No. 25-1086

In the Supreme Court of the United States

KEITH PHARMS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioner's Fifth and Sixth Amendment rights by considering conduct that it found by a preponderance of the evidence, but that the jury did not find beyond a reasonable doubt, in determining petitioner's sentence.

PARTIES TO THE PROCEEDING

Petitioner (defendant-appellant below) is Keith Pharms.

Respondent (appellee below) is the United States of America.

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OPINION BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2026. The petition for a writ of certiorari was filed on March 13, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of assaulting a federal officer, in violation of 18 U.S.C. 111(a) and (b); using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c); possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1); possessing a prohibited ob-

ject (one or more cellular phones) while in federal custody, in violation of 18 U.S.C. 1791(a)(2) and (d)(1)(F); and possessing a prohibited object (a handcuff key) intended to facilitate escape while in federal custody, in violation of 18 U.S.C. 1791(a)(2) and (d)(1)(B). Pet. App. 16a-17a; see *id.* at 30a-31a. He was sentenced to 192 months of imprisonment, reduced by nine months and 20 days for time served in state custody, to be followed by three years of supervised release. *Id.* at 18a-19a. The court of appeals affirmed. *Id.* at 1a-15a.

1. Shortly after his release from state prison in February 2022, petitioner and two codefendants stole a car and led police on a high-speed chase. See Presentence Investigation Report (PSR) ¶¶ 13-16. During the chase, "several" shots were fired; one of the bullets hit the police car and narrowly missed the officer. PSR ¶ 14; see PSR ¶ 15; Pet. App. 2a. A federal grand jury indicted petitioner for assaulting a federal officer, in violation of 18 U.S.C. 111(a) and (b); using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c); and possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. A superseding indictment additionally charged petitioner with possessing a prohibited object (three cellular phones) while in federal custody, in violation of 18 U.S.C. 1791(a)(2) and (d)(1)(F); and possessing a prohibited object (a handcuff key) intended to facilitate escape while in federal custody, in violation of 18 U.S.C. 1791(a)(2) and (d)(1)(B). Superseding Indictment 3-4.

At trial, one of petitioner's codefendants testified that he drove the car while petitioner shot at the pursuing officers. Pet. App. 3a. The government also presented video evidence showing that petitioner was in the passenger seat, not the driver's seat where he would

have had to steer and control the car. *Ibid.* In addition, petitioner's cellmate testified that petitioner "told him [that petitioner] had shot at the vehicle following them after the theft." *Ibid.* And the government "presented social media evidence depicting [petitioner] with a gun resembling the one matching the shell casings recovered from the scene." *Ibid.*

The jury found petitioner guilty on all five counts. Pet. App. 3a; see *id.* at 33a-34a. The verdict form asked the jury, as to the Section 924(c) count, "was the firearm discharged?" *Id.* at 34a. The jury checked the "No" box. *Ibid.*

2. At sentencing, the district court computed an advisory guidelines range of 63 to 78 months of imprisonment, "plus 60 months consecutive" for the Section 924(c) count. Sentencing Tr. 41; see 18 U.S.C. 924(c)(1)(A)(i) and (D)(ii) (providing for a statutory-minimum term of five years of imprisonment, to be served consecutively to any other sentence, for a Section 924(c) violation). The government sought an above-guidelines sentence based on petitioner's having fired at the police car during the chase. See Pet. App. 5a. The district court agreed that such a sentence was appropriate. *Id.* at 46a-49a.

The district court found by a preponderance of the evidence that petitioner had shot at the officer's car during the chase and explaining that "the evidence is fairly considerable to that effect." Pet. App. 42a. The court emphasized that the officer "was almost hit and would have obviously been potentially seriously injured, if not killed. As far as assault on a federal officer, I don't think it gets a whole lot worse than that, other than when the bullet actually strikes the target." *Id.* at 47a. And the court found petitioner, who "was on state felony

probation at the time of these crimes," to have committed "an incredibly serious offense" and to have engaged in "particularly egregious behavior." *Id.* at 47a-48a.

The district court sentenced petitioner to a total of 192 months of imprisonment (132 months of imprisonment on four of the counts, to be served consecutive to the mandatory minimum 60 months of imprisonment on the Section 924(c) count), less nine months and twenty days of credit for time served in state custody. Pet. App. 18a. The court noted that "if I hadn't found that he was a shooter, my sentence would not have been the same." *Id.* at 49a.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-15a. On appeal, petitioner contended, *inter alia*, that the district court's reliance at sentencing on a finding by a preponderance of the evidence that he had fired at the officer's car violated his constitutional rights under the Fifth and Sixth Amendments because the jury had not found beyond a reasonable doubt that the firearm was discharged. See *id.* at 6a-12a. The court of appeals rejected that contention as foreclosed by this Court's decision in *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), as well as circuit precedent. Pet. App. 6a-12a. The court of appeals explained that "[w]e have long permitted sentencing courts to take into account acquitted conduct proven by a preponderance of the evidence." *Id.* at 7a. And here, the court found "ample evidence to support the district court's factual finding that [petitioner] was the shooter." *Id.* at 13a; see *id.* at 13a-15a.

ARGUMENT

Petitioner contends (Pet. 11-31) that the district court violated his Fifth Amendment right to due process and his Sixth Amendment right to trial by jury by

relying for sentencing purposes on conduct that it found by a preponderance of the evidence, but that the jury declined to find beyond a reasonable doubt. The court of appeals correctly rejected that contention. This Court has long upheld a district court's authority to consider such conduct in determining an appropriate sentence. And as petitioner correctly acknowledges, every federal court of appeals with criminal jurisdiction has recognized a sentencing court's ability to rely on conduct that the court finds by a preponderance of the evidence, even if a jury did not find that conduct beyond a reasonable doubt. This Court has recently and repeatedly denied petitions for writs of certiorari raising similar questions and it should follow the same course here.[1]

1. When selecting an appropriate sentence, a district court may, consistent with the Fifth and Sixth Amendments, consider conduct that was not intrinsic to the underlying conviction. Although the Sixth Amendment requires that, other than the fact of a prior conviction, "any fact that increase[s] the prescribed statutory

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[1] See, *e.g.*, *Perricone* v. *United States*, 145 S. Ct. 1142 (2025) (No. 24-5339); *O'Bannon* v. *United States*, 144 S. Ct. 572 (2024) (No. 23-554); *Merry* v. *United States*, 143 S. Ct. 2692 (2023) (No. 22-6815); *Martin* v. *United States*, 143 S. Ct. 2692 (2023) (No. 22-6736); *Sanchez* v. *United States*, 143 S. Ct. 2691 (2023) (No. 22-6386); *Cain* v. *United States*, 143 S. Ct. 2691 (2023) (No. 22-6212); *Bullock* v. *United States*, 143 S. Ct. 2691 (2023) (No. 22-5828); *Karr* v. *United States*, 143 S. Ct. 2691 (2023) (No. 22-5345); *Luczak* v. *United States*, 143 S. Ct. 2690 (2023) (No. 21-8190); *Shaw* v. *United States*, 143 S. Ct. 2689 (2023) (No. 22-118); *McClinton* v. *United States*, 143 S. Ct. 2400 (2023) (No. 21-1557); see also U.S. Br. in Opp. at 14-15, *McClinton*, *supra* (No. 21-1557) (listing additional cases). The pending petition for a writ of certiorari in *Ghanem* v. *United States*, No. 25-970 (filed Feb. 13, 2026), raises a similar issue.

maximum sentence" or the statutory "minimum sentence" for an offense "must be submitted to the jury and found beyond a reasonable doubt," *Alleyne* v. *United States*, 570 U.S. 99, 106, 108 (2013) (plurality opinion), judges have broad discretion to engage in factfinding to determine an appropriate sentence within a statutorily authorized range, see, *e.g.*, *id.* at 116 (majority opinion) ("[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."); *United States* v. *Booker*, 543 U.S. 220, 233 (2005) ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."); see also 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

Contrary to petitioner's contention (Pet. 22-29), neither the Fifth Amendment nor the Sixth Amendment precludes sentencing courts from finding facts about relevant conduct under that framework when the defendant is not convicted of that conduct under a higher standard of proof at trial. As this Court explained in *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), in addressing judicial factfinding under the then-mandatory federal Sentencing Guidelines, "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." *Id.* at 157.

The Court observed that under the pre-Guidelines sentencing regime, it was "'well established that a sen-

tencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted,'" and that "[t]he Guidelines did not alter this aspect of the sentencing court's discretion." *Watts*, 519 U.S. at 152 (citation omitted). And the Court explained that a jury's determination that the government failed to prove a fact beyond a reasonable doubt does not have preclusive effect in contexts in which a lower standard of proof applies. *Id.* at 156 ("[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.") (citation omitted).

Petitioner's effort (Pet. 23-25) to characterize *Watts* as an inapposite double-jeopardy case lacks merit. Although *Watts* specifically addressed a challenge to acquitted conduct based on double-jeopardy principles, its clear import is that sentencing courts may take unconvicted conduct into account at sentencing without offending the Constitution. See 519 U.S. at 157; see also, *e.g.*, *Alabama* v. *Shelton*, 535 U.S. 654, 665 (2002); *United States* v. *Grubbs*, 585 F.3d 793, 798-799 (4th Cir. 2009) (describing *Watts* as "clear Supreme Court * * * precedent holding that a sentencing court may consider uncharged and acquitted conduct in determining a sentence, as long as that conduct is proven by a preponderance of the evidence"), cert. denied, 559 U.S. 1022 (2010). Indeed, *Watts* is incompatible with petitioner's core premise: that consideration of acquitted conduct as part of sentencing contravenes the jury's verdict or punishes the defendant for a crime for which he was not convicted. If consideration of such conduct at sentencing were in fact a reprosecution of the prior charges, it

is difficult to see how *Watts* could have found it compatible with the Double Jeopardy Clause.

This Court's decision in *United States* v. *Booker* confirms that a judge may constitutionally base a defendant's sentence on conduct that was not found by the jury, so long as the sentence is at or below the statutory maximum. In discussing the type of information that a sentencing court could consider under the advisory guidelines, *Booker* made no distinction between acquitted, dismissed, or uncharged conduct and other relevant conduct. See, *e.g.*, 543 U.S. at 252 (emphasizing the need to consider all relevant conduct to achieve "the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways"). To the contrary, after emphasizing the judge's "broad discretion in imposing a sentence within a statutory range," *id.* at 233, *Booker* cited *Watts* for the proposition that "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found unproved (beyond a reasonable doubt)," *id.* at 251 (emphasis omitted). And after *Booker*, the majority opinion in *Alleyne* v. *United States* expressly distinguished "facts that increase either the statutory maximum or minimum" from those "used to guide judicial discretion in selecting a punishment 'within limits fixed by law.'" 570 U.S. at 113 n.2 (citation omitted). The Court made clear that although the latter "may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing." *Ibid.*

Petitioner repeatedly invokes (Pet. 3, 5, 12-13, 20, 24-27, 31) Justice Scalia's dissent from the denial of certiorari in *Jones* v. *United States*, 574 U.S. 948 (2014), highlighting his suggestion "that any fact necessary to pre-

vent a sentence from being substantively unreasonable * * * must be either admitted by the defendant or found by the jury," *id.* at 949. But petitioner elides Justice Scalia's observation that the Court could "eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable." *Id.* at 950; cf., *e.g.*, *Gall* v. *United States*, 552 U.S. 38, 60 (2007) (Scalia, J., concurring) ("I continue to believe that substantive-reasonableness review is inherently flawed."). Accordingly, were the Court inclined to revisit long-settled precedent affirming judicial factfinding at sentencing, the Court would have to confront the argument that Congress's specification of a statutory range necessarily reflects its policy judgment that a term of imprisonment at or below the maximum of that range is not an unreasonably long sentence for the offense. Petitioner's proposal that a jury must determine all facts required to maintain the substantive reasonableness of a sentence is also unworkable: reasonableness is an *appellate* standard applied after the fact, not a standard that district courts apply—or can necessarily predict—in carrying out their duty to determine an appropriate sentence in the first instance. See 18 U.S.C. 3553(a); *Holguin-Hernandez* v. *United States*, 589 U.S. 169, 174-175 (2020).

Petitioner's Fifth Amendment argument (Pet. 27-29) is likewise unsound. Notwithstanding that judges have historically enjoyed discretion to impose sentences based on additional facts found by a preponderance of the evidence at sentencing, petitioner essentially proposes (Pet. 28-29) to create an exception for factual findings concerning acquitted conduct. That exception is logically unsound because factual findings that satisfy the preponderance standard do not conflict with a jury's

verdict of acquittal under the more demanding beyond-a-reasonable doubt standard. See *Watts*, 519 U.S. at 156; cf. 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4422, at 634 (3d ed. 2016) (explaining that an acquittal is not issue preclusive in civil cases when the standard of proof is lower, and that the same rule "applies also when further criminal proceedings do not require proof beyond a reasonable doubt").

2. As petitioner acknowledges (Pet. 16-17), every federal court of appeals with criminal jurisdiction has recognized that a district court may consider acquitted or uncharged conduct for sentencing purposes.[2] Petitioner asserts (Pet. 20) that this Court's intervention is warranted because "every court of appeals has been asked to reconsider the issue en banc, and each has refused." See Pet. 20 n.1 (listing cases). But that uniformity on the question presented is a reason to deny review, not to grant it. See Sup. Ct. R. 10.

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[2] See, *e.g.*, *United States* v. *Gobbi*, 471 F.3d 302, 313-314 (1st Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 526-527 (2d Cir. 2005) (Sotomayor, J.), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Ciavarella*, 716 F.3d 705, 735-736 (3d Cir. 2013), cert. denied, 571 U.S. 1239 (2014); *Grubbs*, 585 F.3d at 798-799 (4th Cir.); *United States* v. *Farias*, 469 F.3d 393, 399-400 & n.17 (5th Cir. 2006), cert. denied, 549 U.S. 1272 (2007); *United States* v. *White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc), cert. denied, 556 U.S. 1215 (2009); *United States* v. *Waltower*, 643 F.3d 572, 574-578 (7th Cir.), cert. denied, 565 U.S. 1019 (2011); *United States* v. *High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States* v. *Mercado*, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 552 U.S. 1297 (2008); *United States* v. *Magallanez*, 408 F.3d 672, 683-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Siegelman*, 786 F.3d 1322, 1332-1333 & n.12 (11th Cir. 2015), cert. denied, 577 U.S. 1092 (2016); *United States* v. *Settles*, 530 F.3d 920, 923-924 (D.C. Cir. 2008), cert. denied, 555 U.S. 1140 (2009).

Petitioner's reliance (Pet. 17-20) on various state-court decisions is misplaced. Several of those decisions predate *Watts* and are thus inapposite. *E.g.*, *Jefferson* v. *State*, 353 S.E.2d 468 (Ga.), cert. denied, 484 U.S. 872 (1987); *McNew* v. *State*, 391 N.E.2d 607 (Ind. 1979); *State* v. *Cote*, 530 A.2d 775 (N.H. 1987); *State* v. *Marley*, 364 S.E.2d 133 (N.C. 1988). The others either do not cite *Watts* or rely on state law and thus do not create a conflict on the federal constitutional question presented here. *E.g.*, *Harris* v. *State*, 392 So. 3d 125 (Fla. Dist. Ct. App. 2024) (not citing *Watts*); *State* v. *Cobb*, 732 A.2d 425 (N.H. 1999) (same); *State* v. *Melvin*, 258 A.3d 1075, 1094 (N.J. 2021) (explaining that the "State Constitution offers greater protection against the consideration of acquitted conduct in sentencing than does the Federal Constitution"). Indeed, the Supreme Court of New Hampshire has since clarified that its earlier decision in "*Cote* provides greater protection than that provided to a defendant in *United States* v. *Watts*"—a statement best read as clarifying that its decisions are rooted in state law and thus do not create a conflict on the federal constitutional question presented here. *State* v. *Gibbs*, 953 A.2d 439, 442 (2008). And one of the cases petitioner cites actually states that "[u]nder certain circumstances, a sentencing court may consider, in crafting its punishment, crimes of which the defendant has been acquitted." *Hamilton* v. *State*, No. 2288, Sept. Term, 2023, 2025 WL 2304310, at *5 (Md. Ct. Spec. App. Aug. 11, 2025).

Petitioner also cites (Pet. 18) the Supreme Court of Michigan's decision in *People* v. *Beck*, 939 N.W.2d 213 (2019), cert. denied, 589 U.S. 1244 (2020), which took the view that "due process bars sentencing courts from finding by a preponderance of the evidence that a de-

fendant engaged in conduct of which he was acquitted." *Id.* at 227. *Beck* not only is an outlier decision, but appears to be the first of its kind. And its reasoning is tenuous. In that court's view, "when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent," and reliance on acquitted conduct at sentencing "'is fundamentally inconsistent with the presumption of innocence itself.'" *Id.* at 225 (citation omitted). But an individual is equally "presumed innocent" when he is never charged with a crime in the first place. *Ibid.*

The logical implication of the *Beck* majority's reasoning would therefore preclude a sentencing court from relying on *any* conduct not directly underlying the elements of the offense on which the defendant is being sentenced. Yet *Beck* itself acknowledged that "[w]hen a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard." 939 N.W.2d at 225. The majority did not attempt to explain that logical inconsistency in its reasoning.

3. Nor is this Court's intervention necessary to address any of petitioner's asserted policy concerns. Congress could pass a statute to preclude reliance on unconvicted conduct at sentencing. See *United States* v. *Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (per curiam) (Kavanaugh, J., concurring in the denial of rehearing en banc). Indeed, Congress currently is considering legislation to amend 18 U.S.C. 3661 to prohibit consideration of acquitted conduct at sentencing except in mitigation.

See S. 3483, 119th Cong., 1st Sess. (introduced in the Senate on Dec. 15, 2025).

This Court's intervention is particularly unwarranted now that the Sentencing Commission has amended the Sentencing Guidelines to instruct courts not to consider conduct "charged and acquitted in federal court" when calculating a defendant's guidelines range. Sentencing Guidelines § 1B1.3(c); see *McClinton* v. *United States*, 143 S. Ct. 2400, 2403 (2023) (Sotomayor, J., statement respecting the denial of certiorari) (citing Commission's efforts to "resolve questions around acquitted-conduct sentencing"); *McClinton*, 143 S. Ct. at 2403 (Kavanaugh, J., respecting the denial of certiorari) (similar).

In particular, in 2024, the Commission amended the guidelines to provide that the "relevant conduct" that courts may consider to calculate the guidelines range "does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction." Sentencing Guidelines § 1B1.3(c). Moreover, even in the limited circumstances where the Sentencing Guidelines still *permit* courts to consider conduct underlying acquitted conduct, the Guidelines do not *require* it. And sentencing courts always retain discretion to consider whether such conduct should carry weight in their assessment of each defendant's "background, character, and conduct" for the purpose of imposing a sentence in a given case. 18 U.S.C. 3661; see *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc).

Petitioner emphasizes that the recent amendment does not apply retroactively or "preclude courts from considering acquitted conduct when analyzing the factors under 18 U.S.C. § 3553(a)." Pet. 21 (citation omit-

ted); see Pet. 4. But the Commission could revisit its retroactivity decision in a future amendment cycle, and Congress could override the Commission's judgments. Either of those institutions is the appropriate one through which to channel policy concerns like the ones petitioner posits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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