

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*

REPLY BRIEF FOR THE PETITIONER

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The government concedes that federal appellate courts and state courts of last resort are divided over the constitutionality of acquitted-conduct sentencing. Opp. 11-12. In doing so, the government confirms that courts are *also* divided on whether *United States v. Watts*, 519 U.S. 148 (1997), resolved the constitutionality of the practice, or instead answered a narrow double jeopardy question. The government does not dispute that the question is important and recurring. Nor does it deny that the Sentencing Commission’s Amendment 826—the development that led four Justices to defer decision in *McClinton v. United States*, 143 S. Ct. 2400 (2023)—has been rendered “meaningless,” because courts “simply circumvent the amendment by way of the [18 U.S.C.] § 3553(a) factors.” Nat’l Ass’n Crim. Def. Laws. (“NACDL”) Amicus Br. 15-16; accord Former Judges Amici Br. 6-7; Professors Amici Br. 3-4, 12-14; Pet. 21-22.

The government’s opposition boils down to this: In a nine-page per curiam opinion issued without full briefing or oral argument, *Watts* conclusively resolved the constitutionality of acquitted-conduct sentencing under both the Fifth and Sixth Amendments—though it mentioned neither provision. The government insists that

Watts's “clear import is that sentencing courts may take unconvicted conduct into account at sentencing without offending the constitution.” Opp. 7. But this Court has described its holding much more modestly: *Watts* “presented a very narrow question regarding the interaction of the Sentencing Guidelines with the Double Jeopardy Clause.” *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005).

The government likewise says nothing about historical evidence showing how recent and anomalous acquitted-conduct sentencing is. Pet. 2, 22-23. As Sentencing Commission Vice Chair Claire Murray has explained, “*Watts* placed the Court’s imprimatur on a sentencing practice that courts had approved only with carefully nuanced restraints merely twenty-five years before,” as “no court is recorded as sentencing any offender based even partly * * * on conduct for which he had already been acquitted” during the “decades” before acquitted-conduct sentencing emerged in the 1970s. Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 St. John’s L. Rev. 1415, 1416, 1427 (2010). The government does not dispute that the practice is incompatible with the Founding-era jury’s role in authorizing punishment. Then, the “sentence [wa]s what was at stake” in jury trials, as partial acquittals (and “downvalu[ation]” of property) controlled punishment. See John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 54-55 (1983); Pet. 25-26. That novelty is telling: “[l]ack of historical precedent can indicate a constitutional infirmity.” *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 260 (2011).

Finally, the government identifies no vehicle problem. It acknowledges that the jury found petitioner *did not* discharge a firearm, but the judge still sentenced

him because “he was a shooter.” Opp. 4. That finding yielded a nearly 40-percent, five-year increase in petitioner’s punishment, effectively replicating the sentence he would have received had the jury convicted him of discharging the weapon. Pet. 4. The time has come to “put an end to the unbroken string of cases disregarding the Sixth Amendment.” *Jones v. United States*, 574 U.S. 948, 948 (2014) (Scalia, J., dissenting from denial of certiorari). Only this Court can resolve this issue.

I. The Split Is Real

The government concedes that there is a split between federal appellate courts and several state courts of last resort. Opp. 11-12. But the government attempts to downplay the split, asserting that besides *People v. Beck*, 939 N.W.2d 213 (Mich. 2019), several of the state court decisions “predate *Watts*,” or “do not cite *Watts*.” Opp. 11. Even taking the government’s characterization at face value, this Court *routinely* grants review based on similar splits,¹ often at the government’s urging.² Review is nevertheless warranted to “ensure the integrity and uniformity of federal law.” *Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring).

Moreover, the government assumes the very point in dispute: that *Watts* resolved the constitutionality of acquitted conduct under the Fifth and Sixth Amendments. It did not. *Booker*, 543 U.S. at 240 n.4. And the government does not contest that there is a split on *that* question too. The New Jersey Supreme Court “agree[d]

¹ See, e.g., Pet. at 11-12, *Wilkins v. United States*, 598 U.S. 152 (2023) (No. 21-1164) (7-1 split); Pet. at 14, *Perez v. Sturgis Pub. Schs.*, 598 U.S. 142 (2023) (No. 21-887) (11-1).

² See, e.g., Pet. at 11, *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590 (2016) (No. 15-290) (urging review of “shallow” 1-1 circuit split); Pet. at 25, *United States v. Sanchez-Gomez*, 584 U.S. 381 (2018) (No. 17-312) (2-1 split).

with the Michigan Supreme Court that *Watts* is not dispositive” of the due process and jury trial issues *under federal law* 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.” *State v. Melvin*, 258 A.3d 1075, 1090 (N.J. 2021) (citing *Beck*, 939 N.W.2d at 224). *Melvin* further held that “*Watts* is not dispositive of the due process” question under federal law, nor does it “control” the Sixth Amendment analysis. *Id.* at 1088, 1090.

The fact remains that several state supreme courts have applied federal constitutional law to reject acquitted-conduct sentencing, and whether they cited *Watts* is of no significance. Pet. 17-20. The pre-*Watts* decisions in particular remain highly relevant evidence of the American common-law tradition: courts then understood an acquittal to place meaningful limits on punishment. See, e.g., *Jefferson v. State*, 353 S.E.2d 468 (Ga. 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). And *Watts*’s failure to mention those many due process and jury trial decisions confirms that it did not sweep as broadly as the government claims.

The conflict is intolerable because it divides state courts of last resort from their corresponding federal appellate courts, making the scope of constitutional protections turn on the choice of forum. See *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994) (granting review to resolve 1-1 split). That concern is squarely implicated here. The government does not dispute that petitioner’s sentence could not have been enhanced if he had been convicted in Georgia state court. Pet. 19-20.

II. The Eleventh Circuit's Decision Was Wrong

The government's merits defense depends on giving *Watts* a reach it lacks. The government concedes that *Watts* "specifically addressed a challenge to acquitted conduct based on double-jeopardy principles." Opp. 7. Yet, without even acknowledging *Booker*'s contrary framing, it asserts that the "clear import" of the decision was to foreclose all constitutional objections to acquitted-conduct sentencing. *Ibid.* *Watts*, however, never mentioned the historical treatment of acquittals, the Fifth Amendment, or the Sixth Amendment. And it predated this Court's long series of decisions requiring juries, not judges, to find facts that determine the extent of punishment. Pet. 23-28. The government offers no account of how acquitted-conduct sentencing can be reconciled with that precedent.

Nor does the government answer petitioner's Sixth Amendment argument. It invokes the familiar proposition that sentencing judges may consider facts not found by the jury. Opp. 8-9. But acquitted conduct is not merely conduct "not found." It is conduct the jury *rejected*. The distinction matters. "With an acquittal, the jury as representative of the community has been asked by the State to authorize punishment for an alleged crime and has refused to do so." *McClinton*, 143 S. Ct. at 2402 (Sotomayor, J., statement respecting denial of certiorari). "The history and nature of acquittals distinguishes the narrow question of acquitted-conduct sentencing" from "other kinds of facts judges may consider at sentencing." *Id.* at 2403 n.3. That is why acquittals have long been "accorded special weight," *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980)—and why Justice Kennedy faulted *Watts* for not confronting "the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted." 519 U.S. at 170 (Kennedy, J., dissenting).

This case illustrates the constitutional problem starkly—and, at minimum, warrants review alongside *Ghanem v. United States*, No. 25-970, involving only conduct “not found.” The sentence here was not based on some fact the jury never considered. The jury was asked whether petitioner discharged the firearm. It said “no.” Pet. App. 33a. The district court then found by a preponderance that petitioner discharged the firearm anyway and imposed nearly five additional years of punishment on that basis, essentially the same sentence petitioner would have received had the jury convicted him of discharging the weapon. Pet. App. 49a. That is not ordinary sentencing discretion. It is a judicial override of the jury’s refusal to authorize punishment for firearm discharge.

It is no answer that the sentence was “at or below the statutory maximum.” Opp. 8. As Justice Scalia explained, the question is whether the sentence “would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.” *United States v. Gall*, 552 U.S. 38, 60 (2007) (Scalia, J., concurring). If a judge-found fact is necessary to justify the higher sentence, that fact exposes the defendant to greater punishment in the relevant constitutional sense. *Jones*, 574 U.S. at 949 (Scalia, J., dissenting from denial of certiorari). Here, the judge said exactly that: without his finding that petitioner was the shooter, “my sentence would not have been the same.” Pet. App. 49a. That concession squarely presents the constitutional question.

The government’s due process response fares no better. It says only that a preponderance finding does not “conflict” with an acquittal because an acquittal means merely that the government failed to prove guilt beyond a reasonable doubt. Opp. 9-10. But that proves petitioner’s point. The reasonable-doubt standard is not a technicality that evaporates at sentencing. It is the “prime instrument for reducing the risk of convictions resting on factual

error” and “provides concrete substance for the presumption of innocence.” *In re Winship*, 397 U.S. 358, 363 (1970). Allowing the same allegation to increase punishment once proved only by a preponderance deprives the acquittal of precisely the protection the reasonable-doubt standard is designed to provide.

The government’s historical argument is nonexistent. It calls acquitted-conduct sentencing “well established,” Opp. 6, but identifies no Founding-era tradition of judges imposing punishment for charges the jury rejected. The first decision upholding the constitutionality of the practice was issued in the 1970s and literally cited *no precedent* for the practice. See *United States v. Sweig*, 454 F.2d 181, 184 (2d Cir. 1972); Murray, *supra*, at 1470. Historical practice was directly to the contrary. See Cato Inst. Amicus Br. 3-8. This Court has recognized that juries historically used “verdicts of guilty to lesser included offenses” to “check[.]” the “severity of sentences,” *Jones v. United States*, 526 U.S. 227, 245 (1999), and Blackstone observed that juries routinely reduced the value of stolen goods to avoid harsh punishment, 4 William Blackstone, *Commentaries on the Laws of England* *238-39 (1769). In short, “[t]he jury not only decided guilt, but it chose the sanction through its manipulation of the partial verdict.” Langbein, *supra*, at 55. Acquitted-conduct sentencing inverts that tradition: it lets a judge impose punishment for an aggravated offense after the jury rejected the aggravating fact.

Nor does the government address the chorus of judicial criticism. Members of this Court have repeatedly questioned acquitted-conduct sentencing. *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting); *Jones*, 574 U.S. at 948-950 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari); *McClinton*, 143 S. Ct. at 2401-2403 (Sotomayor, J., statement respecting denial of certiorari); *id.* at 2403 (Kavanaugh, J., joined by

Gorsuch and Barrett, JJ., statement respecting denial of certiorari). So have judges across the courts of appeals and state courts of last resort. Pet. 12-20. The government's only answer is that lower courts have continued to allow the practice. But that is the problem, not a reason to deny review. As Justice Scalia noted, the lower courts have treated this Court's silence as approval long enough. *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial of certiorari). It is time to squarely address the issue.

III. Only This Court Can Resolve The Split

The government is wrong to suggest this Court's intervention is unnecessary. Only this Court can establish a uniform national rule on acquitted-conduct sentencing.

The government first suggests that "Congress *could* pass a statute to preclude reliance on unconvicted conduct at sentencing," noting that a bill to amend 18 U.S.C. § 3661 was introduced last year. Opp. 12 (emphasis added). But that bill would apply only in federal courts, where only a small fraction of criminal defendants are sentenced. Pet. 21. And the government has repeatedly won review despite pending legislation, assuring this Court that "[t]he speculative possibility that Congress might ultimately enact one of the bills that are still pending in committee should not deter the Court from considering the important questions presented by this case." U.S. Cert. Reply Br. at 8, *United States v. Eurodif S.A.*, 555 U.S. 305 (2009) (No. 07-1059); U.S. Cert. Reply Br. at 10 n.8, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (No. 05-1629) (similar). This Court routinely grants review despite pending legislation. *E.g.*, *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 581 U.S. 258 (2017); *United States v. Windsor*, 570 U.S. 744 (2013); *Henderson v. Shinseki*, 562 U.S. 428 (2011).

The government next argues that review is "particularly unwarranted" because the Sentencing Commission recently amended U.S.S.G. § 1B1.3(c).

Opp. 13. But that amendment *confirms* the need for review. It addresses only the advisory Guidelines calculation, and does so only prospectively. It does not bar courts from relying on acquitted conduct under 18 U.S.C. § 3553(a)—precisely what happened here. Pet. 21-22. That limitation is no accident: the government argues that § 3661 prohibits the Commission from barring judges from considering acquitted conduct at sentencing, and Vice Chair Murray takes the same position. Pet. 22. Justice Scalia cited the same provision when he argued that the Commission lacked authority to conclusively address the practice. *Watts*, 519 U.S. at 158 (Scalia, J., concurring).

In practice, that means that the amendment has been rendered “meaningless,” because courts “simply circumvent the amendment by way of the § 3553(a) factors.” NACDL Amicus Br. 15-16; accord Former Judges Amici Br. 6-7; Professors Amici Br. 3-4, 12-14; Pet. 21-22. The federal courts of appeals have uniformly affirmed use of that mechanism to increase sentences. See, e.g., *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).

Even if the Sentencing Commission *could* prohibit all acquitted-conduct sentencing, as Justice Alito has explained, “that decision will not affect state courts, and therefore the constitutional issue will remain.” *McClinton*, 143 S. Ct. at 2403 (Alito, J., concurring in denial of certiorari). Thus, the Commission cannot create a uniform national rule. If the Constitution forbids punishment based on acquitted conduct, only this Court can say so.

The government downplays the importance of the issue by arguing that although the amendment “*permit[s]*” courts to consider conduct underlying acquitted conduct,

the Guidelines do not *require* it.” Opp. 13. But this Court should not assume the government will allow judges to decline consideration of acquitted conduct. The government has repeatedly taken appeals to discipline judges who “categorically refus[e] to consider acquitted conduct,” insisting that position “contravene[s] 18 U.S.C. § 3661.” *United States v. Ibanga*, 271 F. App’x 298, 299-301 (4th Cir. 2008) (agreeing with the government that the district court “committed significant procedural error” when it declined to consider acquitted conduct because “sentencing based upon acquitted conduct would not promote respect for the law” and “thwart the historic roles of the jury”); accord, *e.g.*, *United States v. Vaughn*, 430 F.3d 518, 527 (2d Cir. 2005) (“direct[ing]” sentencing court “to consider all facts relevant to sentencing,” including “those relating to acquitted conduct, consistent with its statutory obligation to consider the Guidelines” (citing § 3553(a))).

Thus, as the government has argued, sentencing courts will remain *obligated* to consider acquitted conduct. Consequently, as Judge Millett observed, it “falls upon the Supreme Court to hold that sentencing defendants based on conduct for which they have been acquitted contravenes the Constitution and to firmly put an end to the practice.” *United States v. Khatallah*, 41 F.4th 608, 653 (D.C. Cir. 2022) (Millett, J., concurring).

IV. This Petition Provides An Ideal Vehicle

The government argues that because this Court has “recently and repeatedly” denied certiorari on this question, it should do so here. Opp. 5 & n.1. But the reasons for those denials are not present here. Cf. U.S. Br. in Opp. at 6, *Hunter v. United States* (No. 24-1063) (cert. granted Oct. 10, 2025) (“This Court has repeatedly denied certiorari in cases involving similar issues.”).

This Court denied nine of the eleven cited petitions at the time of *McClinton* because the Sentencing

Commission had announced it would “resolve questions around acquitted-conduct sentencing in the coming year.” *McClinton*, 143 S. Ct. at 2403 (Sotomayor, J., statement respecting denial of certiorari); accord *id.* (Kavanaugh, J., statement respecting denial of certiorari). A tenth was denied before the Commission had acted. See *O’Bannon v. United States*, 144 S. Ct. 572 (2024). But the Commission has since acted, and yet “there are still many defendants like Pharms serving longer, constitutionally-suspect sentences based on judge-found facts related to acquitted conduct.” Professors Amici Br. 12.

The last case the government cites presented a vehicle problem: potentially “complicated inquiries into state law and records” because the acquittal had happened in a state court. See U.S. Br. in Opp. at 13-15, *Perricone v. United States*, 145 S. Ct. 1142 (2025) (No. 24-5339). By contrast, the government has identified *no* vehicle problems here. The Fifth and Sixth Amendment challenges were fully litigated and squarely decided at every level. And there is no question that petitioner’s “sentence would not have been the same” (Pet. App. 49a) if the sentencing judge had not considered acquitted conduct: it would have been nearly *five years* shorter. This case thus cleanly presents an issue that is long overdue for this Court’s resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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