

No. 25-

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**In the Supreme Court of the United States**

KEITH PHARMS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT*

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Whether the Fifth and Sixth Amendments prohibit a sentencing court from increasing a criminal defendant's sentence based on conduct of which a jury acquitted him.

**RELATED PROCEEDINGS**

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii).

United States District Court (N.D. Ga.):

*United States v. Pharms*, No. 1:23-cr-00004-JPB-JSA-2 (Dec. 19, 2024)

United States Court of Appeals (11th Cir.):

*United States v. Pharms*, No. 24-14191 (Feb. 5, 2026)

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**OPINION BELOW**

The opinion of the court of appeals (App. 1a-15a) is unreported but available at 2026 WL 311607.

**JURISDICTION**

The judgment of the court of appeals was entered on February 5, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL PROVISIONS INVOLVED**

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

No person shall \* \* \* be subject for the same offense to be twice put in jeopardy of life or limb; \* \* \* nor be deprived of life, liberty, or property, without due process of law \* \* \* .

U.S. Const. amend. V.

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

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury \* \* \* .

U.S. Const. amend. VI.

### INTRODUCTION

This case concerns the constitutionality of a common sentencing practice that has long troubled jurists: whether a sentencing judge may increase a defendant's sentence based on conduct of which the jury acquitted him.

For most of American history, an acquittal was treated as final and “inviolable.” *McClinton v. United States*, 143 S. Ct. 2400, 2402 (2023) (Sotomayor, J., statement respecting denial of certiorari). “[T]rial by jury” was considered “‘the grand bulwark’ of English liberties,” *Jones v. United States*, 526 U.S. 227, 246 (1999) (quoting 4 William Blackstone, *Commentaries on the Laws of England* \*278 (1769)), serving to check state power to punish in “the form not only of flat-out acquittals” but also through “verdicts of guilty to lesser included offenses” that limited judges’ authority to punish. *Id.* at 245. But beginning in the 1970s, judges increasingly began treating jury acquittals as merely advisory, using conduct of which defendants were acquitted as the basis for enhancing sentences for other offenses. See Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 St. John’s L. Rev. 1416, 1427 (2010) (“The eventual trend toward prior acquittal sentencing found its catalyst in the 1970 passage of [the Organized Crime Control Act].”).

That approach cannot be squared with the bedrock principle that “[j]udges may not assume the jury’s fact-finding function for themselves” consistent with the Constitution’s due process and jury-trial protections, thereby “intrud[ing] on a power the Fifth and Sixth Amendments

reserve to the American people.” *Erlinger v. United States*, 602 U.S. 821, 834-835 (2024). It is therefore unsurprising that members of this Court have repeatedly questioned the constitutionality of enhancing a criminal defendant’s sentence based on acquitted conduct. *E.g.*, *McClinton*, 143 S. Ct. at 2401 (Sotomayor, J., statement respecting denial of certiorari); *id.* at 2403 (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., statement respecting denial of certiorari); *United States v. Watts*, 519 U.S. 148, 161 (1997) (Stevens, J., dissenting); *id.* at 170 (Kennedy, J., dissenting); *Jones v. United States*, 574 U.S. 948, 948 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari); see also *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (opinion of Gorsuch, J.). Numerous state supreme courts have held the practice unconstitutional. Indeed, if petitioner had been prosecuted in Georgia state court rather than federal court there, his sentence could not have been enhanced for conduct of which the jury had acquitted him. But federal courts of appeals uniformly have upheld acquitted-conduct sentencing. See pp. 16-20, *infra*.

This is an excellent case in which to resolve that conflict. Petitioner was tried for participating in a car theft, during which shots were fired at a pursuing officer. App. 2a. At trial, the government’s theory was that petitioner, rather than one of his two co-defendants, was the shooter. App. 3a. But the evidence supporting that theory was slim. There was no physical or forensic evidence tying petitioner to the shooting. App. 39a-41a. The firearm used for the shooting belonged to (and was found at the home of) one of petitioner’s co-defendants, who had been in a separate car at the time and had a history of shootouts. App. 40a, 43a. The only eyewitness testimony

identifying petitioner as the shooter came from a second co-defendant, who had an interest in clearing himself of the shooting. App. 42a. After the shooting, both co-defendants, who were friends, continued on their armed car-theft spree—without petitioner. 09/26/2024 Tr. 73.

The jury returned a special verdict that expressly found petitioner had not discharged the firearm, apparently crediting the defense’s theory that the shooting was committed by one of petitioner’s co-defendants who had both pleaded guilty to reduced charges in exchange for lesser sentences. App. 34a. But because acquitted-conduct sentencing permits sentencing enhancements based on judicial factfinding under a “much different level of proof,” the sentencing judge “[ou]nd by a preponderance of the evidence that [petitioner] was a shooter the night in question” and thus declined to follow the advisory Guidelines’ 123- to 138-month sentence. App. 42a. Instead, the court imposed a sentence of 192 months in prison, App. 45a—a nearly *40 percent, five-year increase* over the maximum Guidelines sentence, effectively replicating the sentence petitioner would have received had the jury convicted him of discharging the weapon. App. 25a.

Three Terms ago, this Court denied review in a similar case to allow the Sentencing Commission an opportunity to consider the issue. The Commission amended the Sentencing Guidelines in 2024 to prospectively “exclude[] consideration of acquitted conduct, in certain circumstances, for purpose of the Sentencing Guidelines calculations.” App. 8a-9a (citing U.S.S.G. § 1B1.3(c) (effective Nov. 1, 2024)). But the Commission declined to act on proposals to make the amendment retroactive (and has no plans to take retroactivity back up). See U.S. Sentencing Commission, Public Meeting at 10 (Aug. 8, 2024), <https://bit.ly/46R0BfO>. And courts have made clear that the amendment is toothless, permitting judges to freely rely on acquitted conduct to increase a defendant’s

sentence by the simple expedient of varying from the Guidelines range under 18 U.S.C. § 3553(a). App. 9a; see *United States v. Texidor*, 164 F.4th 248, 254 (3d Cir. 2026); *United States v. Ware*, 141 F.4th 970, 974 n.2 (8th Cir. 2025); *United States v. Ralston*, 110 F.4th 909, 921 (6th Cir. 2024). The amendment thus does nothing to prevent a judge from “gut[ting] the role of the jury in preserving individual liberty and preventing oppression by the government.” *United States v. Brown*, 892 F.3d 385, 408 (D.C. Cir. 2018) (Millett, J., concurring).

As Justice Scalia observed more than a decade ago (joined by Justices Thomas and Ginsburg), “[t]his has gone on long enough.” *Jones*, 574 U.S. at 949 (Scalia, J., dissenting from denial of certiorari). Review is urgently warranted.

#### STATEMENT

1. In February 2022, Blake Beard and his friend Jokava Harris went with petitioner to steal a Dodge Charger Hellcat from an apartment complex in Atlanta, Georgia. App. 2a. After arriving together, Harris stole the Charger, while Beard drove a separate car with petitioner in the passenger seat. App. 2a. As the cars left, an Atlanta Police Department sergeant assigned to “help[]” a Federal Bureau of Investigation task force “that night” began following in an unmarked vehicle, suspecting that the Charger had been stolen. 09/24/2024 Tr. 47.

The officer heard gunfire. App. 2a. After turning a corner, he saw both vehicles stopped side by side and heard more gunfire, which struck his vehicle. 09/24/2024 Tr. 32. Beard and petitioner then fled in their car, while Harris abandoned the Charger and fled on foot, dropping his phone. *Id.* at 53-56. In the coming months, Beard and Harris stole several more cars without petitioner. 09/24/2024 Tr. 139; 09/26/2024 Tr. 73.

Police recovered the phone and determined it belonged to Harris. 09/24/2024 Tr. 56. During a search of Harris’s home, agents seized “approximately” eight firearms, including a 9mm Glock pistol belonging to Harris that matched shell casings at the scene. 09/26/2024 Tr. 35-36. In September 2022, Harris was charged for the shooting as the lone gunman, see Indictment, *United States v. Harris*, No. 1-22-cr-00324 (N.D. Ga. Sept. 6, 2022) (Doc. 3), around the time that petitioner was incarcerated in a county jail in connection with a probation violation. 09/25/2024 Tr. 56. There, petitioner met Avery Hardy, who previously had been released early from a life sentence but was then serving a five-year sentence for fraud and drug trafficking. *Id.* at 51-56. In December 2022, after reading an article about petitioner’s case, *id.* at 76, Hardy—a “pathological cooperator,” App. 39a—contacted the government offering his testimony in four different cases, including petitioner’s, in exchange for his immediate release and termination of additional pending charges. 09/24/2024 Tr. 70-72, 75-76. Before Avery’s statements, the government “believed [Harris] had fired” the gun and that petitioner was *not* “the shooter.” 09/26/2024 Tr. 36. Soon thereafter, Beard began cooperating with the government as well. 09/24/2024 Tr. 136.

Petitioner, Beard, and Harris were then each charged in connection with the incident. Initially, the government charged petitioner, Beard, and Harris with “aid[ing] and abett[ing]” each other in the shooting. Indictment, *United States v. Harris*, No. 1-23-cr-004 (N.D. Ga. Jan. 3, 2023) (Doc. 1). Following additional proffers, both Beard and Harris agreed to plead guilty in exchange for reduced sentences. Harris pleaded guilty to a felon-in-possession and accessory-after-the-fact charge. Guilty Plea, *Harris, supra* (No. 1-22-cr-00324) (Doc. 64-1). And Beard, who had evaded arrest in connection with “numerous” prior “police chases” (09/24/2024 Tr. 113-114, 139)

involving additional car thefts with Harris, pleaded guilty to an accessory-after-the-fact charge. 09/26/2024 Tr. 73; Judgment, *United States v. Beard*, No. 1-24-cr-00085 (N.D. Ga. Nov. 20, 2024) (Doc. 28).

In September 2024, the government filed a superseding indictment charging petitioner as the sole shooter, “aided and abetted” by Beard and Harris. App. 28a. That distinction was significant because a 18 U.S.C. § 924(c) conviction for “using” a firearm mandates a five-year minimum sentence. But if the government proves that the defendant “discharged” the firearm, the statute mandates a ten-year minimum sentence.

2. At trial, petitioner did not dispute his role in the vehicle theft or that he possessed another firearm. 09/24/2024 Tr. 16-18. Petitioner disputed, however, that he was the shooter. *Id.* at 19. The police officer testified that he could not identify “which of the vehicles the shots were coming from.” *Id.* at 40, 69. The only physical evidence against petitioner was a social media post showing him holding a pistol with “similar characteristics” (09/25/2024 Tr. 195) to the one belonging to (and found with) Harris, who “ha[d] been involved in [prior] shootouts.” App. 40a, 44a; Indictment, *Harris, supra* (No. 1-22-cr-00324) (Doc. 3); Tr. at 20-22, *Harris, supra* (No. 1-22-cr-00324) (Doc. 101). The government’s case against petitioner for the shooting was therefore based almost entirely on the testimony of Beard and Hardy, both of whom were cooperating in an effort to reduce lengthy prison sentences. App. 39a, 42a. And Beard—in addition to facing an expected 20-year sentence, 09/24/2024 Tr. 137, was motivated to clear himself of culpability for the shooting, App. 42a.

Beard testified that petitioner was the shooter. 09/24/2024 Tr. 100, 106. And Hardy testified that petitioner had confessed to firing the shots and that petitioner had told him that he had given the gun to Harris to dispose

of. 09/25/2024 Tr. 58-59, 62-63. (Beard, however, told the government during a proffer that *he* told Harris to dispose of the gun, and testified at trial that he “[n]ever bec[a]me aware \* \* \* that [petitioner] gave the gun to anybody.” 09/24/2024 Tr. 135, 144.) The government presented no corroborating physical or forensic evidence to pin the shooting on petitioner. App. 39a. Ballistics, however, “matched a gun” belonging to Harris and “found at” his home. App. 14a.

The jury found petitioner guilty on all counts—including of using a firearm (or aiding and abetting its use) during a crime of violence under § 924(c). App. 33a-34a. But in completing a special interrogatory form, the jury was asked whether, “[a]s to [that count], was the firearm discharged?” and checked “No,” App. 3a, 33a, rejecting the government’s theory that petitioner was the shooter.

3. The probation office prepared a presentence investigation report (PSR). Recognizing that the jury specifically found petitioner did not discharge the firearm, “the PSR calculated the applicable guideline sentence as the minimum term of imprisonment required by statute [for the § 924(c) charge]: five years, running consecutively with any other term of imprisonment,” rather than the ten years that would have been required if petitioner had been convicted of discharging the weapon. App. 4a. In total, the PSR recommended a Guidelines imprisonment range of 63-78 months, plus 60 months for the § 924(c) conviction to run consecutive to all other counts. App. 5a.

At sentencing, the government moved for an upward variance under 18 U.S.C. § 3553(a) based on its theory that, notwithstanding the jury verdict, petitioner *had* discharged the firearm. App. 5a. The government argued that “[a] jury’s verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge so long as that conduct has been proved by a preponderance of the evidence.” App. 37a. The

government thus urged the court to sentence petitioner to a 204-month total sentence. App. 5a.

The sentencing judge recognized the jury acquitted petitioner of discharging the pistol, but concluded it could nevertheless apply “a much different level of proof” to determine whether petitioner was the shooter. App. 41a-42a. Over petitioner’s express “object[ion] to \* \* \* any factual finding that [petitioner] is the shooter,” App. 36a, the court “conclud[ed] that the evidence supported a finding by the preponderance of the evidence that [petitioner] had been the shooter,” App. 5a.

The court acknowledged that Beard’s and Hardy’s credibility was questionable because both were “cooperating to get a deal.” App. 42a. But the court believed it “makes a lot more sense that it be the passenger [(i.e., Pharms)] who is firing the shots” rather than “a driver” (i.e., Beard or Harris), App. 42a—notwithstanding the undisputed evidence that both vehicles had stopped completely when the officer was fired upon (09/24/2024 Tr. 33) and the only firearm matching shell casings at the scene belonged to (and was found in the possession of) Harris, App. 14a. The judge also credited a photograph on social media of petitioner holding a pistol that the judge thought looked “similar \* \* \* as the one that was used here.” App. 42a. Accordingly, the judge imposed a sentence of 192 months imprisonment, a nearly five-year increase from petitioner’s Guidelines sentence—effectively replicating the ten-year mandatory minimum sentence for discharging a firearm under § 924(c)(1)(A)(iii). See App. 25a.

The court acknowledged that if it had “found differently on the objections as to [the] shooter,” petitioner’s “sentence would not have been the same.” App. 49a. Beard had been sentenced to time served, Judgment, *Beard, supra* (No. 1-24-cr-00085) (Doc. 28), and Harris had been given a sentence of 100 months, App. 43a—barely half of petitioner’s sentence. But the judge

rejected petitioner's argument that there was an unjustified sentencing disparity between petitioner and his co-conspirators because petitioner "was, as I found by a preponderance of the evidence, a shooter." App. 48a.

4. The Eleventh Circuit affirmed, rejecting petitioner's arguments that relying on acquitted conduct to enhance his sentence violated his jury-trial right under the Sixth Amendment and the Due Process Clause of the Fifth Amendment. App. 6a-12a. Respecting the Sixth Amendment, the court explained that it has "long permitted sentencing courts to take into account acquitted conduct proven by a preponderance of the evidence," so "the district court did not act unconstitutionally in varying upward on the basis of conduct of which [petitioner] was acquitted under the higher beyond-a-reasonable-doubt standard." App. 7a, 10a. "So long as the sentence imposed by the district court does not exceed the sentence authorized by the jury verdict and is supported by a preponderance of the evidence, it does not violate the Fifth or Sixth Amendments to consider acquitted conduct at sentencing." App. 11a (quotation marks omitted). Because petitioner's 192-month sentence fell below the "maximum statutory penalty of 240 months," and was supported by a preponderance of the evidence, the court explained that it did not matter that the sentence imposed vastly exceeded what would have been reasonable under the Guidelines. App. 8a.

The court also rejected petitioner's contention that the recent Sentencing Guidelines amendment excludes consideration of acquitted conduct. App. 8a-9a, 37a. Joining the other courts of appeals to have considered the issue, the Eleventh Circuit held that "the amendment does not affect the district court's discretionary application of the § 3553 factors" to vary upward petitioner's sentence. App. 9a.

The court “acknowledge[d] the growing number of opinions \* \* \* criticizing the use of acquitted conduct at sentencing.” App. 10a n.1. But it explained that, “[u]ntil either this [c]ourt sitting en banc or the Supreme Court abrogates our existing precedents, we are bound to follow them.” App. 10a n.1.

### REASONS FOR GRANTING THE PETITION

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

This Court has never squarely addressed whether a sentencing judge’s consideration of acquitted conduct to increase a defendant’s sentence violates the Due Process Clause of the Fifth Amendment or the Sixth Amendment’s guarantee of trial by jury. In *United States v. Watts*, a divided Court, in a summary disposition, held narrowly that considering acquitted conduct at sentencing does not offend the Double Jeopardy Clause of the Fifth Amendment. 519 U.S. at 154 (per curiam). This Court later emphasized that *Watts* “presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument.” *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005). Thus, the *Watts* Court did not have occasion to consider whether the Due Process Clause of the Fifth Amendment or the Sixth Amendment’s jury-trial guarantee forbids the use of acquitted conduct at sentencing. Yet for decades, “[n]umerous courts of appeals”—including the Eleventh Circuit below, App. 9a—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) (Merritt, J., dissenting, joined by five others).

### A. Distinguished Jurists Have Long Criticized Acquitted-Conduct Sentencing

1. From the outset, members of this Court questioned the holding in *Watts*, as well as its summary disposition of such an important issue. Justice Stevens decried the idea “that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved” as “repugnant” to the Constitution. *Watts*, 519 U.S. at 170 (Stevens, J., dissenting). And 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.” *Id.* at 170 (Kennedy, J., dissenting). At minimum, he wrote, increasing a sentence based on conduct underlying an acquitted charge “raise[s] concerns about undercutting the verdict of acquittal.” *Ibid.*

2. As the Eleventh Circuit noted below, in the three decades since *Watts*, there have been a “growing number of opinions \* \* \* criticizing the use of acquitted conduct at sentencing.” App. 10a n.1.

For instance, in *Jones v. United States*, petitioners convicted by a jury of distributing small amounts of crack cocaine—but acquitted of conspiracy—challenged the sentencing judge’s reliance on acquitted conduct to enhance their sentences. 574 U.S. at 948 (Scalia, J., dissenting from denial of certiorari). Justice Scalia, joined by Justices Thomas and Ginsburg, dissented from the Court’s denial of certiorari, explaining that “[t]he Sixth Amendment, together with the Fifth Amendment’s Due Process Clause, requires that each element of a crime be either admitted by the defendant, or proved to the jury beyond a reasonable doubt.” *Ibid.* (quotation marks omitted). Accordingly, “[a]ny fact that increases the

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

Since then, criticism has only intensified. Then-Judge Gorsuch wrote that “[i]t is far from certain whether the Constitution allows” “a district judge [to] \* \* \* increase a defendant’s sentence \* \* \* based on facts the judge finds without the aid of a jury.” *Sabillon-Umana*, 772 F.3d at 1331 (citing *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial of certiorari)). Then-Judge Kavanaugh likewise has written that “[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences \* \* \* seems a dubious infringement of the rights to due process and to a jury trial.” *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing en banc). He observed that “resolving that concern as a constitutional matter would likely require” Supreme Court review. *Id.* at 927. In another case where the defendant was acquitted on most counts but “sentenced in essence as if he had been convicted on all of the[m],” *Brown*, 892 F.3d at 415 (Kavanaugh, J., dissenting in part), then-Judge Kavanaugh described acquitted-conduct sentencing as “unsound,” and noted “good reasons to be concerned about [it],” *ibid.*; see also *United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (opinion of Kavanaugh, J.) (“Many judges and commentators have similarly argued that using acquitted

conduct to increase a defendant's sentence undermines respect for the law and the jury system.”); *United States 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 that “the Constitution requires that facts used to increase a sentence beyond what the defendant otherwise could have received be proved *to a jury beyond a reasonable doubt*”).

Judge Millett has repeatedly lamented that “allowing a judge to dramatically increase a defendant's sentence based on jury-acquitted conduct is at war with the fundamental purpose of the Sixth Amendment's jury-trial guarantee” because “it considers facts of which the jury expressly disapproved.” *Bell*, 808 F.3d at 929-930 (Millett, J., concurring in the denial of rehearing en banc) (quotation marks omitted). The practice thus “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). She observed that “only the Supreme Court can resolve the contradictions in the current state of the law,” and urged this Court “to take up this important, frequently recurring, and troubling contradiction in sentencing law.” *Bell*, 808 F.3d at 932 (Millett, J., concurring in the denial of rehearing en banc).

Judge Collins has recently criticized the “disturbing incongruity” of basing sentences on facts not found by the jury. *United States v. Ghanem*, 143 F.4th 1114, 1132 (9th Cir. 2025) (Collins, J., concurring). He explained that under the reasoning of *Booker* (or at least the first half of it), “it would be a flagrant violation of [a defendant's] Sixth Amendment rights to allow a district judge to make the findings necessary to raise his sentence above” the range set by the Guidelines. *Id.* at 1133. He concluded that “[o]nly the Supreme Court has the authority \* \* \* to address this disquieting anomaly.” *Id.* at 1134. Many

other judges have expressed similar views. Accord, *e.g.*, *United States v. Canania*, 532 F.3d 764, 776-777 (8th Cir. 2008) (Bright, J., concurring) (expressing “strongly held view” that “consideration of ‘acquitted conduct’ to enhance a defendant’s sentence is unconstitutional” and “urg[ing] the Supreme Court to re-examine” practice); *United States v. Mercado*, 474 F.3d 654, 658, 664 (9th Cir. 2007) (Fletcher, J., dissenting) (acquitted-conduct sentencing “defies logic” and violates the Fifth and Sixth Amendments, “allow[ing] the jury’s role to be circumvented by the prosecutor and usurped by the judge”); *White*, 551 F.3d at 392 (Merritt, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) (“sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment”).

3. Three Terms ago, this Court considered a petition that asked whether acquitted-conduct sentencing is constitutionally permissible. *McClinton*, 143 S. Ct. at 2400. Because the Sentencing Commission had announced its intention to “resolve questions around acquitted-conduct sentencing in the coming year,” *id.* at 2403 (Sotomayor, J., statement respecting denial of certiorari), four Justices explained when the Court denied review that it was “appropriate \* \* \* to wait for the Sentencing Commission’s determination before the Court decides whether to grant certiorari in a case involving the use of acquitted conduct,” *id.* (Kavanaugh, J., statement respecting denial of certiorari); accord *id.* (Sotomayor, J., statement respecting denial of certiorari). But those Justices emphasized that “[t]he use of acquitted conduct to alter a defendant’s Sentencing Guidelines range raises important questions.” See *id.* at 2403 (Kavanaugh, J., statement respecting denial of certiorari); *id.* at 2401

(Sotomayor, J., statement respecting denial of certiorari) (similar).

Justice Sotomayor explained that acquitted-conduct sentencing raises serious concerns about fairness, accuracy, and the jury's historic role. *Id.* at 2401-2403 (Sotomayor, J., statement respecting denial of certiorari). Historically, Justice Sotomayor explained, juries “use[d] acquittals in various ways to limit the State’s authority to punish, an ability that the Founders prized.” *Id.* at 2401. Therefore, “acquittals have long been ‘accorded special weight,’ distinguishing them from conduct that was never charged and passed upon by a jury.” *Id.* at 2402 (quoting *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980)). Accordingly, acquittals were “traditionally treat[ed] \* \* \* as inviolate, even if a judge is convinced that the jury was ‘mistaken.’” *Ibid.* (quoting *DiFrancesco*, 449 U.S. at 130). Moreover, acquitted-conduct sentencing raises “concerns about procedural fairness and accuracy when the State gets a second bite at the apple” using “a *lower* standard of proof,” and thereby risks undermining “the public’s perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system.” *Id.* at 2402-2403. Justice Sotomayor explained that acquitted-conduct sentencing creates a regime in which “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.” *Id.* at 2403 (quoting *Canania*, 532 F.3d at 778 n.4 (Bright, J., concurring)).

4. Since *McClinton*, a majority of the federal courts of appeals have recognized the debate raging about the constitutionality of acquitted-conduct sentencing—but they consider themselves bound by *Watts* and their precedents until they are abrogated by this Court. *E.g.*, *United States v. Carvajal*, 85 F.4th 602, 611 (1st Cir. 2023); *United States v. Tapia*, No. 21-1674, 2023 WL

2942922, at \*2 n.2 (2d Cir. Apr. 14, 2023); *United States v. Freitekh*, 114 F.4th 292, 318 (4th Cir. 2024); *United States v. Cardenas-Ramirez*, No. 24-40692, 2026 WL 509046, at \*5 (5th Cir. Feb. 24, 2026); *United States v. Guerrero*, No. 23-1570, 2024 WL 3427204, at \*5 (6th Cir. July 16, 2024); *United States v. Coleman*, 138 F.4th 489, 511-512 (7th Cir. 2025); *United States v. Myore*, 142 F.4th 606, 613 (8th Cir. 2025); App. 10a n.1.

### **B. State Courts Are Divided About The Constitutionality Of Acquitted-Conduct Sentencing**

State courts are divided on whether the federal Constitution permits consideration of acquitted conduct at sentencing. Some states have held, consistent with the federal courts of appeals, that the Constitution permits sentencing courts to consider acquitted conduct. *E.g.*, *State v. Witmer*, 10 A.3d 728, 733 (Me. 2011) (identifying California, Colorado, Florida, Missouri, Ohio, and Wisconsin). But 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); *McClinton*, 43 S. Ct. at 2402 n.4 (2023) (Sotomayor, J., statement respecting denial of certiorari) (“various States have expressly limited such consideration [of acquitted conduct] for decades”).

The New Hampshire Supreme Court, for example, has concluded that considering acquitted conduct at sentencing violates due process because it denies the defendant the “full benefit” of the presumption of innocence to “use[] charges that have resulted in acquittals to punish the defendant.” *State v. Cote*, 530 A.2d 775, 785 (N.H. 1987) (citing *United States v. Tucker*, 404 U.S. 443 (1972), and *Coffin v. United States*, 156 U.S.

432, 453 (1895)); see also *State v. Cobb*, 732 A.2d 425, 442 (N.H. 1999) (reaffirming *Cote* post-*Watts*). The North Carolina Supreme Court has likewise held “that due process and fundamental fairness” preclude a sentencing judge from using acquitted conduct to calculate a defendant’s sentence. *State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988). And the Michigan Supreme Court has held that sentencing based on acquitted conduct violates the Due Process Clause of the Fourteenth Amendment. *People v. Beck*, 939 N.W.2d 213, 225-226 (Mich. 2019).

Many other state courts of last resort (and other state appellate courts) have prohibited the use of acquitted conduct in sentencing. The New Jersey Supreme Court canvassed both federal and state constitutional law, emphasizing the criticisms of members of this Court and other federal appellate judges, 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, 1087-1090, 1092-1095 (N.J. 2021); see also, e.g., *Jefferson v. State*, 353 S.E.2d 468, 474 (Ga. 1987) (“a prior crime may be proven in aggravation despite the lack of a conviction, so long as there has not been a previous acquittal”); *Harris v. State*, 392 So. 3d 125, 127 (Fla. Dist. Ct. App. 2024) (“It is a violation of due process for the court to rely on conduct of which the defendant has actually been acquitted when imposing a sentence.” (quotation marks omitted)); *McNew v. State*, 391 N.E.2d 607, 612 (Ind. 1979) (holding judge acted properly by not “consider[ing] the \* \* \* charge which resulted in acquittal. A not guilty judgment \* \* \* is a finding of innocence. And the courts of this state, including this Court, must give exonerative effect to a not guilty verdict [in sentencing] if anyone is to respect and

honor the judgments coming out of our criminal justice system.”); *Hamilton v. State*, No. 2288, 2025 WL 2304310, at \*7 (Md. Ct. Spec. App. Aug. 11, 2025) (“The very possibility that the court may have disregarded either the jury’s not guilty verdict \* \* \* or the presumption of [the petitioner’s] innocence is enough to convince us to remand for a new sentencing proceeding.” (citing *McClinton*, 143 S. Ct. at 2402-2403 (Sotomayor, J., statement respecting denial of certiorari))).

Although federal courts have treated *Watts* as the last word on acquitted-conduct sentencing, several state supreme courts have construed *Watts* narrowly, consistent with this Court’s description in *Booker*. The Michigan Supreme Court “[ou]nd *Watts* unhelpful in resolving whether the use of acquitted conduct at sentencing violates due process” because “*Watts* addressed only a double-jeopardy challenge.” *Beck*, 939 N.W.2d at 224. 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.” *Melvin*, 258 A.3d at 1090.

Thus, several state supreme courts applying federal law have adopted rules about acquitted-conduct sentencing at odds with the corresponding regional federal court of appeals. This Court has recognized that such splits are particularly intolerable because the rule of decision turns on the happenstance of whether a matter is brought in federal or state court. See, e.g., *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994) (granting review to resolve “conflict between” state supreme court and regional court of appeals regarding constitutionality of state action). Those concerns are directly implicated here. Georgia has a state § 924(c)

analogue that likewise includes a five-year mandatory minimum for possessing a firearm during specified violent crimes, including auto theft. Ga. Code Ann. § 16-11-106. If petitioner had been tried in state court for this offense, his acquittal of discharging the weapon would have precluded consideration of the discharge “in aggravation” of the sentence. *Jefferson*, 353 S.E.2d at 474. In federal court, however, the acquittal poses no obstacle to using that conduct to justify a sentencing enhancement.

### C. This Court’s Intervention Is Necessary

Without this Court’s review, this division of authority will persist. As Justice Scalia warned in *Jones*, the federal courts of appeals continue to “take[] [this Court’s] continuing silence to suggest that the Constitution *does* permit” acquitted-conduct sentencing. See 574 U.S. at 949 (Scalia, J., dissenting from denial of certiorari). Not only has every federal court of appeals with criminal jurisdiction foreclosed such challenges, see *ibid.*—every court of appeals has been asked to reconsider the issue en banc, and each has refused.<sup>1</sup>

Only this Court can bring national uniformity to the question. As Justice Alito observed in *McClinton*, “[e]ven if the Commission eventually decides on policy grounds that [acquitted] conduct should not be considered in

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<sup>1</sup> See, e.g., *United States v. S. Union Co.*, No. 09-2403 (1st Cir. Feb. 17, 2011); *United States v. Allums*, No. 18-1794 (2d Cir. Aug. 13, 2021) (Doc. 420); *United States v. Jackson*, No. 16-1200 (3d Cir. Sept. 6, 2017); *United States v. Benkahla*, No. 07-4778 (4th Cir. July 22, 2008) (Doc. 57); *United States v. Redd*, No. 06-60806 (5th Cir. Mar. 17, 2009) (Doc. 272); *United States v. Baquedano*, No. 13-1007 (6th Cir. Nov. 27, 2013) (Doc. 66); *United States v. Ashqar*, No. 07-3879 (7th Cir. Oct. 28, 2009) (Doc. 60); *United States v. Shield*, No. 15-2341 (8th Cir. Sept. 29, 2016); *United States v. Fitch*, No. 07-10607 (9th Cir. Feb. 22, 2012) (Doc. 142); *United States v. Ray*, No. 11-3383 (10th Cir. Feb. 1, 2013) (Doc. 50); *United States v. Sims*, 309 F. App’x 384 (11th Cir. 2009); *Bell*, 808 F.3d at 927 (D.C. Cir.).

federal sentencing proceedings, that decision will not affect state courts, and therefore the constitutional issue will remain.” 143 S. Ct. at 2403 (Alito, J., concurring in denial of certiorari). And “the vast majority of criminal cases in the U.S. are prosecuted in state courts.” Giovanna Shay & Christopher Lasch, *Initiating A New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 Wm. & Mary L. Rev. 211, 242-243 (2008).

The Sentencing Commission has also failed to “resolve questions around acquitted-conduct sentencing.” *McClinton*, 143 S. Ct. at 2403 (Sotomayor, J., statement respecting denial of certiorari). Although the Commission amended the Sentencing Guidelines to prohibit sentencing courts from considering acquitted conduct as “relevant conduct” when calculating the Guidelines range, that amendment has been stripped of any practical force. See U.S.S.G. amend. 826 (effective Nov. 1, 2024) (amending U.S.S.G. § 1B1.3). Every court of appeals that has considered the impact of the amendment on sentencing has held “that § 1B1.3(c) does not preclude courts from considering acquitted conduct when analyzing the factors under 18 U.S.C. § 3553(a) and determining whether and where to impose a sentence within or outside of the Guidelines range.” *Texidor*, 164 F.4th at 254; *Ware*, 141 F.4th at 974 n.2; *Ralston*, 110 F.4th at 921; App. 9a.

The Commission has declined to act on proposals to make its amendment retroactive and has announced no plans to revisit the issue. See U.S. Sentencing Commission, Public Meeting at 10 (declining to vote on whether the 2024 amendment should apply retroactively).

Nor could further amendments to the Sentencing Guidelines resolve these lingering questions. The Sentencing Commission has taken the position that it lacks the authority to prohibit sentencing courts from

considering acquitted conduct when imposing the sentence (rather than when merely calculating the advisory Sentencing Guidelines range), explaining that sentencing courts are governed by 18 U.S.C. § 3661, “which provides that the full range of conduct, including acquitted conduct, may be considered.” Vice Chair Claire Murray, Remarks at U.S. Sentencing Commission Public Meeting at 14 (Apr. 17, 2024), <https://bit.ly/40Jdipg>. The government has likewise argued that barring consideration of acquitted conduct would be “inconsistent with” § 3661. Proposed Amendments to the Federal Sentencing Guidelines Before the U.S. Sentencing Commission, at 1:58:49 (Feb. 24, 2023) (statement of Jessica D. Aber, U.S. Att’y, E.D. Va.), <https://bit.ly/4ranyBG>. Justice Scalia cited the same statute when he argued that the Sentencing Commission lacked authority to conclusively address acquitted-conduct sentencing. *Watts*, 519 U.S. at 158 (Scalia, J., concurring) (quoting 18 U.S.C. § 3661). Thus, as the Eleventh Circuit concluded below, “until \* \* \* the Supreme Court abrogates our existing precedents,” App. 10a n.1, the practice of acquitted-conduct sentencing will persist.

## II. The Decision Below Is Wrong

Judicial skepticism of acquitted-conduct sentencing is well founded. Its use is “relatively novel” and contrary to historical practice, Murray, 84 St. John’s L. Rev. at 1417, with “little record of acquitted-conduct sentencing before the 1970s,” *McClinton*, 143 S. Ct. at 2402 (Sotomayor, J., statement respecting denial of certiorari.). Before the federal Sentencing Guidelines were promulgated in the late 1980s, acquitted-conduct sentencing remained rare; “[n]ot until the promulgation of the Federal Sentencing Guidelines did the number of appeals for prior acquittal sentencing explode.” Murray, 84 St. John’s L. Rev. at 1427, 1450. Thus, “[w]hen *Watts* was decided, the

legitimacy of considering prior acquitted conduct in sentencing was hardly a venerable or entrenched institution. Indeed, *Watts* placed the Court's imprimatur on a sentencing practice that courts had approved only with carefully nuanced restraints merely twenty-five years before." *Id.* at 1416.

**A. *Watts* Did Not Resolve Whether The Due Process Clause Or Sixth Amendment Jury-Trial Right Prohibits Consideration Of Acquitted Conduct At Sentencing**

The Eleventh Circuit relied on *Watts* to affirm petitioner's sentence. App. 6a-7a, 14a. But as this Court has explained, *Watts* presented a "very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause," and did not consider whether a judge's "sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment" or the implications of acquitted-conduct sentencing for the Due Process Clause. *Booker*, 543 U.S. at 240 & n.4. Lower courts' reliance on *Watts* to resolve different constitutional arguments is therefore "misplaced." *Mercado*, 474 F.3d at 661 (Fletcher, J., dissenting); accord, e.g., *White*, 551 F.3d at 392 (Merritt, J., dissenting, joined by five others) ("reliance on *Watts* as authority for enhancements based on acquitted conduct is obviously a mistake"); *Melvin*, 258 A.3d at 1090 (similar); *Beck*, 939 N.W.2d at 224 (similar). This Court should be particularly reluctant to read *Watts* broadly because the Court decided the case by summary disposition and "did not even have the benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 n.4.

The broader reading applied by federal courts of appeals is hard to square with the Court's more recent sentencing precedents. In the nearly 30 years since *Watts*, this Court has issued numerous decisions emphasizing the essential importance of jury factfinding

under the Sixth Amendment in determining sentences. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (jury must find all facts affecting statutory maximum); *Ring v. Arizona*, 536 U.S. 584 (2002) (jury must find aggravating factors permitting death penalty); *Blakely v. Washington*, 542 U.S. 296 (2004) (jury must find all facts essential to sentence); *Booker*, 543 U.S. 220 (Sentencing Guidelines are subject to Sixth Amendment); *Cunningham v. California*, 549 U.S. 270 (2007) (jury must find facts exposing defendant to longer sentence); *S. Union Co. v. United States*, 567 U.S. 343 (2012) (jury must find facts permitting imposition of criminal fine); *Alleyne v. United States*, 570 U.S. 99 (2013) (jury must find facts increasing mandatory minimum); *Hurst v. Florida*, 577 U.S. 92 (2016) (jury must make critical findings needed for imposition of death sentence); *United States v. Haymond*, 139 S. Ct. 2369 (2019) (judge cannot make findings to increase sentence during supervised release term); *Erlinger*, 602 U.S. 821 (jury must determine whether defendant’s alleged offenses occurred on different occasions or during single criminal episode).

From these cases, “[i]t unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element [of the crime] that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge.” *Jones*, 574 U.S. at 949 (Scalia, J., dissenting from denial of certiorari). Many of these decisions have emphasized that the jury trial right works “in conjunction with the Due Process Clause” because a court’s authority to sentence a defendant fundamentally flows from jury findings regarding facts essential to punishment, which are elements of the offense. *Alleyne*, 570 U.S. at 104; accord *Hurst*, 577 U.S. at 97-98. This series of cases provides a compelling reason to limit *Watts* to the Double Jeopardy

context, if not to overrule it entirely. See *Faust*, 456 F.3d at 1349 (Barkett, J., specially concurring) (“*Watts* \* \* \* has no bearing on this case in light of the Court’s more recent and relevant rulings in *Apprendi v. New Jersey*, *Ring v. Arizona*, *Blakely*, and *Booker*.” (citations omitted)). As this Court has long recognized, it is “less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument.” *Hohn v. United States*, 524 U.S. 236, 251 (1998); *Connecticut v. Doehr*, 501 U.S. 1, 12 n.4 (1991) (similar).

#### **B. The Sixth Amendment Prohibits Courts From Relying On Acquitted Conduct At Sentencing**

The Sixth Amendment’s jury-trial right is one of the most “fundamental reservation[s] of power in our constitutional structure.” *Blakely*, 542 U.S. at 306. By giving citizens “control in the judiciary,” *ibid.*, 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.

Historically, juries acted as the conscience of the community not only through “flat-out acquittals,” but also “indirectly check[ing]” the “severity of sentences” by issuing “what today we would call verdicts of guilty to lesser included offenses.” *Jones*, 526 U.S. at 245; 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 twelvenpence,” and thereby avoid a mandatory death sentence. 4 Blackstone, *Commentaries* \*238-239. It was common for eighteenth-century jurors, for example, to “downvalue from grand to petty larceny” based on their determination that “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 (citations and quotation marks omitted).

In the decades since *Watts*, this Court has again focused on the historic importance of jury factfinding in sentencing. These decisions have helped restore the basic constitutional truth that “[j]udges may not assume the jury’s factfinding function for themselves, let alone purport to perform it using a mere preponderance-of-the-evidence standard.” *Erlinger*, 602 U.S. at 834. Beginning with *Apprendi*, this Court’s sentencing cases have “carrie[d] out this design by ensuring that the judge’s authority to sentence derives wholly from the jury’s verdict” because, “[w]ithout that restriction, the jury would not exercise the control that the Framers intended.” *Blakely*, 542 U.S. at 306. Accordingly, “any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge.” *Jones*, 574 U.S. at 949 (Scalia, J., dissenting from denial of certiorari).

When courts consider acquitted conduct as a basis for increasing 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.” *DiFrancesco*, 449 U.S. at 129. “[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, 122-123 (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 \* \* \* .” *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir. 1942) (L. Hand, J.).

Acquitted-conduct sentencing is at odds with this deeply-rooted history and tradition. It “diminishes the jury’s role and dramatically undermines the protections enshrined in the Sixth Amendment.” *Mercado*, 474 F.3d at 658 (Fletcher, J., dissenting). Permitting acquitted-conduct sentencing transforms the jury from the constitutional role as the “circuitbreaker in the State’s machinery of justice,” into a “mere preliminary” screen whose determinations may be disregarded at sentencing. *Blakely*, 542 U.S. at 306-307. The Sixth Amendment does not tolerate that result.

### **C. The Fifth Amendment Prohibits Courts From Relying On Acquitted Conduct At Sentencing**

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 certiorari) (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

beyond-a-reasonable-doubt “standard provides concrete substance for the presumption of innocence.” *Id.* at 363.

Considering acquitted conduct at sentencing offends the Due Process Clause in several related ways. To begin, using acquitted conduct as a sentencing factor that can be imposed based on facts found by a preponderance of the evidence eliminates the core procedural protection of proof beyond a reasonable doubt and deprives the accused of the full benefit of the presumption of innocence. See *Beck*, 939 N.W.2d at 225 (“conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process”); *Marley*, 364 S.E.2d at 139; *Cote*, 530 A.2d at 785. Even *Apprendi* skeptics acknowledge that basing enhancements that drastically increase sentences on findings made by a preponderance could cause “unusual and serious procedural unfairness” that could give rise to due process violations. 530 U.S. at 562-563 (Breyer, J., dissenting). This case—in which petitioner’s sentence for his § 924(c) conviction was effectively doubled, essentially giving him the sentence he would have received if the jury had convicted him of being the shooter, App. 45a—obviously implicates the concerns Justice Breyer identified.

A court’s reliance on acquitted conduct also implicates due process concerns because the risk of inaccurate sentencing increases when the court relies on facts that the jury determined the prosecution failed to prove. See *Townsend v. Burke*, 334 U.S. 736, 740-741 (1948) (saying, regarding a petitioner 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.” (emphasis added)). Thus, the Fifth Amendment independently prohibits courts

from increasing a defendant's sentence based on conduct of which he has been acquitted.

### **III. This Case Presents An Excellent Vehicle To Resolve The Question Presented**

This case presents an excellent vehicle for the Court to consider whether the Fifth or Sixth Amendments prohibit consideration of acquitted conduct at sentencing.

The record in this case is straightforward, and there are no relevant factual disputes. The jury explicitly acquitted petitioner of discharging the firearm by special interrogatory. App. 3a, 34a. The district court nevertheless increased petitioner's Guidelines sentence by nearly five years based solely on the judge's finding by a preponderance of the evidence that petitioner was the shooter. App. 5a-6a. The sentencing court confirmed that had it "found differently on the objections as to [the] shooter," petitioner's "sentence *would not have been the same.*" App. 49a (emphasis added). The sentencing judge explained away the sentencing disparities with the other participants who received dramatically lower sentences (ranging from time served (Beard) to 100 months (Harris)) on the ground that the court "found by a preponderance of the evidence" that petitioner was "a shooter." App. 48a.

This case presents a particularly stark example of acquitted-conduct sentencing because the court imposed essentially the same sentence that it would have had petitioner been convicted of discharging the firearm. What happened to petitioner is antithetical to the conception of juries that "the Founders prized," whereby a jury acquittal "formally and finally determined that the defendant will not be held criminally culpable for the conduct at issue," forever "releas[ing]" the defendant "from a charge or *suspicion* of guilt." *McClinton*, 143 S. Ct. at 2401-2402 (Sotomayor, J., statement respecting denial of certiorari) (quotation marks omitted)). This case

thus presents a compelling illustration of how acquitted-conduct sentencing eliminates the jury's role "as circuitbreaker in the State's machinery of justice" and instead "relegate[s]" the jury to "a mere preliminary" role of deciding which minor offense will serve as the predicate for "the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 306-307.

In addition, petitioner squarely challenged this acquitted-conduct sentencing at every step of the litigation, throughout the sentencing process, and before the court of appeals. See App. 6a-11a, 36a-37a. The government identified no procedural shortcomings, addressing petitioner's arguments on the merits. And the Eleventh Circuit squarely addressed petitioner's arguments, affirming petitioner's sentence because the court considered itself "bound" by circuit precedent. App. 10a n.1.

The pending petition in *Ghanem v. United States* raises the related but distinct question of whether a sentencing court may consider conduct underlying a vacated conviction when sentencing a defendant. *Ghanem v. United States*, petition for cert. pending, No. 25-970 (filed Feb. 13, 2026). Although that petition asks this Court to decide the constitutionality of considering "uncharged, dismissed, or acquitted conduct" during sentencing, Pet. at i, *Ghanem*, No. 25-970, "acquittals have long been 'accorded special weight'" because, "[w]ith 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." *McClinton*, 143 S. Ct. at 2402 (Sotomayor, J, statement respecting denial of certiorari) (quoting *DiFrancesco*, 449 U.S. at 129). Thus, "[t]he history and nature of acquittals distinguishes the narrow question of acquitted-conduct sentencing from broader questions \* \* \* about the other kinds of facts judges may consider at sentencing," like

“conduct that was never charged and passed upon by a jury.” *Id.* at 2402 & n.3; see also, *e.g.*, *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting) (noting “the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted”); *United States v. Shanks*, No. 24-12247, 2025 WL 1621179, at \*3 (11th Cir. June 9, 2025) (“acquittals have special weight, distinct from conduct that was not charged or passed upon by a jury, because the jury has determined that the state does not have the authority to punish the alleged misconduct”); U.S.S.G. amend. 826 (effective Nov. 1, 2024) (excluding consideration of acquitted conduct when calculating Sentencing Guidelines range because “[a]cquitted conduct is unique,” and explaining “this amendment does not comment on the use of uncharged, dismissed, or other relevant conduct”).

*Ghanem* undoubtedly raises important questions. But if the Court chooses to grant review in *Ghanem*, it should also grant review in this case and have the two cases argued in tandem to ensure that it can resolve the constitutionality of a full range of sentencing enhancements for which there is no jury finding of guilt. Cf. *Lindke v. Freed*, 601 U.S. 187 (2024); *O’Connor-Ratcliff v. Garnier*, 601 U.S. 205 (2024).

\* \* \* \* \*

As Justice Scalia wrote over a decade ago: “This has gone on long enough.” *Jones*, 574 U.S. at 949 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari). The Court “should grant certiorari to put an end to the unbroken string of cases disregarding” the Constitution and this Court’s precedents. *Id.* at 950.

**CONCLUSION**

The petition for a writ of certiorari should be granted.  
Respectfully submitted.

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