), he noted that "[i]t is far from certain whether the Constitution allows" a judge to increase a defendant's sentence based on "a finding that a defendant had committed an offense for which a jury acquitted him." *Id.* 1331.

The next year, in *Bell*, then-Judge Kavanaugh observed that "[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." 808 F.3d at 928 (concurring in denial of rehearing en banc); see also *United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part) (noting "good reasons to be concerned about the use of acquitted conduct at sentencing").

b. Numerous additional judges have opined that the Fifth and Sixth Amendments should prohibit reliance on acquitted conduct at sentencing and have urged this Court to provide guidance.

Judge Millett has called the use of acquitted conduct at sentencing an "important, frequently recurring, and troubling contradiction in sentencing law" that "only the Supreme Court can resolve." *Bell*, 808 F.3d at 931 (Millett, J., concurring in denial of rehearing en banc). Judge Bright has argued that "the use of acquitted conduct to enhance a defendant's sentence should be deemed unconstitutional under both the Sixth Amendment and the Due Process Clause of the Fifth Amendment," *United States v. Lasley*, 832 F.3d 910, 920–21 (8th Cir. 2016) (dissent); accord, *United States v. Canania*, 532 F.3d 764, 776–78 (8th Cir. 2008) (concurrence). Others agree. See *White*, 551 F.3d at 392 (Merritt, J., dissenting, joined by five others); *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., specially concurring); *United States v. Coleman*, 370 F. Supp. 2d 661, 671 (S.D. Ohio 2005)

(Marbley, J.); *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005) (Gertner, J.). These judicial critics worry that the practice "can often invite disrespect for the sentencing process," *United States v. Lombard*, 102 F.3d 1, 5 (1st Cir. 1996) (Boudin, J.).[11]

c. Some state courts have taken the step that federal courts of appeals have not, prohibiting the use of acquitted conduct at sentencing.

The Michigan Supreme Court did so in *People v. Beck*, 504 Mich. 605, 939 N.W.2d 213 (2019), *cert. denied*, 140 S. Ct. 1243 (2020), holding by 6–3 vote that a judge's reliance on acquitted conduct to justify a higher sentence deprives the defendant of liberty without due process of law, in violation of the Fourteenth Amendment. See *State v. Cote*, 530 A.2d 775, 785 (N.H. 1987); *State v. Cobb*, 732 A.2d 425, 442 (N.H. 1999); see also *Bishop v. State*, 486 S.E.2d 887, 897 (Ga. 1997); *State v. Marley*, 364 S.E.2d 133, 138 (N.C. 1988).

Other states take a different view, permitting the practice. See *State v. Witmer*, 10 A.3d 728, 733–34 (Me. 2011) (collecting cases); *People v. Rose*, 776 N.W.2d 888, 891 (Mich. 2010) (Kelly, C.J., dissenting)

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[11] Before *Watts*, appellate judges likewise expressed doubts. See *United States v. Lanoue*, 71 F.3d 966, 984 (1st Cir. 1995) (Bownes, J., for 3-judge panel, urging *en banc* consideration); *United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring) ("This is jurisprudence reminiscent of *Alice in Wonderland*. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'"); *United States v. Silverman*, 976 F.2d 1502, 1533, 1534 (6th Cir. 1992) (Martin, J., dissenting).

(cataloging "the split among state courts on the issue").

More recently, the New Jersey Supreme Court canvassed both federal and state constitutional law before holding as a matter of state law that, "once the jury has spoken through its verdict of acquittal, that verdict is final and unassailable. *** Fundamental fairness simply cannot let stand the perverse result of allowing in through the back door at sentencing conduct that the jury rejected at trial." *State* v. *Melvin*, 258 A.3d 1075, 1086, 1089, 1093–94 (N.J. 2021).

d. As the dissenters lamented in *Jones*, this Court's "continuing silence" on the question has led the courts of appeals to infer that "the Constitution does permit" sentences supported by judicial findings that defendants "engaged in [offense conduct] of which the jury acquitted them." 574 U.S. at 948.

The court below did so in this case, relying on binding Ninth Circuit precedent. Appx. A3a, citing *Mercado*, *supra*. Every circuit has by now adopted the same view, applying *Watts* not only to resolve Double Jeopardy claims, but also expanding it to reject defendants' Due Process and Sixth Amendment challenges. See *White*, 551 F.3d at 392 n.2 (Merritt, J., dissenting) (collecting cases). Thus, even judges who believe that *Watts* did not resolve the constitutionality of this practice under the Due Process Clause or the Sixth Amendment are now bound by circuit precedent mistakenly holding the contrary. See, *e.g.*, *United States v. Bagcho*, 923 F.3d 1131, 1141 (D.C. Cir. 2019) (Millett, J., concurring) (noting that "circuit precedent forecloses this panel from righting this grave constitutional wrong");

*Faust*, 456 F.3d at 1349 (Barkett, J., specially concurring) (similar).

For these reasons, the circuits have declined to revisit the issue in the absence of clearer guidance from this Court.

e. The passage of time has confirmed that this Court should not stay its hand in hopes that some other institution will remedy the problem. Justice Breyer initially suggested in *Watts* that, "[g]iven the role that juries and acquittals play in our system," the Sentencing Commission "could decide to revisit this matter." *Watts*, 519 U.S. at 159 (Breyer, J., concurring). During the 1990s, the Commission published for discussion multiple proposals to abolish the use of acquitted conduct at sentencing. *See* 62 Fed. Reg. 15201 (1997); 58 Fed. Reg. 67,522, 67,541 (1993); 57 Fed. Reg. 62,832 (1992). But it never acted on those suggestions, for reasons it did not explain. And more than two decades later, the Commission still has not done so. Given the potential threat that a rule against using "acquitted conduct" might pose to the stability of the Commission's "cornerstone" principle, the

"relevant conduct" rule,[12] it is highly unlikely to take a different tack, even under new leadership.[13]

Nor are sentencing judges free to redress the problem as a practical matter by "disclaim[ing] reliance" on acquitted conduct in individual cases. *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing). One "problem is that the very discretion available to sentencing judges prevents this from being a comprehensive reform." Johnson, *The*

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[12] *See* Wilkins & Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 499 n.27 (1990) ("[T]he central feature of the guidelines (*i.e.*, Relevant Conduct) ... significantly reduces the impact of prosecutorial charge selection and plea bargaining by ensuring the court will be able to consider the defendant's real offense behavior in imposing a guideline sentence."). *See also* Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8–9 (1988).

[13] One possible explanation for its silence is Justice Scalia's concurrence in *Watts*, which suggested that 18 U.S.C. § 3661 may itself foreclose the Commission from abolishing the practice. *See* Statutes Involved, *ante*. (The Guidelines, by law (28 U.S.C. § 994(b)(1)) must be "consistent with all pertinent provisions of title 18, United States Code." See *Watts*, 519 U.S. at 158 (Scalia, J., concurring).

Actually, § 3661 (like the cognate provision at 21 U.S.C. § 850) is better understood as codifying the holding of *Williams v. New York*, 337 U.S. 241 (1949), that due process does not require application of either confrontation rights or the rules of evidence at sentencing. See *United States v. Grayson*, 438 U.S. 41, 50 & n.10 (1978) (discussing identically-worded predecessor provision). The Commentary at USSG § 6A1.3 (p.s.) suggests that the Commission reads both *Watts* and § 3661 broadly.

*Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 SUFFOLK U. L. REV. 1, 45 (2016). Judges who attempt to do so across the board run the risk of reversal for procedural error. In *United States v. Ibanga*, 271 F.App'x 298 (4th Cir. 2008), for example, the government challenged on appeal the district court's refusal to consider acquitted conduct. *Id.* 300. The Fourth Circuit found "significant procedural error" and reversed for resentencing. See *id.* 301 (citing *Watts*).

Finally, Congress is highly unlikely to correct the problem. It is true that a "Prohibiting Punishment of Acquitted Conduct Act" passed the House on March 28, 2022 as H.R. 1621 (117th Cong., 2d Sess.). That bill would add a proviso to 18 U.S.C. § 3661 specifying that "a court of the United States shall not consider, except for purposes of mitigating a sentence, acquitted conduct ...." The legislation goes on to define "acquitted conduct" (by amendment to *id.* § 3673) as including "an[y] act for which a person was criminally charged and with regard to which that person was adjudicated not guilty after trial in a Federal, State or Tribal court ..." (internal punctuation omitted). The bill does not mention (and thus presumably does not affect) 21 U.S.C. § 850, the cognate provision for sentencing in controlled substances cases.[14]

[14] Nor does the bill explain how a court is to determine when a defendant must be deemed to have been "adjudicated not guilty" "with regard to" an *act*, in a system where juries typically return general verdicts on charged *offenses*. Thus, even if this legislation were enacted, litigation over implementation would continue.

In the Senate, where it was received on March 29, 2022, this bill has been made part of a larger package of criminal justice reforms (not yet formally introduced) which has not proceeded even as far as the Judiciary Committee's agenda and shows no sign of advancing. In each of the last four congressional sessions, legislation that would outlaw acquitted conduct sentencing has lapsed without a vote, even though it was introduced on a bipartisan basis.[15] There is no reason to believe that a different fate awaits the current or any future legislative response.

In short, without this Court's intervention to clarify, narrow or overrule *Watts*, and thereby resolve the divergent holdings of the federal circuits versus some state courts of last resort, the use of acquitted conduct at sentencing will continue unabated in the federal courts.

**2. The decision below is wrong: Adverse use of acquitted conduct at a federal sentencing violates Article III, the Fifth and Sixth Amendments, and traditional principles of issue preclusion.**

Basing a federal criminal sentence on acquitted conduct weakens at least two core rights whose "historical foundation[s] ... extend[ ] down centuries into the common law": the Sixth Amendment right to a jury (which elaborates a right enshrined in Article III, §2) and the Fifth Amendment right to due process. The role assigned in the Constitution to the

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[15] *See* S. 601, 117th Cong.; S. 2566, 116th Cong.; H.R. 8352, 116th Cong. § 60406; S. 4, 115th Cong.; H.R. 5785, 115th Cong. § 6006; H.R. 4261, 115th Cong. § 407; H.R. 2944, 114th Cong. § 105.

jury is unique: a firewall of popular justice with the power to utterly disable the State and its agents (including judges) from depriving a person of liberty. In one of his most evocative phrases, Justice Scalia called the absolute power of the trial jury "the spinal column of American democracy." *Neder v. United States*, 527 U.S. 1, 30 (1999) (dissenting opinion).[16] Sentencing based on acquitted conduct violates that bedrock principle. The decision below in petitioner's case, affirming the adverse use of acquitted conduct at sentencing, was therefore wrong.

**A. This Court should not permit the lower courts to misread *Watts* as controlling the issue.**

1. The court of appeals in petitioner's case cited *Watts* when affirming. App. A3a. But as already articulated, *Watts* was decided exclusively on Double Jeopardy grounds, and therefore does not control this Court's examination of the Questions Presented, nor should it have been deemed to control in the court below. See *Booker*, 543 U.S. at 240 & n.4. *Watts* did not consider whether a sentencing court's use of acquitted conduct implicated – let alone violated – the Fifth Amendment's due process guarantee or the Sixth Amendment's jury-trial right. Nor did it consider whether there was any non-constitutional

[16] *Neder* was decided by a 5-1-3 vote. The dissenters viewed the holding as a major constitutional error. *See* 527 U.S. at 30–40 (Scalia, J., with Souter & Ginsburg, JJ., dissenting); see also *id.* 28-29 (Stevens, J., concurring). Arguably, the *Neder* dissenters' reverent view of the Article III and Sixth Amendment jury trial right has since prevailed. See, *e.g.*, *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)).

federal rule of issue preclusion that could properly serve to avoid the constitutional issues.

2. Even if the Court were to conclude that *Watts* requires a conclusion that the Due Process Clause and the Constitution's jury-trial guarantees permit the use of acquitted conduct at sentencing, this Court's more recent jurisprudence would call that aspect of *Watts* into question and invite its overruling. *Cf. Ramos v. Louisiana*, 590 U.S. —, 140 S. Ct. 1390, 1405 (2020) (discussing *stare decisis* in relation to jury trial right). This is particularly true "in the *Apprendi* context," where this Court has found that "*stare decisis* does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of [Sixth Amendment] constitutional law." *Hurst v. Florida*, 577 U.S. 92, 102 (2016) (internal quotations omitted). See also *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)); *Alleyne v. United States*, 570 U.S. 99, 116 & n.5 (2013) (overruling *Harris v. United States*, 536 U.S. 545 (2002)). Thus, in *Ramos* the Court declared that *stare decisis* does not require adherence to precedent that undermines the jury right, which is "fundamental to the American scheme of justice." 140 S.Ct. at 1397 (overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality) and *Johnson v. Louisiana*, 406 U.S. 356 (1972)).

While as already explained, overturning *Watts* is unnecessary to a reversal here, that case is ripe for overruling under all the criteria articulated in the closely-related context of *Ramos*, that is, "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." 140 S.Ct. at

1405. *Watts*' reasoning is thin, as explained above. And this Court has recognized the limited precedential value of summary decisions on the merits, finding itself "less constrained" by opinions "rendered without full briefing or argument." See *Hohn v. United States*, 524 U.S. 236, 251 (1998).

Moreover, "any reliance interest that the Federal Government ... might have is particularly minimal here" because the government already tried – and failed – to prove the underlying acquitted conduct to a jury. *Alleyne*, 570 U.S. at 119. Under such circumstances, "*stare decisis* cannot excuse a refusal to bring 'coherence and consistency,' to ... Sixth Amendment law." *Id.* 121.

Finally, as already noted, subsequent legal developments in the *Apprendi-Alleyne* line of cases also strongly favor revisiting *Watts*. Many of these decisions also cite the Due Process Clause in emphasizing that a court's sentencing authority flows from the jury's verdict – with the jury, not the judge, occupying the central role in our criminal justice system. *See*, *e.g.*, *Hurst*, 577 U.S. at 97; *Alleyne*, 570 U.S. at 104. The cases provide a compelling reason to examine whether the Constitution permits consideration of acquitted conduct at sentencing. Just as the judge's authority to sentence at all depends on the verdict(s) of conviction, so that power ought to be constrained by any verdicts of acquittal. At minimum, certiorari should be granted to give this question the full hearing in this Court that it has not yet received.

**B. The Constitution's twice-iterated jury trial right prohibits courts from relying on acquitted conduct at sentencing.**

The Sixth Amendment, underscoring in federal cases a guarantee enshrined in Article III, preserves the "jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012) (quoting earlier authority).

The guarantee of trial by jury is a constitutional protection "of surpassing importance." *Apprendi*, 530 U.S. at 476–77. Since the Founding, the jury "has occupied a central position in our system of justice by safeguarding 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).

When courts sentence defendants on the basis of acquitted conduct, they undermine the right to trial by jury. "Americans of the [Founding] period perfectly well understood the lesson that the jury right could be lost not only by gross denial, but [also] by erosion." *Jones v. United States*, 526 U.S. 227, 248 (1999). When the government fails to persuade a jury at trial but is permitted to persuade the court at sentencing, it gets a "second bite at the apple" that "trivializes" the jury's role. *Canania*, 53 F.3d at 776 (Bright, J., concurring). Prohibiting consideration of acquitted conduct at sentencing is thus essential to protecting the jury-trial right.

1. "Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions." *United States v. Haymond*, 588

U.S. —, 139 S.Ct. 2369, 2375 (2019) (plurality). "Those who wrote our constitution" "insisted" on the jury right as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968). So fundamental was this guarantee that, even before the Sixth Amendment guaranteed "the right to ... an impartial jury," Article III enshrined the right to a jury in federal criminal cases as an essential limitation on the otherwise broadly-defined judicial power. *See* U.S. CONST., art. III, § 2, cl. 3.

2. The Court's recent cases "carr[y] out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict," for "[w]ithout that restriction, the jury would not exercise the control that the Framers intended." *Blakely*, 542 U.S. at 306. To be sure, American judges have long exercised substantial discretion at sentencing. But, in both the English tradition and at the time of the Founding, juries possessed the power to check "[t]he potential or inevitable severity of sentences" by issuing either "verdicts of guilty to lesser included offenses" or "flat-out acquittals in the face of guilt." *Jones*, 526 U.S. at 245. A sentencing court's consideration of acquitted conduct denies the jury its constitutionally-protected role as the "circuitbreaker in the State's machinery of justice." *Blakely*, 542 U.S. at 306–07.

Ordinarily, "[a]n acquittal is accorded special weight." *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980). "[I]ts finality is unassailable," "[e]ven if the verdict is based upon an egregiously erroneous foundation." *Yeager v. United States*, 557 U.S. 110,

122–23 (2009) (cleaned up); *accord*, *United States v. Oppenheimer*, 242 U.S. 85 (1916) (Holmes, J.: prior acquittal premised on erroneous application of statute of limitations). An acquittal is constitutionally inviolate. See *Burks v. United States*, 437 U.S. 1, 17 (1978). If a jury's acquittal does not preclude a judge from later basing a sentence on the very facts that the record shows the jury necessarily rejected, the acquittal instead becomes merely "advisory." *Cf. Hurst*, 577 U.S. at 100.

If a jury agrees with the prosecution theory and convicts, its guilty verdict is final unless the defendant demonstrates prejudicial error. But under the current mistaken rule, if a jury finds that the prosecution did not carry its burden and acquits, the government may try again at sentencing, to a new trier of fact and under a lower standard of proof.[17] In other words, if the government wins, it wins decisively. But if it loses, it has a chance to "try its case not once but twice[:] The first time before a jury; the second before a judge." *Canania*, 532 F.3d at 776

[17] While the lower burden of proof may prevent the acquittal from triggering collateral estoppel protection in a subsequent proceeding, see, *e.g.*, *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), that point has no bearing on the significance of the jury right within the bounds of a single criminal case. The jury's task is not simply to decide whether there is reasonable doubt. Rather, the jury is empowered and required to *use* the reasonable doubt principle *as a rule of decision* for determining – authoritatively – whether there is guilt or not, and thus whether the defendant may lawfully be deprived of liberty, consistent with due process. See *Nelson v. Colorado*, 581 U. S. 128 (2017). That is the same constitutional question that the court confronts at sentencing.

(Bright, J., concurring). This state of affairs denigrates the jury's authority in a way the Founders would not recognize and which the Constitution cannot tolerate.

The Constitution generally permits judges latitude to make findings of fact at sentencing, even if those facts in aggravation of the offense are such that they imply the commission of another crime. See, *e.g.*, *Williams v. Oklahoma*, 358 U.S. 576 (1959) (due process did not bar consideration of death of victim when sentencing within statutory limits for kidnapping, even though death could be and was separately prosecuted as murder). But it is wholly different to "allow[ ] judges to materially increase the length of imprisonment based on facts that were *submitted directly to and rejected by* the jury." *Bell*, 808 F.3d at 930 (Millett, J., concurring in denial of rehearing en banc). That practice invades the sanctity and finality of jury verdicts.

3. The practical consequences of permitting the use of acquitted conduct at sentencing are precisely those that concerned the Founders: giving the prosecutor and the judge the power to override the jury, obviating a defendant's choice to go to trial and the prosecution's failure to prove guilt beyond a reasonable doubt. This turns the Constitution on its head: the jury-trial right is "clearly intended to protect the accused from oppression by the Government." *Singer v. United States*, 380 U.S. 24, 31 (1965).

Petitioner here reposed his faith in the jury system. Unlike 70 of his original co-defendants, *see* note 2 *ante*, he refused any plea offer that would have required him to admit participation in gang activity which he denied. The centerpiece of his trial defense

was that he was an independent drug dealer, neither an "enforcer" nor a "supplier" for the Broadway Crips. The jury apparently found these arguments more persuasive than the government's contrary presentation: it acquitted petitioner entirely of RICO conspiracy (with the gang being the "enterprise"), drug conspiracy, commission of murder in aid of racketeering, and use of firearms to commit murder in furtherance of such crimes.

Petitioner's decision to stand on his constitutional jury-trial rights rather than plead guilty to conspiracy and other associational offenses appeared to have been validated by the verdict. But it was undone at sentencing. Presenting no fresh evidence of participation in racketeering or of the alleged conspiratorial agreement, the prosecutor simply urged a new and less skeptical trier of fact – the court – to make a different finding on a lower standard of proof. The prosecutor also relied in part on a vague reference to "several trials and many plea agreements [of non-testifying defendants]. … [T]hat's documented in countless pleas and admissions and in the trials." Sent.Tr. 47. The court acquiesced, applying adjustments to the Sentencing Guideline for drug distribution via the "relevant conduct" rule, USSG § 1B1.3(a)(2). Petitioner was sentenced as though the government had proved its full-blown case to the jury. But if an acquitted defendant is not "guilty enough" to allow even the imposition of costs, *Nelson v. Colorado*, 581 U. S. 128, 137 S.Ct. 1249, 1256 (2017), surely he is not "guilty enough" to be sentenced as if convicted.

Permitting the use of acquitted conduct at sentencing made petitioner's assertion of his right to trial by jury functionally meaningless. The rule

creates a powerful incentive for all defendants to waive that right and plead guilty despite plausible claims of innocence, as well as an incentive for the government to overcharge the case[18] – because anything less than a complete acquittal on every count is functionally equivalent to pleading guilty to all of them.

Barring consideration of acquitted conduct at sentencing would not limit a judge's sentencing discretion to find facts generally. Petitioner does not here assert that the jury must find every fact necessary to justify the severity of the sentence, even within statutory limits established by the verdict. But the court's sentencing authority is properly subordinated to the jury's verdict (*Blakely*, 542 U.S. at 306). The court must not override that verdict by making findings that the record shows the jury necessarily rejected.

### C. The Fifth Amendment's due process clause prohibits courts from relying on acquitted conduct at a federal sentencing.

1. In addition, the use of acquitted conduct at sentencing offends the Due Process Clause. Both before and after the adoption of the Sentencing Guidelines, this Court emphasized that sentencing procedures are not "immune from scrutiny" under that clause. *Williams v. New York*, 337 U.S. 241, 252 n.18 (1949); see *Beckles v. United States*, 580 U.S. 256, 137 S.Ct. 886, 896 (2017) (same, while holding

[18] Justice Scalia noted the systemic hazard "of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty." *Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (dissent).

Guidelines not subject to vagueness challenges). The *Apprendi* line of cases acknowledges that "the Due Process Clause of the Fifth Amendment" works hand-in-hand with the Sixth Amendment in this realm. *Jones*, 526 U.S. at 243 n.6; see also *Alleyne*, 570 U.S. at 104 (same).

It is well-settled that due process principles constrain the types of information courts may consider at sentencing. For example, "due process of law" makes it "constitutionally impermissible" for a court to enhance a sentence based on the "race, religion, or political affiliation of the defendant." *Zant v. Stephens*, 462 U.S. 862, 885 (1983). It likewise forbids sentencing courts from relying on defendants' exercise of the right to appeal, *North Carolina v. Pearce*, 395 U.S. 711, 723–25 (1969); or their right to a jury trial, *United States v. Jackson*, 390 U.S. 570, 581–83 (1968); and forbids a court from resting a sentence upon a prior conviction that has been found constitutionally infirm, *United States v. Tucker*, 404 U.S. 443, 447 (1972) (conviction secured in violation of right to counsel); *cf.* 21 U.S.C. § 851(c). Due process also bars courts from imposing a sentence on the basis of "assumptions concerning [a defendant's] criminal record which were materially untrue." *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (reversing denial of habeas corpus, where judge justified harsher sentence in reliance on listing of prior cases in which defendant, in two instances, had in fact been acquitted).

Due process should similarly be held to exclude the consideration of acquitted conduct at sentencing. Due process guarantees to every individual the "[a]xiomatic and elementary" presumption of innocence that "lies at the foundation of our criminal law."

*Nelson*, 137 S.Ct. at 1255–56 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). It "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). This standard provides "concrete substance for the presumption of innocence," and averts the "lack of fundamental fairness" that would arise if a defendant "could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." *Id.* 363 (internal quotation marks omitted).

2. Due process also guards against the risk of inaccuracy in verdicts and sentencing—a risk that the reliance on acquitted conduct at sentencing heightens.

The government's burden to prove guilt beyond a reasonable doubt is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Winship*, 397 U.S. at 372 (Harlan, J., concurring). And the Due Process Clause guarantees defendants, if nothing else, the right to be sentenced based solely on essentially accurate information. See *Townsend*, 334 U.S. at 741; *cf.* USSG § 6A1.3 (p.s.) ("sufficient indicia of reliability to support its probable accuracy").[19]

[19] The critical importance of the due process accuracy rule is underscored by the fact that neither the Confrontation Clause nor the Rules of Evidence apply at sentencing. See *Williams v. New York*, 337 U.S. 241 (1949); Fed.R.Evid. 1101(d)(3); *cf. Betterman v. Montana*, 587 U.S. 437 (2016) (discussing application *vel non* of Sixth Amendment rights at sentencing).

The Court has found that even the use of facts underlying prior convictions to enhance a sentence raises a problem of "unfairness" because official records purporting to contain "non-elemental" facts may be "prone to error." *Mathis v. United States*, 579 U.S. 500, 512 (2016) (justifying categorical approach to sentencing enhancements). This concern applies even more strongly to prior acquittals, where one factfinder has already weighed the evidence and authoritatively rejected it as a basis for criminal liability. That the factfinder that rejected it – the jury – has primacy in our legal system illustrates the synergy between the due process and jury-trial guarantees. *See also* Eang Ngov, *Judicial Nullification of Juries: The Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 279–84 (2009) (arguing that jury determinations tend to be more accurate than judicial factfinding).

As Justices Scalia, Thomas, and Ginsburg wrote nearly a decade ago: "This has gone on long enough." *Jones*, 574 U.S. at 949 (dissent from denial of petition). The Court "should grant certiorari to put an end to the unbroken string of cases disregarding" the Constitution and this Court's precedents. *Id.* 950.

### D. Even short of any constitutional rule, traditional notions of issue preclusion should be held to bar the use of acquitted conduct, narrowly defined, at sentencing.

This Court has long adhered to the prudent doctrine that if a case can be resolved on non-constitutional grounds, then unnecessary decision of a fraught constitutional issue should be avoided or deferred. *E.g.*, *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam); *Ashwander v. Tenn-*

*essee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). The traditional rules of issue preclusion in federal litigation – which apply in criminal as well as civil cases, albeit only in a "guarded" fashion, *Bravo-Fernandez v. United States*, 585 U.S. 5, 10 (2016) – afford such an alternative path to decision here. While not addressed, to counsel's knowledge, in any of the many lower court decisions on the acquitted conduct issue, that approach may solve the problem presented in a more effective and manageable way than applying the constitutional doctrines just discussed.

This Court has long applied a federal common law doctrine of issue preclusion to enforce the effect on subsequent proceedings of acquittals in federal criminal cases, without regard to whether constitutional double jeopardy would apply. Under that rule, a fact that was necessarily determined in the defendant's favor, if the jury's verdict is to be understood as rationally based on the evidence, instructions and arguments at trial, may not be relitigated at a second trial for a different offense charged by the same sovereign. See *Ashe v. Swenson*, 397 U.S. 436, 443–44 (1970) (discussing cases).[20]

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[20] *Ashe* held that this rule is also enforceable against the States under the Fourteenth Amendment's incorporation of Double Jeopardy protection. In *Currier v. Virginia*, 585 U.S. —, 138 S.Ct. 2144, 2152–56 (2018) four Justices argued (in a concurrence by Justice Gorsuch), that *Ashe* is not premised on a proper understanding of the Double Jeopardy Clause. The concurrence also discusses several differences between ordinary civil collateral estoppel and the *Ashe* rule. Be that as it may, the application of issue preclusion advocated here does not depend on any

Thus, in *Sealfon v. United States*, 332 U.S. 575 (1948), this Court held that a confidently inferred factual basis for the defendant's prior acquittal of conspiracy barred his subsequent prosecution for the substantive offense, even though the latter was not the "same offense" as the former. "[R]es judicata may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings ... and operates to conclude those [factual] matters at issue which the verdict determined though the offenses be different." *Id.* 579. Applying the same principle, the Court in *United States v. Adams*, 281 U.S. 202, 204–05 (1930) , ruled *against* the defendant. Justice Holmes explained that where the jury's basis for a prior acquittal for making a false entry in the books of a bank might, on that record, have been a lack of knowledge or criminal intent at the pertinent time, a second prosecution for a similar offense involving the same falsehood but allegedly committed at a later time was not barred. Petitioner's case is much like Sealfon's, in that the jury acquitted him of all the associational offenses charged, where the only asserted and rational basis for such acquittal was the jury's belief that his admitted criminal conduct was not part of the alleged conspiracy or enterprise.

The same rule that this Court articulated in *Adams* and applied in *Sealfon* should logically govern the effect of a verdict of acquittal on a judge's discretion in fashioning a sentence for any counts of conviction. That is the proper and limited scope of the

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interpretation of the Double Jeopardy Clause. (The holding in *Currier* was that the defendant waived collateral estoppel protection by consenting to a severance of the second charge from the first trial. *Id.* 2149–51.)

"acquitted conduct" rule: Findings of fact that are necessarily implicit in any "not guilty" verdict, presuming it to be rationally based on the evidence and arguments made at trial[21] – whether a general verdict, or an answer to an interrogatory on a special verdict form, as here – and so long as that verdict is not logically inconsistent with any verdict of conviction rendered by the same jury[22] – must be accepted by the sentencing judge.[23] A sentence that rests, in whole or in part, on any contrary factual basis is unlawful.

A verdict of acquittal is final; it can (and should) be reduced to judgment on the count at issue then and there, without more.[24] Thus, to the extent that issue

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[21] In other words, this rule disregards the possibility that the jury may have exercised its power to acquit on any count as a matter of compromise, lenity, or nullification. *Cf. Bravo-Fernandez*, 580 U.S. at 10–11.

[22] This limitation implements the holding of *Bravo-Fernandez*, which cabins the *Ashe* rule. See also *Yeager v. United States*, 557 U.S. 110 (2009) (only acquittals, not counts on which jury may have hung, are to be analyzed for rational basis).

[23] In 1962, the American Law Institute endorsed this Court's *Adams-Sealfon* rule in the final draft of the Model Penal Code as barring prosecution on a new charge if a prior acquittal "necessarily required a determination inconsistent with a fact which must be established for conviction of the second offense." MPC § 1.09(2).

[24] In petitioner's case, the docket does not show that the court ever entered judgments of acquittal on the "not guilty" counts, as required by Fed.R.Crim.P. 32(k)(1). Instead, the docket (Doc. 3659), but not the judgment itself (*see* Doc. 3660) or any written order, states that the court "dismissed" those counts at the time of sentencing. This

preclusion typically requires a prior judgment, that condition is at least functionally satisfied. Whether the pertinent doctrine is more appropriately viewed in this setting as a kind of "issue preclusion" or as an application of the "law of the case," see *Currier*, 138 S.Ct. at 2154 (Gorsuch, J., concurring, highlighting this distinction), the principle is the same.

As this Court has recognized for more than a century, an adjudication of acquittal is final "as to the matters determined by it." *United States v. Oppenheimer*, 242 U.S. 85, 88 (1916) (Holmes, J.). The judge has no more authority, when fashioning and justifying a judgment of sentence on the counts of conviction, to disregard or dispute the facts necessarily established by a jury's "not guilty" determination on other counts than it has to overrule that acquittal entirely.

The present petition should therefore be granted to address and decide the validity of a non-constitutional basis for rejecting the much-maligned "acquitted conduct" doctrine, without the necessity of deciding the complex constitutional issues which have long divided the lower appellate courts.

### 3. This case offers an excellent vehicle for resolving the long-festering issue of sentencing based on "acquitted conduct."

Petitioner is well aware that this Court has reviewed and rejected many petitions presenting the

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technical or clerical error cannot affect the legal significance of those verdicts as fully equivalent to a final judgment for purposes of applying issue preclusion.

"acquitted conduct" issue (albeit, to petitioner's knowledge, not the non-constitutional approach to the problem addressed at Point 2.D.). On the hypothesis that the Court has been waiting for the "right case" to decide these questions, petitioner now suggests that his own be the one.

First, this case involves acquitted conduct in the nature of murder, the most dramatic example imaginable. Trial defense counsel challenged "acquitted conduct" sentencing in the district court. Sent.Tr. 30–31. New counsel advanced a constitutional challenge on appeal, so the issue was both presented and pressed below. And it was ruled upon. App.A3a.

Moreover, at sentencing, the court invoked both of the justifications under federal sentencing law for utilizing "acquitted conduct," that is, both Guidelines "relevant conduct" and statutory "history and characteristics of the defendant." Sent.Tr. 53, 59–60. The court treated as "relevant conduct" a "course of [drug trafficking] conduct," USSG § 1B1.3(a)(2), that the jury rejected in its acquittals on the conspiracy counts. By premising the Guidelines range on 2.8 *kilograms* of cocaine base rather than on the 68.6 *grams* for which the jury convicted, the court added ten levels to the adjusted offense score, USSG § 2D1.1(c) (Level 34 versus Level 24), suggesting more than ten extra years of incarceration.

In addition, the sentencing court expressly found that the 2003 killing for which the jury had acquitted petitioner of murder under the VICAR and firearms counts was part of petitioner's "history," "background" or "conduct" (18 U.S.C. §§ 3553(a)(2), 3661; 21 U.S.C. § 850), warranting imposition of a *de facto* life sentence of 35 years' imprisonment (five years above

the bottom of the selected range) for the 43-year-old defendant.[25] Indeed, on this basis the court expressly stated that it would have imposed the same sentence even if another court were later to find that petitioner was not properly classified as a "career offender." Sent.Tr. 60–61. A favorable decision, in other words, would make a huge practical difference to the petitioner, and the "acquitted conduct" issue was outcome determinative at sentencing.

For these reasons, petitioner's case affords an excellent vehicle for resolution of the questions presented.

**4. At least, this petition should be held pending disposition of the petition in *McClintock*, which presents substantially the same issue.**

Petitioner Shaw is aware that on June 10, 2022, a well-framed petition for certiorari was filed on behalf of Dayonta McClinton, docketed at No. 21-1557. That petition presents substantially the same issues as petitioner's, although not the non-constitutional alternative theory. The *McClinton* petition has garnered significant amicus support, and was the subject of a Call for Response on July 14, 2022. The Court may wish to grant and consolidate the two cases, or if it grants only one of them (or any other petition presenting the "acquitted conduct" issue of which petitioner may be unaware), then hold the other petition(s) pending decision in the granted case.

[25] *See* note 10 *ante*.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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