

No. 25-

IN THE
Supreme Court of the United States

RAMI GHANEM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

BENJAMIN L. COLEMAN
BENJAMIN L. COLEMAN
LAW PC
1350 Columbia Street,
Suite 600
San Diego, CA 92101
(619) 865-5106
blc@blcolemanlaw.com

NEAL KUMAR KATYAL
Counsel of Record
WILLIAM E. HAVEMANN
KRISTINA ALEKSEYEVA
NATALIE NOGUEIRA
MILBANK LLP
1101 New York Ave. NW
Washington, DC 20005
(202) 835-7500
nkatyal@milbank.com

Counsel for Petitioner

QUESTION PRESENTED

Whether the Fifth and Sixth Amendments prohibit federal courts from increasing a criminal defendant's authorized punishment based on conduct—including uncharged, dismissed, or acquitted conduct—that was never admitted by the defendant or proven to the jury beyond a reasonable doubt.

PARTIES TO THE PROCEEDING

Rami Ghanem, petitioner on review, was the appellant below.

The United States of America, respondent on review, was the appellee below.

STATEMENT OF RELATED PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit:

- *United States v. Ghanem*, No. 22-50266 (9th Cir. July 17, 2025) (reported at 143 F.4th 1114)
- *United States v. Ghanem*, No. 19-50278 (9th Cir. Apr. 12, 2021) (reported at 993 F.3d 1113)

U.S. District Court for the Central District of California:

- *United States v. Asad-Ghanem*, No. 2:15-cr-00704-FLA-1 (C.D. Cal. Nov. 17, 2022) (not reported)

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PETITION FOR A WRIT OF CERTIORARI

Rami Ghanem respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 143 F.4th 1114. Pet. App. 1a-38a. That court's order denying rehearing and rehearing en banc is not reported but is available at *United States v. Ghanem*, No. 22-50266 (9th Cir. Oct. 16, 2025), Dkt. No. 56. Pet. App. 92a-93a. The transcript of the district court's resentencing hearing is available at *United States v. Asad-Ghanem*, No. 2:15-cr-00704-FLA-1 (C.D. Cal. Nov. 17, 2022), Dkt. No. 527. Pet. App. 39a-91a.

JURISDICTION

The Ninth Circuit entered judgment on July 17, 2025. Pet. App. 1a-38a. Mr. Ghanem sought panel rehearing and rehearing en banc, which the court denied on October 16, 2025. Pet. App. 92a-93a. On December 1, 2025, Justice Kagan granted a 30-day extension of the period for filing this petition to February 13, 2026. This Court has jurisdiction 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 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 petition asks the Court to finally end a constitutionally indefensible sentencing practice: the use of judicially found facts—including facts underlying charges that were dismissed or for which the defendant was acquitted—to enhance a criminal defendant’s authorized punishment.

The jury-trial right is “a fundamental reservation of power in our constitutional structure” that “ensures the people’s ultimate control” in the judiciary. *Blakely v. Washington*, 542 U.S. 296, 305-306 (2004).

To safeguard that fundamental right, the Framers enacted the Sixth Amendment, promising that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” U.S. Const. amend. VI. And in the Fifth Amendment, the Framers added that no person may be deprived of liberty without “due process of law.” U.S. Const. amend. V. “Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has ‘extended down centuries.’” *United States v. Haymond*, 588 U.S. 634, 641 (2019) (plurality op.) (brackets omitted) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000)).

Consistent with that history, this Court has held that “[j]udges may not assume the jury’s factfinding function for themselves.” *Erlinger v. United States*, 602 U.S. 821, 834 (2024). Of course, “judges can find facts that help guide their discretion *within* the sentencing range that is authorized by the facts found by the jury or admitted by the defendant.” *Rita v. United States*, 551 U.S. 338, 373 (2007) (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment). But sentences that would be unlawful but for a judge-found fact violate the Constitution; any other rule “would intrude on a power the Fifth and Sixth Amendments reserve to the American people.” *Erlinger*, 602 U.S. at 835.

In the decision below, however, a Ninth Circuit panel deemed itself obligated under circuit precedent to uphold a 22-year sentencing enhancement—more than three times the upper limit of the Guidelines range—based on conduct underlying a conviction that had been vacated in a prior appeal. Although the Government did not retry the defendant on the

vacated charge, the district court on remand, applying the relaxed preponderance-of-the-evidence standard, imposed the exact same sentence anyway. Judge Collins authored the panel opinion, explaining that he understood himself to be compelled by precedent to affirm the sentence. But Judge Collins took the extraordinary step of concurring in his own opinion to emphasize that the sentence was “patently unlawful” and to highlight the “very troubling feature of the precedent we must apply.” Pet. App. 33a, 37a.

The decision below is the most recent contribution to a line of circuit decisions permitting judicial fact-finding at sentencing based on uncharged, vacated, and acquitted conduct. Like the panel below, other federal courts of appeals have taken this Court’s “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, 949 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari). The circuits permit such judicial fact-finding even where, as here, it produces a severalfold increase to the defendant’s sentence, and even where, as here, the facts found by the judge could constitute an entirely separate offense under the U.S. Code.

The Ninth Circuit, like the other circuits, has misread this Court’s precedent in permitting this practice, which cannot be reconciled with our Nation’s constitutional commitment to jury fact-finding beyond a reasonable doubt. This practice also splits from decisions of several state supreme courts, which have correctly interpreted the federal constitution to prohibit the use of uncharged and acquitted conduct to increase a defendant’s authorized punishment.

This issue is exceptionally important, affecting countless defendants across the country. Members of this Court have repeatedly called the practice into question. *E.g.*, *McClinton v. United States*, 143 S. Ct. 2400, 2401-03 (2023) (Sotomayor, J., respecting denial of certiorari); *id.* at 2403 (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., respecting denial of certiorari); *United States v. Watts*, 519 U.S. 148, 170 (1997) (Stevens, J., dissenting); *id.* (Kennedy, J., dissenting); *Jones*, 574 U.S. at 949 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.). Lower court judges, too, routinely criticize sentencing enhancements based on judge-found facts but are compelled to uphold them based on circuit precedent. As Judge Collins explained, only this Court can resolve this “disquieting anomaly.” Pet. App. 38a.

This case is an excellent vehicle to do so. The Ninth Circuit panel openly acknowledged that Mr. Ghanem’s sentence was predicated on conduct “that underlay the now-vacated conviction” and that his sentence would be “substantively unreasonable” without judge-found facts. Pet. App. 29a, 31a-32a. And although this Court denied a similar petition three Terms ago to give the Sentencing Commission an opportunity to consider the issue, the Commission has now acted but failed to fix the constitutional problem.

More than a decade ago, Justice Scalia concluded that the practice of increasing criminal defendants’ authorized punishments based on judge-found facts “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 the petition.

STATEMENT

Rami Ghanem pleaded guilty to criminal charges related to his attempt to export pistols, ammunition, night-vision goggles, and machine guns out of the United States without the necessary license. *See* 18 U.S.C. §§ 554(a), 1956(a)(2)(A); Pet. App. 4a. In all, Mr. Ghanem made two payments, each just under \$90,000, to an undercover federal agent for equipment he believed he would be exporting. Pet. App. 4a, 6a-7a.

In a superseding indictment, however, the Government further charged Mr. Ghanem with conspiring to acquire, transport, and use surface-to-air missiles in violation of 18 U.S.C. § 2332g, which carries a 25-year mandatory minimum. Pet. App. 4a. Mr. Ghanem vigorously disputed his guilt of that charge and went to trial on it. Pet. App. 4a. The jury convicted him, and the district court sentenced him to a term of 30 years' imprisonment based on a Guidelines range of 292-365 months. Pet. App. 4a.

The Ninth Circuit subsequently vacated Mr. Ghanem's § 2332g conviction because the jury had been improperly instructed. Pet. App. 5a. The court concluded that there was "a reasonable likelihood that the jury may have acquitted Mr. Ghanem" but for the erroneous instruction. *United States v. Ghanem*, 993 F.3d 1113, 1130 (9th Cir. 2021).

On remand, the Government opted not to retry Mr. Ghanem on the § 2332g charge, and the Probation Office calculated Mr. Ghanem's Guidelines range on the remaining counts as 78-97 months. Pet. App. 11a-

12a. The Government, however, asked the district court—a different court than had presided over Mr. Ghanem’s trial—to re-impose the same 30-year sentence, which was 22 years longer than the top end of the Guidelines range for the charges to which Mr. Ghanem pleaded guilty. Pet. App. 12a. According to the Government, Mr. Ghanem’s relevant “conduct remain[ed] exactly the same” as at the first sentencing despite the vacatur of the § 2332g conviction, so “the appropriate sentence for that conduct also remain[ed] the same.” Pet. App. 12a (brackets omitted).

The district court agreed, sentencing Mr. Ghanem to 30 years’ imprisonment over Mr. Ghanem’s objections. Pet. App. 12a. The court reasoned that “it was allowed to consider the conduct underlying the vacated § 2332g count,” and determined that an upward variance was appropriate due to the “extreme facts” underlying the vacated conviction. Pet. App. 13a.

Mr. Ghanem appealed his sentence, maintaining that the 22-year enhancement violated his due process and jury-trial rights under the Fifth and Sixth Amendments. He emphasized that, had the district court sentenced him to 30 years based solely on the conduct he admitted in his plea, that sentence would have been substantively unreasonable. As Mr. Ghanem explained, the district court imposed that exorbitant sentence only by making its own findings of fact related to the vacated charge. That was unconstitutional: “any fact necessary to prevent a sentence from being substantively unreasonable” “is an element that must be either admitted by the defendant or found by the jury.” *Jones*, 574 U.S. at 949 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari). And Mr. Ghanem explained that his sentence enhancement was particularly

egregious because it was based on conduct underlying a charge the government had been forced to dismiss.

In a majority opinion authored by Judge Collins, the Ninth Circuit affirmed. The court acknowledged that, “[g]iven the loadbearing weight that we have placed on the district court’s factual findings in concluding that Ghanem’s sentence is substantively reasonable, his sentence here would violate the Sixth Amendment under Justice Scalia’s view.” Pet. App. 32a. But the panel held that “Justice Scalia’s position has not commanded a majority of the Supreme Court,” and that the panel was bound by Ninth Circuit precedent applying this Court’s decisions in *Watts*, 519 U.S. 148, and *United States v. Booker*, 543 U.S. 220 (2005). Pet. App. 31a-32a. For example, the Ninth Circuit in *United States v. Mercado*, 474 F.3d 654 (9th Cir. 2007), determined that “*Booker* has not abrogated the previously prevailing constitutional jurisprudence that allowed sentencing courts to consider conduct underlying acquitted criminal charges.” *Id.* at 658. And *United States v. Treadwell*, 593 F.3d 990 (9th Cir. 2010), permitted district courts to “impose a sentence anywhere within the range established by the statute of conviction.” *Id.* at 1017.

Judge Collins concurred in his own majority opinion. He reiterated that the “discrete” and “limited” facts underlying Mr. Ghanem’s guilty plea “support, at most, a guidelines range of 78–97 months, and therefore any upward departure from that range would require additional fact-finding that,” under the Sixth Amendment, “only a jury may make.” Pet. App. 35a-36a. Judge Collins therefore concluded that allowing “a district judge to make the findings necessary to raise Ghanem’s sentence above the 97-month cap” was “patently unlawful” and “a flagrant violation

of Ghanem’s Sixth Amendment rights.” Pet. App. 36a-37a. Judge Collins further observed that “even the Government’s lawyer candidly conceded at oral argument” that Mr. Ghanem’s 30-year sentence “was ‘absolutely’ unlawful under” the Guidelines as originally written by Congress. Pet. App. 38a. Nonetheless, Judge Collins understood himself to be “required to affirm” the sentence under *Watts*, *Booker*, and circuit precedent applying those decisions. Pet. App. 38a. “Only the Supreme Court has the authority, if it sees fit, to address this disquieting anomaly.” Pet. App. 38a.

Mr. Ghanem sought rehearing and rehearing en banc, explaining that the panel misread *Watts* and *Booker* and disregarded this Court’s precedent prohibiting the use of uncharged, vacated, and acquitted conduct to increase a defendant’s authorized punishment. The Ninth Circuit denied Mr. Ghanem’s petition. Pet. App. 92a-93a.

REASONS FOR GRANTING THE PETITION

I. USE OF UNCHARGED, DISMISSED, AND ACQUITTED CONDUCT TO INCREASE A DEFENDANT’S AUTHORIZED PUNISHMENT VIOLATES THE CONSTITUTION.

Courts have broad authority to impose a sentence that reflects the seriousness of a defendant’s offense, but courts may not use judge-found facts to impose a sentence that would be unlawful without those facts. As the Court explained in *Booker*: “Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” 543 U.S. at 244.

The panel below affirmed a 30-year sentence that was “*more than triple* the top of the guidelines range” based on conduct underlying a conviction that had been vacated in a prior appeal. Pet. App. 36a (emphasis added). The panel recognized that this sentence would be “substantively unreasonable” absent judge-found facts regarding the vacated charge, but understood itself to be bound by circuit precedent to affirm the sentence anyway. Pet. App. 31a-32a. As Judge Collins explained concurring in his own majority opinion, Mr. Ghanem’s sentence was “patently unlawful.” Pet. App. 37a. The Court should grant certiorari and resolve the “disquieting anomaly” underlying it. Pet. App. 38a.

A. Relying On Judge-Found Facts To Increase A Defendant’s Authorized Punishment Violates The Sixth And Fifth Amendments.

The Sixth Amendment’s jury-trial right is one of the most “fundamental reservation[s] of power in our constitutional structure.” *Blakely*, 542 U.S. at 305-306. It guarantees citizens’ “control in the judiciary,” *id.* at 306, and “safeguard[s] a person accused of crime against the arbitrary exercise of power by prosecutor or judge,” *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). The Sixth Amendment’s jury-trial right works in tandem with the Fifth Amendment right to due process, which “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). Increasing a defendant’s authorized punishment based on acquitted or uncharged conduct is a manifest violation of these principles.

1. The Sixth Amendment “gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.” *United States v. Gaudin*, 515 U.S. 506, 511 (1995). That right grew from a centuries-long Anglo-American common-law tradition that viewed the right to jury trial as an “inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

Common-law juries acted as the conscience of the community not only through “flat-out acquittals,” but also by “indirectly check[ing]” the “severity of sentences” by issuing “what today we would call verdicts of guilty to lesser included offenses.” *Jones v. United States*, 526 U.S. 227, 245 (1999). Juries, for example, would “often * * * bring in larceny to be under the value of twelvepence” to avoid a mandatory death sentence. 4 William Blackstone, *Commentaries* 248.

Early American statutes similarly “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 v. United States*, 570 U.S. 99, 108 (2013) (discussing 3 William Blackstone, *Commentaries* 396). A judge could not “swell the penalty above what the law * * * provided for the acts” found by a jury of the defendant’s peers. *Apprendi*, 530 U.S. at 519 (Thomas, J., concurring) (citation omitted).

In recent decades, however, legislatures have experimented with sentencing provisions that cut juries out of the sentencing process. *Erlinger*, 602 U.S. at 832. This Court responded to this experimentation decisively, insisting on jury fact-finding in sentencing

because “the Constitution’s guarantees cannot mean less today than they did the day they were adopted.” *Haymond*, 588 U.S. at 642 (plurality op.). In *Apprendi*, the Court thus held that “the relevant inquiry” in every case is whether “the required finding expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict.” 530 U.S. at 494. And in *Blakely*, the Court made clear “that the judge’s authority to sentence derives wholly from the jury’s verdict” or guilty plea. 542 U.S. at 306. Thus, it “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 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., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari).

The use of uncharged and acquitted conduct at sentencing not only infringes criminal defendants’ jury-trial rights. It also “undermines respect for the law and the jury system.” *United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (Kavanaugh, J.). Increasing a defendant’s sentence based on judicial fact-finding deprives the sentence of the legitimacy that follows from a jury verdict and “divest[s] the people at large * * * of their constitutional authority to set the metes and bounds of judicially administered criminal punishments.” *Haymond*, 588 U.S. at 646 (plurality op.) (quotation marks and citation omitted); see *United States v. Canania*, 532 F.3d 764, 778 n.4 (8th Cir. 2008) (Bright, J., concurring) (quoting letter from juror to judge calling the use of acquitted conduct a “tragedy” that denigrates “our contribution as jurors”).

2. Relying on acquitted, dismissed, and uncharged conduct to increase a defendant’s authorized punishment also violates due process. The Fifth Amendment “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.” *Winship*, 397 U.S. at 364. That standard of proof “provides concrete substance for the presumption of innocence.” *Id.* at 363.

Judicial fact-finding, however, permits a preponderance-of-the-evidence standard. Increasing a defendant’s authorized punishment based on findings made by a preponderance causes “unusual and serious procedural unfairness,” *Apprendi*, 530 U.S. at 562-563 (Breyer, J., joined by Roberts, C.J., dissenting)—particularly where that conduct could “constitute entirely free-standing offenses under the applicable law,” *United States v. Faust*, 456 F.3d 1342, 1352 (11th Cir. 2006) (Barkett, J., specially concurring); see *United States v. Fisher*, 502 F.3d 293, 311-312 (3d Cir. 2007) (Rendell, J., concurring) (similar).

Finally, fact-finding by a preponderance of the evidence increases the risk of inaccurate sentencing. Even where a defendant has previously been *convicted* of a crime, this Court has cautioned that reliance on facts underlying those prior convictions may raise concerns about “unfairness” and lead to “error.” *Mathis v. United States*, 579 U.S. 500, 501 (2016). Those same concerns obviously apply when the court relies on facts underlying uncharged, vacated, and acquitted conduct—facts the Government has not proven. “Such a result * * * is inconsistent with due process of law.” *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

B. The Ninth Circuit, Like The Other Circuits, Has Misinterpreted This Court's Precedent.

1. The decision below cannot be reconciled with the Sixth and Fifth Amendments' basic guarantees. The panel approved a criminal sentence that was "more than triple"—22 years above—"the top of the guidelines range" based on judge-found facts that Mr. Ghanem never admitted in the plea and that were never proven to the jury beyond a reasonable doubt. Pet. App. 36a. The panel acknowledged that the sentence would have been "substantively unreasonable" without those judge-found facts. Pet. App. 31a-32a (citing *Jones*, 574 U.S. at 949-950 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari)). And those facts were based on a charge underlying an entirely separate provision of the U.S. Code that had been vacated in a prior appeal. *See* 18 U.S.C. § 2332g.

These proceedings deprived Mr. Ghanem of his constitutional right to have his punishment determined by a jury beyond a reasonable doubt. The Government prosecuted Mr. Ghanem under Section 2332g but the conviction was vacated, rendering it a nullity. Rather than retry Mr. Ghanem, the Government prevailed on the district court to impose "exactly the same" sentence based on "exactly the same" conduct anyway—a sentence that the Ninth Circuit recognized would have been unlawful based on the conduct Mr. Ghanem admitted in his plea. Pet. App. 12a. The Government may not short-circuit constitutional guardrails in this manner for the sake of convenience. 4 Blackstone, *supra*, at 344.

2. In upholding Mr. Ghanem’s sentencing enhancement, the panel understood itself to be bound by Ninth Circuit precedent that has construed this Court’s cases to permit judicial fact-finding to increase a defendant’s authorized punishment. But the Ninth Circuit has misunderstood this Court’s cases and federal law.

First, the Ninth Circuit has relied on this Court’s decision in *Watts* to justify judicial fact-finding to increase a defendant’s authorized punishment. But this Court has already explained that *Watts* did not sanction “sentencing enhancement[s]” that exceed the punishment “authorized by the jury verdict.” *Booker*, 543 U.S. at 240. Rather, *Watts* decided a “very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause.” *Id.* at 240 n.4. Indeed, this Court has specifically warned against overreliance on *Watts*, which “did not even have the benefit of full briefing or oral argument.” *Id.*; *see also, e.g., Connecticut v. Doehr*, 501 U.S. 1, 12 n.4 (1991) (summary dispositions do “not enjoy the full precedential value of a case argued on the merits”).

Watts is also out of step with the Court’s modern Sixth Amendment jurisprudence. *See supra* pp. 11-12; *see also Hurst v. Florida*, 577 U.S. 92, 98-99 (2016) (jury must make critical findings needed to impose a death sentence); *Alleyne*, 570 U.S. at 117 (jury must find facts increasing mandatory minimum); *Cunningham v. California*, 549 U.S. 270, 293 (2007) (jury must find facts exposing defendant to longer sentence); *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (any “increase in a defendant’s authorized punishment contingent on the finding of a fact” requires a jury finding).

The Ninth Circuit’s uncritical reliance on *Watts* is therefore “misplaced.” *Mercado*, 474 F.3d at 661 (Fletcher, J., dissenting); *accord, e.g., United States v. White*, 551 F.3d 381, 392 (6th Cir. 2008) (Merritt, J., dissenting) (“reliance on *Watts* as authority for enhancements based on acquitted conduct is obviously a mistake”); *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”).

Second, the Ninth Circuit has concluded that *Booker*’s remedial opinion, authored by Justice Breyer, permits judges to rely on uncharged and acquitted conduct so long as the sentence ultimately does not exceed the statutory maximum, because *Booker* declined to engraft a jury-trial requirement onto the Guidelines. *See United States v. Perez*, 962 F.3d 420, 454 (9th Cir. 2020); Pet. App. 33a-38a; *see also White*, 551 F.3d at 384.

But nothing about *Booker*’s remedial opinion—or the Court’s precedent applying it—forecloses “as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea.” *Rita*, 551 U.S. at 375 (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment); *see also White*, 551 F.3d at 389 (Merritt, J., dissenting) (“it is clear that the post-*Booker* development of reasonableness review has opened the door for Sixth Amendment challenges” even “to sentences *within*

the statutory range authorized by the jury's verdict" (emphasis added)).

Booker's constitutional opinion, moreover, specifically rejected the government's attempt to downplay *Apprendi*. The government had argued that *Apprendi* was not controlling because it addressed only the statutory maximum and not the Guidelines. The Court disagreed, explaining that the government was wrong to fixate on the particular "language used in our holding in *Apprendi*." *Booker*, 543 U.S. at 238. "More important" were the principles the Court "sought to vindicate" in that case, like averting "the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases." *Id.* at 238-239 (quoting *The Federalist* No. 83, at 499 (Alexander Hamilton) (C. Rossiter ed. 1961)). "Those principles are unquestionably applicable to the Guidelines" as well. *Id.* at 238.

II. SEVERAL STATE SUPREME COURTS HAVE SPLIT FROM THE FEDERAL COURTS OF APPEALS.

While the federal courts consistently impose sentencing enhancements based on acquitted, dismissed, and uncharged conduct, several States have interpreted the U.S. Constitution to prohibit the use of judge-found facts to impose a sentence that would be substantively unreasonable without those facts.

The Minnesota Supreme Court has repeatedly held that, while a court may "consider the conduct underlying the charge of which the defendant is convicted," "reliance on other offenses that are not part of the charge and of which the defendant was not convicted is not a permissible basis" for a sentencing

enhancement. *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003). In *Taylor*, for example, the defendant pleaded guilty to one count of sexual misconduct. *Id.* at 585. At sentencing, the State requested a 3-year upward departure based on evidence of a prior uncharged sex offense that the defendant did not admit in the plea. *Id.* at 586. The trial court increased the defendant's sentence accordingly, but the Minnesota Supreme Court reversed. "To use prior uncharged sex offenses would amount to improper sentencing for crimes of which the defendant was not convicted," the court explained. *Id.* at 588. Where "the evidence 'only supports defendant's guilt of some other offense but does not support the conclusion that the defendant committed the instant offense for which he is being sentenced in a particularly serious way, then it cannot be relied upon as a ground for departure.'" *Id.* (quoting *State v. Ott*, 341 N.W.2d 883, 884 (Minn. 1984)); see also, e.g., *State v. Peterson*, 329 N.W.2d 58, 60 (Minn. 1983); *State v. Barnes*, 313 N.W.2d 1, 3 (Minn. 1981); *State v. Chase*, 343 N.W.2d 695, 697 (Minn. Ct. App. 1984) (all reiterating the same rule). "If the state has evidence" of the additional violations, "the state should charge defendant." *Barnes*, 313 N.W.2d at 3.

The North Carolina Supreme Court has similarly held that "due process and fundamental fairness preclude[] the trial court from aggravating [a] defendant's sentence" based on uncharged or acquitted conduct. *State v. Marley*, 364 S.E.2d 133, 138-139 (N.C. 1988). In *Marley*, the jury acquitted the defendant of first-degree murder, but the trial court nevertheless imposed a life sentence based on its own finding of "premeditation and deliberation as an aggravating factor." *Id.* at 134, 137. The North Carolina Supreme

Court reversed. As the court put it, the “use at sentencing [of] an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself.” *Id.* at 139; *accord State v. Mack*, 359 S.E.2d 485, 489-490 (N.C. Ct. App. 1987) (that a defendant may be guilty of another offense “is not itself an unenumerated aggravating factor reasonably related to the purposes of sentencing” (quotation marks and citation omitted)); *State v. Simpson*, No. COA24-1092, 2026 WL 40886, at *5-6 (N.C. Ct. App. Jan. 7, 2026) (although the trial court has “wide latitude” to consider such “matters as the age, character, education, environment, habits, mentality, propensities and record of the defendant,” it may not significantly increase a sentence based on “conduct not alleged in the indictment” (quotation marks and citations omitted)).

New Jersey follows the same rule. In *Melvin*, the New Jersey Supreme Court concluded that neither the New Jersey nor the federal constitution allows trial courts to rely on acquitted or uncharged conduct at sentencing, because “the right to a criminal trial by jury is inviolate.” 258 A.3d at 1092 (quotation marks and citation omitted). Permitting “re-litigation of facts in a criminal case under the lower preponderance of the evidence standard” therefore “would render the jury’s role in the criminal justice process null and would be fundamentally unfair.” *Id.* The court considered whether *Watts* requires it to affirm the sentence, and determined that it does not. “As clarified in *Booker*, *Watts* was cabined specifically to the question of whether the practice of using acquitted conduct at sentencing was inconsistent with double

jeopardy.” *Id.* at 1090; *see also State v. Bunn*, No. A-2206-18, 2022 WL 3022381, at *3 (N.J. Super. Ct. App. Div. Aug. 1, 2022) (vacating a sentence based on “acquitted and uncharged conduct”).

* * *

The decision below thus entrenched a split between federal and state courts, giving criminal defendants in federal court diminished rights under the Fifth and Sixth Amendments relative to defendants in Minnesota, North Carolina, and New Jersey. This split is particularly intolerable for defendants in those three States, whose Sixth Amendment protections vary depending on whether they are charged in federal or state court.

III. ONLY THIS COURT CAN RESOLVE THE IMPORTANT QUESTION PRESENTED, AND THIS CASE IS AN EXCELLENT VEHICLE TO DO SO.

1. This case raises exceptionally important constitutional issues that affect the rights of criminal defendants in both federal and state courts. Multiple Justices of this Court have expressed concern over using acquitted, dismissed, and uncharged conduct to increase a defendant’s sentence and have called on the Court to put an end to this practice.

Over a decade ago, Justices Scalia, Thomas, and Ginsburg dissented from denial of certiorari in *Jones*, explaining that “[a]ny fact that increases the penalty to which a defendant is exposed constitutes an element of a crime” that “must be found by a jury, not a judge.” 574 U.S. at 948 (quotation marks and citations omitted). Yet, the Justices observed, “the Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution *does* permit

otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range.” *Id.* at 949. The Justices urged the Court to weigh in and “put an end to the unbroken string of cases disregarding the Sixth Amendment.” *Id.* at 950.

Justices Sotomayor, Kavanaugh, Gorsuch, and Barrett echoed those same concerns three Terms ago, explaining that the use of acquitted conduct at sentencing raised important issues “that go to the fairness and perceived fairness of the criminal justice system” warranting this Court’s review. *McClinton*, 143 S. Ct. at 2401 (Sotomayor, J., respecting denial of certiorari); *see id.* at 2403 (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., respecting denial of certiorari) (similar). Justices have consistently raised these concerns—not only as to acquitted conduct, but as to vacated and other uncharged conduct as well. *See Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing en banc) (“Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial.”); *Sabillon-Umana*, 772 F.3d at 1331 (Gorsuch, J.) (“It is far from certain whether the Constitution allows” a district judge to increase a defendant’s sentence within the statutorily authorized range “based on facts the judge finds without the aid of a jury or the defendant’s consent.”).

Lower-court judges have also repeatedly and emphatically called on this Court to address the unfairness of allowing uncharged, vacated, or acquitted conduct to drive a defendant’s sentence. *See United States v. Baylor*, 97 F.3d 542, 550 (D.C. Cir. 1996) (Wald, J., concurring specially) (“the use of acquitted conduct in an identical fashion with convicted conduct

in computing an offender’s sentence leaves such a jagged scar on our constitutional complexion that periodically its presence must be highlighted and reevaluated in the hopes that someone will eventually pay attention, [for example] through a grant of certiorari”); *Bell*, 808 F.3d at 932 (Millett, J., concurring in denial of rehearing en banc) (observing that “only the Supreme Court can resolve the contradictions in the current state of the law” and urging the Court “to take up this important, frequently recurring, and troubling contradiction in sentencing law”); *United States v. Norman*, 926 F.3d 804, 811 (D.C. Cir. 2019) (Sentelle, J.) (affirming sentence only because “[t]he Supreme Court has not yet done what Justice Scalia suggested”); *White*, 551 F.3d at 387 (Merritt, J., dissenting) (similar); *Faust*, 456 F.3d at 1349 (Barkett, J., specially concurring) (similar); *Canania*, 532 F.3d at 776-778 (Bright, J., concurring) (similar); Pet. App. 38a (similar).

As Justices Scalia, Thomas, and Ginsburg anticipated, federal courts of appeals have continued to understand this Court’s silence regarding the practice as approval of it, holding that the use of uncharged, vacated, and acquitted conduct to increase a defendant’s authorized punishment is permissible. *Every* circuit with criminal jurisdiction has blessed this practice.¹

¹ See *United States v. González*, 857 F.3d 46, 58 (1st Cir. 2017); *United States v. Vaughn*, 430 F.3d 518, 526-527 (2d Cir. 2005); *United States v. Ciavarella*, 716 F.3d 705, 735-736 (3d Cir. 2013); *United States v. Grubbs*, 585 F.3d 793, 798-799 (4th Cir. 2009); *United States v. Farias*, 469 F.3d 393, 399-400 & n.17 (5th Cir. 2006); *White*, 551 F.3d at 386 (6th Cir.); *United States v. Waltower*, 643 F.3d 572, 575-578 (7th Cir. 2011); *United States v. Waller*, 689 F.3d 947, 958-960 (8th Cir. 2012); *United States v. Lucas*, 101 F.4th 1158, 1162-63 (9th Cir. 2024); *United States v. Constantine*, 263 F.3d 1122, 1125 n.2 (10th Cir. 2001); *United*

And *every* circuit has refused to reconsider the question en banc.² Thus, while the federal and state courts are split on the question, there is no prospect that any circuit will change its position absent this Court’s intervention.

Lower-court judges therefore have no choice but to affirm extraordinary sentencing enhancements not because they believe them to be constitutional but because they are compelled to do so by circuit precedent. *See, e.g., United States v. Sikes*, 824 F. App’x 805, 810 (11th Cir. 2020) (per curiam) (affirming a sentence double the Guidelines range for mail fraud based on evidence of uncharged conduct because, “even if th[e] jurists and scholars are correct” that “the Fifth and Sixth Amendments preclude district courts from considering uncharged conduct at sentencing,” “we would not be permitted to overlook” binding precedent); *United States v. Hebert*, 813 F.3d 551, 564-565 (5th

States v. Siegelman, 786 F.3d 1322, 1332-33 & n.12 (11th Cir. 2015); *Settles*, 530 F.3d at 923-924 (D.C. Cir.).

² *See United States v. Cortes-Medina*, No. 14-1101 (1st Cir. June 28, 2016), Dkt. No. 58; *United States v. Jones*, No. 18-1794 (2d Cir. Aug. 13, 2021), Dkt. No. 420; *United States v. Lynch*, No. 17-1144 (3d Cir. June 26, 2018), Dkt. No. 91; *United States v. Benkahla*, No. 07-4778 (4th Cir. July 22, 2008), Dkt. No. 32; *United States v. Redd*, No. 06-60806 (5th Cir. Mar. 17, 2009), Dkt. No. 272; *United States v. Baquedano*, No. 13-1007 (6th Cir. Nov. 27, 2013), Dkt. No. 66; *United States v. Ashqar*, No. 07-3879 (7th Cir. Oct. 28, 2009), Dkt. No. 60; *United States v. Shield*, No. 15-2341 (8th Cir. Sep. 29, 2016), Dkt. No. 61; *United States v. Fitch*, No. 07-10607 (9th Cir. Feb. 22, 2012), Dkt. No. 142; *United States v. Ray*, No. 11-3383 (10th Cir. Feb. 1, 2013), Dkt. No. 48; *United States v. Sims*, 299 F. App’x 945 (11th Cir. 2008), *reh’g en banc denied*, 309 F. App’x 384 (11th Cir. 2009) (Table); *United States v. Browne*, No. 18-3073 (D.C. Cir. June 12, 2020), Dkt. No. 46.

Cir. 2015) (upholding a sentence *eighty-six years* above the Guidelines range because judicial fact-finding did not violate the defendant’s “due process right and constitutional right to a jury trial” under the court’s “precedent”).

Even district judges cannot “disclaim reliance on acquitted or uncharged conduct,” because circuit courts do not merely *permit* district judges to increase defendants’ sentences based on judge-found facts; they *require* them to do so. *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing en banc). In *United States v. Ibanga*, 271 F. App’x 298 (4th Cir. 2008) (per curiam), for example, the district court “refus[ed] to consider acquitted conduct * * * in determining [a defendant’s] sentence.” *Id.* at 299. The Fourth Circuit reversed, finding that the district court “committed significant procedural error by categorically excluding acquitted conduct from the information that it could consider in the sentencing process.” *Id.* at 301 (citation omitted). Likewise in *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005), the Second Circuit vacated the district court’s sentence and ordered 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.” *Id.* at 527.

2. Denying certiorari in *McClinton*, Justices Sotomayor, Gorsuch, Kavanaugh, and Barrett explained that the case “raise[d] important questions” but that review was unwarranted because the Sentencing Commission was “considering the issue.” 143 S. Ct. at 2403 (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., respecting denial of certiorari); *see id.* at 2402-03 (Sotomayor, J., respecting denial of

certiorari) (“If the Commission does not act expeditiously or chooses not to act, however, this Court may need to take up the constitutional issues presented.”).

In 2024, the Commission amended the Guidelines to provide that “[r]elevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court.” U.S.S.G. § 1B1.3(c). That amendment, however, did not cure the constitutional problem. For one thing, the amendment prohibits sentencing enhancements only based on acquitted conduct; it “does not comment on the use of uncharged, dismissed, or other relevant conduct.” U.S.S.G. amend. 826.³ The amendment therefore does not reach cases like Mr. Ghanem’s.

More fundamentally, the amendment’s “plain text does not limit the consideration of acquitted conduct in contexts other than calculating the Guidelines range,” so even “acquitted conduct may still be considered when determining the appropriate sentence.” *United States v. Texidor*, 164 F.4th 248, 255 (3d Cir. 2026); see *Public Meeting* at 14, United States Sentencing Commission (Apr. 17, 2024) (statement of Vice Chair Murray) (clarifying that a court *can* consider acquitted conduct when “imposing a sentence”).⁴

Only this Court—not the Commission—can enforce the limits of the Fifth and Sixth Amendments. The Commission can only “preclude[] consideration of acquitted conduct in the context of *calculating the Guidelines*”; it cannot prohibit courts from relying on

³ Available at <https://www.ussc.gov/guidelines/amendment/826>.

⁴ Available at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20240417/transcript.pdf>.

uncharged or acquitted conduct when *varying upwards* from the Guidelines under the 18 U.S.C. § 3553(a) factors. *United States v. Ralston*, 110 F.4th 909, 921 (6th Cir. 2024) (brackets and citation omitted); *accord United States v. Ware*, 141 F.4th 970, 974 n.2 (8th Cir. 2025) (§ 1B1.3(c) “does not prohibit a court from considering acquitted conduct when analyzing the factors from § 3553(a)”). Indeed, Congress has provided that “[n]o 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.” 18 U.S.C. § 3661.

Circuit courts accordingly have continued to impose substantially increased sentences based on acquitted and uncharged conduct even after the amendment. *E.g.*, Pet. App. 28a; *Ralston*, 110 F.4th at 921-922; *Ware*, 141 F.4th at 974 n.2. Only this Court can end that practice.

3. This case is an ideal vehicle to resolve these constitutional questions. Mr. Ghanem’s sentence was indisputably based on dismissed conduct. Pet. App. 12a-13a, 31a-32a. And the panel majority candidly acknowledged that the sentence would be substantively unreasonable without judge-found facts and “would violate the Sixth Amendment” under the proper analysis. Pet. App. 31a-32a. As Judge Collins explained, the facts underlying Mr. Ghanem’s guilty plea “support, at most, a guidelines range of 78–97 months,” and the district court tripled Mr. Ghanem’s punishment only because it engaged in “additional fact-finding.” Pet. App. 36a. The question presented is therefore dispositive.

The sentencing enhancement, moreover, was particularly egregious here because Mr. Ghanem's 30-year sentence was "more than triple the top of the guidelines range," Pet. App. 36a, and the facts underlying his conviction "could, in themselves, constitute entirely free-standing offenses under the applicable law," *Faust*, 456 F.3d at 1352 (Barkett, J., specially concurring). That distinguishes Mr. Ghanem's petition from similar petitions the Court has declined to consider. The Court "should grant certiorari to put an end to the unbroken string of cases disregarding" the Constitution and this Court's precedents. *Jones*, 574 U.S. at 950 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari).

CONCLUSION

The Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

BENJAMIN L. COLEMAN
BENJAMIN L. COLEMAN
LAW PC
1350 Columbia Street,
Suite 600
San Diego, CA 92101
(619) 865-5106
blc@blcolemanlaw.com

NEAL KUMAR KATYAL
Counsel of Record
WILLIAM E. HAVEMANN
KRISTINA ALEKSEYEVA
NATALIE NOGUEIRA
MILBANK LLP
1101 New York Ave. NW
Washington, DC 20005
(202) 835-7500
nkatyal@milbank.com

Counsel for Petitioner

February 13, 2026

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APPENDIX A

**FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

United States of America,
Plaintiff-Appellee,
v.
Rami Ghanem,
Defendant-Appellant.

No. 22-50266
D.C. No. 2:15-cr-00704-FLA-1

OPINION

Appeal from the United States District Court
for the Central District of California
Fernando L. Aenlle-Rocha, District Judge, Presiding

Argued and Submitted June 7, 2024
Pasadena, California
Filed July 17, 2025

Before: Richard R. Clifton, Daniel P. Collins, and
Kenneth K. Lee, Circuit Judges.
Opinion by Judge Collins;
Concurrence by Judge Collins

SUMMARY*

Criminal Law

The panel affirmed the 360-month sentence imposed at resentencing on six counts to which Rami Ghanem pleaded guilty in a case in which Ghanem sought to export military equipment from the United States to Libya.

The district court resentenced Ghanem on remand after this court vacated his jury conviction for conspiring to acquire, transport, and use surface-to-air missiles in violation of 18 U.S.C. § 2332g.

The panel rejected all of Ghanem's arguments that the district court committed significant procedural error at resentencing. The panel held that the district court applied the correct legal standards in declining to reduce Ghanem's offense level under U.S.S.G. § 3E1.1 for acceptance of responsibility, and did not clearly err in finding that evidence of Ghanem's failure to accept responsibility outweighed his guilty plea and truthful admissions. As to the district court's decision to depart and vary from the Sentencing Guidelines range, the panel held that (1) the district court adequately explained its sentencing decision, (2) the district court did not fail to address Ghanem's argument that a significant upward deviation from the guidelines was inconsistent with the need to avoid unwarranted sentencing disparities among similarly

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

situated defendants, (3) no special procedural limitations apply to the consideration of large enhancements based on conduct underlying dismissed charges, and (4) because § 2332g applies extraterritorially to Ghanem's overseas conduct, the district court did not err "by relying on foreign conduct that may not even have been criminal."

Rejecting Ghanem's argument that the sentence is substantively unreasonable, the panel held that the district court did not abuse its discretion in concluding that a 360-month sentence was warranted under the 18 U.S.C. § 3553(a) factors.

The panel rejected Ghanem's arguments that, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, his sentence violates the Fifth Amendment Due Process Clause and the Sixth Amendment right to a jury trial.

Concurring, Judge Collins wrote separately to point out how this case illustrates a troubling feature of the precedent this court must apply. Under the statutes enacted by Congress and under the Sixth Amendment as construed in Part I of the opinion in *Booker v. United States*, 543 U.S. 220 (2005), Ghanem's sentence is patently unlawful, because the facts necessary to justify exceeding the guidelines range were found by the district judge rather than established by a jury verdict or by the defendant's admissions. But the panel must uphold the sentence because Part II of *Booker* eliminated the predicate for Ghanem's Sixth Amendment claim by deleting two of the Sentencing Reform Act's provisions and then adding a new, judge-made "reasonableness" review requirement.

COUNSEL

A. Carley Palmer (argued) and Annamartine Salick, Assistant United States Attorneys; Bram M. Alden, Assistant United States Attorney, Chief; Criminal Appeals Section; E. Martin Estrada, United States Attorney; Office of the United States Attorney, United States Department of Justice, Los Angeles, California; for Plaintiff-Appellee.

Benjamin L. Coleman (argued), Benjamin L. Coleman Law PC, San Diego, California, for Defendant-Appellant.

OPINION

COLLINS, Circuit Judge:

After undercover federal agents conducted a sting operation in which Defendant Rami Ghanem sought to export military equipment from the United States to Libya, Ghanem pleaded guilty to two counts of violating the Arms Export Control Act (“AECA”), *see* 22 U.S.C. § 2778; one count of conspiring to violate the AECA and its regulations, *see* 18 U.S.C. § 371; one count of unlawful smuggling, *see* 18 U.S.C. § 554; and two counts of money laundering, *see* 18 U.S.C. § 1956(a)(2)(A). But Ghanem proceeded to trial on a remaining charge that he had conspired to acquire, transport, and use surface-to-air anti-aircraft missiles (again for use in Libya) in violation of 18 U.S.C. § 2332g, which carries a 25-year mandatory minimum. Ghanem was found guilty and was sentenced to 360 months of imprisonment, which was within the applicable guidelines range of 292–365 months. The 360-month total sentence rested on two

independent concurrent groups of sentences: (1) a 360-month sentence for the § 2332g count alone; and (2) a package of concurrent and consecutive sentences on the remaining six counts that also yielded an aggregate 360-month sentence. On appeal, we vacated Ghanem’s § 2332g conviction due to a defective jury instruction on venue, and we remanded for resentencing. *United States v. Ghanem*, 993 F.3d 1113 (9th Cir. 2021). At resentencing on the remaining six counts, the district court calculated the guidelines range as now being 78–97 months. Nonetheless, the court ultimately adopted the same above-described second package of sentences as before, and Ghanem was once again sentenced to 360 months of imprisonment.

Ghanem appeals, challenging his sentence on multiple grounds. We affirm.

I

A

Defendant Rami Ghanem, a Jordanian-born naturalized U.S. citizen, first came to the attention of federal authorities in May 2014, shortly after he sent an email to a “Los Angeles-based manufacturer of military equipment” seeking to establish, as he put it, a “cooperative relationship to supply our customers in Jordan (military and security) with your line of products.” Federal authorities quickly verified that Ghanem lacked any license from the U.S. to engage in international arms transactions, and they decided to investigate further.

Shortly thereafter, an undercover federal agent, posing as a business owner who sold weapons on the “black market,” began contacting Ghanem. They had a series of telephone conversations over the ensuing

months, and they met in person in Athens, Greece on March 10 and 11, 2015. In telephone conversations in August 2015, they discussed their first planned shipment, which would involve shipping pistols, rifles, ammunition, and “night vision” goggles or scopes to Libya. They agreed that the shipment would be falsely labeled, ultimately deciding to list the contents in the shipping documents as “industrial equipment.” On December 8, 2015, Ghanem arrived at a warehouse in Athens to inspect the planned shipment, but upon arrival he was instead arrested by Greek authorities. These authorities seized two cell phones that were in Ghanem’s possession, and they conducted a later search of his Athens hotel room that yielded multiple other electronic devices containing a wealth of information about Ghanem’s arms-trafficking activities.

Two weeks later, Ghanem was indicted in the Central District of California on four charges arising from the planned weapons sale. Ghanem was subsequently extradited from Greece and was arraigned in the Central District in April 2016. A superseding indictment adding three additional charges was filed in March 2017. On the day before his scheduled trial in October 2018, Ghanem pleaded guilty, without a plea agreement, to all four of the counts in the original indictment and to two of the three counts in the superseding indictment.

Count one of the original indictment charged Ghanem with attempted export of various munitions without the necessary license, in violation of the AECA, 22 U.S.C. § 2778(b)(2), (c). At the plea hearing, the factual basis for this charge was that Ghanem, with the intent to accomplish the unlicensed export to

Libya, “took a substantial step toward actually exporting” the designated “pistols, rifles, ammunition, and night-vision goggles” by causing a co-conspirator on September 2, 2015 “to wire \$89,971 from a bank account in Jordan” to the undercover agent’s bank account in the Central District. Based on the same wire transfer and on Ghanem’s agreement to falsely identify the shipment on the export documents, Ghanem also pleaded guilty to a violation of 18 U.S.C. § 554(a), namely, his attempted buying of such items for subsequent unlawful export in violation of the AECA (count two). Counts three and four alleged two counts of money laundering in violation of 18 U.S.C. § 1956(a)(2)(A), namely the transferring of funds from outside the United States to an account inside the United States with the intent to promote the violations alleged in counts one and two. The factual basis for Ghanem’s plea to these charges was the above-mentioned wire transfer (count three) and a subsequent wire transfer in the same amount on October 22, 2015 (count four).

Count one of the superseding indictment alleged a conspiracy, in violation of 18 U.S.C. § 371, to violate (1) the AECA’s requirement, in 22 U.S.C. § 2778(b)(1), to obtain a license before engaging in “brokering activities” involving designated defense articles; (2) the AECA’s prohibition on unlicensed export of such defense articles in violation of 22 U.S.C. § 2778(b)(2); and (3) the prohibition, in the AECA’s implementing regulations, on making certain proposals to export such defense articles without a license, *see* 22 C.F.R. § 126.1(e)(1). At the plea hearing, Ghanem agreed that he “became a member of the conspiracy knowing of these objects.” The indictment alleged 44 overt acts

in support of this conspiracy, but Ghanem's plea to this count was taken based on only one of them, namely, that on March 11, 2015, he met with the undercover agent for the purpose of purchasing and exporting, without the required license, "PVS-27 night-vision weapon sights." Count two of the superseding indictment charged Ghanem with engaging in brokering activities with respect to 100 different types of defense articles, without the required license, in violation of 22 U.S.C. § 2778(b)(1)(A)(ii). In articulating a factual basis for this charge, the prosecutor only identified one such category that Ghanem had brokered, namely, "12.7 millimeter NSVT machine guns."

B

The third and last count of the superseding indictment alleged a conspiracy to acquire, transfer, and use surface-to-air missiles designed to destroy aircraft ("SAMs"), in violation of 18 U.S.C. § 2332g. Ghanem proceeded to trial on this charge. The evidence at trial showed that Ghanem, while working for a Jordanian company called "Gateway to MENA" (referring to the Middle East and North Africa), was involved in several transactions involving SAMs.

For example, Ghanem arranged in 2015 for SAMs to be transferred to "Libya Dawn," an insurgent group that claimed to be the government of Libya and that was fighting against the U.S.-recognized government. In connection with this transaction, Ghanem worked with another employee of Gateway to MENA in preparing an "end-user certificate," which is a document needed in international arms transactions to identify the ultimate user of the weapons involved. Ghanem handwrote a draft of the document,

purporting to be from the unrecognized, insurgent Libyan government, and later sent an official-looking version to a Ukrainian state-owned arms company with a cover letter asking about purchasing the items listed. Among the items requested were 50 “Igla” SAMs and five Igla launchers. Around the same time, he sent a photograph of a SAMs launcher to a Georgian weapons broker, who worked through a company registered in Belize. About a week later, the Georgian responded by sending back both Ghanem’s end-user certificate listing the SAMs and launcher, as well an invoice for \$297,000 from his Belize-registered company, ostensibly for 1200 computer hard drives. A federal agent opined that this invoice was not, in fact, for hard drives, but for the purchase of weapons associated with the fraudulent end-user certificate.

A few weeks after that, Ghanem also had a series of email exchanges with the Georgian broker about hiring a crew to operate Igla SAMs and other equipment in Libya. In the same time frame, Ghanem also communicated with a retired general from the Jordanian army about Ghanem’s efforts to acquire crew members to operate Iglas in Libya. In one such email to the retired general, Ghanem attached a \$409,000 invoice for “training” from the Georgian’s Belize company, and Ghanem explained that it would cover a variety of systems, including Iglas. The general responded by stating that he thought, based on the cost of each item (including the \$30,000 he attributed to the Igla crews), the total invoice should only be for \$398,000. Shortly thereafter, \$398,000 was wired from Gateway to MENA to the Georgian’s Belize company.

Two months later, in April 2015, Ghanem had a further email exchange with the Georgian broker, in which Ghanem complained about changes in pricing for the Igla operators. Ghanem told the broker, “[w]e agreed on the following: One operator for Igla[.] [H]e gets 10,000 for 2 months and they get as a bonus 50,000 for each plan[e] he sh[o]t[]down.” Later that month, Ghanem communicated by email with the Jordanian retired general about passports and travel arrangements to Libya for two SAMs operators and a third person who recruited them. Ghanem then reached out directly to the recruiter about the travel arrangements. Deposition testimony from these two SAMs operators and the recruiter was played at trial. One of the operators described the SAMs as being “Strela systems” rather than “Igla systems,” although he acknowledged that the two were “almost identical.” The recruiter explained that the Igla systems they saw in Libya were inoperable but that the Strela systems were in “very good condition.” The recruiter also confirmed Ghanem’s role in arranging travel and payment for the operators, and he specifically confirmed that Ghanem agreed to pay a \$50,000 bonus for each aircraft shot down. However, the recruiter testified that, to his knowledge, neither of the operators shot down any aircraft.

The jury convicted Ghanem on the § 2332g charge. In August 2019, the district court sentenced Ghanem to 360 months of imprisonment. Specifically, Ghanem was sentenced to 240 months of imprisonment on count one of the indictment (the § 2778(b)(2) munitions export charge), to run consecutively with 120 months of imprisonment on count two (the § 554(a) smuggling charge). As to the remaining counts

of conviction, which all ran concurrently, Ghanem was sentenced to 240 months on each of the two § 1956(a)(2)(A) money laundering charges (counts three and four of the indictment), 60 months on the § 371 conspiracy charge (count one of the superseding indictment), 240 months on the § 2778(b)(1)(A)(ii) brokering charge (count two of the superseding indictment), and 360 months on the § 2332g charge (count three of the superseding indictment). This total sentence was five years above the statutory mandatory minimum for the § 2332g charge, *see* 18 U.S.C. § 2332g(c)(1), and within the applicable guidelines range, which was 292–365 months.

C

On appeal, we vacated Ghanem’s § 2332g conviction on the ground that the jury had received improper instructions with respect to the disputed issue of venue. *Ghanem*, 993 F.3d at 1130, 1133–34. On remand, the Government agreed to dismiss the § 2332g charge without prejudice. Because the district judge who presided at Ghanem’s trial had retired, a different judge presided at Ghanem’s resentencing.

The Probation Office’s presentence investigation report (“PSR”) calculated Ghanem’s sentencing guidelines range as follows. The PSR noted that, under United States Sentencing Guidelines (“U.S.S.G.”) § 2S1.1(a)(1), the base offense level for the money laundering counts would be determined by the offense level for the arms-trafficking counts, which, under U.S.S.G. § 2M5.2(a)(1), was 26. The PSR then added two levels because Ghanem was convicted under 18 U.S.C. § 1956. *See* U.S.S.G. § 2S1.1(b)(2)(B). The result was an offense level of 28 for the money laundering counts, and because all of the offenses

grouped together under U.S.S.G. § 3D1.2, that became the final offense level under the PSR's calculations. Because Ghanem had no criminal history, his criminal history category was I, and his resulting sentencing range was 78–97 months. However, the probation officer recommended that the district court depart or vary upward from the guidelines and impose an aggregate sentence of 240 months.

In his sentencing papers, Ghanem argued that he should receive a two-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1, which would yield a guidelines range of 63–78 months, and he sought a within-range sentence of 77 months. The Government sought an aggregate sentence of 360 months, arguing that, despite the vacatur of the jury verdict, Ghanem's relevant "conduct remains exactly the same" as at the first sentencing and that "[t]he appropriate sentence for that conduct also remains the same."

At Ghanem's resentencing hearing, the district court "decline[d] to apply the two-level downward adjustment for acceptance of responsibility." The district court therefore agreed with the PSR's calculation of the guidelines range as being 78–97 months. The district court nonetheless sentenced Ghanem to an aggregate term of 360 months of incarceration, to be followed by a three-year term of supervised release. Specifically, with the exception of deleting the prior concurrent sentence on the now-vacated § 2332g charge, the district court imposed the exact same term of imprisonment on each of the remaining six counts as had been imposed at the previous sentencing: 240 months on the § 2778(b)(2)

munitions export charge, followed by a consecutive 120-month sentence on the § 554(a) smuggling charge; concurrent sentences of 240 months on each of the money laundering charges; a concurrent sentence of 60 months on the conspiracy charge; and a concurrent sentence of 240 months on the § 2778(b)(1)(A)(ii) brokering charge.

In imposing this above-guidelines sentence, the court stated that there were grounds for both an upward departure and an upward variance. The district court noted at the outset that it was allowed to consider the conduct underlying the vacated § 2332g count, either for purposes of choosing a sentence within the guidelines range or for purposes of deciding whether to depart or vary from that range. *See* U.S.S.G. § 1B1.4 (citing 18 U.S.C. § 3661); *see also* U.S.S.G. § 5K2.21. The court therefore concluded that Ghanem’s “relevant conduct remains unchanged from the time that Judge Otero, the trial judge, imposed sentence in 2019.” As specific grounds for departure, the court pointed first to application note 2 to § 2M5.2, which authorizes an upward departure when certain aggravating features, such as the “volume of commerce involved,” are “present in an extreme form.” U.S.S.G. § 2M5.2, cmt. n.2. It also cited § 5K2.14, which allows for an upward departure when “national security . . . was significantly endangered.” U.S.S.G. § 5K2.14.

In finding these departure grounds applicable here, and in deciding to vary from the guidelines under 18 U.S.C. § 3553, the court emphasized what it considered to be the “extreme facts” of this case. As the court found, Ghanem had made his living for several years as a “black market arms trafficker,”

dealing in a variety of “weapons of war, including trading in machine guns and assault rifles and rockets and mortars and rocket-propelled grenades and anti-tank weapons.” The district court summarized the above-described two main transactions that were a focus of the charges, namely, the planned shipment of various arms from Greece to Libya through an undercover federal agent and the deal with the Georgian broker concerning the delivery and operation of SAMs in Libya. The district court also cited several additional examples of Ghanem’s black-market arms-trafficking activities. These included Ghanem’s efforts in September 2013 “to acquire surface-to-air missiles and missile launchers on behalf of a foreign government” that would be “covertly supplied” to, *inter alia*, “the Kurdish region of Iraq,” and Ghanem’s “repeated offers to a foreign government” in July 2014 “to sell weapons, including 400 Strela . . . surface-to-air missiles” that Ghanem said were “available for immediate shipment.” The district court also alluded to evidence showing that Ghanem had mentioned, in his discussions with the undercover agent, that he was able to deliver arms on a massive scale, including a deal involving “100 million” rounds of AK-47 ammunition; that Ghanem at one point sought from the agent “as many as you have” of a variety of heavy arms; and that Ghanem also bragged to the agent about his ties to various governments and militias, including Hezbollah.

The district court stated that, in undertaking his black-market arms-trafficking, Ghanem was “indifferent to the consequences of his actions” and “was motivated solely by profit.” According to the court, “Ghanem’s own words, written and spoken,

demonstrated a lack of respect for human life.” The court further found that “Ghanem’s conduct unequivocally endangered the security and foreign policy interests of the United States as well as the safety and security of far less stable nations.”

The district court described Ghanem’s personal history, medical problems, and various letters submitted on his behalf, and the court stated that it had considered this “personal history and background in determining the appropriate sentence.” Despite these considerations, the district court concluded that “a significant upward variance and departure is warranted given the extremely serious and callous nature, breadth, volume, duration, planning, and sophistication of Mr. Ghanem’s offenses, and the threat to the security and foreign policy interest of the United States and the security of more vulnerable nations.” The court also rejected Ghanem’s argument that a 360-month sentence would produce unwarranted sentencing disparities. *Cf.* 18 U.S.C. § 3553(a)(6).

Ghanem timely appealed his sentence. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

II

Before reviewing the substantive reasonableness of Ghanem’s sentence, “we first consider whether the district court committed significant procedural error,” *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc), “such as failing to calculate (or improperly calculating) the [g]uidelines range, treating the [g]uidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to

adequately explain the chosen sentence—including an explanation for any deviation from the [g]uidelines range,” *Gall v. United States*, 552 U.S. 38, 51 (2007). Ghanem asserts a variety of procedural challenges on appeal, but none of them are meritorious.¹

A

Because the federal sentencing guidelines are “the starting point and the initial benchmark” in “all sentencing proceedings,” we first address Ghanem’s contention that the district court committed the procedural error of failing to “correctly calculat[e] the applicable [g]uidelines range.” *Gall*, 552 U.S. at 49. Specifically, Ghanem contends that the district court erred in failing to reduce his offense level by two levels under U.S.S.G. § 3E1.1 for acceptance of responsibility. “A district court’s decision about whether a defendant has accepted responsibility is a factual determination reviewed for clear error,” *United States v. Rosas*, 615 F.3d 1058, 1066 (9th Cir. 2010) (citation omitted), but we “review de novo whether the district court misapprehended the law with respect to the acceptance of responsibility reduction,” *United States v. Green*, 940 F.3d 1038, 1041 (9th Cir. 2019) (citation omitted). Applying these

¹ We generally review procedural challenges to a sentence for abuse of discretion, and we review the factual determinations underlying a sentence for clear error. *United States v. Spangle*, 626 F.3d 488, 497 (9th Cir. 2010). The Government argues, however, that most of Ghanem’s procedural claims “were not raised before the district court and are therefore reviewed for plain error only.” Ghanem vigorously disagrees, contending that he adequately preserved all of his claims of error in the district court. We need not resolve this issue. Even applying *arguendo* the more favorable standards of review that Ghanem advocates, we conclude that his procedural claims all fail.

standards, we uphold the district court's decision not to apply the two-level adjustment.

1

Before turning to Ghanem's particular arguments on this score, we first summarize the district court's stated reasons for denying an adjustment for acceptance of responsibility.

In addressing this issue, the court first examined several of the "considerations" that the guidelines' commentary identifies, in application note 1, as being relevant to the issue of acceptance of responsibility. *See* U.S.S.G. § 3E1.1, cmt. n.1. The court concluded that Ghanem's "decision to plead guilty does not demonstrate timeliness in accepting responsibility" because "he did so on the eve of trial after several years of litigation." The court also stated that Ghanem "did not voluntarily terminate his criminal conduct," did not make voluntary restitution, or "voluntarily surrender to authorities or assist authorities in the recovery of the fruits and instrumentalities of his offenses," and that he "declined to speak about the offense" with the probation officer who was preparing his presentence report.

Having ticked through the various factors in application note 1, the court then turned to application note 3 to § 3E1.1. Paraphrasing that note, the district court stated that "entry of a guilty plea prior to commencement of trial and truthfully admitting the conduct comprising the offenses of conviction, combined with truthfully admitting or not falsely denying additional relevant conduct, is evidence of acceptance of responsibility," but that "this evidence may be outweighed by conduct that is

inconsistent with acceptance of responsibility.” The district court then held that, based on its “review of this file,” Ghanem had not “accepted true responsibility for the full scope of his conduct.” Rather, the court explained, he had “minimized his involvement,” by arguing, for example, that “he was not an international arms dealer” and that his foreign conduct merely involved discussions of deals with “foreign governments” that never “materialized.” Finally, the court noted that Ghanem had “declined to speak with the Probation Office about the offenses to which he pleaded guilty.”

2

At the outset, Ghanem argues that the district court applied the wrong legal standards in assessing acceptance of responsibility, because it failed to start from the premise that “a guilty plea supported by truthful admissions by the defendant creates a presumption that the defendant will receive the acceptance-of-responsibility reduction.” *Green*, 940 F.3d at 1042. We disagree.

In stating that the guidelines “suggest” such a presumption, we relied in *Green* on application note 3. *See* 940 F.3d at 1042 (citing U.S.S.G. § 3E1.1, cmt. n.3 and *United States v. Vance*, 62 F.3d 1152, 1158 (9th Cir. 1995) (also relying upon U.S.S.G. § 3E1.1, cmt. n.3)). That application note states, in full:

Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (*see*

Application Note 1(A)), *will constitute significant evidence* of acceptance of responsibility for the purposes of subsection (a). However, this evidence *may be outweighed* by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

U.S.S.G. § 3E1.1, cmt. n.3 (emphasis added). Here, as noted, the district court specifically cited this note and paraphrased all three of its sentences, sometimes replicating verbatim entire phrases. In nonetheless arguing that the court failed to apply the note's standards, Ghanem emphasizes that, in its paraphrase of the first sentence, the district court omitted the word "significant" and instead said only that a guilty plea accompanied by truthful admissions "is *evidence* of acceptance of responsibility" (emphasis added). Considering the district court's comments in full context, we reject Ghanem's effort to attach talismanic significance to the omission of this one word. The overall thrust of the court's recitation reflects its awareness that the central question was whether there was "conduct of [Ghanem] that is inconsistent with . . . acceptance of responsibility" and that "outweighs" the showing otherwise established by his guilty plea and truthful admission to the factual basis for the convictions. *Id.* We are therefore satisfied that the court applied the correct legal standards under *Green*.

Moreover, we discern no clear error in the district court's ultimate finding that there was sufficient countervailing evidence that Ghanem had failed to

accept responsibility. Conduct that is “inconsistent” with acceptance of responsibility “can include, for example, falsely denying, or frivolously contesting, relevant conduct that the court determines to be true.” *Green*, 940 F.3d at 1042–43 (simplified). Another “example of inconsistent conduct that weighs against a finding of acceptance of responsibility is a defendant’s attempt to minimize his own involvement in the offense,” including “through his lawyer.” *United States v. Scrivener*, 189 F.3d 944, 948 (9th Cir. 1999). Here, the district court pointed to such evidence in the record, specifically noting that Ghanem’s counsel at the first sentencing had “minimized Mr. Ghanem’s involvement” by “argu[ing] that he was *not* an international arms dealer” (emphasis added), and that Ghanem’s papers in connection with the resentencing similarly argued that “virtually[] all of his foreign conduct involved discussions” about arms deals “almost none of [which] ever materialized.” The district court did not clearly err in rejecting this minimization, which was flatly inconsistent with its findings that Ghanem’s offenses of conviction were part of a pattern of black-market arms dealing that had gone on for several years. And those latter findings are amply supported by the record evidence we have summarized above, including Ghanem’s own many statements to the undercover federal agent about his activities. *See supra* at 13–14.

Ghanem further argues that the district court erred by reciting and relying upon additional factors that did not properly bear on whether he had accepted responsibility. We reject this contention. As we have explained, prior to turning to application note 3, the district court began by ticking through the various

“considerations” that are enumerated in application note 1 as being potentially reflective of acceptance of responsibility, including “voluntary termination [of] criminal conduct” or “voluntary payment of restitution.” See U.S.S.G. § 3E1.1, cmt. n.1(A)–(H). As the district court recognized as it worked through this checklist, most of these considerations were inapplicable here. We do not construe the district court’s discussion on this score as signaling that the court was thereby *faulting* Ghanem and weighing the absence of such factors affirmatively against him. Rather, the court was simply noting the absence of these particular types of “evidence supporting the defendant’s claim of acceptance, but that is not the same thing as treating [that absence] as a factor weighing against him.” *Vance*, 62 F.3d at 1157. Having thus recognized that the affirmative evidence of acceptance of responsibility came down simply to Ghanem’s guilty plea to all remaining charges and his associated admissions, the district court then turned to application note 3, which addresses how to analyze that issue. While the district court’s examination of the various considerations listed in application note 1 was perhaps unnecessary, we cannot say that it introduced prejudicial error into the court’s analysis of the acceptance-of-responsibility issue.²

² The only factor from application note 1 that the district court referenced in its analysis under application note 3 was Ghanem’s declining to speak with the probation office. But given the district court’s earlier express acknowledgement that Ghanem did so “on the advice of [c]ounsel, which, of course, he is entitled to follow and invoke,” we view this comment in context as simply reiterating the lack of additional affirmative evidence of acceptance of responsibility beyond Ghanem’s guilty plea and associated admissions. See *Vance*, 62 F.3d at 1157 (stating that

The district court did not commit clear error in declining to apply an adjustment for acceptance of responsibility. It therefore correctly determined that the applicable guidelines range was 78–97 months.

B

Ghanem’s remaining procedural challenges all relate to the district court’s decision to depart and vary from the guidelines range. We conclude that these challenges also fail.

First, Ghanem contends that the district court procedurally erred by “fail[ing] adequately to explain the sentence selected, including any deviation from the [g]uidelines range.” *United States v. Taylor*, 78 F.4th 1132, 1136 (9th Cir. 2023) (citation omitted). However, “[a] district court need not provide a lengthy explanation of the [sentencing] factors in order for its explanation to be sufficient.” *United States v. Ali*, 620 F.3d 1062, 1074 (9th Cir. 2010). Instead, it need only “set forth enough to satisfy the appellate court that [it] has considered the parties’ arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority.” *Rita v. United States*, 551 U.S. 338, 356 (2007). Under that standard, the district court’s explanation was sufficient.

Here, the district court stated that it was relying upon the same scope of relevant conduct as at the prior sentencing, including Ghanem’s involvement in a deal for delivery and operation of SAMs in Libya. The court summarized the basic facts concerning that deal, including Ghanem’s offer of a \$50,000 bonus for

“[a] defendant’s refusal to discuss the offense conduct with the probation officer may reduce the amount of evidence supporting the defendant’s claim of acceptance”).

each aircraft shot down by the SAMs operators. It also outlined Ghanem's actions in arranging the deal with the undercover agent to send arms to Libya in 2015, as well as other examples that underscored the breadth and scope of Ghanem's arms-trafficking activities. In light of this review of the facts concerning Ghanem's relevant conduct, which we have summarized above, *see supra* at 13–14, the district court concluded that its “significant upward variance and departure is warranted” in light of the nature and scope of Ghanem's activities and the harm to the national security and foreign policy interests of the United States. The court also considered mitigating factors, including Ghanem's medical problems and statements from his family, but the court explained that these were significantly outweighed by the gravity of Ghanem's conduct. The extent of the deviation from the guidelines range was also adequately explained: the district court expressly stated that the relevant conduct had not changed from the prior sentencing, and the variance the court selected effectively replicated the prior sentence.

Second, Ghanem argues that the district court failed to address his argument that a significant upward deviation from the guidelines was inconsistent with 18 U.S.C. § 3553(a)(6), which requires courts to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” The record refutes this contention. Ghanem's sentencing-disparity argument below relied heavily on the contention that other arms-trafficking defendants had received less severe sentences, and he cited as examples the published decisions in *United States v.*

Pedrioli, 978 F.2d 457 (9th Cir. 1992), and *United States v. Tsai*, 954 F.2d 155 (3d Cir. 1992). Although the district court did not explicitly use the phrase “sentencing disparities” in explaining its sentence, it specifically explained why it believed that the circumstances of *Pedrioli* and *Tsai* were distinguishable from Ghanem’s case. As the district court explained, *Pedrioli* involved a defendant who unlawfully exported a total of around 800 guns during a two-year period, *see* 978 F.2d at 458, which was substantially less serious than Ghanem’s conduct. Likewise, although *Tsai* involved military equipment, the district court noted that the scale of the defendant’s activities was not comparable. *See Tsai*, 954 F.2d at 165–66 (“No evidence suggests that the volume and scope of exports involved in this case were extremely large.”).

Third, Ghanem argues that, even if consideration of the conduct underlying a dismissed charge is constitutionally permissible at a sentencing on the remaining charges, such consideration should be disallowed as *procedurally* unreasonable where “the sentencing enhancement [is] ‘a tail which wags the dog of the substantive offense.’” *United States v. Watts*, 519 U.S. 148, 156 n.2 (1997) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)); *see also id.* at 156–57 (reserving the question, on which the circuits were then split, “as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence”). We disagree.

As we recently held, en banc, the advisory nature of the guidelines after *United States v. Booker*, 543 U.S. 220 (2005), vitiates any argument for imposing, as a

matter of due process, any special procedural rules concerning “large enhancements,” and we therefore overruled our prior caselaw holding that sentencing courts must “make factual findings by clear and convincing evidence ‘when a sentencing factor has an extremely disproportionate effect on the sentence relative to the conviction.’” *United States v. Lucas*, 101 F.4th 1158, 1159, 1163 (9th Cir. 2024) (en banc) (citation omitted).³ Rather, *Lucas* held, “challenges to ‘large enhancements . . . should be viewed through the lens of *Booker* reasonableness rather than that of due process.” *Id.* at 1163 (quoting *United States v. Grubbs*, 585 F.3d 793, 802–03 (4th Cir. 2009), and *United States v. Brika*, 487 F.3d 450, 462 (6th Cir. 2007)). Although *Lucas* focused on whether a heightened pleading standard was required as a matter of due process, its logic applies equally here. The concern about a factor’s disproportionate impact on the sentence is ultimately one of *substantive* reasonableness, and should be reviewed under that rubric. *See Brika*, 487 F.3d at 462 (confirming that the relevant “*Booker* reasonableness” review asks whether the large enhancement renders the sentence “*substantively* unreasonable” (emphasis added)); *see also Lucas*, 101 F.4th at 1163 (endorsing *Brika*). We thus reject Ghanem’s contention that special procedural limitations apply to the consideration of

³ *Lucas* thus squarely forecloses Ghanem’s further argument that a clear-and-convincing evidence standard should have been applied here.

large enhancements based on conduct underlying dismissed charges.⁴

Fourth, Ghanem argues that the district court erred “by relying on foreign conduct that may not have even been criminal.” Ghanem relies on *United States v. Chao Fan Xu*, 706 F.3d 965 (9th Cir. 2013), which held that, under the circumstances of that case, the district court procedurally erred in basing the defendant’s guidelines offense level on foreign fraudulent conduct that did not violate extraterritorially applicable U.S. law. *Id.* at 992–93.⁵ This principle has no application to the district court’s consideration of the conduct underlying the dismissed § 2332g charge, because we explicitly held, in Ghanem’s prior appeal, that this statute *does* apply extraterritorially to Ghanem’s overseas conduct. *See Ghanem*, 993 F.3d at 1131–32. Moreover, *Chao Fan Xu*’s limitations on consideration of foreign conduct in setting the guidelines offense level for an offense under a statute that does not apply extraterritorially do not support Ghanem’s view that unlawful foreign acts—such as black-market arms dealing using front corporations and fraudulent documents—may not be considered at sentencing at all. Such a categorical limitation would be hard to square with 18 U.S.C. § 3661, which states that “[n]o limitation shall be placed on the information

⁴ We address Ghanem’s substantive reasonableness arguments in section III, *infra*. We address his Sixth Amendment challenge in section IV, *infra*.

⁵ *Chao Fan Xu*’s predicate holding that the overseas fraudulent activity did not violate an extraterritorially applicable U.S. law was based on its categorical conclusion that the RICO statute does not apply extraterritorially. *See* 706 F.3d at 974–75. However, *Chao Fan Xu* was expressly abrogated on that point in *RJR Nabisco v. European Community*, 579 U.S. 325, 335 (2016).

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.”

Accordingly, we reject all of Ghanem’s arguments that the district court “committed significant procedural error.” *Carty*, 520 F.3d at 993.

III

Ghanem also argues that the district court’s 360-month sentence was substantively unreasonable. We review this issue only for abuse of discretion, *see United States v. Brown*, 42 F.4th 1142, 1145 (9th Cir. 2022), meaning that “we may reverse if, upon reviewing the record, we have a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors,” *United States v. Ressam*, 679 F.3d 1069, 1087 (9th Cir. 2012) (en banc) (citation omitted). We find no abuse of discretion here.

“Congress has instructed sentencing courts to impose sentences that are ‘sufficient, *but not greater than necessary*, to comply with’ (among other things) certain basic objectives, including the need for “just punishment, deterrence, protection of the public, and rehabilitation.” *Holguin-Hernandez v. United States*, 589 U.S. 169, 173 (2020) (quoting 18 U.S.C. § 3553(a)(2) (further citation and internal quotation marks omitted)). In assessing whether the district court’s sentence reflects a substantively unreasonable weighing of the sentencing factors listed in § 3553(a), we must “take into account the totality of the circumstances, including the extent of any variance from the [g]uidelines range.” *Gall*, 552 U.S. at 51. Where, as here, there was a substantial departure

from the guidelines range, our reasonableness review requires that we “give due deference to the district court’s decision that the § 3553(a) factors, on [the] whole, justify the extent of the variance.” *Id.*; *see also United States v. Gutierrez-Sanchez*, 587 F.3d 904, 908 (9th Cir. 2009) (“The weight to be given the various [§ 3553(a)] factors in a particular case is for the discretion of the district court.”).

Under these standards, we conclude that the district court did not abuse its discretion in concluding that a 360-month sentence was warranted under the § 3553(a) factors. The district court permissibly put great weight on the fact that the offense conduct, which specifically concerned planned unlawful arms exports to Libya, was part of a broader pattern of high-volume, black-market arms-trafficking. That trafficking included Ghanem’s dealings with a Georgian arms broker to send SAMs to, and operate them in, Libya. The court properly considered that Ghanem had acted with a callous “lack of respect for human life” and that he had “turned a blind eye to the ultimate destination of the arms he brokered and sold and was indifferent as to whether those weapons were obtained by terrorist organizations or used against civilian targets.” The court further stated that, by sending arms to “less stable nations” such as Libya and doing so without regard to whether they landed in the hands of terrorists, Ghanem’s “conduct unequivocally endangered the security and foreign policy interests of the United States.” The court expressly considered mitigating considerations such as Ghanem’s medical conditions and the support of his family members, but found them to be outweighed by the other

considerations it had identified. These reasons for substantially varying from the guidelines range reflect a reasonable weighing of the guidelines factor, *see* 18 U.S.C. § 3553(a)(4), in light of the “nature and circumstances of the offense,” the defendant’s “history and characteristics,” the “seriousness of the offense,” and the need for “adequate deterrence,” *see id.* § 3553(a)(1), (2)(A)–(B).

Contrary to what Ghanem suggests, the district court did not simply disregard the guidelines factor and arbitrarily pick a sentence that was untethered to any objective benchmark. As we have explained, the district court viewed the relevant conduct as being the same as at the prior sentencing. The district court had before it the entire record of the trial, and it found by a preponderance of the evidence that Ghanem had been involved in the delivery and operation of SAMs in Libya that underlay the now-vacated conviction under § 2332g. Congress’s assessment is that such conduct merits at least a 25-year sentence, *see* 18 U.S.C. § 2332g(c)(1), but the district court was not bound by that congressional judgment here (given that Ghanem’s § 2332g conviction was set aside due to improper venue). But in light of that judgment, we are hard-pressed to say that, under the extreme circumstances of this case, the district court abused its discretion in deciding to fix the extent of its variance from the guidelines range by deciding simply to replicate the prior sentence. Given the facts of this case, and the deference owed to the district court, we conclude that the district court’s “justification is

sufficiently compelling to support the degree of the variance.” *Gall*, 552 U.S. at 50.⁶

Ghanem is also wrong in asserting that the district court’s sentence fails to give appropriate weight to the need to avoid unwarranted sentencing disparities. 18 U.S.C. § 3553(a)(6). The district court essentially concluded that, due to the unique and extreme facts of this case, a 360-month sentence would not produce an *unwarranted* sentencing disparity when compared with other defendants convicted of arms-export and money-laundering offenses. On this record, that judgment was not an abuse of discretion. Moreover, even if the disparity in this case “were assumed to be unwarranted, . . . that factor alone would not render [Ghanem’s] sentence[] unreasonable; the need to avoid unwarranted sentencing disparities is only one factor a district court is to consider in imposing a sentence.” *United States v. Marcial-Santiago*, 447 F.3d 715, 719 (9th Cir. 2006).

IV

Finally, Ghanem argues that, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, his sentence is unconstitutional in violation of the Fifth

⁶ Nor do we view this case as an impermissible example of a sentencing factor serving as a “tail which wags the dog of the substantive offense.” *McMillan*, 477 U.S. at 88. To treat the guidelines range as the “dog” and all of the other considerations noted by the district court as a “tail” would be inconsistent with the established rule that the “[g]uidelines factor” should not “be given more or less weight than any other.” *Carty*, 520 F.3d at 991. In all events, the district court did not abuse its discretion in deciding that, when considered against the surrounding context of uncharged or dismissed conduct, the guidelines range calculation substantially understated the seriousness of Ghanem’s offense conduct.

Amendment Due Process Clause and the Sixth Amendment right to a jury trial.

To the extent that Ghanem argues that there is something uniquely suspect about relying on conduct underlying a *dismissed* charge, his argument cannot be squared with *Watts*. There, the Court held that conduct underlying a charge of which the defendant was *acquitted* may be considered at sentencing, where the burden of proof is only a preponderance of the evidence. *Watts*, 519 U.S. at 156–57; *see also United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (“We hold that *Booker* has not abrogated the previously prevailing constitutional jurisprudence that allowed sentencing courts to consider conduct underlying acquitted criminal charges.”). Ghanem has presented no argument as to why conduct underlying a dismissed charge should be treated with *more* solicitude than conduct underlying a charge rejected by acquittal. *See United States v. Bridgewater*, 950 F.3d 928, 938 (7th Cir. 2020) (“A district court may consider a wide range of conduct at sentencing, including acquitted conduct and dismissed offenses.” (citation omitted)).

Ghanem also argues, however, for a broader Sixth Amendment rule that would equally apply to conduct underlying acquittals and dismissed charges and, indeed, to any conduct not found by a jury or admitted by the defendant. Specifically, Ghanem urges us to adopt Justice Scalia’s view that “any fact *necessary* to prevent a sentence from being substantively unreasonable [under *Booker*—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury.” *Jones v. United States*, 574 U.S. 948, 949–

50 (2014) (Scalia, J., dissenting from the denial of certiorari) (emphasis added).⁷ Given the loadbearing weight that we have placed on the district court’s factual findings in concluding that Ghanem’s sentence is substantively reasonable, his sentence here would violate the Sixth Amendment under Justice Scalia’s view.

But Justice Scalia’s position has not commanded a majority of the Supreme Court, and this court has squarely rejected it:

The defendants have adopted an argument that Justice Scalia, writing separately, has encouraged litigants to raise in several recent Supreme Court sentencing decisions. . . . Defendants argue that in their case, the relevant maximum sentence is not the maximum established by the [criminal] statutes, but rather the maximum of what we would consider “reasonable” when reviewing their sentences under § 3553(a) if we were to rely solely on the facts found by the jury. . . .

We reject the defendants’ argument, and join the Fourth, Sixth, and Seventh Circuits in holding that “this argument is too creative for the law as it stands.” . . . In *Booker*, the

⁷ See also *Gall*, 552 U.S. at 60 (Scalia, J., concurring) (“The door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory [g]uidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.”); *Rita*, 551 U.S. at 374 (Scalia, J., concurring in part and concurring in the judgment) (arguing that the Sixth Amendment would be violated by a sentence that survives *Booker* reasonableness review only by virtue of the district court’s reliance on facts that had neither been found by a jury nor admitted by the defendant).

Supreme Court rendered the [g]uidelines advisory, permitting a district court to impose a sentence anywhere within the range established by the statute of conviction without violating the Sixth Amendment. The mere fact that, on appeal, we review the sentence imposed for “reasonableness” does not lower the relevant *statutory* maximum below that set by the United States Code.

United States v. Treadwell, 593 F.3d 990, 1017 (9th Cir. 2010) (citation omitted), *abrogated on other grounds by United States v. Miller*, 953 F.3d 1095, 1102 (9th Cir. 2020).

* * *

For the foregoing reasons, we affirm Ghanem’s sentence.

AFFIRMED.

COLLINS, Circuit Judge, concurring:

In upholding Ghanem’s sentence in this case, my opinion for the panel faithfully applies current precedent concerning the review of federal sentences. I write separately only to point out how this case starkly illustrates a very troubling feature of the precedent we must apply.

In *Booker v. United States*, 543 U.S. 220 (2005), a five-Justice majority of the Supreme Court held, in an opinion by Justice Stevens, that the following core holding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applied to the application of the federal sentencing guidelines: “Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts

established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” *Booker*, 543 U.S. at 244. Put another way, the jury trial right in “the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge’s determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.” *Id.* at 245 (further opin. for the Court by Breyer, J.) (citation omitted) (summarizing the holding of Justice Stevens’s opinion for the Court).

Having found that the guidelines violated the Sixth Amendment to the extent that they relied on judicial fact-finding to increase the maximum permissible sentence, the Court then confronted the question of the proper “remedy” for this Sixth Amendment violation. *Id.* at 245. In an opinion for the Court by Justice Breyer, a different five-Justice majority (consisting of the four dissenters to *Booker*’s Sixth Amendment holding plus Justice Ginsburg) settled on the following remedy:

We answer the question of remedy by finding the provision of the federal sentencing statute that makes the [g]uidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp. IV), incompatible with today’s constitutional holding. We conclude that this provision must be severed and excised, as must one other statutory section, § 3742(e) (2000 ed. and Supp. IV), which depends upon the [g]uidelines’ mandatory nature. So modified, the federal sentencing statute, *see* Sentencing Reform Act of 1984 (Sentencing Act), as amended, 18

U.S.C. § 3551 *et seq.*, 28 U.S.C. § 991 *et seq.*, makes the [g]uidelines effectively advisory. It requires a sentencing court to consider [g]uidelines ranges, *see* 18 U.S.C. § 3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, *see* § 3553(a).

543 U.S. at 245–46. Having excised § 3742(e)’s instruction that the threshold decision to depart from the guidelines should be reviewed *de novo*, the Court instead adopted an across-the-board instruction to review all sentences for “reasonableness.” *Id.* at 262. The Court also expressly declined to limit its remedy to those cases in which the application of the guidelines would violate the Sixth Amendment and to thereby “leave the [g]uidelines as binding in other cases.” *Id.* at 266. Accordingly, the Court held that its remedial revision of the statute would apply systemically in all cases. *Id.*

As applied to the facts of this case, the two portions of the *Booker* opinion produce a disturbing incongruity. Under Justice Stevens’s majority opinion in *Booker* (which, for convenience, I will call “*Booker* Part I”), Ghanem has a constitutional right under the Sixth Amendment to have a jury find any fact that would increase his sentence beyond what is allowed under the guidelines regime in light of “the facts established by [his] plea of guilty or a jury verdict.” *Booker*, 543 U.S. at 244. Here, there are no facts established by a “jury verdict,” because the jury’s conviction of Ghanem on the § 2332g charge was vacated on appeal. Moreover, as the panel opinion explains, *see* Opin. at 6–8, the “facts established by [Ghanem’s] plea of guilty” are quite limited. *Booker*,

543 U.S. at 244. Those discrete facts support, at most, a guidelines range of 78–97 months, and therefore any upward departure from that range would require additional fact-finding that, under *Booker* Part I, only a jury may make. Thus, under *Booker* Part I, it would be a flagrant violation of Ghanem’s Sixth Amendment rights to allow a district judge to make the findings necessary to raise Ghanem’s sentence above the 97-month cap that applies under the mandatory guidelines system created by Congress.

But under Justice Breyer’s further majority opinion (which I will call “*Booker* Part II”), the “remedy” for this violation of Ghanem’s Sixth Amendment rights is to eliminate the very feature of the guidelines *that gives rise to that Sixth Amendment right*—namely, the mandatory nature of the guidelines. That is, the “remedy” for the Sixth Amendment violation that would result from allowing the district judge to find the facts that would waive the guidelines’ 97-month cap in Ghanem’s case is simply to waive that cap in *all* cases—thereby allowing the district judge to freely impose a 360-month sentence that is more than triple the top of the guidelines range. The logic of this syllogism is difficult to follow: it effectively eliminates the Sixth Amendment violation by getting rid of the relevant Sixth Amendment right. That is akin to “curing” a patient’s illness by killing the patient—that certainly gets rid of the illness, but it loses sight of what is at stake.

One can understand why the four dissenters from *Booker* Part I—who rejected the premise that there was a right to jury fact-finding in connection with the operation of the guidelines system—would prefer this so-called “remedy” to the alternative remedy that

would “engraft” *Booker* Part I’s “constitutional requirement” of jury fact-finding “onto th[e] statutory scheme” that Congress created. *Booker*, 543 U.S. at 265. And one can likewise understand how four of the Justices in the *Booker* Part I majority concluded that the *Booker* Part II remedy was flawed because, *inter alia*, it “effectively eliminated the very constitutional right *Apprendi* sought to vindicate.” *Id.* at 302 (Stevens, J., dissenting); *see also id.* at 313 (Thomas, J., dissenting) (agreeing with much of the analysis in Justice Stevens’s dissent). Only one Justice—Justice Ginsburg—joined *both* parts of *Booker*, but she did not write separately to explain how to reconcile the right recognized in *Booker* Part I with the effective elimination of that right in *Booker* Part II. *See* Susan R. Klein, *The Return of Judicial Discretion in Criminal Sentencing*, 39 VALPARAISO U. L. REV. 693, 695 (2005) (describing Justice Ginsburg’s joinder in “both competing majority opinions in *Booker*” as “inexplicabl[e]”).

We are thus left with a situation in which, under the statutes enacted by Congress and under the Sixth Amendment as construed in *Booker* Part I, Ghanem’s sentence in this case is patently unlawful. But we must nonetheless uphold it because *Booker* Part II eliminated the predicate for Ghanem’s Sixth Amendment claim by “engag[ing] in a wholesale rewriting” of the Sentencing Reform Act by facially deleting two of the Act’s provisions and then adding—again, across the board—a new, judge-made “reasonableness” review requirement. *Booker*, 543 U.S. at 284 (Stevens, J., dissenting); *see also id.* at 272 (objecting that the *Booker* Part II majority had effectively “repeal[ed] these two statutory

provisions”). Justice Stevens’s dissent explained at length why the *Booker* Part II remedy was wholly unprecedented, could not be justified by the severability doctrines the majority invoked, and was, at bottom, “an exercise of legislative, rather than judicial, power.” *Id.* at 274–91. And, as the facts of this case make clear, the two parts of *Booker* are logically irreconcilable.

As a judge on a court that is “inferior” to the “one supreme Court,” *see* U.S. CONST. art. III § 1, I am constrained to follow the clear holding of *Booker* Part II, no matter how flawed it may seem, and I have faithfully done so. But I cannot help but note that, in applying *Booker* Part II, I have been required to affirm a sentence that even the Government’s lawyer candidly conceded at oral argument was “absolutely” unlawful under the statute as written by Congress. Only the Supreme Court has the authority, if it sees fit, to address this disquieting anomaly.

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APPENDIX B

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

-oOo-

**HONORABLE FERNANDO AENLLE-ROCHA,
UNITED STATES DISTRICT JUDGE**

UNITED STATES OF AMERICA,
Plaintiff,

v.

RAMI GHANEM, also known as
RAMI NAJM ASAD GHANEM,
Defendant.

No. 2:15-CR-00704-FLA

**REPORTER'S TRANSCRIPT OF SENTENCING
LOS ANGELES, CALIFORNIA
OCTOBER 21, 2022**

SUZANNE M. McKENNON, CRR, RMR
UNITED STATES COURT REPORTER

UNITED STATES COURTHOUSE
350 W 1st STREET, ROOM 3411
LOS ANGELES, CALIFORNIA 90012
(213) 894-90012
suzanne@ears2hands.com

APPEARANCES:

On Behalf of the Government:

ANNAMARTINE SALICK, Assistant United States Attorney

ALEXANDER ROBBINS, Assistant United States Attorney

United States Attorney's Office

Terrorism and Export Crimes Section

312 N Spring Street, Suite 1200

Los Angeles, California 90012

Also on Behalf of the Government: Jolinda Pasciucco, HSI

On Behalf of the Defendant:

BENJAMIN L. COLEMAN, Attorney at Law

Benjamin L. Coleman Law PC

1350 Columbia Street, Suite 600

San Diego, California 92101

MEGHAN A. BLANCO, Attorney at Law

Law Offices of Meghan Blanco

28202 Cabot Road, Suite 300

Laguna Niguel, California 92677

(Proceedings commenced on October 21, 2022 at 10:10 a.m.)

THE COURTROOM DEPUTY: Calling Item Number 2, LA CR-15-00704, United States of America versus Rami Najm Asad Ghanem.

Counsel, please make your appearances beginning with the government.

MS. SALICK: Good afternoon -- or good morning, Your Honor. Annamartine Salick on behalf of the United States. I'm joined at counsel table by HSI Special Agent Jolinda Pasciucco, and AUSA Alex Robbins, who represented the government in the appeal.

THE COURT: Good morning.

MR. COLEMAN: Good morning, Your Honor. Ben Coleman for Mr. Ghanem, who is present. Also at counsel table with me is Megan Blanco.

THE COURT: Good morning to everyone. Welcome.

MS. BLANCO: Good morning.

THE COURT: Good morning. All right. I'm going to ask Counsel and Mr. Ghanem to go to the lectern, please. If Mr. Ghanem is uncomfortable standing, he's welcome to sit. I typically have defendants stand at the lectern for sentencing, but if it's physically challenging for him in any way, he's welcome to sit. Okay?

THE DEFENDANT: As you wish, Your Honor.

THE COURT: However, you're most comfortable, sir.

THE DEFENDANT: I can stand.

THE COURT: This might take a while, just so you understand.

THE DEFENDANT: Thank you.

THE COURT: So you're welcome to sit, if not now, at any time. All right?

THE DEFENDANT: Thank you.

THE COURT: It's not a problem.

THE DEFENDANT: Thank you.

THE COURT: All right. So, Mr. Ghanem, I am Judge Aenlle-Rocha, and we're here today for your re-sentencing. This case was previously before Judge Otero, as I know you know.

On October 29 of 2018, Mr. Ghanem pleaded guilty to a four count indictment, along with Counts 1 and 2 of a first superseding indictment.

And on October 30, the next day, trial began as to Count 3 of the first superseding indictment.

On November the 15th of 2018, the jury returned a guilty verdict on Count 3.

And on August 19 of 2019, Judge Otero held a sentencing hearing and imposed a 30-year term of imprisonment. Judge Otero imposed a sentence of 360 months as to Count 3 of the first superseding indictment. He imposed the statutory maximum as to the remaining counts of conviction with Counts 1 and 2 to run consecutively and the remaining counts to run concurrently.

Count 1, the sentence for each count was, as to Count 1, 240 months; Count 2, 120 months. And those two counts ran consecutively. And then all other counts ran concurrently, Count 3 was 240 months; Count 4 was 240 months; the first superseding indictment, Count 1, was 60 months; and the first superseding indictment, Count 2, was 240 months.

Mr. Ghanem appealed his conviction. And on appeal, the Ninth Circuit vacated Mr. Ghanem's conviction as to Count 3 of the first superseding indictment, which was a conspiracy to use and to transfer anti-aircraft missiles, on the ground that the Court's jury instruction on extraterritorial venue was erroneous. Jurisdiction was returned to this District

Court for the purpose of re-sentencing on the remaining six counts of conviction.

As a result of Judge Otero's retirement in 2020, the case was reassigned to me on July 7 of 2021.

So, Mr. Ghanem, I want to explain to you a little bit about how the re-sentencing hearing will be going forward today. You may already be familiar with some of what I'm about to say as a result of your first sentencing hearing before Judge Otero in August of 2019.

Under the Sentencing Reform Act of 1984, the United States Sentencing Commission issued guidelines for judges to consider when sentencing an individual in a criminal case. The sentencing guidelines are advisory, which means that they are not binding on judges. Even though they are not mandatory, I am still required to arrive at a sentencing guideline range and to consider that range, along with a number of other factors, before imposing a final sentence.

As a result, during this re-sentencing hearing, I will be making calculations under the sentencing guidelines and arriving at a guideline range, and I will consider that range. I will also consider a number of other factors. In your case, I do not believe there was a plea agreement, so I will not need to consider the impact of a plea agreement.

If there are objections to the sentencing guidelines, -- and I know that your attorneys have filed objections to at least some aspect of the sentencing guideline calculation -- I will consider those objections, and I will rule on the objections during this hearing.

I will also consider and hear statements made by the prosecutor and by your attorneys, and I will hear any

statement that you may wish to make. You are not obligated to make a statement. I will consider the recommendation of the probation officer. I will consider whether the sentencing guideline sentence is appropriate after determining whether an upward or a downward departure from the guideline range is appropriate in your case.

I will, also, consider a number of factors, that are set forth at Title 18 United States Code section 3553(a), to determine whether I should impose a sentence within the guidelines or outside the guidelines. And those factors include all of the following: the nature and circumstances of the offense or offenses in your case and your history and characteristics, the need for the sentence imposed to reflect the seriousness of the offenses, to promote respect for the law, and to provide a just punishment for the offenses, to afford adequate deterrence to criminal conduct, to protect the public from further crimes by you, and to provide you with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

The factors I am required to consider also include the kinds of sentences available and the need to avoid a sentencing disparity among defendants with similar records who have been convicted of similar conduct, along with the need to provide restitution to victims of the offenses. Not all of these factors, that I have just set forth and described to you, may apply in your case.

So in preparing for today's hearing, I have read and considered the reports and recommendations of the United States Probation Office, the sentencing memoranda that was filed by the prosecutor and by your attorney, along with a classified document that

was filed by your attorney. So we will now move forward.

I will ask the government: Are there any victims in this case?

MS. SALICK: No, Your Honor.

THE COURT: Okay. Have both parties received and reviewed the final presentence report?

MS. SALICK: Yes, Your Honor.

MR. COLEMAN: Yes, Your Honor.

THE COURT: And, Counsel, have you had sufficient time to read and discuss the final presentence report and recommendation with your client, Mr. Ghanem?

MR. COLEMAN: Yes, Your Honor.

THE COURT: I am going to summarize the presentence report's guideline recommendations. The report provides for a base offense level of 26, a two-level increase because Mr. Ghanem was convicted of the money laundering offense at 18 U.S.C. section 1956, and that results in an adjusted and in a total offense level of 28. He has no criminal history points, and thus he is a Criminal History Category I.

So this results in a sentencing guideline range of 78 to 97 months, a supervised release guideline range of one to three years, a guideline fine range of \$25,000 to \$1 million, a special assessment of \$100 for each count of conviction. And based on my review of the parties' sentencing memoranda, it appears that the parties are in agreement as to the sentencing guideline calculations including the total offense level, the criminal history, and each of the adjustments I just summarized, and that Mr. Ghanem's only objection is to the probation officer's

failure to apply a two-level downward adjustment for acceptance of responsibility.

Is that correct?

MR. COLEMAN: Yes, Your Honor.

THE COURT: So, Counsel, would you like to address -- first of all, your client's objections to the sentencing guideline calculation or the failure to apply a two-level downward adjustment for acceptance of responsibility?

MR. COLEMAN: Yes, Your Honor. The reasoning in the presentence report, I believe, is that Mr. Ghanem pled guilty late, on the eve of trial, and, therefore, he shouldn't get acceptance of responsibility. We believe both the guidelines and the case law are clear that that issue affects whether he gets a third point for acceptance, but it doesn't bear on whether he gets two points for acceptance, and we are not asking for the third point. We recognize that the plea came, you know, relatively late in the day. We're just asking for two points. So that, I guess, complaint or issue with acceptance really is legally invalid.

I know the government has made much in their briefs that there was a comment at the initial presentence interview that Mr. Ghanem had said that he had never seen or touched any military equipment, and, therefore, the government is claiming that he said something that was false to the probation officer, and that that is a basis to deny acceptance of responsibility. And I just think that there is just a simple misunderstanding of what was said.

And if you look at that part of the presentence report, what Mr. Ghanem was saying is that, before he got into this business, he knew nothing about military equipment and had not seen or touched

military equipment, and so he had to research a lot of it on the Internet for him to begin to understand what the business entailed and the different types of equipment that were involved.

So I don't think that there was any type of intentional misrepresentation to the probation office. I think it was just a lack of communication if that's, in fact, what the probation officer meant because, when you look at the context, he's clearly saying, "I didn't know about this before I got in the business, and then I proceeded to do a lot of Internet research on the various equipment to understand what is going on." And, of course, a lot of that research on the Internet is reflected in the various documents that the government has produced as far as their sentencing memo was concerned.

So it's our position that the two levels -- he pled guilty to all the counts that he is being sentenced on -- that the two levels should apply. There is a presumption that acceptance applies when a defendant pleads guilty, and we think the presumption has not been rebutted in this case.

THE COURT: All right. Thank you.

Would the government like to be heard on the issue of acceptance of responsibility?

MS. SALICK: Yes, Your Honor.

THE COURT: You may. All right. You're welcome to use the lectern if you'd wish.

I don't want to -- and, again, you are welcome to sit down, Mr. Ghanem, if more comfortable.

MS. SALICK: Thank you, Your Honor.

The government is in agreement with the U.S. Probation Office's conclusion that 3E1.1 for

acceptance of responsibility is simply not applicable in this case. I believe that the government has fully delineated the evidence showing how the defendant's statements to the probation officers were false, so I will leave that to the papers.

What I would just like to note is that not only does a level two reduction require truthful admission for the conduct of the conviction, it, also, under Note 3, requires truthful admission of the conduct comprising the offense of conviction and not falsely denying any relevant conduct, which is accountable under 1B1.3.

Everything that is being litigated today is putting into doubt, is contesting the relevant conduct. On that basis alone, the government submits that any application or adjustment for acceptance of responsibility is simply unavailable.

I would also just briefly note, because these are delineated in our papers -- and I won't take anymore of the Court's time -- that in addition to those false statements, the defendant spent several years contesting the offenses, litigating the offenses, cross-examining witnesses at a four-week trial, has continued to fight the convictions, and as evidenced from the sentencing paper his Counsel submitted in connection with today's hearing, continues to attempt to minimize or sanitize his conduct.

And so for those reasons and the reasons in our brief addressing this point, we agree with the probation's calculation that any credit for acceptance of responsibility is absolutely not applicable in this case.

THE COURT: All right. Anything else on this point, Mr. Coleman?

MR. COLEMAN: No, Your Honor.

THE COURT: All right. I would like to give each side and, of course, Mr. Ghanem an opportunity to speak before I impose sentence.

So, Mr. Coleman, would you like to -- I imagine you would. And I also want to be clear. I view this as a very serious case, a very significant case, so there is no urgency here. I want to give each side a fair and complete opportunity to be heard. Okay?

MR. COLEMAN: Understood, Your Honor.

THE COURT: We're not under any rush.

MR. COLEMAN: Thank you, Your Honor.

Before I begin, I just wanted to note that Mr. Ghanem's daughter is here. His grandson, who he has never seen because he was in custody for so long, he saw him for the first time today, he is also here but, I think he is out in the well so that he won't disturb the proceedings. So I just wanted to note that family support before I begin.

The first issue that I wanted to address is that really the only case that the government cites to justify what they're asking for here, which is, in essence, a 20- to 25-year upward departure or variance, is a case called Johnson out of the First Circuit. And we believe Johnson actually supports our position.

Before I explain that, I just wanted to indicate that what happened in Johnson was that there were defendants who were on U.S. soil who were plotting to use surface-to-air missiles to blow up British helicopters. So you have a difference in that these are people on U.S. soil plotting to do this. And the defendants in that case didn't plead guilty to the offenses of conviction like Mr. Ghanem has; they went to trial.

So the case is different, but the interesting thing, in the government's memorandum, is that they never say what those defendants received for their sentences. And one defendant received eight years and the other defendant received ten years. That is sort of in line with the recommendation that we are making. So to say that Johnson supports the government, a 30-year sentence, when those defendants got eight and ten years which are very much in line with the sentence that we're proposing, I just don't think that that, you know, does enough work for the government. If anything, that case supports our position with respect to the general sentence that we're recommending. So I wanted to first address that particular issue.

I also wanted to address, again, to show how extraordinary and unusual the government's request is to look at some of the cases that they cited in explaining why under 3553(a)(6) there would be no sentencing disparity here. And, again, all of those cases support our position; they do not support the government's position.

Of course, the Court articulated the 3553(a)(6) standard when you were going over the factors with Mr. Ghanem. And the important thing in 3553(a)(6) is that it's defendants with similar records who have, in fact, been convicted of certain conduct. And what the government has done is cited a series of cases where the defendants had 2332g convictions, which we don't have here anymore, that conviction has been vacated, and where the guidelines range -- there were a 25-year minimum, mandatory minimums applicable -- and where the guidelines range was life in prison. So, again, we're talking about apples and

oranges. They're citing cases that are directly contrary to the 3553(a)(6) standard.

So not only is there a significant legal flaw in that analysis, but if you also looked at the facts of those cases, you will see why those sentences were higher. And I'm not going to go through all of them, because I don't want to take too much time, but I will go through several just to make the point.

The first case they cite is the Hammadi case out of Sixth Circuit. Now, again, the guideline range in that case was life in prison. And so the defendants got what the guideline range was. In addition, those were defendants who were on U.S. soil in Kentucky, and they were conspiring to kill U.S. officers and a U.S. Army Captain. We have none of that here. There is no conspiracy to kill any U.S. Citizens or U.S. officers. They were also sending the equipment from Kentucky, or were trying to send it to, al-Qaeda. Again, we don't have any of that here. So, number one, the facts are extraordinarily different; and, number 2, the convictions are completely different; and, number 3, the guideline range is completely different.

The second case they cite is United States versus Bout, and I did want to briefly discuss this case because Victor Bout was the defendant, and he's been in the news a little bit lately because there has been discussion about whether the U.S. should conduct a prison transfer and send Mr. Bout back to Russia so that they could get the women's MBA star from Russia back to the United States. There's been that discussion in the news.

And the interesting thing about that discussion is that the district judge who sentenced Mr. Bout was interviewed to see if she would support the prison

transfer. She had since stepped down from the bench and gone into private practice. And what she said was she fully supported it because, number one, she felt that Mr. Bout got too much time, and she only sentenced him to 25 years because that was the mandatory minimum; and, number two -- and if she could have, she would have sentenced him to less -- and, number two, given that he's been in custody for several years, she didn't think that he had the contacts or anything to go back into the business, and she felt that the U.S. should conduct a prison transfer.

I would also note that, in the Victor Bout case, not only did he have the 2332g conviction with the 25-year minimum.

(Interruption by court reporter.)

MR. COLEMAN: I'm sorry.

But he was also convicted of conspiring to kill U.S. nationals and U.S. officers, something we don't have here. So, again, the government is citing a case that is completely different from this case.

I'll go through one more. I could say a lot about all of them, but I'm just going in the order that they're listed. And they all have the same themes, which is that the defendants were convicted of 25-year minimums with a guideline range of life in prison.

But I'll take the Cromitie case, which is spelled C-r-o-m-i-t-i-e, the Second Circuit case, that is the third case that they've cited. Again, defendant's convicted of 25-year mandatory minimums. We're talking about domestic terrorism. These are defendants in New York who are plotting to blow up a synagogue in Riverdale, New York, and plotting to send explosives and explode a military airport in New York. I believe it was in Newburgh, New York. I think it's Stewart

Airport Base. That's what they were doing in the United States, plotting to kill innocent, observing Jews in New York at a synagogue, and then to blow up a military airport in New York. Those defendants were -- they got the 25 years, and that was the minimum because they were convicted of 2332g counts.

So we're talking about drastically different types of cases that they're using to try to justify the extraordinary upward departure or variance in this case. We've cited the cases that have explained that the guidelines contemplate -- the guidelines, that apply in this case, contemplate that the conduct will implicate national security. That's already taken into account under the guidelines.

And if the Court -- and I understand the Court has said it's a serious case, and we understand it's a serious case. If the Court thinks that -- and while we don't agree; we think that a sentence at upper end of the range would be appropriate -- but if the Court thinks that an upward departure or an upward variance is appropriate, the kind that the government is talking about, a 20- to 25-year upward departure or upward variance, they've cited no case to ever support that type of upward departure or variance.

So maybe a modest upward departure or variance would be in order. We don't believe so. We think that the guidelines adequately take the conduct into account and at least the upper end of the guideline range is sufficient and not greater than necessary, which is the standard for 3553(a), but certainly not the type of upward departure or variance that the government is asking for.

In addition, Mr. Ghanem has been in custody for nearly seven years now. He's 56 years old. He's not in good health. You can even just look at his teeth. He's almost missing all of them. A sentence of 20 or 30 years will effectively be a life sentence. You know, if he is able to survive that type of sentence with his medical conditions, I don't think he'll live long afterward. And, again, the 3553(a) test is sufficient but not greater than necessary. And a sentence of essentially life in prison, which is what the government is asking, is certainly greater than necessary when the guideline range is, if the Court gives acceptance, 63 to 78 months; if it doesn't, 78 to 97 months, I believe it is, significantly greater than necessary.

And those are the main points that I wanted to make, Your Honor.

THE COURT: Okay. Thank you very much.

Would Mr. Ghanem like to address the Court? Obviously, he's not obligated to make a statement, but he is most welcome to make a statement. And Counsel, of course, is ably representing him. But I am happy to hear any statement Mr. Ghanem would like to make if he wishes to make one.

MR. COLEMAN: Let me just one moment speak to Mr. Ghanem.

THE COURT: Yes.

(A discussion off the record between Counsel and Defendant.)

MR. COLEMAN: He'll make a brief statement, Your Honor.

Would you like him to come to the podium?

THE COURT: However, he's most comfortable. If he wishes to make it from his seat, he may do that.

THE DEFENDANT: Thank you, Your Honor.

First of all, I'm a U.S. Citizen. I used to live in Arlington, Texas. The girl down -- that is my girl, my sweetheart. She was born in Arlington, Texas. I will never, ever, make no mistake, be a part or associate with anybody that would harm this country. So it give me a goose bump when I hear, when they talking about cases related to somebody tried to harm this country. I just want to make sure to tell you I will never, ever be a part of that. And thank you for your time, Your Honor.

THE COURT: Thank you. Thank you, Mr. Ghanem. And thank you, Counsel.

All right. Ms. Salick, would you like to be heard?

MS. SALICK: Yes, Your Honor.

THE COURT: You may.

I do have -- a couple of questions come to mind, and I don't mean to take you off of whatever points you wish to make, which you are free to make. But, obviously, I did not have the benefit of being the trial Judge in the case and hearing the evidence presented at trial.

And just in my review of the case, the case law, these cases do seem to be sort of far and few between. There aren't a lot of them. A number of them are pre-Booker, and, of course, the landscape was a bit different then.

So if you have any insight as to -- you know, Counsel has addressed, defense Counsel has addressed, the facts in a number of these cases, you know, and harm intended or aimed at the United States versus, you know, our case. It appears that the conduct is directed

at other countries that are enduring civil war and other forms of instability. So if you have any insights to that.

And, of course, Mr. Coleman, if you have anything else to add, I will give you an opportunity to add that.

Go ahead. And anything else you want me to hear.

MS. SALICK: Thank you, Your Honor. And I will happily address those two points. And like you, I was not the representative from the government during this trial, but I followed the case well and also have reviewed everything that has been submitted, so I will assist the Court in any way that I can and address those two specific questions that the Court raised.

By way of introduction, I want to begin by returning to the six counts to which the defendant pleaded guilty for which we are here to resentence him. And these six counts barely begin to capture the defendant's decades-long career as an international arms trafficker at the highest level. They barely capture the extent of the defendant's career made by exploiting human suffering by indiscriminately trading in weapons of war and instruments of death by fueling militias, a foreign terrorist organization designated by the United States government and our country's foreign adversaries.

He defendant chose, he purposefully inserted himself, into theaters of war both internal and international armed conflict. And through the types of weapons but also the amount of weapons and ammunition the defendant traded in, he quite literally had the ability to change the balance of power, to bring down governments, to prop up autocratic regimes, and to decimate civilian populations suffering in the grips of civil war.

Most significantly, defendant's only motive was greed. He was not motivated by ideology or patriotism or nationalism. Instead he supplied massive quantities of weapons and ammunition across the globe for one purpose, greed. And he prided himself on being willfully blind to the end result of the weapons that he sold. And at other times he, in fact, requested confirmation that his articles, his weapons of war obtained their deadly goal.

Defendant was a profiteer, to borrow Judge Otero's words at the 2019 sentencing hearing, and most devastatingly displayed a chilling indifference to the human cost his arms business took to human life.

Now, although the Ninth Circuit vacated one count of conviction, the 2332g antiaircraft charge, which the jury found defendant guilty of beyond a reasonable doubt after a four-week trial, defendant's conduct, the conduct to which he is being sentenced, has not changed. And for the purpose of today's argument only, I want to put aside all the evidence and all the records related to the 2332 count. It is a small fraction of the defendant's decades-long career as an arms trafficker.

And for the reasons briefed in the sentencing paper and as detailed in the PSR and the U.S. Probation Office recommendation letter, the government requests an admittedly extraordinary departure from the applicable guidelines and that is because this is an extraordinary case which gets directly to this Court's question as to the dearth of similar situated cases.

Defendant's conduct is so extraordinarily aggravating both in the scope of the deals he made and in the amount of weapons and ammunition he

personally transferred. They cannot be captured -- his conduct cannot be captured by the guidelines range. And his conduct, again, speaking only about the charged conduct, is of such an insidious nature as to warrant the significant upward departure the government is requesting.

And to underscore the point, while the government submits this Court should and may consider and is within its legal authority to consider all of the evidence supporting the dismissed -- excuse me, the vacated conviction, the Court need not even look at those facts to reach the sentence the government is seeking based on the conduct as charged and as the defendant has admitted in the six counts of conviction that we are here today to resentence on.

I want to just very briefly offer, as detailed in both the government's papers and the Probation Office's letter and PSR, that the Court may achieve this sentence, may account for the inability of the guidelines to capture the defendant's conduct in one of three ways, any of which is sufficient to legally support the Court's acceptance of an admittedly extreme departure from the guidelines range. And I believe it is noteworthy that the defendant's conduct, while not adequately captured by the guidelines, easily falls within one of these three methods to support a significant upward departure.

First, under relevant conduct, under 1B1.3, and, again, focusing solely on the relevant conduct underlying the six counts of conviction to which the defendant pleaded guilty, there is a sufficient basis to depart from the guidelines.

Second, the Court may make an upward departure under either 5K2.14 or 2M5.2, Note 2. These are the

provisions which related to harms to national security and foreign security.

And, third, the Court may make an upward variance under 3553, either based on the nature and circumstances of this offense, the scope, and the breadth of the defendant's conduct and the history and characteristics of the defendant; the defendant's continued inability to take responsibility and to accept the grave damage, as we just heard, his action caused to foreign nations and to our own or based on the aggravated -- based on 3553(b)(1), the aggravating circumstances not adequately considered by the guidelines.

Defendant's efforts to sanitize his conduct are unavailing. We have discussed this at length, but I wanted to focus on two items that the Court inquired about. The first is whether the defendant should be allowed leniency because his conduct did not occur on U.S. soil. It is simply illogical to believe that the defendant's conduct did not touch, did not affect, did not significantly impact the security of the United States.

At a very base level, the defendant himself is a United States citizen. As the defendant just stated, he is a citizen and previously resided in Texas. But the defendant chose, he inserted himself into international foreign armed conflicts. And he affected our nation's security when he, at numerous instances as captured and as detailed in all of the exhibits and records attached to the sentencing memoranda, took sides, inserted himself into ongoing foreign conflicts, supplied arms to individuals who purported to be leaders of militant factions, militant factions that were fighting against nations supported by the U.S.

government and in some cases even supported by U.S. personnel.

The defendant also had no qualms as demonstrated in the recorded statements introduced at trial and attached in the transcripts to the sentencing memo to supply these arms, these weapons in astonishing numbers to a designated foreign terrorist organization, a designation the United States government makes at the highest levels of our government after determining that that organization is engaged in terrorism which by its nature affects the United States.

With respect to defendant's claims that the sentence the government is asking for would result in an unwarranted disparity and this Court's request or inquiry related to other cases where similar facts are adduced, I, one, note all of the 25-year plus sentences that the government recited in its sentencing position paper -- and I can point the Court to those cases although I know the Court is well-aware of those cases. And I would also note that one of the reasons that we cannot find a case or that a case is not easily found with the same facts is because the defendant's conduct is so exceptional.

The lack -- or I should say the limited support -- and I'm not even comfortable with that word because I think there is significant support for our position. But it is correct that this is not a drug case or a felon in possession case where we can look to many, many cases. And that is because this case is so exceptional in nature.

I would also note that these arguments were similarly made to Judge Otero. And in his wisdom, in 2019, he placed no merit on these claims because he,

too, as the Probation Office and the government have repeatedly shown, was taken aback by the breadth and scope of the defendant's decades-long career as an international arms trader.

I wanted to quickly note a clarification to the defendant's recitation of the facts in Johnson and to an attempt to sanitize the defendant's conduct because it occurred overseas. The United States government prosecutes many serious cases where the conduct occurs overseas. In today's world, it is simply impossible to divorce conduct that is specifically aimed at the balance of power between nations and conduct that is specifically aimed at changing governments and supporting autocratic regimes. It is simply impossible to attempt to say that such conduct somehow did not touch the United States.

For all of the reasons -- and I won't take anymore time on this issue because I do believe it is fully briefed and supported by the evidence -- there is no basis to allow leniency based on the idea that the defendant's conduct did not touch the soil of the United States government -- of the United States.

I also -- just with respect to the Johnson case, because defense took issue with that, I would note that in that case the defendant was convicted of supplying bomb-making parts. And it would be illogical to equate the supplying of bomb-making parts to the millions of rounds of ammunition and the hundreds of thousands of weapons of war that the defendant traded in.

Before I stop there, I am ready to address any additional questions the Court may have, but in preparing for this, I wanted to return not to further argument from the government but to the defendant's

own reflections on his career as an international arms dealer.

In a 2005 recorded conversation that was played at trial and transcripts of which were attached to the government's sentencing memoranda, the defendant stated in discussing his criminal conduct: "I wake up every day in the morning. I go to the news. If there is peace, I go to sleep. If there is war, I wake up. I am happy. There is more business for me. I love war because it is business."

With that, Your Honor, the government asks that you make an exceptional upward variance because this case is exceptional. And I am happy to answer any other questions the Court may have.

THE COURT: All right. Thank you, Counsel.

Mr. Coleman or Ms. Blanco, anything else?

MR. COLEMAN: Yes, Your Honor. I did want to make a few points. Some of the things that were said and said in very sort of grandiose and generalized terminology is just not true. I think perhaps five or six times the government repeated that Mr. Ghanem was a decades-long arms trafficker. That's just not true. The conspiracies here are from 2013 to 2015. Maybe he got into the business about 2011, 2012 and was arrested in 2015, three to four years. He was not a decades-long arms trafficker. That is just flat out incorrect.

The government made -- concluded with a statement that they said was made in 2005. It wasn't. It was made in 2015 on the day he was arrested.

So it's this tendency to exaggerate some of the things and our position that I would like -- and I understand the government wants to do that, because

they're asking for something is that's exaggerated and extraordinary. But I would like to bring it back down to the specific legal principles and some of the specific facts in the case.

The government said we're asking for leniency. We're asking for the guideline sentence. We're not asking for a downward departure. We're not asking for downward variance. We're asking for the guidelines. So in that sense we're not asking for leniency.

And so when the government says, "Well, Judge Otero gave a particular sentence," well, yes, he did when there was a 25-year minimum and guidelines range of life in prison. That's a lot different than when the guideline range is in the neighborhood that we're talking about of five to eight years depending on whether he gets acceptance of responsibility. It's a completely different legal landscape.

The Court had asked about the fact that some of these cases or most of them are pre-Booker, and some of them, I think, are pre-Booker or most of them are pre-Booker, but I think even under a 3553(a) analysis, the point of those cases is captured. And that is why I went to 3553(a)(6), which is that, when you're doing a comparative analysis in trying to make sure that there is not unwarranted disparity, which is the essential purpose of the guidelines is to make sure that we're not sentencing different people to dramatically different things, you need to look at the counts of conviction. It's what the defendant has been convicted of. And so I think the same analysis that occurred in those pre-Booker cases carries over into the 3553(a) world when you look at 3553(a)(6).

I wanted to make one point about sort of the foreign conduct aspect. Yes, the government prosecutes extraterritorial cases, and this is a very vigorous extension of extraterritorial prosecution. I think the point that we've been trying to make is that, when you start to do that and there is no direct emphasis or focus on U.S. citizens or U.S. military, you start to fall into a bit of a gray area for some of these things.

And as an example, the government makes much of the fact that Mr. Ghanem, while living in Egypt, was hired by the Egyptian military to seek out military weapons. The government has not explained how that is a violation of U.S. law. If Mr. Ghanem is in Egypt and the Egyptian military is asking him to look into that, it is not clear to me, at least, when you look at this very difficult regulatory regime of figuring out what you can and can't do, that it is a violation of American law. But if it is -- and let's assume that it is -- it's not the basis for 20- to 25-year upward departure when there is no indication that there is any specific intent to harm a U.S. individual or U.S. military.

So the point that we're making is that this case is far different than even the other cases where defendants were convicted of 2332g and with conspiracy to kill U.S. citizens or U.S. military. We don't have that here. This is a vigorous extension of extraterritorial prosecution abroad.

Is the conduct serious? Yes, it is. We're not saying it's not, and we're not asking for any leniency. We're asking the Court to follow the guidelines. If the Court feels that the guidelines are not sufficient and an upward departure or variance is appropriate, then an upward departure or variance of the type that is often

taken in cases, whether it's two levels or four levels, then that degree of magnitude would be certainly sufficient and not greater than necessary.

But to add on dozens of levels and decades of time in prison, when there is no direct intent to threaten or kill a U.S. military person or a U.S. citizen, we believe would be creating not only an unwarranted disparity under 3553(a)(6) but would also be contrary to the guidelines regime. Thank you.

THE COURT: Thank you.

Ms. Salick, anything else?

MS. SALICK: Just to -- I did misspeak. My apologies for that. The quote was from 2015. I did not mean to mislead the Court. And that is stated as a 2015 date in all of our papers.

THE COURT: All right. Thank you.

All right. Thank you, Counsel and Mr. Ghanem. Obviously, this is a very significant case involving very serious acts.

Does either Counsel know of any reason why sentence should not now be imposed?

MR. COLEMAN: No, Your Honor.

MS. SALICK: No, Your Honor.

THE COURT: All right. Because I was not the trial Judge, I have spent what I consider a meaningful amount of time in reviewing the parties' papers and the underlying trial exhibits to try to give myself a sense of what it was like to sit in Judge Otero's chair during that trial.

And I will do the best I can with the knowledge that I've acquired to date and the benefit of Counsels' arguments today. I will begin first by calculating the appropriate sentencing guideline range, and I will

then impose my sentence and state the reasons for my sentence. Because of the significant factual history in the case, I expect it will take me a little bit of time to go through the various sentencing factors and the underlying facts.

And I want you to know, Mr. Ghanem, that I do appreciate the fact that you are a United States citizen, and at least I think you believe that the conduct that you engaged in was not intended to injure the United States, but I'm afraid, I think, it indirectly injured the interests of the United States.

So I am consulting and taking into account the 2021 edition of the sentencing guidelines, and I adopt the following sentencing guideline factors and calculations. The parties do not object to the Probation Office's criminal history calculation, so I find it to be accurate in statement.

I adopt the criminal history calculation. Mr. Ghanem has zero criminal history points; thus, he will receive a Criminal History Category of I.

The parties disagree about the total offense level in this action. The Probation Office and the government calculate the total offense level as 28. The defense calculates the total offense level as 26. The parties agree that pursuant to guidelines section 2M5.2(a)(1), that the base offense level is 26 and that a two-level increase applies because Mr. Ghanem was convicted for a violation of 18 U.S.C. section 1956.

As stated today during the hearing and the papers, Mr. Ghanem believes a two-level reduction applies for acceptance of responsibility under Section 3E1.1 because, essentially, he pleaded guilty to all counts of conviction. Mr. Ghanem pleaded guilty to six of the seven counts in the indictment and the first

superseding indictment on Friday, October 16 of 2018. Four days before the case was set to begin trial the following Tuesday, October 20 of 2018, Mr. Ghanem informed the prosecutor that he intended to enter a plea of guilty. On Monday, October 19, 2018, the day before trial, Mr. Ghanem pleaded guilty to six of the seven counts.

And as to Count 3 of the first superseding indictment, Mr. Ghanem exercised his constitutional right to a jury trial. And although the Ninth Circuit vacated Mr. Ghanem's conviction as to Count 3 of the first superseding indictment, I still may consider the evidence underlying that count as relevant conduct under the sentencing guidelines.

The application notes to guidelines section 3E1.1 do provide useful guidance. Application note 1 provides that, in determining whether a defendant qualifies for an adjustment based on acceptance of responsibility, I may consider whether he truthfully admitted the conduct comprising the offenses of conviction and whether he truthfully admitted or did not falsely deny any additional relevant conduct.

I may also consider his voluntary termination or withdrawal from criminal conduct, his voluntary -- among other factors that are set forth in that note, his voluntary surrender to authorities promptly after commission of the offense, voluntary assistance to authorities in the recovery of fruits and instrumentalities to the offense, and the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

Mr. Ghanem pleaded guilty to six of seven counts, but he did so on the eve of trial after several years of litigation. Therefore, in my view, his decision to plead

guilty does not demonstrate timeliness in accepting responsibility.

In addition, with respect to the other factors I just recited, he did not voluntarily terminate his criminal conduct. There is also a provision for voluntary payment of restitution before adjudication of guilt. There was no restitution paid. He did not voluntarily surrender to authorities or assist authorities in the recovery of the fruits and instrumentalities of his offenses.

In connection with preparing the presentence report on December the 18th of 2018, in the presence of his attorney, the probation officer interviewed Mr. Ghanem at the Metropolitan Detention Center here in Los Angeles. And on the advice of Counsel, which, of course, he is entitled to follow and invoke, he declined to speak about the offense, but he did state that he accepted responsibility.

Coming forward in time, in October of 2021 when the Probation Office was preparing its revised presentence report, Mr. Ghanem told the probation officer that not much had changed and that there was no real need for another interview.

So as stated in the Application Note 3, although entry of a guilty plea prior to commencement of trial and truthfully admitting the conduct comprising the offenses of conviction, combined with truthfully admitting or not falsely denying additional relevant conduct, is evidence of acceptance of responsibility, this evidence may be outweighed by conduct that is inconsistent with acceptance of responsibility. And a defendant who enters a plea of guilty is not entitled to an adjustment under section 3E1.1 as a matter of right.

Based on my review of this file, it does not appear to me that Mr. Ghanem has ever accepted true responsibility for the full scope of his conduct. To the contrary, it appears that he has deflected such responsibility. He has minimized his involvement in the crimes of conviction. For example, at his original sentencing, Mr. Ghanem's Counsel minimized Mr. Ghanem's involvement and argued that he was not an international arms dealer.

The most recent sentencing memorandum argues that, virtually, all of his foreign conduct "involved discussions that Mr. Ghanem undertook on behalf of foreign governments to secure military equipment and that almost none of it ever materialized."

Mr. Ghanem also declined to speak with the Probation Office about the offenses to which he pleaded guilty, so I do find that Mr. Ghanem's conduct is inconsistent with acceptance of responsibility, and I decline to apply the two-level downward adjustment for acceptance of responsibility. As a result, the total offense level remains at level 28 as calculated by the Probation Office.

As Counsel correctly stated, sentencing guideline range for this offense level and a Criminal History Category of I is 78 to 97 months.

As I said earlier, Title 18 U.S. Code section 3553(a) lists the factors that I'm required to consider before I can impose an appropriate sentence. Mr. Ghanem filed a sentencing memorandum, which included letters of support from members of his family, a retired U.S. Army Master Sergeant who concedes that he is unfamiliar with the details of Mr. Ghanem's case or the reasons for his arrest and detention, and a retired CIA officer who served in Jordan and who

retired from the CIA in 1998, which was 15 to 17 years before the acts that are set forth in the indictment and the first superseding indictment.

Interestingly, that officer writes that Mr. Ghanem informed him in 2011 that Mr. Ghanem had told him that "He had established important senior contacts among the new leadership and government in Libya," which may correspond with Counsel's argument to the Court that Mr. Ghanem's involvement in this particular line of work may have begun around that time. None of these letters, though, suggest that the authors were truly familiar with the criminal acts that Mr. Ghanem admitted to committing as a result of his guilty plea.

The prosecutor also filed a sentencing memorandum, and I reviewed -- which I reviewed, and I also reviewed the final presentence report. As I've stated, the parties' respective memoranda for sentencing, the government's exhibits, Mr. Ghanem's letters of support, and I have considered and weighed the parties' arguments today and Mr. Ghanem's statement to the Court.

So pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that defendant Rami Najm Asad Ghanem is hereby committed on Counts 1, 2, 3, and 4 of the indictment and Counts 1 and 2 of the first superseding indictment to the custody of the Bureau of Prisons for a term of 360 months.

The term consists of the following: 240 months on Count 1 of the indictment, 120 months on Count 2 of the indictment to run consecutive to the 240 months imposed on Count 1 of the indictment, 240 months on each of Counts 3 and 4 of the indictment to run concurrent with the 360 months imposed on Counts 1

and 2 of the indictment, 60 months on Count 1 of the first superseding indictment to run concurrent with the 360 months imposed on Counts 1 and 2 of the indictment, and 240 months on Count 2 of the first superseding indictment to run concurrent with the 360 months imposed on Counts 1 and 2 of the indictment.

Based on the factors set forth at 18 U.S.C. section 3553(a), I believe that a sentence of 360 months and 3 years supervised release is sufficient but not greater than necessary to comply with the objectives of section 3553(a). This sentence will properly hold Mr. Ghanem accountable for his offenses, provide adequate deterrence, protect the public from further crimes by Mr. Ghanem, and achieve parity with the sentences of defendants with similar records who are convicted of similar offenses, and provide Mr. Ghanem with needed educational or vocational training, medical care, or other correctional treatment.

It is ordered that Mr. Ghanem shall pay the United States a special assessment of \$600, which is due immediately. Any unpaid balance shall be due during the period of imprisonment at the rate of not less than \$25 per quarter and pursuant to the Bureau of Prisons Inmate Financial Responsibility Program.

All fines are waived, as I find that it will be too difficult to enforce payment of a fine in light of the significant sentence that I have imposed.

In imposing this sentence, I find that there are aggravating or mitigating circumstances of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different

from that described in the guidelines as permitted under Title 18 U.S. Code section 3553(b).

In addition, I'm applying an upward departure pursuant to guidelines section 5K2.14 and Application Note 2 of guidelines section 2M5.2, and I'm also varying upwards pursuant to 18 U.S.C. section 3553(a) for a number of reasons that I will explain in a moment.

I recommend that the Bureau of Prisons conduct a mental health evaluation of Mr. Ghanem and provide all necessary treatment, if he's willing to undergo such treatment. I also recommend that the Bureau of Prisons consider Mr. Ghanem for participation in the Residential Drug Abuse Prevention program known as RDAP, if Mr. Ghanem is willing.

And upon his release from imprisonment, Mr. Ghanem shall be placed on supervised release for a term of three years. The term consists of three years on each of Counts, 1, 2, 3, and 4 of the indictment and Counts 1 and 2 of the first superseding indictment.

All such terms to run concurrently under the following terms and conditions:

One, the defendant shall comply with the rules and regulations of the U.S. Probation and Pretrial Services Office and Second Amended General Order 20-04;

Two, the defendant shall not commit any violation of local, state, or federal law or ordinance.

Three, the defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from custody and at least two periodic drug tests

thereafter not to exceed eight tests per month as districted by the probation officer.

Four, the defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urinalysis, breath, and/or sweat patch testing as directed by the probation officer. The defendant shall abstain from using alcohol, any illicit drugs, and from abusing prescription medications during the period of supervision.

Five, as directed by the probation officer, the defendant shall pay all or part of the costs of the court-ordered treatment to the aftercare contractors during the period of community supervision. The defendant shall provide payment and proof of payment as directed by the probation officer. If the defendant has no ability to pay, then no payment shall be required.

Six, during the period of community supervision, the defendant shall pay the special assessment in accordance with this judgment's orders pertaining to such payment.

Seven, the defendant shall not obtain or possess any driver's license, Social Security number, birth certificate, passport, or any other form of identification in any name other than the defendant's true legal name nor shall the defendant use any name other than his true legal name without the prior written approval of the probation officer.

Eight, the defendant shall participate in an anger management program as approved and directed by the probation officer.

Nine, the defendant shall cooperate in the collection of a DNA sample from the defendant.

Ten, the defendant shall submit the defendant's person, property, house, residence, vehicle, papers, computers, cell phones, other electronic communications or data storage devices or media, e-mail accounts, social media accounts, cloud storage accounts, or other areas under the defendant's control to a search conducted by a United States probation officer or law enforcement officer. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search pursuant to this condition will be conducted at a reasonable time, in a reasonable manner, upon reasonable suspicion that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation.

I recommend that Mr. Ghanem be housed at a facility that can address his health conditions. And I authorize the Probation and Pretrial Services Office to disclose the presentence report to the substance abuse treatment provider to facilitate the defendant's treatment for narcotic addiction or drug dependency. Further redisclosure of the presentence report by the treatment provider is prohibited without the Court's consent.

Now, I find this sentence to be appropriate for the following reasons: A significant upward variance and departure is necessary due to the seriousness of the offenses which the sentencing guidelines do not adequately take into consideration.

In determining whether to impose a sentence within the guideline range or whether to vary or depart upwards, the Court may consider without limitation

any information concerning the background, character, and conduct of the defendant unless otherwise prohibited by law.

The Court can also consider conduct of which the defendant has been acquitted. Mr. Ghanem has not been acquitted of any conduct. To the contrary, although the Court of Appeals vacated Mr. Ghanem's conviction for conspiracy to use and transfer missile systems designed to destroy aircraft, the circuit court did not find that the evidence at trial was insufficient to support his conviction or that Mr. Ghanem cannot be retried for the same offense in the proper district.

For purposes of today's sentencing hearing, Mr. Ghanem's relevant conduct remains unchanged from the time that Judge Otero, the trial judge, imposed sentence in 2019.

An upward variance may be appropriate under 18 U.S.C. section 3553(b) based on aggravating circumstances not adequately taken into consideration by the Sentencing Commission.

Guidelines section 2M5.2 applies to the exportation of arms, munitions, or other military equipment or services without a valid export license. The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. However, the base offense level does not adequately capture the extreme conduct present here.

Unlike the conduct in certain of the pre-Booker cases, involving section 2M5.2, cited in the defendant's sentencing memorandum such as Tsai, T-s-a-i, which involved 11 units of missile components or Pedrioli, which involved the smuggling of 800 handguns for a military purpose, Mr. Ghanem was

involved in the trafficking of breathtaking quantities of weapons of war, namely rockets, anti-tank missiles, anti-aircraft missiles, mortars, tanks, fighter aircraft, machine guns, automatic rifles, and ammunition.

Guidelines section 2M5.2, Application Note 2, provides that an upward departure from the guidelines may be warranted where "The degree to which the violation threatened a security or foreign policy interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences are present in an extreme form."

Also, pursuant to guidelines section 5K2.14, "If national security, public health, or safety was significantly endangered, a Court may depart upward to reflect the nature and circumstances of the offense." I find that a significant upward variance in departure is warranted by the extreme facts of this case.

From September 4, 2013, through December 8, 2015, Mr. Ghanem was a black market arms trafficker, who collaborated and conspired with others to buy, sell, and broker weapons of war including missile systems designed to destroy aircraft. There was overwhelming evidence presented at trial and summarized in the presentence report that Mr. Ghanem made his living as a high-level arms dealer who regularly dealt with weapons of war, including trading in machine guns and assault rifles and rockets and mortars and rocket-propelled grenades and anti-tank weapons.

Over the course of several years, Mr. Ghanem bought, sold, and brokered the sale of millions of rounds of ammunition. For example, in September of

2013, Mr. Ghanem bought ASOT to acquire surface-to-air missiles and missile launchers on behalf of a foreign government to be covertly supplied to Libya, Syria, and the Kurdish region of Iraq.

In July of 2014, Mr. Ghanem made repeated offers to a foreign government to sell weapons, including 400 Strela, S-t-r-e-l-a, surface-to-air missiles that were, in his words, "Available for immediate shipment."

Also, in July of 2014, Mr. Ghanem asked to buy, again in his words, "As many as you have of heavy arms," including AK-47s, sniper rifles, machine guns, mortars, missiles, armored vehicles, and ammunition from a Homeland Security Investigations informant, which Mr. Ghanem would require upon his arrival in Iraq.

Mr. Ghanem then sought to procure what he described as massive quantities of weapons and military equipment from an undercover federal agent. He told the agent that his clients did not buy in small quantities and that, for example, he was looking to buy one hundred million rounds of AK-47 ammunition.

On September 18 of 2014, Mr. Ghanem met with the undercover federal agent in Athens, Greece and discussed his extensive global arms trafficking network, including connections with the Iraqi head of Hezbollah, a designated foreign terrorist organization and high-level contacts in numerous foreign governments and militant groups around the world.

In March of 2015, Mr. Ghanem met with the undercover agent again to discuss the proposed transaction.

In August of 2015, Mr. Ghanem placed an order and arranged to export military equipment valued at \$220,000 from the United States to Libya and requested that the undercover agent falsely declare the weapons initially as juice on the export documents. Mr. Ghanem intended this to be an initial order to test the agent's capabilities and that larger orders would follow.

On September 2 and October 22 of 2015, Mr. Ghanem sent payments totaling nearly \$180,000 from his bank account in Jordan to the undercover agent's account in the United States for the purchase of military equipment.

Mr. Ghanem made arrangements to inspect the weapons he had ordered in Greece on December 8 of 2015 before the shipment was to be sent to Mr. Ghanem's customer in Libya. When Mr. Ghanem arrived at the prearranged location in Greece, he was arrested.

The night before Mr. Ghanem's arrest, he told the undercover agent that he did not want to knowingly be a part of killing Arab refugees. But if he sold guided missiles to Saudi Arabia, which in turn shipped them to Yemen and Syria resulting in heavy civilian casualties, then, well, "That's their business."

Upon his arrest, Greek law enforcement seized 19 digital devices from Mr. Ghanem's person and hotel room. The devices contained evidence of Mr. Ghanem's words and his global arms trafficking business including numerous communications reflecting Mr. Ghanem's effort to buy and sell a wide array of heavy weapons including anti-aircraft missiles and a signed contract to purchase \$250,000 in weapons and ammunition and bank transfers for

Mr. Ghanem's brokering of the services of mercenary fighters.

Evidence introduced at trial established that Mr. Ghanem had engaged in a conspiracy to transfer and use anti-aircraft missiles and that he had engaged in and profited from multiple transactions whereby he provided mercenary anti-aircraft missile specialists to shoot down airplanes over Libya. This included Mr. Ghanem's own communications reflecting his efforts to buy and sell anti-aircraft missiles and the testimony, taken outside the United States and presented at trial, of two anti-aircraft missile operators and another arms broker who participated in one of Mr. Ghanem's transactions and to whom Mr. Ghanem had offered a \$50,000 bounty if they were successful in shooting down an airplane operated by the government of Libya.

In addition, the evidence showed that Mr. Ghanem had the ability to buy, sell, and broker anti-aircraft missiles of all kinds ranging from the smaller, shoulder-fired man-portable air-defense systems, known as MANPADs which included IGLA, I-G-L-A, and Strela and others to the larger and more sophisticated vehicle-borne Russian S-400 and S-300 Triumf systems.

Mr. Ghanem was without a doubt a prolific international arms trader for several years dealing in anti-tank missiles, rockets, mortars, grenades, and the necessary launchers, machine guns of various sizes, sniper rifles, assault rifles, pistols and other small arms, night vision equipment, and other sensitive military technology, attack aircraft, tanks, radar systems, mercenary fighters, and other heavy

weapons, along with many millions of rounds of ammunition.

Mr. Ghanem's own words, written and spoken, demonstrated a lack of respect for human life. He was motivated solely by profit. Mr. Ghanem was, as correctly characterized by Judge Otero, a profiteer, indifferent to the consequences of his actions.

Mr. Ghanem turned a blind eye to the ultimate destination of the arms he brokered and sold and was indifferent as to whether those weapons were obtained by terrorist organizations or used against civilian targets.

Mr. Ghanem embraced war because war meant profit. In one of the most damning pieces of evidence admitted at trial was Mr. Ghanem's recorded statement to the undercover federal agent, which the prosecutor read into the record during today's hearing.

The presentence report mentions, though it does not treat as relevant conduct and nor do I, that during his commission of the charged offenses, Mr. Ghanem was involved in a trade of black market uranium, a critical component in the development of nuclear weapons and dirty bombs on behalf of a client in China, he said.

Mr. Ghanem's conduct unequivocally endangered the security and foreign policy interests of the United States as well as the safety and security of far less stable nations. According to the evidence presented at trial and summarized in the presentence report, Mr. Ghanem was not a low-level arms trafficker; rather he engaged in repeated high-volume transactions involving costly military equipment over the course of several years. Such transactions required planning,

sophistication, contacts in numerous countries, and a focused effort.

I have also considered Mr. Ghanem's personal history and background in determining the appropriate sentence. Mr. Ghanem was born and raised in Jordan. In approximately 1984, he came to the United States to study. Between 1985 and 1990, he is reported to have obtained English and computer certificates. In 1994, he became a United States citizen.

In approximately 1996, he returned to Jordan to be with his family. Mr. Ghanem had five children and, prior to being arrested, had lived in Egypt with his wife and three of his children.

Mr. Ghanem suffered the painful loss of one of his children to a congenital illness, which caused him a great deal of anguish.

Mr. Ghanem worked for a Jordan-based company called Gateway to MENA from 2011 to December of 2015. Mr. Ghanem stated that the company dealt with military supplies. The evidence at trial showed that he used the company to commit the crimes of conviction.

Mr. Ghanem has no prior criminal convictions in the United States.

He has multiple medical problems including high cholesterol, high blood pressure, diabetes, neuropathy, back pain, sciatic nerve pain, sleep apnea, skin problems, and dental problems.

Mr. Ghanem's family members have written moving letters of support expressing their love and affection for him and stressing the important role he has

played in their lives and the pain they have endured since his arrest in this case as a result of his absence.

I have considered and balanced each of these facts and find that a significant upward variance and departure is warranted given the extremely serious and callous nature, breadth, volume, duration, planning, and sophistication of Mr. Ghanem's offenses, and the threat to the security and foreign policy interest of the United States and the security of more vulnerable nations.

I am aware that I have the discretion to impose an even longer sentence of up to 95 years based on the statutory maximum for the six offenses of conviction, but I declined to do so because I find that a sentence of 360 months is sufficient but not greater than necessary to comply with the purposes of Title 18 United States Code section 3553.

The statement of reasons shall be included in the commitment order and the judgment and shall be provided to the United States Probation Office, the United States Sentencing Commission, and the Bureau of Prisons. Mr. Ghanem is remanded to the custody of the United States Marshal.

Mr. Ghanem, you have the right to appeal your conviction if you believe your guilty plea was somehow unlawful or involuntary or if there were some other fundamental defect in the proceedings. You also have a right to appeal your sentence if you think your sentence is contrary to law. If you choose to appeal, with few exceptions, a Notice of Appeal must be filed within 14 days of the judgment being entered.

Do you understand this?

THE DEFENDANT: (Inaudible response.)

THE COURT: Is that a "Yes"?

THE DEFENDANT: Yes.

THE COURT: I need to hear you so the court reporter can write it down.

THE DEFENDANT: Yes.

THE COURT: If you are unable to afford a transcript of the record in this case, one will be provided at government expense. If you are unable to pay the cost of an appeal or filing fee, you may apply for leave to appeal in forma pauperis. If you do not have Counsel to act on your behalf and if you request it, the Clerk of the Court will prepare and file a Notice of Appeal on your behalf.

Again, you must make the request within 14 days of entry of judgment. The Notice of Appeal must designate the judgment or order appealed from and the fact that you are appealing to the United States Court of Appeals. You should designate the portion of the proceedings not already on file that you deem necessary for the court reporter to include.

Anything further?

MR. COLEMAN: Yes, Your Honor. First, we ask that Count 3 of the superseding indictment be dismissed.

THE COURT: Is the government moving to dismiss that count?

MS. SALICK: We are not, Your Honor.

THE COURT: Okay.

MR. COLEMAN: Then we should set a trial. They're already outside the Speedy Trial Act by a wide margin. There is numerous reasons why the count can't go forward, but we're demanding a speedy trial. They've already violated the Speedy Trial Act.

THE COURT: Well, you are asking me to set a trial date? I thought the case couldn't be tried in this district.

MR. COLEMAN: It can't. But they say they are not dismissing. So let's set the case for trial. We will -- there are many reasons why they can't go forward, but if they don't dismiss, then let's set the case for trial.

THE COURT: Well, it doesn't sound like any judge in this district would be the trial judge over this case. Does it not need to be brought in another district? Isn't that what the Ninth Circuit held?

MS. SALICK: Your Honor, the government has no objection to setting an interim trial date at this time. We will then determine internally where and whether to move forward on the vacated count of conviction.

MR. COLEMAN: We ask for next week. They're already late. They've already blown the Speedy Trial Act. We want our trial right now.

THE COURT: So what is your position with respect to when the Speedy Trial Act started to run?

MR. COLEMAN: They had 180 days, at most. They really had 70 days from the date the mandate spread, but, at most, they had 180 days, and that's run a long, long time ago.

They also -- there are numerous reasons why the case can't go forward, but they said they were going to dismiss. That was the representation that they made to me, they made it to the Probation Office, it was in the presentence report, and now they're going back on their representation.

But set the case for trial next week. We'll file motions to dismiss.

THE COURT: When you said, "They're going back on their representation," what representation was that?

MR. COLEMAN: They represented to me, and if you look at the presentence report, page --

THE COURT: The count would be dismissed?

MR. COLEMAN: Yes. Page 5, Footnote 3, "The government intends to move to dismiss Count 3 of the first superseding indictment without prejudice at or near the time of resentencing, has not decided whether to retry Ghanem on Count 3 of the first superseding indictment."

THE COURT: I mean, perhaps you can enlighten me, but would that particular count not have to be brought in another district, meaning a grand jury would need to sit and hear evidence and return an indictment as to that count in that other district?

MR. COLEMAN: Well, clearly, the count can't go forward in this district, which is why they should be dismissing it.

THE COURT: Right. I am not really inclined to set a trial date here because it seems pointless to set a trial date here.

MR. COLEMAN: Correct. The count should be dismissed. The count is -- there is no venue here; the count should be dismissed. It violates the doctrine of specialty; the count should be dismissed. They violated the Speedy Trial Act; the count should be dismissed. And they violated the Sixth Amendment. It's already delay -- it's well past the Sixth Amendment docket standard; the count should be dismissed.

They said they were going to dismiss it, and for whatever reason now, they're not. But we're moving to dismiss it for all of those reasons.

MS. SALICK: Thank you, Your Honor. First, all of the arguments defense Counsel made were summarily rejected by the Ninth Circuit.

With respect to the live issue here today as to the Speedy Trial Act, it's the government's position that a trial should go forward within 70 days pursuant to 3161(e). We are amenable to setting a trial date at this time.

I will note that it is not a decision my office can make without consultation per the United States Justice Manual as to where and whether to bring the charge. I can provide a status report to the Court within a few days as to our intention as to whether and where to proceed.

But we do not believe there is a basis to dismiss the count now and ask, if the defense is demanding for a trial date within the next 70 days -- and within the next few days, I can confirm the government's position in writing to the parties and on the record.

MR. COLEMAN: Your Honor, I have several responses.

THE COURT: Well, I am sure you do. Look, I mean, if the government ultimately decides to move to dismiss the count, I take it you'll be satisfied and you won't need to make much of a response; right? It's up to the government as to whether it wishes to seek to have a grand jury return an indictment in the proper district, should that be possible at this point in time.

MR. COLEMAN: Correct, Your Honor.

THE COURT: I guess, if the government elects to move forward with the count, we know it can't happen in this district. So setting a trial date here is pointless. I can set a date by which you can file, I guess, a status report as to the remaining count, but it's not going to go to trial in this District regardless of the Speedy Trial Act or anything else. The Ninth Circuit has held that it's not going to trial in this District, so that is not going to happen.

MR. COLEMAN: Right. We just --

THE COURT: How much time do you need to file some kind of a status report as to what you intend to do with this count?

MS. SALICK: We would ask by next Friday, Your Honor, one week.

THE COURT: All right. I think that's reasonable.

MR. COLEMAN: Your Honor, I'd request that the Court hold the judgment until they file their motion. Until they file their status or motion to dismiss.

THE COURT: But the judgment isn't affected by that.

MR. COLEMAN: Well, we --

THE COURT: He's been resentenced on the counts that he pled guilty to, as ordered by the Circuit. That's what I did today. So that remaining count is of no consequence to today's sentencing.

MR. COLEMAN: Well, I mean, properly the government has changed their tune. The case should have been retried before he was resentenced, but they said they were dismissing the count, which is why we went forward with the sentence.

I mean, there should be a consolidated sentencing proceeding. It's inefficient for me to take two appeals,

first to appeal the sentence and then to have to appeal whatever it is that they decide to do. It just seems to make sense to hold the judgment and then let them - if they need another week, I mean, they've had 18 months to decide, and they already had made a decision to dismiss. So I'd ask that the Court hold the judgment until they let us know what they're going to do.

THE COURT: All right. I'll hold the judgment for a week until Friday until I see the government's status report, but, I mean, I know it's clear that count can't be re-prosecuted in this district; otherwise, we wouldn't be here at all.

MR. ROBBINS: Your Honor, Alexander Robbins for the government. I apologize for any confusion on this. Just procedurally, we are not allowed to dismiss this count yet without consulting with other parts of the Department of Justice, which is the reason why we said and, I think, the PSR accurately states that we would intend to dismiss around the time of sentencing, which is still our intent.

I think, perhaps, Mr. Coleman is reading more into it than there is. That statement was accurate. That's where we are now. That's all we're doing.

And to the extent that there is an issue, I guess, I would ask my colleague Mr. Coleman right now, other than normally would just give him a phone call, would you object -- does the defense object to the government -- to a motion for voluntary dismissal if we bring that up next week?

MR. COLEMAN: No. Well, I do think a dismissal should be with prejudice. The Speedy Trial Act has run. The Sixth Amendment time frame has expired.

But I don't object if they dismiss. That's what I'm asking for is for the count to be dismissed.

MR. ROBBINS: Thank you.

THE COURT: Okay. Well, it sounds like the government needs -- I take it, what I'm hearing, is that the government needed to have the sentencing on the other six Counts take place before it could make a final decision exercising its prosecutorial discretion as to whether to proceed or to move to dismiss the count that was vacated by the Circuit.

So a week is not an unreasonable amount of time, so I will give the government until a week from today to file some sort of status report, a motion to dismiss with the Court, and then we'll take it from there. Okay?

MR. COLEMAN: Thank you. Your Honor --

THE COURT: And I'll wait on executing the entry of the final judgment until I have the government's report a week from today.

MR. COLEMAN: Thank you, Your Honor.

I'm not sure that I need to do this, but I am going to be just to be sure because, I think, as Your Honor can understand, we will be appealing the sentence. I want to obviously renew or confirm and preserve our objection as to acceptance of responsibility. I want to renew and preserve our objections as to the substantive reasonableness of the sentence and the procedural reasonableness of the sentence, particularly, as to all of the 3553(a) factors but particularly 3553(a)(6).

And I don't mean to be disrespectful. I understand Your Honor's sentence. But the one thing that I did want to say is that, as far as 3553(a)(6), we have

people that have attacked the Capitol, there have been officers killed, they tried to overthrow election and tried and discussed hanging the Vice President of the United States, and they're getting a fraction of 30 years. And if anything endangers the national security of the country, it is those types of acts in our very nation's Capitol. And Mr. Ghanem -- the sentences that they are receiving are a fraction of 30 years.

I just -- if we're talking about national security and 3553(a)(6), I think the case -- the sentence is substantively and procedurally unreasonable.

Thank you, Your Honor.

THE COURT: All right, Counsel.

All right. Thank you, Counsel.

MS. BLANCO: Your Honor, I'm sorry. One final request. Mr. Ghanem's 17-month-old grandson is here

--

THE COURT: Yes.

MS. BLANCO: -- who he has never seen.

Would it be possible for me to carry him --

THE COURT: Absolutely.

MS. BLANCO: -- into the well to see Mr. Ghanem?

THE COURT: Yes.

MS. BLANCO: Thank you.

THE COURT: Not a problem.

All right. Thank you.

Good luck, Mr. Ghanem.

THE COURTROOM DEPUTY: All rise.

(Adjourned at 11:55 a.m.)

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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript of proceedings in the above-entitled matter.

/s/ Suzanne M. McKennon, CSR, CRR, RMR

United States Court Reporter

Date: 11/13/2022

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT 16, 2025
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RAMI GHANEM,
Defendant-Appellant.

No. 22-50266
D.C. No. 2:15-cr-00704-FLA-1
Central District of California
Los Angeles

ORDER

Before: CLIFTON, COLLINS, and LEE, Circuit
Judges.

The panel has unanimously voted to deny the
petition for panel rehearing. Judge Collins and Judge
Lee have voted to deny the petition for rehearing en
banc, and Judge Clifton so recommends. The full

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court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* FED. R. APP. P. 40. Accordingly, Defendant-Appellant's petition for panel rehearing and for rehearing en banc (Dkt. Entry No. 55) is

DENIED.