NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

Michael Ashford - Petitioner,

vs.

United States of America - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court should be able to utilize acquitted conduct in determining the advisory Guidelines and in reaching an appropriate sentence for any purpose other than mitigation, or whether such violates the Due Process Clause of the Fifth Amendment and the jury trial guarantee of the Sixth Amendment.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

(1) *United States v. Michael Ashford*, 2:22-cr-1037 (N.D. Iowa) (criminal proceedings), judgment entered October 27, 2023.

(2) *United States v. Michael Ashford*, 23-3395 (8th Cir.) (direct criminal appeal), judgment entered January 13, 2025, *available at* 2025 U.S.App. LEXIS 635 (8th Cir. 2025).

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The petitioner, Michael Ashford ("Defendant"), through counsel, respectfully prays a writ of certiorari issue to review the January 13, 2025, judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 23-3395.

OPINION BELOW

On January 13, 2025, a panel of the Eighth Circuit Court of Appeals affirmed Ashford's conviction and sentence under 18 U.S.C. §§ 1412(b)(1), (b)(3), (k), concluding the district court could properly determine the advisory sentencing guideline range and consider an appropriate sentence utilizing conduct for which Ashford was acquitted because Ashford's arguments such violated the Due Process Clause of the Fifth Amendment and his right to jury trial under the Sixth Amendment were foreclosed by Eighth Circuit precedent.

JURISDICTION

The Court of Appeals entered its judgment on January 13, 2025. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. Factual History

The Government accused Defendant of wrongdoing related to guns and drugs from two dates. First, the Government asserted on January 8, 2022, Defendant possessed with intent to distribute a controlled substance (methamphetamine, cocaine, marijuana) (count 1); possessed a firearm during and in furtherance of a drug trafficking crime (count 2); and possessed a firearm as a felon (count 3). (R. Doc. 99). Second, the Government asserted on January 14, 2022, Defendant possessed with intent to distribute a controlled substance (methamphetamine, cocaine base, salt of cocaine, marijuana) (count 4).

After Defendant had been arrested and charged, and was in custody, the Government alleged, Defendant engaged in a conspiracy with his co-defendant, Jenise Colvin, to tamper with a witness, Kentrall Barnes (count 5); and in fact, tampered with Kentrall Barnes (count 7). (R. Doc. 99). [1]

On January 8, 2022, law enforcement responded to a report of a firearm being displayed at Kentrall Barnes by a subject in a vehicle while Mr. Barnes stood outside Liquor Tobacco & Gas in Dubuque, Iowa. (Tr. TR II 201:2–16). Law enforcement

[1] In this brief, "R. Doc." refers to the district court docket, criminal Case No. 2:22-cr-1037 in the United States District Court for the Northern District of Iowa. "Sent. TR" refers to the official transcript of the sentencing hearing held October 25, 2023, available at R. Doc. 210. "Tr. TR." refers to the official transcript of the jury trial held May 22, 2023 to May 25, 2023, available at R. Doc. 206–209. "PSR" refers to the presentence report prepared for sentencing in the case. R. Doc. 169.

subsequently located an unoccupied vehicle, in which drugs and a firearm were located. (Tr. TR II 205:7–16). The Government argued it was Defendant who, while in this vehicle, had pointed the firearm at Mr. Barnes. (Tr. TR IV 594:13–615:15, 640:7–653:4). Further, the Government urged Defendant had been in possession of the drugs with the intention of distributing them, using the firearm to advance that distribution, and had then pointed the firearm at Mr. Barnes. (Tr. TR IV 594:13–615:15, 640:7–653:4).

The jury acquitted Defendant of all counts related to the Government's accusations. (R. Doc. 146).

On January 14, 2022, law enforcement attempted to initiate a traffic stop on a vehicle; the vehicle fled and crashed. (Tr. TR II 213:14–214:18). After a foot pursuit, Defendant was located behind a residence and arrested. (*Id.* at 214:19–215:3, 216:25–217:5). Two other people were in the vehicle, and officers located drugs in the vehicle. (*Id.* at 216:14–16, 224:17–225:8, 231:25–232:4). The Government urged Defendant had been in possession of those drugs with the intention of distributing them. (Tr. TR IV 594:13–615:15, 640:7–653:4).

Again, the jury acquitted Defendant of all counts related to the Government's accusations. (R. Doc. 146).

The Government argued in the months of September and October, after Defendant was in custody, Defendant made a series of jail calls to his co-defendant, Jenise Colvin, and to Kentrall Barnes. (Tr. TR IV 594:13–615:15, 640:7–653:4). During these calls, the Government argued, Defendant and Jenise Colvin discussed

how Ms. Colvin could contact Mr. Barnes to influence his testimony, and Defendant spoke with Mr. Barnes to influence his testimony. (Tr. TR IV 594:13–615:15, 640:7–653:4).

The jury convicted Defendant of the charges of conspiracy to tamper with a witness and tampering with a witness. (R. Doc. 146).

The District Court, at sentencing, relied upon the allegations concerning which the jury had acquitted. The District Court made the following findings of fact for sentencing purposes, relative to acquitted conduct:

> As I mentioned, I was the presiding judge at this trial. I listened to all the evidence. I observed all the witnesses. I thought the evidence, quite frankly, was overwhelming, the defendant was, in fact, the person who assaulted K.B. at the gas station and was in possession of the firearm. If nothing else, his admission during one of the recorded phone calls with his codefendant that K.B. was the only one that could put the gun on him was a pretty damning and convincing admission, in my view. And I'll talk about this more in all likelihood later on, but it was clear that K.B's testimony at trial was inconsistent in some ways with his testimony before the grand jury, which was in turn somewhat inconsistent with his statement to the police. His statement to the police at the time was more consistent with what he told the grand jury. My observations of K.B. at the trial was that he was still quite frightened about testifying; he did not want to testify. And, in the end, what that showed me, if anything, was that the defendant's efforts to tamper with that witness was nearly completely successful. And he is not to be rewarded in his effort to intimidate this witness, to keep him from testifying completely truthfully by the Court not taking into account the other evidence in the case that clearly showed that Mr. Ashford was in possession of the firearm and threatened -- threatened K.B. with it. So I find the evidence shows that the defendant was in possession, that he knew he was in possession of the gun on that occasion. He clearly also knew that he was a prohibited person and prohibited from possessing a firearm at the time based on his prior convictions.

(Sent. TR 17:2–18:8).

The District Court continued:

> First of all, my factual findings are these. That the defendant, in my mind, very clearly attempted to recruit Mr. Morris and his wife to be false alibi witnesses.[2] Yes, the defendant has a right to put on a defense, but the defendant does not have a right to suborn perjury. And the fact that he thought that he had secured two alleged alibi witnesses for him and that he was behind this is reflected by the fact that there was a notice of alibi defense in which he named these two witnesses. The timing of the calls, the timing of the reference to the letters, the conversation the defendant had with Mr. Morris, all fall into place to show that the defendant was orchestrating yet another obstructive effort here to evade justice by recruiting two more people to engage in criminal conduct who otherwise would have had no involvement in it. I found one of the most telling parts of it was watching the interview between Investigator Schlosser and the Morrises, when Mr. Morris starts off with the false story that the defendant wanted him to give, and that is that the defendant was with him playing cards and drinking when this assault took place at the gas station, and when Investigator Schlosser says, "I'm a federal agent, and it's a crime to lie to a federal agent," I've never seen anybody back off of a story so quickly as Mr. Morris did at that point. It was clear that he was not going to get himself into trouble for the defendant, that he was putting forth a false statement, and when he was confronted with the possibility that he himself might be in criminal liability for it, he backed off of that story as quickly as possible. No wonder he was not called as a witness at trial under those circumstances. I do find that whole story to be completely inconsistent with all the rest of the evidence. The videotape from the scene showed the defendant at that location. It showed the car at that location. The witness said that the occupant in that car pulled a gun on him. What a surprise, the officers later found a gun in that car. The defendant matched the description given by K.B. at the scene, even if K.B. was afraid to give that same description at trial in front of the defendant. And defendant himself admitted that he was at that gas station. And I understand the nuanced argument made by Ms. Jaeger, and she's a good attorney and is making a good argument, but in context, at that traffic stop, when the officer was talking with the defendant, the defendant knew very

[2] The Government did not allege any counts related to a "false alibi." The referenced individuals were included in a notice of alibi filed by Defendant prior to trial, but neither was called as a witness, and Defendant did not pursue the noticed alibi defense at the time of trial. (*See* R. Doc. 25, 120).

well what time they were talking about. The context makes it clear the officer was talking about an assault that allegedly just took place, and the defendant admitted he was at that station. So there's no doubt in my mind the defendant and the officer were communicating, they both understood they were talking about a time that just occurred, the defendant admitted that he was at the gas station, and then later orchestrates this effort to get two more innocent people in trouble by having them be false alibi witnesses for him. … But when charged with that tampering and the government was continuing to pursue it, the defendant didn't give up. He decided he was going to go and double down on his efforts to evade justice by recruiting two more innocent people and exposing them to criminal liability by getting them to suborn -- or to perjure themselves in federal court to give a false alibi. … His unsuccessful attempt to suborn perjury can't go unpunished in my view.

(Sent. TR 25:21–28:2, 8–14, 23–25).

Further, the District Court found:

Turning first to the offense conduct and, in connection with that, I'm going to address the defendant's argument for a downward variance to the extent that it ties to the use of acquitted conduct to arrive at a sentence. First of all, the offense conduct here is very aggravating. First, pulling a gun on an innocent person in a convenience store, which I find the defendant did, is an aggravating offense. Unless you've been on the receiving end of a firearm, it's hard to describe how scary that can be. The very fact that this individual, K.B., called 9-1-1 when it was clear from everything that followed that he would never in a million years call 9-1-1, but he was so scared that day that he called 9-1-1 and lived to regret it, because it got him in the crosshairs of the defendant. It just shows how incredibly scary being confronted and having a firearm pointed at you can be, and so that's aggravating. And then it gets worse because the defendant then attacks the criminal justice system by attempting to intimidate and tamper with that witness. And then, as I've noted, he goes further and doubles down and then starts to try to establish a false alibi as well. And so this is an offender, as I noted earlier, who not only engages in criminal conduct, and violent criminal conduct at that, but also has utter disregard for the criminal justice system and sees it as something for him to manipulate and evade. And he has in part, in my view, evaded the consequences of his conduct here by successfully intimidating K.B., to

> the point where his testimony was very poor at trial and, in my mind, led to
> his acquittal of the underlying counts of distribution of controlled substances and possession of a firearm.
> …
> And again, while the guidelines could provide for that and I have found the defendant engaged in the acquitted underlying conduct of possession of a firearm and pointing the firearm at K.B., I don't find an upward departure to be appropriate on those grounds. First of all, with regard to the evidence of the 924(c), I don't find that as overwhelming as the evidence the defendant possessed the firearm and pointed it at K.B. Sure, my gut tells me, and there's certainly some evidence to suggest, the defendant was out dealing drugs that night, but it's based largely on conjecture and suppositions, which are probably correct, but nevertheless, there's no hard evidence of tying him to drug dealing that night or that he possessed the firearm directly connected to that drug dealing, like there is that he was in possession of a firearm and that he pointed it at K.B. And so I'm not so convinced that the evidence is so overwhelming that not to hold him accountable for that would somehow be a travesty of justice or not reflect an appropriate sentence.
> …
> The idea of tampering with a witness to avoid – to evade justice, if that is not punished harshly, then our entire system breaks down. And the defendant did it not
> only once but attempted to do it a second time, and he reaped the benefits of his attempt, in my view, because I think he intimidated K.B. sufficient that it led to poor testimony by K.B. and an ultimate acquittal of the underlying conduct here.

(Sent. TR 56:3–57:9, 62:18–63:12, 64:19–65:1).

B. Legal History

Defendant was indicted in the Northern District of Iowa with possession with intent to distribute a controlled substance (methamphetamine, cocaine, marijuana), in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), (b)(1)(D), 851 (count 1 related to January 8, 2022); possession of firearm during and in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) (count 2 related to January 8,

2022); possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (count 3 related to January 8, 2022); possession with intent to distribute a controlled substance (methamphetamine, cocaine base, salt of cocaine, marijuana), in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), (b)(1)(D), 851 (count 4 related to January 14, 2022); conspiracy to tamper with a witness, in violation of 18 U.S.C. § 1512(k) (count 5 related to September and October 2022); and tampering with a witness, in violation of 18 U.S.C. §§ 1512(b)(1) and 1512(b)(3) (count 7 related to October 8, October 10, and October 11, 2022). (R. Doc. 99).

On May 22, 2023, Defendant's four-day jury trial commenced. (R. Doc. 133, 135, 138, 142, 143). The jury submitted three sets of questions. (R. Doc. 144, 145, 151). The first set of questions included three to five questions, depending on one's reading, all of which centered around the charged offenses of conspiracy to tamper and tampering. (R. Doc. 144). The second set of questions included one to two questions, depending on one's reading, which centered around the issue of unanimity of verdicts and potential deadlock. (R. Doc. 145). The third set of questions included two questions, which centered around the evidence related to the charge alleged to have occurred January 14, 2022—count 4, possession with intent to distribute a controlled substance.

On May 25, 2023, the jury returned verdicts of not guilty as to all drug and gun counts (counts 1–4) and verdicts of guilty as to conspiracy to tamper with a witness and tampering with a witness (counts 5, 7). (R. Doc. 146).

The Presentence Investigation Report ("PSR") provided an advisory guideline range of 100–125 months, based upon a base offense level 22 (which relied upon a cross reference utilizing acquitted conduct) and a 2-level enhancement for role in the offense (related to the offenses of conviction). (PSR pp. 9–15, 33 ¶¶ 19–28, 99 at R. Doc. 169). The Government sought an additional 2-level enhancement for obstruction of justice. (Sent. TR 18:11–21:15; R. Doc. 192–93).

Defendant maintained his innocence and objected to the technical and constitutional application of the Guidelines, most importantly in utilizing acquitted conduct. (Sent. TR 13:15–36:11; R. Doc. 168, 194). Defendant argued the appropriate base offense level should be 14, as the District Court should not rely upon acquitted conduct, and the base offense level would otherwise be calculated at 14. (Sent. TR 14:2–11; R. Doc. 194). Defendant objected to the role enhancement, as well as the Government's request for obstruction of justice. (Sent. TR 14:2–11, 21:18–25:17; R. Doc. 194). If Defendant's Guidelines calculations had been utilized—using a base offense level which was not calculated using acquitted conduct and without applying a role enhancement or obstruction enhancement—the resulting advisory range would have been 37–46 months. (R. Doc. 194, p. 2 ¶ 5).

The District Court rejected Defendant's argument acquitted conduct should not be utilized and doing so was a violation of the 5th and 6th Amendments. (Sent. TR 15:25–18:10, 57:10–59:2). The District Court utilized acquitted conduct in both determining the base offense level (utilizing the cross-reference) and the enhancement for obstruction of justice, resulting in a new advisory guideline range

of 120–150 months. (Sent. TR 13:15–29:11). Exhibits related to acquitted conduct were also admitted at sentencing, over Defendant's objection. (Sent. TR 12:18–13:8).

After relying upon acquitted conduct in its application of the Guidelines, the District Court again relied upon acquitted conduct in consideration of sentencing factors under § 3553(a). (Sent. TR 13:15–29:11, 55:22–67:4).

Defendant was sentenced to a term of imprisonment of 150 months, with 3 years' supervised release to follow, and $200 special assessment. (Sent. TR 55:22–67:1; R. Doc. 197, Addendum p. 2–3, 6) On October 27, 2023, Defendant filed a timely Notice of Appeal to the Eighth Circuit. (R. Doc. 199).

Defendant requested the Eighth Circuit reverse the District Court and remand for resentencing, arguing utilizing acquitted conduct for any reason other than in mitigation violated the Fifth Amendment right to Due Process and Sixth Amendment right to jury trial. The Eighth Circuit rejected Defendant's arguments finding Defendant's arguments were foreclosed by existing Eighth Circuit precedent. App. A.

REASONS FOR GRANTING THE WRIT

The issue of acquitted conduct sentencing presents an ongoing and recurring matter for which there is a state and federal split in authority. Furthermore, this matter is of great import to individual constitution rights. While some jurisdictions do not allow acquitted conduct sentencing, others do; this results in a great disparity of incarceration between circuits and states. The problem presented by acquitted conduct sentencing has not yet been resolved by this Court, nor adequately addressed by the U.S. Sentencing Commission or legislation. The need for further action, respectfully, warrants certiorari in this matter.

A writ of certiorari in this case is imperative because it involves an issue of exceptional importance: an accused's fundamental rights to Due Process under the Fifth Amendment and right to a fair jury trial under the Sixth Amendment. *See* Supreme Ct. Rule 10(c).

The issue of acquitted conduct sentencing presents continues to be a recurring problem in both state and federal courts, wherein there is a split of authority in state courts and a split of authority in federal circuits. *See* Supreme Ct. Rule 10(a). Since this Court's denial of certiorari in *McClinton v. United States*, 143 S. Ct. 2400 (2023), this matter continues to be a problem across the federal and state jurisdictions. The question of law should be settled by this Court. *See* Supreme Ct. Rules 10(c).

Argument

1. *This Court Should Make Clear Consideration of Acquitted (or Uncharged and Unproven) Conduct at Sentencing For Any Purpose Other Than Mitigation Violates the Fifth and Sixth Amendments, Joining the Criticism Already Found in the Judiciary and Legislative Bodies.*

People facing sentences of incarceration—a deprivation of liberty—should be held accountable for their actions as presented and approved through the criminal justice system and found beyond a reasonable doubt by a fact finder. To do otherwise undermines fundamental constitutional principles and is an affront to the Fifth Amendment guarantee to due process and the Sixth Amendment guarantee to a fair trial by jury. Yet, federal district courts and some state courts continue to sentence people based upon conduct for which the individual has been acquitted and for which the individual was never charged or convicted. This is what happened to Michael Ashford.

Mr. Ashford was charged with numerous counts of gun and drug allegations, in addition to allegations he conspired to and did tamper with a witness once in custody. While the jury found Mr. Ashford guilty of the conspiracy to tamper and tampering count, it acquitted Mr. Ashford of *all* charges related to guns and drugs. Mr. Ashford's sentence was entirely driven, both in calculation of Guidelines and in determination of an appropriate sentence under § 3553(a), through the use of wholly acquitted conduct. This is not like cases where the individual was found guilty only of a lesser quantity or a gun enhancement was rejected; here, *all* allegations and charges driving the sentence resulted in acquittal. To do so, the jury could not have

believed the Government met its burden of proof—in any respect—with regard to any of the gun and drug allegations.

Use of acquitted conduct at sentencing for any purpose other than in mitigation, including calculation of the Guidelines or determination of § 3553(a) factors (like variances), undermines core constitutional principles, public trust and respect for the law and for the criminal justice system, the role of the jury, and considerations of fairness. So-called "acquitted conduct sentencing" has been the subject of much controversy and criticism, including from members of the legislative branch and members of the judicial branch. While the some circuits and state courts have allowed district courts to consider acquitted conduct at the time of sentencing, *see, e.g.*, *U.S. v. Ruelas-Carbajal*, 933 F.3d 928 (8th Cir. 2019); *U.S. v. Carvajal*, 85 F.4th 602 (1st Cir. 2023); *U.S. v. Freitekh*, 114 F.4th 292 (4th Cir. 2024); *U.S. v. Shah*, 95 F.4th 328 (5th Cir. 2024), others have not or have cautioned against its application (even despite existing precedent), *see, e.g.*, *U.S. v. Ralston*, 110 F.4th 909 (6th Cir. 2024) (noting current circuit caselaw allows acquitted conduct sentencing but noting review of the same must be "especially careful" to ensure the preponderance standard was met because "[t]o do otherwise would contradict the 'special weight' and 'absolute finality' typically afforded 'to a jury's verdict of acquittal—no matter how erroneous its decision.' And noting criticism of acquitted conduct sentencing, as well as this Court's *McClinton* caution and the amendment of the Guidelines "that are likely to reduce the future use of acquitted conduct in determining a defendant's ultimate sentence"); *State v. Cote*, 530 A.2d 775 (N.H. 1987).

It is time this Court firmly rejected the practice of acquitted conduct sentencing. In fact, a careful reading of many cases suggests the lower courts are hungry for this determination. *See, e.g.*, *Carvajal*, 85 F.4th at 611 (finding 1st Circuit precedent allowed for use of acquitted conduct sentencing but noting use of the same has been subject to much criticism, then quoting this Court's suggestion in *McClinton* it may need to take up the constitutional issues presented, and stating "unless and until the Supreme Court does so, or the Sentencing Commission revises the Guidelines, we are bound to follow our controlling precedent and must reject Carvajal's due process challenge."); *Freitekh*, 114 F.4th at 318 (noting "While the Supreme Court has recently called this practice into question [citing *McClinton*], the Court has not yet put an end to it. …Without contrary authority [to circuit precedent which allows the same], the district court did not err when it considered acquitted conduct that was established by a preponderance of the evidence…."); *U.S. v. Kirby*, 2023 U.S.App. LEXIS 26283 (7th Cir. Oct. 4, 2023) (because this Court denied certiorari in *McClinton*, the appeal was effectively moot and noting "Whether or not we agree with Kirby's position, only the Court itself can overrule its decisions.").

Further, although the U.S. Sentencing Commission recently adopted an amendment concerning acquitted conduct sentencing, such leaves open the use of acquitted conduct sentencing. *See, e.g.*, *U.S. v. Ralston*, 110 F.4th at 921 (noting the Guidelines amendment leaves the district court free to consider acquitted conduct in consultation within 18 U.S.C. § 3553(a) and 18 U.S.C. § 3661). Indeed, the Guideline amendment leaves discretion to continue the practice of acquitted conduct sentencing

and does not bar its use. As such, the amendment has done nothing to address the resulting constitutional violations or split in authority. The issue requires this Court's determination.

2. Rejection of Acquitted Conduct Sentencing Is Not Foreclosed by Supreme Court Precedent.

In *Ruelas-Carbajal*,[3] the Eighth Circuit determined use of acquitted conduct at sentencing was acceptable, so long as the conduct had been proven by a preponderance of the evidence. *Ruelas-Carbajal*, 933 F.3d at 930 (citation omitted). In reaching this conclusion, the Eighth Circuit (like so many others) relied upon *Watts*. *Id.* at 930; *see U.S. v. Watts*, 519 U.S. 148 (1997); *see also U.S. v. Ross*, 29 F.4th 1003, 1008 fn. 2 (8th Cir. 2022) (approving upward variance based on uncharged conduct found by a preponderance of the evidence). *Watts*, however, does not go as far as its subsequent interpretation suggests, and use of *Watts* to approve largely unrestricted acquitted conduct sentencing has resulted in a growing chorus of criticism and call for reevaluation.

The question of acquitted conduct sentencing has not been clearly answered by this Court. In *Watts*, a divided Court in summary *per curiam* disposition held "a jury's verdict of acquittal does not prevent the sentencing court from considering

[3] Mr. Ruelas-Carbajal was convicted of conspiracy to distribute and possess with intent to distribute methamphetamine, and one count of distributing methamphetamine, but was acquitted of a second count of distribution. Mr. Ruelas-Carbajal acknowledged he was accountable for 124.45 grams of methamphetamine as a result, but disputed another 26.9 grams which came from the count for which he had been acquitted. *Ruelas-Carbajal*, 933 F.3d at 930.

conduct underlying the acquitted charge, so long as that conduct has been proven by a preponderance of the evidence." 519 U.S at 157. Although many lower courts have interpreted *Watts* to mean all constitutional challenges to acquitted conduct sentencing are foreclosed, including under the Fifth Amendment's Due Process Clause and the Sixth Amendment's right to trial by jury, the summary *Watts* opinion does not go that far.

Watts seemingly reached its conclusion based upon the Double Jeopardy Clause of the Fifth Amendment. *See id.* at 154 (discussing the court of appeals determination was in conflict with double jeopardy jurisprudence). As such, it does not foreclose a challenge under the Due Process Clause of the Fifth Amendment nor a challenge under the right to a jury trial under the Sixth Amendment.

Thereafter, this Court later emphasized *Watts* "presented a very narrow question regarding the interaction of the [U.S. Sentencing] Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." *U.S. v. Booker*, 543 U.S. 220, 240 & n.4 (2005). Thus, this Court has recognized *Watts* did not have occasion to consider whether the Due Process Clause of the Fifth Amendment or the Sixth Amendment's jury-trial guarantee forbid the use of acquitted conduct at sentencing.

Indeed, many judges have determined *Watts* did not resolve, and therefore does not foreclose, a challenge to the practice of acquitted conduct sentencing under the Fifth Amendment's Due Process Clause or the Sixth Amendment's right to a jury trial. *See U.S. v. Lasley*, 832 F.3d 910, 920 and n. 10 (8th Cir. 2016) (Bright, J.,

dissenting); *U.S. v. Canania*, 532 F.3d 764, 766–78 (8th Cir. 2008) (Bright, J., concurring); *U.S. v. White*, 551 F.3d 381, 391–92 (6th Cir. 2008) (Merritt, J., dissenting); *U.S. v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting); *U.S. v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring); *U.S. v. Coleman*, 370 F. Supp. 2d 661, 669–71 (S.D. Ohio 2005); *U.S. v. Pimental*, 367 F. Supp. 2d 143, 150–42 (D. Mass. 2005).

Further supporting the conclusion *Watts* does not foreclose a challenge under the Due Process Clause or the Sixth Amendment, some of the justices whose opinions were expressed by the *per curiam* opinion in *Watts* subsequently stated their disagreement and dissatisfaction with acquitted conduct sentencing. For instance, Justices Thomas, Scalia, and Ginsberg, whose opinions were expressed by the *per curiam* opinion or who filed a concurrence in *Watts* in 1997, subsequently said in *Jones* in 2014 use of judicial factfinding to increase sentences for acquitted conduct "has gone on long enough" and "disregard[s] the Sixth Amendment." *Jones v. U.S.*, 574 U.S. 948, 948 (2014) (Scalia, J., joined by Thomas, Ginsburg, JJ., dissenting from denial of certiorari); *see also Watts*, 519 U.S. at 170 (Stevens, J., dissent) ("The notion 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 is repugnant to that jurisprudence."); *Watts*, 519 U.S. at 170–71 (Kennedy, J., dissent) ("At the least it ought to be said that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the

verdict of acquittal….”). Certainly, these justices would not have reached these conclusions if they believed their prior opinion had foreclosed such a challenge.

Recently, the Supreme Court denied *certiorari* in *McClinton v. U.S.* But, it is clear the Court did so because the U.S. Sentencing Commission promised to review the issue in the next year. Justice Sotomayor wrote:

> As many jurists have noted, the use of acquitted conduct to increase a defendant’s Sentencing Guidelines range and sentence raises important questions that go to the fairness and perceived fairness of the criminal justice system.
>
> These concerns arise partly from a tension between acquitted-conduct sentencing and the jury’s historical role. Juries are democratic institutions called upon to represent the community as “a bulwark between the State and the accused,” and their verdicts are the tools by which they do so. Consistent with this, juries were historically able to use acquittals in various ways to limit the State’s authority to punish, an ability that the Founders prized. With an acquittal, the jury as representative of the community has been asked by the State to authorize punishment for an alleged crime and has refused to do so.
>
> This helps explain why acquittals have long been “accorded special weight,” distinguishing them from conduct that was never charged and passed upon by a jury. This special weight includes traditionally treating acquittals as inviolate, even if a judge is convinced that the jury was “mistaken.”
>
> …
>
> …The fact is that even though a jury’s specific reasons for an acquittal will typically be unknown, the jury has formally and finally determined that the defendant will not be held criminally culpable for the conduct at issue. So far as the criminal justice system is concerned, the defendant “has been set free or judicially discharged from an accusation; released from a charge or suspicion of guilt.”
>
> There are also concerns about procedural fairness and accuracy when the State gets a second bite at the apple with evidence that did not convince the jury coupled with a lower standard of proof. Even

> defendants with strong cases may understandably choose not to exercise their right to a jury trial when they learn that even if they are acquitted, the State can get another shot at sentencing.
>
> Finally, acquitted-conduct sentencing also raises questions about the public's perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system. Various jurists have observed that the woman on the street would be quite taken aback to learn about this practice.
>
> This is also true for jurors themselves. One juror, after learning about acquitted-conduct sentencing, put it this way: "'We, the jury, all took our charge seriously. We virtually gave up our private lives to devote our time to the cause of justice . . . . What does it say to our contribution as jurors when we see our verdicts, in my personal view, not given their proper weight. It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked them to have been found guilty.'" In this Nation, juries have historically been venerated as "a free school . . . to which each juror comes to learn about his rights." 1 A. de Tocqueville, Democracy in America 316 (A. Goldhammer transl. 2004). One worries about the lesson jurors learn from acquitted-conduct sentencing.
>
> The Court's denial of certiorari today should not be misinterpreted. The Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted-conduct sentencing in the coming year. If the Commission does not act expeditiously or chooses not to act, however, this Court may need to take up the constitutional issues presented.

McClinton v. U.S., J. Sotomayor, joined by J. Kavanaugh, J. Alito, 143 S. Ct. 2400, 2401 (2023) (citations omitted) (noting as well "Many other state and federal judges have questioned the practice." (collecting cases)).

The US Sentencing Commission announced it had voted unanimously "to prohibit conduct for which a person was acquitted in federal court from being used in calculating a sentence range under the federal guidelines." USSC News Release,

Commission Votes Unanimously to Pass Package of Reforms Including Limit on Use of Acquitted Conduct in Sentencing Guidelines, available at https://www.ussc.gov/about/news/press-releases/april-17-2024?utm_medium=email&utm_source=govdelivery (April 17, 2024). The Commission's press release continued:

> "The reforms passed today reflect a bipartisan commitment to creating a more effective and just sentencing system," said Commission Chair Judge Carlton W. Reeves.
>
> "Not guilty means not guilty," said Chair Reeves. "By enshrining this basic fact within the federal sentencing guidelines, the Commission is taking an important step to protect the credibility of our courts and criminal justice system." This reform comes amid robust debate on acquitted conduct from across the country. Last year, several Supreme Court Justices called for the Commission to address acquitted conduct, while a bipartisan group of legislators in Congress introduced a bill limiting the use of acquitted conduct in sentencing.
>
> …
>
> The Commission will deliver amendments to Congress by May 1, 2024. If Congress does not act to disapprove the changes, they will go into effect on November 1, 2024.

Id. Yet, the final amended Guideline did not fix the problem. Rather, the amended Guideline still allows for use of acquitted conduct sentencing within the sentencing court's discretion, and in consideration of the appropriate sentence pursuant to 18 U.S.C. § 3553(a). As such, the constitutional problems and split of authority remains. Final determination of this issue is required by this Court.

3. *Supreme Court Authority Requires Facts Which Increase a Sentence Be Proven Beyond a Reasonable Doubt and Thus Use of Acquitted Conduct Sentencing Must Be Found Unconstitutional.*

This Court has held the Sixth Amendment, together with the Due Process Clause, "requires that each element of a crime be proved to the jury beyond a reasonable doubt." *Alleyne v. U.S.*, 570 U.S. 99, 104 (2013) (citing *U.S. v. Gaudin*, 515 U.S. 506, 510 (1995); *In re Winship*, 397 U.S. 358 (1970)). These constitutional protections therefore require "any fact that increases the penalty for a crime beyond the prescribed statutory maximum [ ] be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Similarly, any fact which increases the mandatory minimum sentence must be submitted to the jury and proven beyond a reasonable doubt. *Alleyne*, 570 U.S. at 117.

That is, together, the Sixth Amendment and the Due Process Clause require any fact which increases the penalty to which a defendant is exposed be proven to the jury beyond a reasonable doubt. *Alleyne v. U.S.*, 570 U.S. at 104 (jury must find facts increasing mandatory minimum); *Cunningham v. California*, 549 U.S. 270 (2007) (jury must find facts exposing defendant to longer sentence); *Booker*, 543 U.S. at 226 (Sentencing Guidelines are subject to Sixth Amendment); *Blakely v. Washington*, 542 U.S. 296 (2004) (jury must find all facts essential to sentence); *Ring v. Arizona*, 536 U.S. 584 (2002) (jury must find aggravating factors permitting death penalty); *Apprendi*, 530 U.S. at 490 (jury must find all facts affecting statutory maximum); *see also S. Union Co. v. U.S.*, 567 U.S. 343 (2012) (jury must find facts permitting imposition of criminal fine); *Hurst v. Florida*, 577 U.S. 92 (2016) (jury must make

critical findings needed for imposition of death sentence); *U.S. v. Haymond*, 139 S. Ct. 2369 (2019) (judge cannot make findings to increase sentence during supervised release term). These cases have thus "emphasized the central role of the jury in the criminal justice system." *Lasley*, 832 F.3d at 921 (Bright, J., dissenting).

If an individual is sentenced based upon acquitted conduct—the exact opposite of proof of elements beyond a reasonable doubt—the Fifth and Sixth Amendments are offended. *See, e.g.*, *Canania*, 532 F.3d at 776 (Bright, J., concurring) (Supreme Court's affirmation of jury's central role, as found in *Apprendi*, *Ring*, *Blakely*, *Booker*, lead to conclusion "A judge violates a defendant's Sixth Amendment rights by making findings of fact that either ignore or countermand those made by the jury and then rel[ying] on these factual findings to enhance the defendant's sentence." and further stating such violates the Fifth Amendment via the Due Process Clause); *see also U.S. v. Martinez*, 769 Fed. Appx. 12, 17 (2d Cir. 2019) (Pooler, J., concurring) (acquitted conduct sentencing violates 6th Amendment); *U.S. v. Baylor*, 97 F.3d 542, 549 & n. 2 (D.C. Cir. 1996) (Wald, J., specially concurring) (6th Amendment); *U.S. v. Lombard*, 102 F.3d 1, 5 (1st Cir. 1996) ("many judges think that the guidelines are manifestly unwise, as a matter of policy, in requiring the use of acquitted conduct in calculating the guideline range"); *U.S. v. Lanoue*, 71 F.3d 966, 984 (1st Cir. 1995) (5th and 6th Amendments and stating "the Guidelines' apparent requirement that courts sentence for acquitted conduct utterly lacks the appearance of justice"); *U.S. v. Hunter*, 19 F.3d 895, 898 & n. 4 (4th Cir. 1994) (Hall, J., concurring) (5th, 6th, 8th Amendments). This binding authority requires this Court to hold the use of acquitted conduct sentencing

violates the Fifth Amendment's Due Process Clause and the Sixth Amendment's right to a jury trial.

4. Use of Acquitted Conduct Sentencing Has Been Subject to Criticism By Legislators and Courts Alike, Promotes Disrespect For The Law, Undermines The Jury Through Nullification Because It Is Fundamentally Unfair And Bad Policy Resulting In Excessive Sentences.

Acquitted conduct sentencing "guts the role of the jury in preserving individual liberty and preventing oppression by the government," *U.S. v. Brown*, 892 F.3d 385, 408 (D.C. Cir. 2018) (Millett, J., concurring). This is particularly true here, because this is not a case where some case factor—like drug weight or the presence of a gun—enhanced the statutory penalty. "Rather, they are facts comprising [a] different crime[ ]…" *U.S. v. Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass. 2005). That is, the jury *fully* acquitted Mr. Ashford of all drug and gun related offenses—convicting *only* on the tampering counts. Yet, Mr. Ashford's sentence was entirely driven by the gun and drug allegations rejected by the jury, both in reaching the advisory Guidelines and in determining an appropriate sentence under § 3553(a). Sentencing in this manner completely nullified the jury verdicts: although the jury rejected all allegations of drugs and guns, such was completely ignored and disregarded in favor of a significantly longer sentence based upon drugs and guns.

In *Blakely v. Washington*, this Court called "absurd" the idea "that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it." *Blakely v. Washington*, 542 U.S. 296, 306 (2004). Justice Breyer, while dissenting from decisions holding the

Constitution requires jury factfinding in sentencing, acknowledged a constitutional violation could arise in "egregious" situations, such as when a judge greatly increases a defendant's sentence based on its own finding the defendant had committed murder. *Apprendi*, 530 U.S. at 562 (2000) (Breyer, J., dissenting); *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting) (writing a judge "sentenc[ing] an individual for murder though convicted only of making an illegal lane change" is "the kind of problem that the Due Process Clause is well suited to cure").

The same rings true here: the Eighth Circuit affirmation of a one-way (and seemingly ever increasing) ratchet to increase the sentencing penalty based upon wholly acquitted conduct promoted judicial fact-finding standing in direct opposition to the jury's sacred work.

As members of the criminal justice system, we often preach the sanctity of the jury's role. We instruct the jury they are to determine the facts of the case.[4] We organize our schedules around the convenience of the jury. We repeatedly thank the jurors for their service. We remind them of the importance of their role and of this constitutionally protected civic duty. And yet, after this jury spent hours and days with us, paid close attention to the evidence, determined the facts, sought the truth, spent hours and days deliberating, gave careful consideration to the facts and the

[4] And, despite this Counsel's objections, juries are often instructed their role is to "find the truth," *see, e.g.*, *U.S. v. Denson*, 23-CR-1003-CJW (NDIA), R. Doc. 63, at 5, *U.S. v. Buehler*, 21-CR-02006-CJW (NDIA) , R. Doc. 115-1, at 5.

law,[5] and rendered its verdict—its determinations, findings, conclusions, and verdicts were ignored and disregarded.

This is exactly the kind of judicial fact finding and substitution of conclusions against which appellate opinions warn. However, in other areas, courts are loathe to substitute their conclusions for that of the jury. For example, when a tenuous guilty verdict (or verdict of liability) is rendered, appellate courts often affirm, noting jurists cannot substitute their conclusions for that of the jury. *See, e.g.*, *U.S. v. White*, 675 F.3d 1106, 1109 (8th Cir. 2012) ("But 'the jury is always the ultimate arbiter of a witness's credibility, and this Court will not disturb the jury's findings in this regard.' … We decline to substitute our own judgment for that of the jury." (citations omitted)); *Heaton v. Weitz Co.*, 534 F.3d 882, 888 (8th Cir. 2008) ("We will not substitute our judgment for that of the jury when sufficient evidence exists for the jury to make a reasonable determination."); *Land O'Lakes Creameries, Inc. v. Hungerholt*, 319 F.2d 352, 360–61 (8th Cir. 1963) ("That we might draw different inferences or arrive at a different conclusion is immaterial, since we may not substitute our judgment for that of the jury on disputed issues where substantial testimony supports either of two conclusions."). Or, when there is a challenge to admission of evidence followed by a curative jury instruction, it is assumed juries follow the court's instructions. *See, e.g.*, *U.S. v. Logan*, 210 F.3d 820, 823 (8th Cir. 2000) ("the normal presumption, already alluded to, that juries follow their

[5] Indeed, this jury submitted a series of several groups of questions. R. Doc. 144, 145, 151.

instructions."). And yet, acquitted conduct sentencing turns these principles on their heads, allowing jurists to disregard the jury's judgment to deprive a person of their liberty. This is a violation of both the 5th and 6th Amendments and the kind of harm against which cases like *Apprendi* and *Alleyne* caution.

From the outset, members of the Supreme Court questioned *Watts*, as well as its summary disposition of this issue. Justice Stevens wrote "The notion 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 is repugnant to that jurisprudence." *Watts*, 519 U.S. at 170 (Stevens, J., dissenting). Justice Kennedy criticized the Court for failing to clearly "confront[ ] the distinction between uncharged conduct and [acquitted] conduct," which he called a "question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system" and which "ought to be confronted by a reasoned course of argument, not by shrugging it off." *Id.* at 170 (Kennedy, J., dissenting). "At the least," wrote Justice Kennedy, "it ought to be said that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal…." *Id.*

Since Justice Stevens' and Justice Kennedy's critiques, criticism of acquitted conduct sentencing has continued to grow. Many circuit judges and Supreme Court justices, many legislators, and many scholars have criticized the practice of acquitted conduct sentencing, questioning the fairness and constitutionality of the practice. *See, e.g., Jones*, 574 U.S. at 949–50 (Scalia, J., joined by Thomas & Ginsburg, JJ.,

dissenting from the denial of cert.) (noting it violates the Sixth Amendment when the conduct used to increase a defendant's penalty is found by a judge rather than by a jury beyond a reasonable doubt, and highlighting this is particularly so when the facts leading to a substantively unreasonable sentence are ones for which a jury has acquitted the defendant); *U.S. v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of the r'hrg en banc) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); *Canania*, 532 F.3d at 776 (Bright, J., concurring).

In *Jones v. United States*, petitioners convicted by a jury of distributing small amounts of crack cocaine, but acquitted of conspiring to distribute drugs, challenged the constitutionality of the imposition of sentencing enhancements based on the acquitted conduct. Justice Scalia, joined by Justices Thomas and Ginsburg, dissented from the Court's denial of certiorari, finding "[t]he Sixth Amendment, together with the Fifth Amendment's Due Process Clause, requires that each element of a crime be either admitted by the defendant, or proved to the jury beyond a reasonable doubt." *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial of cert.) (quotation marks omitted). Accordingly, "[a]ny fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, and must be found by a jury, not a judge." *Id.* at 949 (citation and quotation marks omitted). Justices Scalia, Thomas, and Ginsburg observed "the Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution does permit otherwise unreasonable

sentences supported by judicial factfinding, so long as they are within the statutory range." *Id.* The dissenters protested "[t]his has gone on long enough," and urged the Court to "grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment." *Id.* at 950.

Following *Jones*, then-Judge Gorsuch questioned the lawfulness of imposing sentences based on judge-found facts, writing "[i]t is far from certain whether the Constitution allows" "a district judge [to]…increase a defendant's sentence…based on facts the judge finds without the aid of a jury." *U.S. v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (citing *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial of cert.)). Then-Judge Kavanaugh has repeatedly criticized acquitted-conduct sentencing. In *U.S. v. Bell*, where the sentencing judge increased the defendant's sentence by more than 300% based on acquitted conduct, then-Judge Kavanaugh wrote "[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 (Kavanaugh, J., concurring in denial of rehearing en banc). Similarly, in *U.S. v. Brown*, where the defendant was acquitted on most counts but "then sentenced in essence as if he had been convicted on all of the counts," 892 F.3d at 415 (Kavanaugh, J., dissenting in part), then-Judge Kavanaugh called acquitted-conduct sentencing "unsound," and noted "good reasons to be concerned about [it]," *id.*; *see also U.S. v. Henry*, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring) (noting "[t]he oddity…that courts are still using acquitted conduct to increase sentences" after *Booker* held "the Constitution requires

that facts used to increase a sentence beyond what the defendant otherwise could have received be proved to a jury beyond a reasonable doubt").

Judge Millett, of the U.S. Court of Appeals District of Columbia Circuit, has repeatedly expressed the view "allowing a judge to dramatically increase a defendant's sentence based on jury-acquitted conduct is at war with the fundamental purpose of the Sixth Amendment's jury-trial guarantee" because "it considers facts of which the jury expressly disapproved." *Bell*, 808 F.3d at 929–30 (Millett, J., concurring in the denial of rehearing en banc) (quotation marks omitted); *see also id.* at 927 (Kavanaugh, J., concurring in denial of rehearing en banc) ("shar[ing] Judge Millett's overarching concern"). Judge Millett has written the practice "guts the role of the jury in preserving individual liberty and preventing oppression by the government." *Brown*, 892 F.3d at 408 (Millett, J., concurring).

Judge Fletcher, of the Ninth Circuit, has called acquitted conduct sentencing a practice which "defies logic" and plainly violates the Fifth and Sixth Amendments because it "allows the jury's role to be circumvented by the prosecutor and usurped by the judge." *Mercado*, 474 F.3d at 658, 664 (Fletcher, J., dissenting). Numerous other federal judges have reached the same conclusion. *See, e.g., White*, 551 F.3d at 392 (Merritt, J., dissenting); *Faust*, 456 F.3d at 1349 (Barkett, J., specially concurring) ("sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment" and stating punishment based on acquitted conduct is "cruel and perverse").

From the Eighth Circuit, Judge Bright has found "the consideration of 'acquitted conduct' to enhance a defendant's sentence is unconstitutional" under both the Due Process Clause of the Fifth Amendment and the Sixth Amendment. *Canania*, 532 F.3d at 776 (Bright, J., concurring) ("the unfairness perpetuated by the use of 'acquitted conduct' at sentencing in federal district courts is uniquely malevolent"); *Lasley*, 832 F.3d at 920–23 (Bright, J., dissenting). Acquitted conduct sentencing "violates the Due Process Clause of the Fifth Amendment" because it "undermines the notice requirement that is at the heart of any criminal proceeding." *Canania*, 532 F.3d at 776–777. Likewise, acquitted conduct sentencing violates the Sixth Amendment jury-trial guarantee because it creates a "sentencing regime that allows the Government to try its case not once but twice. The first time before a jury; the second before a judge." *Id.* at 776.

These highlighted jurists are not alone. In 2010, the Sentencing Commission completed a survey of federal judges on issues related to sentencing practices. Of the 942 judges to whom the survey was sent and who did not ask to be excluded from the survey, 639 responded. Of those 639 responses, only 16% agreed acquitted conduct should be considered relevant conduct at sentencing. U.S. Sentencing Commission, *Results of Survey of United States District Judges January 2010 through March 2010* pp. 6, 10 (available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf); *see also U.S. v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring) (sentencing based on acquitted conduct "is jurisprudence reminiscent of Alice in

Wonderland. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'"); *U.S. v. Sumerour*, 2020 WL 5983202, at *4 (N.D. Tex. Oct. 8, 2020) (sentencing based on acquitted conduct "offends a sense of justice"); *Coleman*, 370 F. Supp. 2d at 671 n. 14 ("consideration of acquitted conduct has a deleterious effect on the public's view of the criminal justice system"); *U.S. v. Mateo-Medina*, 845 F.3d 546, 554 (3d Cir. 2017) (sentencing based on defendant's arrest record "undoubtedly undermines the fairness, integrity, and public reputation of judicial proceedings").

Many state courts do not allow the practice of acquitted conduct sentencing, either based upon federal principles, state principles, or both. Even where state law would ordinarily permit trial judges to consider other misconduct in imposing a sentence, "many" state supreme courts construe the federal constitution to "make an exception for acquitted conduct—conduct that formed the basis for a charge resulting in an acquittal at trial." Nora V. Demleitner et al., *Sentencing Law and Policy* 290 (3d ed. 2013). The New Hampshire Supreme Court, for example, has concluded considering acquitted conduct at sentencing violates due process because it denies the defendant the "full benefit" of the presumption of innocence "when a sentencing court may have used charges that have resulted in acquittals to punish the defendant." *State v. Cote*, 530 A.2d 775, 785 (N.H. 1987) (citing *U.S. v. Tucker*, 404 U.S. 443 (1972) and *Coffin v. U.S.*, 156 U.S. 432, 453 (1895)); *see also State v. Cobb*, 732 A.2d 425, 442 (N.H. 1999) (reaffirming *Cote* post-*Watts*). Likewise, the North Carolina Supreme Court held "due process and fundamental fairness" preclude a sentencing judge from using acquitted conduct to calculate a defendant's sentence

because it violates the presumption of innocence. *State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988); *see also 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." (quotation marks omitted)).

Construing *Watts*, the Michigan Supreme Court held sentencing based on acquitted conduct violates the Due Process Clause of the Fifth Amendment. *People v. Beck*, 939 N.W.2d 213, 225–226 (Mich. 2019). "[W]hen a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent," and "conduct that is protected by the presumption of innocence may not be evaluated using the preponderance of-the-evidence standard without violating due process." *Beck*, 939 N.W.2d at 225. The court wrote:

> While we recognize that our holding today represents a minority position, one final consideration informs our conclusion: the volume and fervor of judges and commentators who have criticized the practice of using acquitted conduct as inconsistent with fundamental fairness and common sense.
> ….
> This ends here. Unlike many of those judges and commentators, 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.

Id. at 225–226.

The New Jersey Supreme Court canvassed both federal and state constitutional law, emphasizing the criticisms of members of the Supreme Court and

other federal appellate judges, before holding as a matter of state law, "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, 1093–1094 (N.J. 2021). The New Jersey Supreme Court "agree[d] 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." *Id*. at 1090.

Members of the legislature have also criticized acquitted conduct sentencing. U.S. Representatives and U.S. Senators have introduced and promoted bills designed specifically to eliminate the practice. *See, e.g.*, Congressman Steve Cohen, *Cohen, Armstrong, Durbin and Grassley Introduce Bipartisan, Bicameral Prohibiting Punishment of Acquitted Conduct Act*, available at https://cohen.house.gov/media-center/press-releases/cohen-armstrong-durbin-and-grassley-introduce-bipartisan-bicameral#:~:text=The%20Prohibiting%20Punishment%20of%20Acquitted,acquitted%20conduct%20at%20sentencing%2C%20and (Sept. 13, 2023) ("This legislation would end the unjust practice of judges increasing sentences based on conduct for which a defendant has been acquitted by a jury." And promoting an amendment to 18 U.S.C. § 3661 to preclude consideration of acquitted conduct at sentencing); *see also* S. 2788 "Prohibiting Punishment of Acquitted Conduct Act of 2023" (available at https://www.congress.gov/bill/118th-congress/senate-

bill/2788/text?s=1&r=31#:~:text=Introduced%20in%20Senate%20(09%2F13%2F2023)&text=To%20amend%20section%203661%20of,of%20acquitted%20conduct%20at%20sentencing.&text=A%20BILL-,To%20amend%20section%203661%20of%20title%2018%2C%20United%20States%20Code,of%20acquitted%20conduct%20at%20sentencing); H.R. 5430 "Prohibiting Punishment of Acquitted Conduct Act of 2023" (available at https://www.congress.gov/bill/118th-congress/house-bill/5430/titles?s=5&r=1&q=%7B%22search%22%3A%22Prohibiting+Punishment+of+Acquitted+Conduct+Act+of+2023%22%7D); H.R. 1621 "Prohibiting Punishment of Acquitted Conduct Act of 2021" (available at https://www.congress.gov/bill/117th-congress/house-bill/1621/text#:~:text=Placed%20on%20Calendar%20Senate%20(03%2F29%2F2022)&text=To%20amend%20section%203661%20of,of%20acquitted%20conduct%20at%20sentencing); S. 601 "Prohibiting Punishment of Acquitted Conduct Act of 2021" (available at https://www.congress.gov/bill/117th-congress/senate-bill/601/text) S. 2566 "Prohibiting Punishment of Acquitted Conduct Act of 2019" (available at https://www.congress.gov/bill/116th-congress/senate-bill/2566?s=1&r=95).

5. ***Use of Acquitted Conduct Sentencing Is Unconstitutional and in Contravention of Fundamental Constitutional Principles and Longstanding Jurisprudence.***

Acquitted conduct sentencing violates the Fifth and Sixth Amendments' guarantees of due process and jury trial. 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 gives citizens a voice in the courtroom and guarantees them "control in the judiciary." *Id*. at 306. Further, 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). Accordingly, 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 jury trial grew out of "several centuries" of Anglo-American common-law tradition, under which the right to trial by jury was an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Historically, juries acted as the conscience of the community, not only through "flat-out acquittals," but also by "indirectly check[ing]" the "severity of sentences" by issuing "what today we would call verdicts of guilty to lesser included offenses." *Jones v. U.S.*, 526 U.S. 227, 245 (1999); *see also* Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 Wis. L. Rev. 377, 393–394 (1999). For example, "juries w[ould] often…bring in larceny to be under the value of twelvepence," and its lower valuation would thereby avoid a mandatory death sentence. 4 William Blackstone, *Commentaries on the Laws of England* *238–239 (1769). It was therefore common for eighteenth-century jurors to, for example, "downvalue from grand to petty larceny" based on their determination "the goods were of relatively small amount." John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View*

from the Ryder Sources, 50 U. Chi. L. Rev. 1, 54–55 (1983); *see, e.g., State v. Bennet*, 5 S.C.L. 515 (S.C. 1815). Through partial acquittals, juries determined not only guilt but also the defendant's sentence. *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 70–71 (2003). The common law system "left judges with little sentencing discretion: once the facts of the offense were determined by the jury, the 'judge was meant simply to impose [the prescribed] sentence.'" *Alleyne*, 570 U.S. at 108 (*quoting* Langbein, *supra*, at 36–37; *citing* 3 William Blackstone, *Commentaries on the Laws of England* *396 (1768)).

Beginning with *Apprendi*, the Court's sentencing cases have built upon this historical tradition. These cases have "carrie[d] out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict," because "[w]ithout that restriction, the jury would not exercise the control that the Framers intended." *Blakeley*, 542 U.S. at 306.

When courts consider acquitted conduct as a basis for enhancing a defendant's sentence, it undermines the "jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." *S. Union Co.*, 567 U.S. at 350. Traditionally, "[a]n acquittal is accorded special weight." *U.S. 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. U.S.*, 557 U.S. 110, 122–23 (2009) (quotation marks omitted). "[I]f [jurors] acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces

a slack into the enforcement of law, tempering its rigor…." *U.S. ex rel. McCann v. Adams*, 126 F.2d 774, 775–76 (2d Cir. 1942) (L. Hand, J.).

Acquitted conduct sentencing undermines this long traditional and historical principles, affording the government a "second bite at the apple," in which "the Government almost always wins by needing only to prove its (lost) case to a judge by a preponderance of the evidence." *Canania*, 532 F.3d at 776 (Bright, J., concurring). This "diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment." *Mercado*, 474 F.3d at 658 (Fletcher, J., dissenting). Moreover, "using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system," *U.S. v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (Kavanaugh, J., for the court), undermining public perceptions of the importance of jury service, discouraging jurors from taking their duties seriously, and disrespecting the time and attention devoted to jury service. *See Canania*, 532 F.3d at 778 & n.4 (quoting May 16, 2008 letter from juror # 6 to Judge Richard Roberts, as reported by Jim McElhatton, *A $600 drug deal, 40 years in prison; Acquitted of murder, convicted of drug deal, Antwuan Ball faces a decades-long sentence,* Washington Times, June 29, 2008 available at https://www.washingtontimes.com/news/2008/jun/29/a-600-drug-deal-40-years-in-prison/); *accord McClinton*, J. Sotomayor, joined by J. Kavanaugh, J. Alito, 143 S. Ct. at 2401 (referencing same letter).

This Court has held the Due Process Clause works in conjunction with the Sixth Amendment to guarantee fair sentencing procedures. Just as "[a]ny fact that

increases the penalty to which a defendant is exposed constitutes an element of a crime, and must be found by a jury, not a judge," *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial of cert.) (citation and quotation marks omitted), 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 proof beyond a reasonable doubt "standard provides concrete substance for the presumption of innocence." *Id.*

The district court's use of acquitted conduct at sentencing eliminated the core procedural protection requiring proof beyond a reasonable doubt for any factor which would increase his sentence. Sentencing in this manner thereby eliminated the 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. Utilizing acquitted conduct in this manner violates a defendant's 5th and 6th Amendment rights.

Further, reliance on acquitted conduct results in inaccurate sentencing. Even when a defendant has previously been convicted of a crime, this Court has cautioned reliance on facts underlying those prior convictions may raise concerns about "unfairness" and lead to "error." *Mathis v. U.S.*, 579 U.S. 500, 501 (2016). Those same accuracy concerns are implicated here. *See Townsend v. Burke*, 334 U.S. 736, 740–741 (1948) (saying of person whose sentence was enhanced because of acquitted conduct, "this prisoner was sentenced on the basis of assumptions concerning his

criminal record which were materially untrue. Such a result…is inconsistent with due process of law, and such a conviction cannot stand.").

Finally, consideration of acquitted conduct undermined the "notice requirement that is at the heart of any criminal proceeding." *Canania*, 532 F.3d at 777 (Bright, J., concurring). This Court's determination on the issue of acquitted conduct sentencing is required to correct the injustice for Mr. Ashford and all other similarly situated defendants.

CONCLUSION

For the foregoing reasons, Michael Ashford respectfully requests the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 23-3395

United States of America,

Plaintiff - Appellee,

v.

Michael Lynn Ashford,

Defendant - Appellant.

Appeal from United States District Court
for the Northern District of Iowa - Eastern

Submitted: September 23, 2024
Filed: January 13, 2025
[Unpublished]

Before COLLOTON, Chief Judge, LOKEN and SHEPHERD, Circuit Judges.

PER CURIAM.

A jury convicted Michael Ashford of tampering with a witness and conspiracy to tamper with a witness. *See* 18 U.S.C. § 1512(b)(1), (b)(3), (k). Evidence at trial showed that Ashford and another person sought to influence a witness to refrain from testifying against Ashford on a firearms charge. In the same trial, the jury acquitted

Ashford on several other charges: two counts of possessing a controlled substance with intent to distribute, one count of possessing a firearm in furtherance of a drug trafficking crime, and one count of possessing a firearm as a felon. *See* 18 U.S.C. §§ 922(g)(1), 924(c)(1)(A); 21 U.S.C. § 841(a)(1).

The prosecution presented evidence at trial that a man waiting for an Uber ride at a convenience store approached a vehicle driven by Ashford. Ashford, however, was not the Uber driver. When the man approached the car, Ashford displayed a firearm and racked a round into the chamber of the gun. Police were summoned; within an hour of the incident, they located and searched the vehicle. Officers found drugs and a loaded firearm in the car. The witness tampering charge arose from Ashford's later efforts to influence the testimony of the man from the convenience store.

At sentencing, the district court[*] calculated an advisory sentencing guideline range by applying a cross-reference under the guideline for obstruction of justice. Where, as here, the defendant's offense of conviction involved obstructing the investigation or prosecution of a criminal offense, the guidelines direct the court to apply a greater offense level with respect to the underlying criminal offense. *See* USSG § 2J1.2(c). Although the jury determined that the firearms charges were not proved beyond a reasonable doubt, the court found by a preponderance of the evidence that Ashford possessed a firearm as a felon and used the firearm in connection with another felony offense—assault while displaying a dangerous weapon. The court thought the evidence that Ashford possessed the firearm and assaulted the man at the convenience store was "overwhelming."

[*]The Honorable C.J. Williams, Chief Judge, United States District Court for the Northern District of Iowa.

The court also applied a two-level increase for Ashford's role as an organizer or leader in the witness tampering offense. *See* USSG § 3B1.1(c). The court applied another two-level increase for obstruction of justice based on Ashford's efforts to recruit false alibi witnesses. *See* USSG § 3C1.1, comment. (n.7). The district court ultimately determined an advisory guideline range of 120 to 150 months' imprisonment, and sentenced Ashford at the top of the range.

Ashford contends that the district court violated his rights under the Due Process Clause of the Fifth Amendment and his right to a jury trial under the Sixth Amendment by considering the fact that he possessed a firearm as a felon and did so in connection with another felony offense. He maintains that because the jury found him not guilty of the charged firearms offenses, it was unconstitutional for the district court to rely on its own finding that Ashford engaged in the offense conduct. He also contends that it was procedural error under the sentencing guidelines for the court to consider this disputed conduct.

These arguments are foreclosed by circuit precedent. "A preponderance of evidence standard of proof applies to judicial fact finding at sentencing, a standard that satisfies both the Fifth Amendment's guarantee to due process and the Sixth Amendment right to trial by jury." *United States v. Webb*, 545 F.3d 673, 677 (8th Cir. 2008). "It is settled . . . that an acquittal 'does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.'" *United States v. Ruelas-Carbajal*, 933 F.3d 928, 930 (8th Cir. 2019) (quoting *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam)). Ashford's argument under the sentencing guidelines is likewise foreclosed. At the time of sentencing, the sentencing guidelines called for the court to consider all conduct proved by a preponderance of the evidence in determining the advisory guideline range. USSG §§ 1B1.3, 6A1.3, comment. (2023); *see United States v. Whiting*, 522 F.3d 845, 850 (8th Cir. 2008). The Sentencing Commission recently amended the guidelines to limit the use of conduct for which a defendant was

criminally charged but acquitted in federal court, *see* USSG App. C, Amend. 826 (Nov. 1, 2024), but the amendment does not apply retroactively. *See* USSG § 1B1.10(a), (d).

Ashford also contends that the district court imposed an unreasonable sentence. We review the reasonableness of a sentence under a deferential abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 41 (2007). An abuse of discretion occurs when a district court "(1) 'fails to consider a relevant factor that should have received significant weight'; (2) 'gives significant weight to an improper or irrelevant factor'; or (3) 'considers only the appropriate factors but in weighing those factors commits a clear error of judgment.'" *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc) (quoting *United States v. Kane*, 552 F.3d 748, 752 (8th Cir. 2009)).

The district court considered appropriate factors under 18 U.S.C. § 3553(a) and arrived at a reasonable sentence. The court properly cited the aggravated nature of the offense conduct, which included "pulling a gun on an innocent person in a convenience store" and then "attack[ing] the criminal justice system by attempting to intimidate and tamper with that witness." The court also cited Ashford's "very serious troubling criminal history" of eighteen adult convictions, including three violent offenses. The court acknowledged that Ashford suffered from a serious medical condition but reasonably found that it did not justify a more lenient sentence: the federal government has "robust medical facilities," and there was no showing that a shorter prison term would facilitate improved health. There was no abuse of discretion in fashioning the sentence.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3395

United States of America

Plaintiff - Appellee

v.

Michael Lynn Ashford

Defendant - Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Eastern
(2:22-cr-01037-CJW-1)

JUDGMENT

Before COLLOTON, Chief Judge, LOKEN, and SHEPHERD, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

January 13, 2025

Order Entered in Accordance with Opinion:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik