

Nos. 25-970, 25-1086

In the
Supreme Court of the United States

RAMI GHANEM, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

KEITH PHARMS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

**On Petitions for a Writ of Certiorari to the
U.S. Court of Appeals for the Ninth and
Eleventh Circuits**

**BRIEF OF 18 FORMER FEDERAL JUDGES AS
AMICI CURIAE IN SUPPORT OF
PETITIONER**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	5
ARGUMENT	10
I. REVIEW WILL HELP TO ENSURE THAT SENTENCING COURTS RESPECT JURY FINDINGS	10
A. There Is Little Historical or Constitu- tional Support for Relying on Criminal Conduct that Does Not Result in a Con- viction.....	11
B. Giving Intelligible Content to the Jury’s Role Requires the Sentencing Court to Respect Jury Findings.....	12
II. REVIEW IS NECESSARY TO PROTECT THE APPEARANCE OF JUSTICE AND LEGITIMACY OF THE COURTS.....	15
CONCLUSION	22
APPENDIX – LIST OF SIGNATORIES	1a

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Allums v. United States</i> , No. 21-996, 2022 WL 135418 (U.S. 2022).....	4
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	4, 5, 9, 10, 12, 13, 14
<i>Asaro v. United States</i> , No. 19-107, 2019 WL 3302460 (U.S. 2019).....	4
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004)	9, 10, 13, 14
<i>Cabrera-Rangel v. United States</i> , No. 18-650, 2018 WL 6065310 (U.S. 2018).....	4
<i>Gall v. United States</i> , 552 U.S. 38 (2007)	18, 19
<i>Gaspar-Felipe v. United States</i> , No. 21-882, 2021 WL 5930606 (U.S. 2021).....	4
<i>Jones v. United States</i> , 574 U.S. 948 (2014)	2, 5
<i>Jones v. United States</i> , 526 U.S. 227 (1999)	11
<i>Ludwikowski v. United States</i> , No. 19-1293, 2020 WL 2510293 (U.S. 2020).....	4
<i>Marshall v. Jerrico</i> , 446 U.S. 238 (1980).....	10
<i>McClinton v. United States</i> , 143 S. Ct. 2400 (2023).....	4, 6, 7, 20

TABLE OF AUTHORITIES—continued

	Page(s)
<i>Offutt v. United States</i> , 348 U.S. 11 (1954).....	10
<i>Osby v. United States</i> , No. 20-1693, 2021 WL 2337153 (U.S. 2021).....	4
<i>People v. Beck</i> , 939 N.W.2d 213 (Mich. 2019)	8
<i>Rita v. United States</i> , 551 U.S. 338 (2007).....	19
<i>State v. Cote</i> , 530 A.2d 775 (N.H. 1987)	9
<i>State v. Melvin</i> , 258 A.3d 1075 (N.J. 2021).....	8
<i>United States v. Bell</i> , 808 F.3d 926 (D.C. Cir. 2015).....	5, 7, 15, 19, 20
<i>United States v. Brown</i> , 892 F.3d 385 (D.C. Cir. 2018).....	5
<i>United States v. Canania</i> , 532 F.3d 764 (8th Cir. 2008).....	21
<i>United States v. Chandler</i> , 732 F.3d 434 (5th Cir. 2013).....	18
<i>United States v. Cruz-Valdivia</i> , 526 F. App'x 735 (9th Cir. 2013).....	18
<i>United States v. Haymond</i> , 588 U.S. 634 (2019).....	7
<i>United States v. Henry</i> , 472 F.3d 910 (D.C. Cir. 2007).....	5
<i>United States v. Ibanga</i> , 271 F. App'x 298 (4th Cir. 2008).....	8

TABLE OF AUTHORITIES—continued

	Page(s)
<i>United States v. Karr</i> , No. 21-90219, 2022 WL 1499288 (5th Cir. May 12, 2022)	8
<i>United States v. Medley</i> , 34 F.4th 326 (4th Cir. 2022)	5
<i>United States v. Mendoza</i> , No. 20-450, 2022 WL 894700, (2d Cir. Mar. 28, 2022)	7
<i>United States v. Paul</i> , 561 F.3d 970 (9th Cir. 2009).....	18
<i>United States v. Pimental</i> , 367 F. Supp. 2d 143 (D. Mass. 2005).....	14, 15, 20
<i>United States v. Ralston</i> , 110 F.4th 909 (6th Cir. 2024)	6
<i>United States v. Sabillon-Umana</i> , 772 F.3d 1328 (10th Cir. 2014).....	5
<i>United States v. Settles</i> , 530 F.3d 920 (D.C. Cir. 2008)	5
<i>United States v. Singh</i> , 877 F.3d 107 (2d Cir. 2017)	18
<i>United States v. Texidor</i> , 164 F.4th 248 (3d Cir. 2026).....	6
<i>United States v. Vaughn</i> , 430 F.3d 518 (2d Cir. 2005)	8
<i>United States v. Ware</i> , 141 F.4th 970 (8th Cir. 2025)	6
<i>United States v. Watts</i> , 519 U.S. 148 (1997).....	1, 2, 3, 8, 11, 12, 17
 CONSTITUTIONAL PROVISIONS & STATUTES	
U.S. Const. amend. V	3, 9, 10, 13, 21

TABLE OF AUTHORITIES—continued

	Page(s)	
U.S. Const. amend. VI.....	3, 9, 10, 12, 15, 18, 21	
18 U.S.C. § 111(b).....	18	
18 U.S.C. § 924(a)(8)	18	
18 U.S.C. § 924(c)(1)(A).....	17	
18 U.S.C. § 1341	18	
18 U.S.C. § 1343	18	
18 U.S.C. § 1956(a)(2)	18	
22 U.S.C. § 2778(c)	18	
U.S.S.G. amend. 826	6	
U.S.S.G. § 1B1.3(c)	6	
MISCELLANEOUS		
Claire McCusker Murray, <i>Hard Cases</i>		
<i>Make Good Law: The Intellectual</i>		
<i>History of Prior Acquittal</i>		
<i>Sentencing</i> , 84 St. John’s L. Rev.		
1415 (2011)	11, 12, 14, 15	
Eang Ngov, <i>Judicial Nullification of</i>		
<i>Juries: Use of Acquitted Conduct at</i>		
<i>Sentencing</i> , 76 Tenn. L. Rev. 235		
(2009).....	15	
Erica K. Beutler, <i>A Look at the Use of</i>		
<i>Acquitted Conduct in Sentencing</i> , 88		
J. Crim. L. & Criminology 809 (1998)		14
Nancy Gertner, <i>Against These</i>		
<i>Guidelines</i> , 87 UMKC L. Rev. 49		
(2018).....	21	

TABLE OF AUTHORITIES—continued

	Page(s)
Nancy Gertner, <i>Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing</i> , 32 Suffolk U. L. Rev. 419 (1999).....	14, 20
Nancy Gertner, <i>Juries and Originalism: Giving “Intelligible Content” to the Right to a Jury Trial</i> , 71 Ohio St. L.J. 935 (2010).....	11, 13

INTEREST OF AMICI CURIAE¹

Amici are 18 former Article III judges who have devoted much of their professional lives to the criminal justice system and who maintain a continuing interest in restoring a system of justice that is fair in both practice and appearance. Collectively, they served roughly 315 years in the federal judiciary. Based on their experience as Article III judges, Amici submit this brief to emphasize the unfairness of the sentences in the cases below. In *Ghanem*, the district court relied upon a vacated conviction to impose a sentence three times higher than the defendant's applicable sentencing range and, in *Pharms*, the district court roughly doubled the defendant's sentence based on acquitted conduct. These decisions reflect a widespread problem in the criminal justice system: defendants are often incarcerated based on alleged criminal conduct that no jury has convicted them of committing.

These cases perfectly illustrate how the lower courts' continued reliance upon *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), as allowing sentencing based on uncharged, dismissed, and acquitted conduct can render a criminal jury utterly irrelevant. Ghanem pled guilty to six of seven charges related to export control violations but chose to go to trial on one count that carried a hefty 25-year statutory minimum sentence. A four-week trial ensued, he was convicted and sentenced to 30 years, but the Ninth Circuit vacated that conviction. On remand, the government did not bother retrying Ghanem,

¹ No counsel for a party authored this brief in whole or in part and no person other than Amici or their counsel made a monetary contribution to its preparation or submission. All parties have received timely notification of the filing of this brief. A full list of amici appears in the Appendix.

figuring that it could get the exact same 30-year sentence without a jury's conviction on this charge. The government's ploy worked. It turned out there was no point in Ghanem's first trial or need to retry the case, as the district court imposed the same 30-year sentence without a conviction that it previously imposed when there was one.

The government sought "an admittedly extraordinary departure" in seeking a 30-year sentence, which was twenty-two years longer than the recommended guideline range of 78–97 months. Ghanem Pet.App.57a. Nevertheless, the district court agreed, explaining that it could "consider conduct of which the defendant has been acquitted" and would treat Ghanem's relevant conduct as "unchanged" since the prior sentencing. Ghanem Pet.App.75a.

The Ninth Circuit affirmed the 30-year sentence, giving "loadbearing weight" to the district court's factual findings made by a preponderance of the evidence that Ghanem committed the offense charged in his vacated conviction. Ghanem Pet.App.32a. The Ninth Circuit recognized that Ghanem's sentence "would violate the Sixth Amendment under Justice Scalia's view" that any fact necessary to prevent a sentence from being substantively unreasonable must be found by a jury beyond a reasonable doubt or admitted by a defendant. *Id.* But it explained that "Justice Scalia's position has not commanded a majority of the Supreme Court, and this court has squarely rejected it." *Id.*; see *Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., joined by Ginsburg and Thomas, J.J., dissenting from denial of certiorari). The Ninth Circuit concluded that Justice Scalia's "argument cannot be squared with *Watts*," which circuit precedent understood to allow sentencing based on criminal conduct

proven only by a preponderance of the evidence. Ghanem Pet.App.31a. Judge Collins took the extraordinary step of filing a concurrence with his own majority opinion to highlight that Ghanem’s case reveals a “disturbing incongruity” in this Court’s precedent, which seems to recognize that this sort of judicial fact-finding violates the Fifth and Sixth Amendments and yet is permissible. Ghanem Pet.App.35a.

The same kind of error occurred in *Pharms* where a defendant’s sentence was roughly doubled based on conduct that no jury found he committed. In fact, this doubling was based on *acquitted* conduct. Pharms was convicted of a slew of crimes associated with a group of people stealing a car. Shots were fired at federal officers pursuing the stolen vehicle, but the jury found in a special interrogatory that Pharms was not the shooter. Nevertheless, the district court “concluded that the evidence supported a finding by the preponderance of the evidence that Mr. Pharms had been the shooter.” Pharms Pet.App.5a. Despite a recommended guideline range of 63–78 months plus a consecutive 60-month sentence (cumulatively 123-138 months) the district court imposed a sixteen-year sentence (192 months) based on this finding. Pharms Pet.App.5a–6a. The district court “noted that the sentence would have been lower had it not found that Mr. Pharms was the shooter.” Pharms Pet.App.5a–6a.

The Eleventh Circuit affirmed, finding Pharms’ constitutional challenge foreclosed by *Watts*. The court “acknowledge[d] the growing number of opinions . . . criticizing the use of acquitted conduct at sentencing. But until either this Court sitting en banc or the Supreme Court abrogates our existing precedents, we are bound to follow them.” Pharms Pet.App.10a n.1.

The decisions below starkly demonstrate how the lower courts' application of *Watts* may render a jury completely irrelevant. In *Ghanem*, no jury was even empaneled to retry the vacated count because—with or without a conviction—the district court believed the defendant was more likely than not guilty and imposed the same sentence. In *Pharms*, the district court ignored the jury's specific rejection of the finding that the defendant was the shooter. The district court concluded otherwise based on a preponderance of the evidence, and roughly doubled *Pharms*' sentence because of it. Thus, the cases reveal that it does not matter if there is a jury or no jury, or a conviction or an acquittal. The bulk of the time each defendant will spend in prison will rest upon facts found by a judge alone.

Excessive sentences where district courts double or triple (or worse) imprisonment based on uncharged, dismissed, or acquitted conduct are common.² Amici believe there is a simple and straightforward solution to this problem, consistent with this Court's line of cases that extends from *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Alleged criminal conduct that has not been proven to a jury beyond a reasonable doubt

² Recent petitions for certiorari reveal that consideration of criminal conduct that does not result in a conviction often results in substantially longer sentences. See, e.g., Petitions for a Writ of Certiorari, *McClinton v. United States*, No. 21-1557 (tripling a sentence based on acquitted conduct); *Allums v. United States*, No. 21-996, 2022 WL 135418 (quadrupling); *Gaspar-Felipe v. United States*, No. 21-882, 2021 WL 5930606 (same); *Osby v. United States*, No. 20-1693, 2021 WL 2337153 (tripling); *Ludwikowski v. United States*, No. 19-1293, 2020 WL 2510293 (same); *Asaro v. United States*, No. 19-107, 2019 WL 3302460 (doubling); *Cabrera-Rangel v. United States*, No. 18-650, 2018 WL 6065310 (tripling).

should not be used to enhance a defendant's penalty for any crime.

INTRODUCTION AND SUMMARY OF ARGUMENT

Twelve years ago, Justice Scalia, joined by Justices Thomas and Ginsburg, 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.” *Jones v. United States*, 574 U.S. 948 (2014) (dissenting from denial of certiorari). They proclaimed: “This has gone on long enough,” and it was time “to put an end to the unbroken string of cases disregarding the Sixth Amendment.” *Id.*; see also *United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part) (explaining “there are good reasons to be concerned about the use of acquitted conduct at sentencing” and imploring the Supreme Court to “fix it”).³

³ See also *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing *en banc*) (explaining that reliance upon acquitted conduct “seems a dubious infringement of the rights to due process and to a jury trial”); *United States v. Settles*, 530 F.3d 920, 923 (D.C. Cir. 2008) (Kavanaugh, J.) (“[W]e understand why defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence[.]”); *United States v. Henry*, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring) (explaining that it is an “oddity,” given the *Apprendi* rule, that “courts are still using *acquitted* conduct to increase sentences beyond what the defendant otherwise could have received”). Similarly, then-Judge Gorsuch cited the *Jones* dissent, explaining, “[i]t is far from certain whether the Constitution allows” using non-jury-found facts at sentencing. *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014); see also *United States v. Medley*, 34 F.4th

The Court had an opportunity to address the problem of acquitted conduct factoring into sentencing in *McClinton v. United States*, 143 S. Ct. 2400 (2023). The Court denied certiorari after the petition was distributed for conference fourteen times and rescheduled four times, but four Justices cautioned that “the denial of certiorari today should not be misinterpreted” and explained that the denial was because the U.S. Sentencing Commission was considering amending the sentencing guidelines to address the consideration of acquitted conduct at sentencing. *Id.* at 2403 (Sotomayor, J., respecting the denial of certiorari), 2403 (Kavanaugh, J, joined by Gorsuch and Barrett, JJ., respecting the denial of certiorari). Justice Sotomayor specifically noted that “[i]f the Commission does not act expeditiously or chooses not to act, however, this Court may need to take up the constitutional issues presented.” *Id.*

The Commission did act but, as the decisions below demonstrate, failed to solve the problem. The Commission prohibited treating acquitted conduct as relevant conduct, but the amendment “does not comment on the use of uncharged, dismissed, or other relevant conduct.” U.S.S.G. amend. 826; *see* U.S.S.G. § 1B1.3(c). The amendment also only prevents acquitted conduct from being used to calculate the guideline range, but the circuits have uniformly found that “acquitted conduct may still be considered when determining the appropriate sentence.” *United States v. Texidor*, 164 F.4th 248, 255 (3d Cir. 2026); *see United*

326, 336 (4th Cir. 2022) (noting “a growing number of critics of this practice”). Petitioners have extensively documented the widespread criticism by other members of the judiciary and scholars of sentencing based on acquitted conduct. Ghanem Pet.13–15; Pharms Pet.13–17.

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). Accordingly, the Eleventh Circuit in *Pharms* found that “the amendment does not affect the district court’s discretionary application of the § 3553 factors here,” and upheld the upward variance based on acquitted conduct. *Pharms* Pet.App.9a–10a. Likewise, the amendment has no bearing on sentencings based on dismissed conduct, as in *Ghanem*, or on state-court sentencings. *See also Erlinger v. United States*, 602 U.S. 821, 868 (2024) (Kavanaugh, J., dissenting) (“[M]ost criminal cases are tried in state court.”).

Consequently, there is a “need to take up the constitutional issues presented” today. *McClinton*, 143 S. Ct. at 2403 (Sotomayor, respecting the denial of certiorari). Otherwise, the rights of criminal defendants and an important structural protection against government overreach will continue to suffer. *See United States v. Haymond*, 588 U.S. 634, 646 (2019) (“Nor did the absence of a jury’s finding beyond a reasonable doubt only infringe the rights of the accused; it also divested the ‘people at large’—the men and women who make up a jury of a defendant’s peers—of their constitutional authority to set the metes and bounds of judicially administered criminal punishments.”).

Certiorari is also warranted to resolve inconsistencies in how uncharged, dismissed, and acquitted conduct are treated in federal and state courts. Federal courts are divided on what weight to give such conduct. While on the D.C. Circuit, Justice Kavanaugh filed a concurring opinion emphasizing: “Importantly. . . federal district judges have power in individual cases to disclaim reliance on acquitted or uncharged conduct.” *Bell*, 808 F.3d at 928 (concurring in denial of rehearing *en banc*). Some district courts do just

that. *See, e.g., United States v. Mendoza*, No. 20-450, 2022 WL 894700, at *2 (2d Cir. Mar. 28, 2022) (summary order) (noting the district judge “had ‘problems’ with ‘the notion that acquitted conduct can be taken into account’” at sentencing and declined to do so). But the Fourth Circuit reversed a district court for “commit[ing] significant procedural error by categorically excluding acquitted conduct from the information that it could consider in the sentencing process.” *United States v. Ibanga*, 271 F. App’x 298, 301 (4th Cir. 2008) (per curiam). The Second Circuit also vacated and remanded a sentence for the district court “to consider all facts relevant to sentencing it determines to have been established by a preponderance of the evidence as it did pre-*Booker*, even those relating to acquitted conduct.” *United States v. Vaughn*, 430 F.3d 518, 527 (2d Cir. 2005). Certiorari is necessary to create uniformity among federal courts.

There is another split among federal and state courts that this Court should resolve. While all federal courts view *Watts* as allowing uncharged, dismissed, and acquitted conduct to be considered at sentencing, several state courts view *Watts* differently. *See, e.g., State v. Melvin*, 258 A.3d 1075, 1090 (N.J. 2021) (“*Watts* is not dispositive of the due process challenge presently before this Court”); *People v. Beck*, 939 N.W.2d 213, 224 (Mich. 2019) (finding “*Watts* unhelpful in resolving whether the use of acquitted conduct at sentencing violates due process” because “*Watts* addressed only a double-jeopardy challenge”); *see also United States v. Karr*, No. 21-90219, 2022 WL 1499288, at *1 n.1 (5th Cir. May 12, 2022) (per curiam) (“Distinguished jurists have called *Watts* into question.”). As Petitioners note, the highest courts in Minnesota, New Jersey, and North Carolina have

found that sentencing decisions relying upon criminal conduct not proven through a conviction violate the U.S. Constitution. Ghanem Pet.17–20; Pharms Pet.17–20; *see also State v. Cote*, 530 A.2d 775, 785 (N.H. 1987) (finding an abuse of discretion in considering acquitted conduct). These splits warrant this Court stepping in to ensure uniform protection for constitutional rights across the country.

Not only are these petitions ideal vehicles for restoring an even application of the Fifth and Sixth Amendments across this country, the opinions below highlight that only this Court can resolve this issue. Pharms Pet.App.10a n.1 (“[U]ntil either this Court sitting en banc or the Supreme Court abrogates our existing precedents, we are bound to follow them.”); Ghanem Pet.App.31a. Judge Collins took the extraordinary step of concurring with his own majority opinion in *Ghanem* to highlight that “this case starkly illustrates a very troubling feature of the precedent we must apply.” Ghanem Pet.App.33a. He recognized that upholding a stiff upward variance based on a vacated conviction was required by precedent but explained that the outcome reflects a “disturbing incongruity.” Ghanem Pet.App.35a. He concluded: “Only the Supreme Court has the authority, if it sees fit, to address this disquieting anomaly.” Ghanem Pet.App.38a.

Amici believe this case can be decided in a simple and straightforward manner that would restore the right to a jury trial to its constitutionally intended status. *Apprendi* adopted a “bright-line rule” in response to “the need to give intelligible content to the right of jury trial.” *Blakely v. Washington*, 542 U.S. 296, 305, 308 (2004). Giving “intelligible content” to the jury trial right meant: “Other than the fact of a prior

conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 301 (quoting *Apprendi*, 530 U.S. at 490). That principle controls here.

Here too, giving “intelligible content” to the jury trial right requires a bright-line rule that no penalty for any crime should be enhanced based on conduct that no jury found proven beyond a reasonable doubt. Quite simply, the right to trial by jury is not respected by ignoring a jury’s acquittal, as in *Pharms*, or by declining to empanel a jury altogether, as in *Ghanem*. This Court should now make explicit what is implicit in the *Apprendi* rule: No defendant’s penalty for any crime should be enhanced based on alleged criminal conduct that has not been proven beyond a reasonable doubt through a conviction or admitted by a defendant.

ARGUMENT

I. REVIEW WILL HELP TO ENSURE THAT SENTENCING COURTS RESPECT JURY FINDINGS

This Court often remarks that “justice must satisfy the appearance of justice.” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). People attach significance to the fact of a jury’s conviction. Yet, the law currently allows sentencing judges to consider alleged criminal conduct where a jury has not been asked to find guilt or has even acquitted. Imposing harsher sentences based on alleged criminal conduct that has not been proven through a valid conviction but is instead proven to a judge by a preponderance of the evidence violates the Fifth and Sixth Amendments.

A. There Is Little Historical or Constitutional Support for Relying on Criminal Conduct that Does Not Result in a Conviction

There is little historical support for sentencing courts relying upon conduct that did not result in a conviction. It is a relatively recent phenomenon. See Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 St. John's L. Rev. 1415, 1444, 1452 (2011) (explaining there was no apparent sentencing based on acquitted conduct before 1970—and fewer than 10 cases addressed the issue prior to the enactment of the federal Sentencing Guidelines—but there were 93 cases in the decade that followed, and the practice continues). At our founding, the criminal code was far simpler, with relatively few offenses, and the public was well aware of the specific penalties that attached to a conviction. Thus, “[w]hile the judge formally imposed the sentence, the jury’s judgment was often outcome-determinative.” Nancy Gertner, *Juries and Originalism: Giving “Intelligible Content” to the Right to a Jury Trial*, 71 Ohio St. L.J. 935, 937 (2010). Knowing this, early juries sometimes engaged in what Blackstone called “pious perjury” by rendering verdicts on lesser charges to mitigate punishments the juries viewed as too harsh. See *Jones v. United States*, 526 U.S. 227, 245 (1999) (quoting 4 William Blackstone, *Commentaries on the Laws of England* 238–39 (1769)).

Still, every U.S. Court of Appeals has concluded that reliance upon uncharged, dismissed, or acquitted conduct at sentencing is appropriate based solely on this Court’s decision in *Watts*. Ghanem Pet.23 n.2. That is remarkable weight to give a case that was GVRed

and decided “without the benefit of oral argument or merits briefing,” *McCusker Murray*, 84 St. John’s L. Rev. at 1456, particularly because, as Justice Kennedy noted, “the case raises a question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system,” *Watts*, 519 U.S. at 170 (dissenting).

Since the Court’s decision in *Watts* and the inappropriate weight it has been given, the issue is no longer percolating through the federal courts. Without the Court’s guidance, the practice will continue; uncharged, dismissed, and acquitted conduct comes into play in criminal sentencings almost every day in every federal courthouse, and the “unbroken string of cases disregarding the Sixth Amendment,” as described by Justice Scalia, will continue to grow longer. *Jones*, 135 S. Ct. at 9 (dissenting from denial of certiorari). This Court often accepts review “where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification.” Stephen M. Shapiro et al., *Supreme Court Practice* 254 (10th ed. 2013). That is precisely the case here.

B. Giving Intelligible Content to the Jury’s Role Requires the Sentencing Court to Respect Jury Findings

Trials matter because they have consequences, and those consequences are particularly serious for criminal defendants facing sentences of incarceration or even death. The Founders knew that and, given their distrust of government, ensured that the people could serve as a check on the power of the government by requiring criminal cases be decided in a “public trial, by an impartial jury.” U.S. Const. amend. VI. As *Apprendi* emphasized, the Sixth Amendment ensures that “*the truth of every accusation*” must be

unanimously confirmed under the watchful eye of the public before a criminal defendant can be convicted and punished. 530 U.S. at 477 (quoting 4 Blackstone, 343).

Britain's distrust of American colonists led it to strip away trial by jury through vice-admiralty courts and, "[a]fter securing their independence, the founding generation sought to ensure what happened before would not happen again." *Erlinger*, 602 U.S. at 829. Trial by jury in criminal cases was "the only right included in every newly enacted state constitution." *Id.* at 830. "Equally, the Fifth and Sixth Amendments sought to ensure that a judge's power to punish would 'deriv[e] wholly' from, and remain always 'control[led]' by, the jury and its verdict." *Id.* at 831 (quoting *Blakely*, 542 U.S. at 306). Thus, "[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. To hold otherwise might not portend a revival of the vice-admiralty courts the framers so feared." *Id.* at 834–35.

Apprendi and the cases that expanded upon its holding provide a "substantial role for the twentieth century jury—namely, a role in sentencing offenders." Gertner, 71 Ohio St. L.J. at 935. They hold that "[v]irtually 'any fact' that 'increase[s] the prescribed range of penalties to which a criminal defendant is exposed' must be resolved by a unanimous jury beyond a reasonable doubt (or freely admitted in a guilty plea)." *Erlinger*, 602 U.S. at 834.

This Court explained that a "bright-line rule" is necessary "to give intelligible content to the right of jury trial." *Blakely*, 542 U.S. at 305, 308. Justice Scalia explained that right "has no intelligible content unless it means that all the facts which must exist in order

to subject the defendant to a legally prescribed punishment *must* be found by the jury.” *Apprendi*, 530 U.S. at 499 (concurring). And the Court itself has confirmed: “The jury could not function as circuitbreaker in the State’s machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.” *Blakely*, 542 U.S. at 306–07.

The jury’s verdict is what validates the legitimacy of a sentence and must dictate the basis for the sentence. See Erica K. Beutler, *A Look at the Use of Acquitted Conduct in Sentencing*, 88 J. Crim. L. & Criminology 809, 843 (1998) (“When the legislature statutorily classifies specific conduct as criminal, it can only punish that behavior by recourse to the criminal justice system established by the Constitution. A conviction is a necessary prerequisite to punishment based on that conduct. While not always an accurate barometer of factual guilt, conviction symbolizes legal guilt, thereby legitimizing the government’s authority to deprive a person of his life, liberty or property.”). A sentence based on uncharged or dismissed conduct lacks that legitimacy. Even worse, “when a jury acquit[s] a defendant . . . , one would have expected no additional criminal punishment would follow.” *United States v. Pimental*, 367 F. Supp. 2d 143, 150 (D. Mass. 2005) (Gertner, J.) (quoting Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 Suffolk U. L. Rev. 419, 433 (1999)). Given that an acquittal is the *only* way for criminal defendants to legally vindicate themselves, those acquittals must be respected. See McCusker Murray, 84 St. John’s L. Rev. at 1464. The “admission of prior acquittals in sentencing undermines the claim

of the criminal justice system to be doing justice, and thus its broader legitimacy.” *Id.* at 1463.

“It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, and *also* conclude that the fruits of the jury’s efforts can be ignored with impunity by the judge in sentencing.” *Pimental*, 367 F. Supp. 2d at 150 (citation omitted). Enhancing a defendant’s sentence based on acquitted conduct is not only something that the jury’s verdict “failed to authorize,” it relies upon “facts of which the jury expressly disapproved.” *Id.* at 152. “[C]onsider[ing] acquitted conduct trivializes ‘legal guilt’ or ‘legal innocence,’” *id.*, resulting in the “judicial nullification of juries,” Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235, 273 (2009).

The district court’s reliance on acquitted conduct in *Pharms* is a stark and explicit rejection of the jury, but the right to trial by jury was just as surely rendered irrelevant in *Ghanem*, where no jury was even empaneled to render a valid verdict after a conviction was vacated. The “intelligible content” of a jury’s verdict is rendered hollow both when a jury is not asked for a verdict or the verdict it renders is ignored.

II. REVIEW IS NECESSARY TO PROTECT THE APPEARANCE OF JUSTICE AND LEGITIMACY OF THE COURTS

Sentencing based on alleged criminal conduct that is not proven to a jury is defended through a legal sleight of hand: The judge is merely sentencing a defendant for the crime of conviction, and the sentence imposed is within “the statutory sentencing range for the offense of conviction alone.” *Bell*, 808 F.3d at 927

(Kavanaugh, J., concurring in denial of rehearing *en banc*). In other words, the sentencing judge is not sentencing the defendant for conduct that was not proven through a conviction, but merely imposing a harsher sentence upon the crime of conviction because the judge determined (by a mere preponderance of the evidence) that the defendant is really guilty of other conduct, such as the acquitted conduct in *Pharms* or the dismissed conduct in *Ghanem*.

Notwithstanding the formal argument, the reality of the situation is obvious, especially in the cases below. Ghanem pled guilty to six of seven charges against him, but the government insisted on putting the defendant and jury through a four-week trial to prove that seventh charge. But when that jury's verdict was vacated on appeal, the government realized there was never any reason to have had that trial in the first place. It was merely performative theater that could be dispensed with by going straight to sentencing on the guilty pleas on the six counts. The government persuaded the district court to find by a preponderance of the evidence that Ghanem committed the seventh charge too and impose the same 30-year sentence.

The jury did not matter because the sentence would be the same with or without a conviction on that charge. But the charge itself mattered a great deal. Ghanem's recommended sentencing range was 78–97 months, and even the government acknowledged that it sought “an admittedly extraordinary departure” in asking the district court to sentence Ghanem to a 30-year sentence. Ghanem Pet.App.57a. For a fifty-six-year-old man in poor health, adding 22 years to the top of his recommended sentencing range through a 30-year sentence is effectively “a life sentence.”

Ghanem Pet.App.54a (noting the defendant is missing nearly all his teeth and could barely stand on his own). Absent the district court's finding that Ghanem committed the conduct charged in the vacated count, the Ninth Circuit recognized that the 30-year sentence would be "substantively unreasonable." Ghanem Pet.App.3a.

The sentence in *Pharms* cannot rest on the jury's verdict alone either. The jury found Pharms guilty of several offenses, including possessing a firearm in the course of a violent felony, but specifically found that he did not fire his weapon.⁴ Pharms' recommended sentence was 63–78 months plus a 60-month consecutive sentence (cumulatively 123-138 months), but the district court concluded by a preponderance of the evidence that Pharms did fire the weapon and sentenced him to 192 months (16 years). Pharms Pet.App.5a–6a, 45a. There is no doubt that the district court's sentence "would have been lower had it not found that Mr. Pharms was the shooter." Pharms Pet.App.6a. Consequently, most of Pharms' sentence is based on the district court's reliance on acquitted conduct, rather than the conduct underlying his convictions. That is a "perverse result." *See Watts*, 519 U.S. at 164 (Stevens, J., dissenting) (describing reliance upon acquitted conduct to elevate a sentencing guideline range from 15–21 months to 27–33 months as a "perverse result").

Nor can a defendant take any comfort that the statutory maximum will provide meaningful protection. Most federal crimes have a statutory maximum of at

⁴ 18 U.S.C. § 924(c)(1)(A) makes possession of a firearm during a crime of violence punishable by a mandatory minimum of five years' imprisonment, but that mandatory minimum jumps to ten years if the jury finds that the firearm was discharged.

least five years, and many crimes carry much higher statutory maximums. Ghanem, for example, pled guilty to two counts of violating the Arms Export Control Act and two counts of money laundering; each of those charges carries a statutory maximum of twenty years' imprisonment. 18 U.S.C. § 1956(a)(2); 22 U.S.C. § 2778(c). Similarly, Pharms' charges of assaulting a federal officer while armed carries a 20-year statutory maximum and being a felon in possession of a firearm carries a 15-year statutory maximum. 18 U.S.C. §§ 111(b), 924(a)(8). Even commonly charged white collar offenses like mail and wire fraud carry 20-year and, in some cases, 30-year statutory maximums. 18 U.S.C. §§ 1341, 1343.

Ghanem and *Pharms* also illustrate that even a single course of conduct can lead to multiple charges and convictions, which often jacks up the aggregate statutory maximum so high that it would exceed anyone's life expectancy. Ghanem's guilty plea on his six counts, for example, raised his statutory maximum to 95 years. At 56 years old, Ghanem would need to live 151 years to serve the full statutory maximum.

In any event, the maximum sentence that can constitutionally be imposed is often not the statutory maximum; rather, post-mandatory Sentencing Guidelines, appellate courts "consider the substantive reasonableness of the sentence imposed." *Gall v. United States*, 552 U.S. 38, 51 (2007). Thus, unreasonable sentences are invalid even when they are below the statutory maximum. *See, e.g., United States v. Singh*, 877 F.3d 107, 116–17 (2d Cir. 2017); *United States v. Chandler*, 732 F.3d 434, 437, 440 (5th Cir. 2013); *United States v. Cruz-Valdivia*, 526 F. App'x 735, 737 (9th Cir. 2013); *United States v. Paul*, 561 F.3d 970, 973–75 (9th Cir. 2009) (per curiam). Moreover,

addressing as-applied Sixth Amendment challenges, Justice Scalia claimed that this Court’s jurisprudence leaves the door “open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.” *Gall*, 552 U.S. at 603 (concurring); see *Rita v. United States*, 551 U.S. 338, 375 (2007) (concurring in part and concurring in the judgment).

As then Judge Kavanaugh explained: “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.” *Bell*, 808 F.3d at 928 (concurring in denial of rehearing *en banc*). Justice Kavanaugh certainly raised the question that is presented to the Court here:

If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don’t you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20-year sentence?

Id. Amici agree that this question should be answered by the Court holding that all factfinding necessary to support a sentence be found by a jury beyond a reasonable doubt.

More particularly, Amici agree with Judge Millett 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.” *Id.* at 929

(concurring in denial of rehearing *en banc*). The reason is simple: “before depriving a defendant of liberty, the government must obtain permission from the defendant’s fellow citizens, who must be persuaded themselves that the defendant committed each element of the charged crime beyond a reasonable doubt.” *Id.* at 930. Thus,

allowing judges to materially increase the length of imprisonment based on facts that were *submitted directly to and rejected by* the jury in the same criminal case is too deep of an incursion into the jury’s constitutional role. “[W]hen a court considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved.”

Id. (emphasis in original) (quoting *Pimental*, 367 F. Supp. 2d at 152). The judge is “directly second-guessing the jury,” and that is “demeaning of[] the jury’s verdict.” Gertner, 32 Suffolk U. L. Rev. at 422.

Reliance upon acquitted conduct at sentencing in cases like *Pharms* undermines the legitimacy of the criminal justice system. The average person “on the street would be quite taken aback to learn about this practice.” *McClinton*, 143 S. Ct. at 2403 (Sotomayor, J., respecting the denial of certiorari).

That was aptly illustrated by an angry juror who wrote a district court upon learning that the prosecution was seeking an increased sentence based on acquitted conduct:

It seems to me a tragedy that one is asked to serve on a jury, serves, but then finds their work may not be given the credit it deserves.

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.

United States v. Canania, 532 F.3d 764, 778 n.4 (8th Cir. 2008) (Bright, J., concurring) (quoting juror's letter to a federal district court judge). That letter undoubtedly captures the sentiment of most people who discover this practice. Not surprisingly, defendants and sentencing courts have described this reliance upon acquitted conduct as "Kafkaesque." Nancy Gertner, *Against These Guidelines*, 87 UMKC L. Rev. 49, 55 n.33 (2018). That perception—grounded in reality—will persist until this Court puts an end to the practice of allowing acquitted conduct to be considered at sentencing.

And what must Ghanem's jurors think? It is undoubtedly frustrating for everyone involved in a trial when a conviction is vacated for instructional error, but everyone should appreciate the need for trials to be conducted fairly. The government had a second chance to get it right through a retrial, but it declined because it could bypass the jury altogether and still get the sentence it wanted. Ghanem's jurors must wonder why they gave up four weeks of their lives to sit through a trial when it did not matter what verdict they rendered or if any verdict was rendered at all.

The truth is that juries should matter and that the Fifth and Sixth Amendment rights of every defendant threatened with the deprivation of his life or liberty should be respected. Imprisonment may very well be an appropriate punishment for criminal conduct that results in a conviction, but defendants should not be deprived of their liberty for conduct that no jury has found them guilty of having committed beyond a reasonable doubt. Nevertheless, our prisons are full of people imprisoned because judges have found it more likely than not that they committed some uncharged, dismissed, or acquitted conduct. The time has come for this Court to reject this practice, definitively, once and for all.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 20, 2026

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
LIST OF SIGNATORIES	1a

LIST OF SIGNATORIES

Judge Mark W. Bennett (Ret.)—District Judge (1994–2000, 2007–2015, Chief Judge 2000–2007), Senior Judge (2015–2019), U.S. District Court for the Northern District of Iowa; Magistrate Judge (1991–94), U.S. District Court for the Southern District of Iowa

Judge Robert J. Cindrich (Ret.)—District Judge (1994–2004), U.S. District Court for the Western District of Pennsylvania

Judge Christopher F. Droney (Ret.)—Circuit Judge (2011–2019), Senior Judge (2019–2020), U.S. Court of Appeals for the Second Circuit; District Judge (1997–2011), U.S. District Court for the District of Connecticut

Judge Jeremy D. Fogel (Ret.)—District Judge (1998–2014), Senior Judge (2014–2018), U.S. District Court for the Northern District of California

Judge W. Royal Furgeson, Jr. (Ret.)—District Judge (1994–2008), Senior Judge (2008–2013), U.S. District Court for the Western District of Texas

Judge Nancy Gertner (Ret.)—District Judge (1994–2011), Senior Judge (2011), U.S. District Court for the District of Massachusetts

Judge John Gleeson (Ret.)—District Judge (1994–2016), U.S. District Court for the Eastern District of New York

Judge Richard A. Holwell (Ret.)—District Judge (2003–2012), U.S. District Court for the Southern District of New York

Judge Barbara S. Jones (Ret.)—District Judge (1995–2012), Senior Judge (2012–2013), U.S. District Court for the Southern District of New York

Judge Timothy K. Lewis (Ret.)—Circuit Judge (1992–1999), U.S. Court of Appeals for the Third Circuit; District Judge (1991–1992), U.S. District Court for the Western District of Pennsylvania

Judge Barbara M. Lynn (Ret.)—District Judge (1999–2016, Chief Judge 2016–2022), Senior Judge (2022–2025), U.S. District Court for the Northern District of Texas

Judge Beverly B. Martin (Ret.)—Circuit Judge (2010–2021), U.S. Court of Appeals for the Eleventh Circuit; District Judge (2000–2010), U.S. District Court for the Northern District of Georgia

Judge A. Howard Matz (Ret.)—District Judge (1998–2011), Senior Judge (2011–2013), U.S. District Court for the Central District of California

Judge Stephen M. Orlofsky (Ret.)—District Judge (1996–2003), Magistrate Judge (1976–1980), U.S. District Court for the District of New Jersey

Judge Shira A. Scheindlin (Ret.)—District Judge (1994–2011), Senior Judge (2011–2016), U.S. District Court for the Southern District of New York; Magistrate Judge (1982–1986), U.S. District Court for the Eastern District of New York

Judge Kevin H. Sharp (Ret.)—District Judge (2011–2014, Chief Judge 2014–2017), U.S. District Court for the Middle District of Tennessee

Judge Thomas I. Vanaskie (Ret.)—Circuit Judge (2010–2018), Senior Judge (2018–2019), U.S. Court of Appeals for the Third Circuit; District Judge (1994–1999, Chief Judge 1999–2006), U.S. District Court for the Middle District of Pennsylvania

Judge T. John Ward (Ret.)—District Judge (1999–2011), U.S. District Court for the Eastern District of Texas