No. 26-____

In The
Supreme Court of the United States

David Roger Franklin,

Petitioner,

v.

United States of America,

Respondent.

Petition for a Writ of Certiorari

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Question Presented

Pending state charges at federal sentencing trigger a nuanced predicament for defendants facing federal prison: challenge the allegations at federal sentencing or retain due process rights at the state trial. This Court deferred to the U.S. Sentencing Commission to rectify a similar issue related to acquitted conduct, but the U.S. Sentencing Commission's changes were silent as to the extent a district court may consider and make findings on pending charges that impact a federal sentencing decision.

Mr. Franklin was denied the opportunity to both rebut allegations made against him at his federal sentencing hearing and preserve the rights he should have retained for a jury trial on his state charges. The district court found that Mr. Franklin "most likely" committed the hands-on offenses charged in a pending state case and imposed the statutory maximum for his federal child pornography convictions accordingly. The Ninth Circuit held that due process was satisfied because the untried allegations were "consistent with" the offenses of conviction and therefore supported by a "minimal indici[a] of reliability beyond mere allegation."

The question presented is whether due process permits a federal sentencing court to make a finding that a pending charge "most likely" occurred and consider that finding as part of its sentence determination, even when the defendant has neither admitted that conduct nor been able to fairly contest the allegations.

Parties to the Proceeding

Petitioner, David Roger Franklin, was the defendant-appellant in the court of appeals.

Respondent, United States of America, was the plaintiff-appellee in the court of appeals.

Related Proceedings

This case arises from the following proceedings in the United States District Court for the Eastern District of Washington and in the United States Court of Appeals for the Ninth Circuit:

United States v. Franklin, No. 25-1208 (9th Cir. May 29, 2026) (unreported).

United States v. Franklin, No. 1:23-CR-02026-SAB-1 (E.D. Wash. Feb. 21, 2025) (unreported).

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Petition for Writ of Certiorari

Petitioner David Roger Franklin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in No. 25-1208.

Opinions Below

The Ninth Circuit's unpublished memorandum disposition affirming Mr. Franklin's sentence was filed on May 29, 2026, and is attached as Appendix A.[1] The transcript of the sentencing hearing in the United States District Court for the Eastern District of Washington, including the district court's oral pronouncement of sentence, is attached as Appendix B.[2] The district court's judgment is unpublished and is attached as Appendix C.[3]

Jurisdiction

This Court holds jurisdiction under 28 U.S.C. § 1254(1). This petition is timely. The Ninth Circuit entered judgment on May 29, 2026.[4] Neither side petitioned for rehearing. Mr. Franklin submitted a request for extension of time to file a petition for writ of certiorari on August 14, 2026, which this Court (specifically Justice Kagan) granted on August 28, 2026, extending Mr. Franklin's deadline until October 26, 2026.[5]

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[1] Pet. App. 1–3.
[2] Pet. App. 4–55.
[3] Pet. App. 56–64.
[4] Pet. App. 1–3.
[5] *See* Application No. 26A268.

Constitutional and Statutory Provisions

The Fifth Amendment to the Constitution states in relevant part:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

Title 18 U.S.C. § 3661 provides:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Section 6A1.3(a) of the United States Sentencing Guidelines provides:

> When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

Introduction

Absent a guilty plea, a state court may convict and punish a person for hands-on child abuse only if the prosecutor proves the crime to a jury beyond a reasonable doubt. At trial, the accused retains the right to remain silent, confront his accuser, and hold the state to its burden of proof. At the time of his federal sentencing, David Roger Franklin had hands-on child abuse charges pending in state court. He was never tried on the charges and they were later dismissed. Yet, a federal judge found that he "most likely" committed the egregious state charges—and relied on that finding to impose a thirty-year sentence on a 68-year-old man with no criminal history who pleaded guilty only to federal pornography offenses.

The state was waiting for that result. At sentencing, the federal prosecutor explained that state authorities would "review this matter following our sentencing" to decide whether a state trial was "the best use of their prosecutorial resources."[6] The child's family asked the federal court to use its "power to guarantee" that the child would never have to testify in the state courtroom.[7] The federal court effectively answered that call and did just that. Mr. Franklin could not respond to the allegations of hands-on conduct without surrendering the privilege he would need in the state case. The government conceded at sentencing that Mr. Franklin had only a "limited ability to contest the factual recounting."[8] His

[6] Pet. App. 8a.
[7] Pet. App. 37a–38a.
[8] Pet. App. 21a–22a.

counsel told the court that Mr. Franklin "cannot respond to that at this time" because "of the constitutional guarantees."[9]

The Ninth Circuit held that due process required nothing more. It reasoned that the untried allegations bore "minimal indici[a] of reliability" because they were "consistent with" the offenses to which Mr. Franklin had pleaded guilty—even though the images underlying those offenses do not depict the state's abuse charges.[10] The Ninth Circuit held that the finding did not matter because the sentencing court relied "primarily" on other factors.[11]

This Court has not yet decided what due process requires when a sentencing court relies on conduct charged in a pending prosecution. Its sentencing cases, from *Williams v. People of State of N.Y.* through *United States v. Watts*, assume that the defendant either had a trial or could contest the accusation at sentencing. A defendant facing pending charges has neither option. Members of this Court have repeatedly questioned the use of acquitted and uncharged conduct at sentencing, and in *McClinton v. United States*, four Justices deferred to the Sentencing Commission.[12] The Commission has since acted, but declined to address charged conduct that has not been tried, and it preserved every sentencing court's power to rely on such conduct under 18 U.S.C. § 3661.[13] Only this Court can answer the

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[9] Pet. App. 23a.
[10] *See* Pet. App. 2a.
[11] Pet. App. 2a.
[12] *McClinton v. United States*, 143 S. Ct. 2400, 2401–03 (2023) (Sotomayor, J., respecting the denial of certiorari); *id.* at 2403 (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., respecting the denial of certiorari).
[13] U.S.S.G. App. C, amend. 826 (eff. Nov. 1, 2024) (Reason for Amendment).

question of whether federal sentencing courts can make findings regarding pending state charges. This case presents it cleanly.

Statement of the Case

A. Mr. Franklin pleaded guilty to federal child-pornography offenses; Washington separately charged him with hands-on offenses.

Mr. Franklin lived his first 65 years without a criminal conviction. He worked as a business executive in Yakima, Washington, was married for more than four decades, and raised five children. In 2021, he took images of a child that constituted child pornography and investigators found other child pornography on his devices as well.[14]

On October 21, 2024, after the case had twice approached trial, Mr. Franklin pleaded guilty to all five counts of the indictment without a plea agreement: three counts of producing child pornography, one count of transporting it, and one count of possessing it.[15] Each production count carried a fifteen-year mandatory minimum and a thirty-year maximum.[16] The federal charges alleged no hands-on abuse.

Separately, Yakima County prosecutors charged Mr. Franklin in state court with first-degree rape of a child and first-degree incest, based on allegations of hands-on abuse of the same child.[17] The photographs underlying the federal production convictions do not depict the state charges. The state charges were

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[14] *See* Pet. App. 16a–17a.
[15] *See* Pet. App. 6a–7a.
[16] 18 U.S.C. § 2251(a), (e).
[17] Pet. App. 20a–21a.

never tried and later dismissed. As the federal prosecutor explained at sentencing, his "general understanding" was "that the state was going to review this matter following our sentencing to determine whether or not it was what they deigned to be the best use of their prosecutorial resources."[18] It is a recurring procedural sequence for the state to hold hands-on charges and the United States to hold image-production charges.

B. At sentencing, Mr. Franklin could not contest the state allegations without jeopardizing his defense to the pending charges.

The presentence investigation report recounted the allegations underlying the state charges in detail. It relied on information that had not been tested by cross-examination and Mr. Franklin did not have the benefit of full discovery from the state case. Mr. Franklin moved to strike those paragraphs. His counsel explained the problem:

> [I]t is fundamentally unfair to Mr. Franklin because this is going to go to prison with him, and he is denied any ability to rebut or challenge or anything else these accusations because of the pending matter that is not even within this court's jurisdiction. . . . My concern, Your Honor, is that all of these things are unchallenged. Mr. Franklin has no ability to challenge that.[19]

The Government did not dispute the premise: "I realize," the prosecutor said, "that the defendant has pending charges and has limited ability to contest the factual recounting."[20] But the Government urged the court to consider the

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[18] Pet. App. 8a.
[19] Pet. App. 20a.
[20] Pet. App. 21a–22a.

allegations anyway, because "the caselaw is quite strong that the court is to consider all relevant matters when coming to a sentence."[21]

The district court read aloud U.S.S.G. § 1B1.4's "without limitation" provision and denied the motion to strike.[22] The court offered to add "a sentence that the defendant denies those specific allegations," but it made clear that it was "going to consider them as part of its sentence."[23] Defense counsel declined the offer: "I cannot address that because of the constitutional guarantees, and Mr. Franklin cannot respond to that at this time."[24] No evidentiary hearing was held. Mr. Franklin did not testify about the allegations, and no witness with personal knowledge of them appeared.

C. The district court found that Mr. Franklin "most likely" committed the untried state offenses and imposed the statutory maximum.

The court calculated a Guidelines "range" of 1,560 months—the sum of the statutory maximums on every count.[25] The government asked for 390 months. Mr. Franklin asked for the 180-month mandatory minimum.[26] The child's father addressed the court and asked it to use its "power to guarantee that [the child] does not have to take the stand in the state courtroom."[27] The government referenced "the fact of the hands-on conduct" during sentencing as if it had been proven.[28]

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[21] Pet. App. 22a.
[22] Pet. App. 22a–23a; *see* U.S.S.G. § 1B1.4.
[23] Pet. App. 23a.
[24] Pet. App. 23a.
[25] Pet. App. 9a, 23a–26a.
[26] Pet. App. 27a, 43a.
[27] Pet. App. 37a–38a.
[28] Pet. App. 31a.

In explaining the sentence, the court addressed the state allegations directly:

> I'm aware of the fact that what you did did involve, most likely, actual touching. Unlike many child pornography cases, there are allegations that you actually abused, physically abused this same granddaughter. That will be handled by another court maybe, but those allegations are pending in that court.[29]

The court also cited the harm to the child and her family and Mr. Franklin's allocution, which the court viewed as insufficiently remorseful.[30] It then imposed the thirty-year statutory maximum on each production count, all to run concurrently.[31] Mr. Franklin was 68 years old. If he survives prison until his projected release date of December 7, 2048, he will be 92.[32]

D. The Ninth Circuit held that the untried allegations were reliable because they were "consistent with" Mr. Franklin's admitted conduct.

Mr. Franklin appealed. He argued that the district court violated his right to be presumed innocent and his right to confront his accuser by finding the pending charges "most likely" true, and that the finding rested on information lacking the reliability due process requires.[33]

The Government's defense of the sentence rested on the untried conduct. It argued that the district court "properly tethered its sentence to the statutory need to punish Defendant for his egregious incestuous child abuse," and that the sentence was "aggravated by evidence of his hands-on sexual abuse of the same

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[29] Pet. App. 49a.
[30] Pet. App. 49a–51a.
[31] Pet. App. 51a.
[32] Pet. App. 48a.
[33] *See* Pet. App. 2a.

victim." The Government conceded that in state court Mr. Franklin "would enjoy the presumption of innocence, the rights to silence and confrontation, the defensive benefits of the hearsay rule, and all of the other protections of the accused." Yet it faulted him for having offered no "factual basis" to show that the allegations were not "most likely" true at federal sentencing.

The Ninth Circuit affirmed in an unpublished memorandum. It held that "even if the district court considered the allegations underlying the state charges, that did not violate due process."[34] The allegations, the panel reasoned, "were supported by 'minimal indici[a] of reliability beyond mere allegation' in that they were consistent with Franklin's admitted conduct."[35] The panel also held that the district court did not "'demonstrably' make the state allegations the basis of the sentence" because it "relied primarily on other factors."[36]

Reasons for Granting the Writ

This petition presents an important and unresolved question about the most basic guarantees of due process at federal sentencing when separate charges are pending. The Ninth Circuit's rule in *Vanderwerfhorst* shifts the burden onto defendants to disprove state claims considered at federal sentencing before the state prosecutor has provided full discovery, let alone presented the state case to a jury. The Ninth Circuit decision below forces a choice between the privilege against self-incrimination and the right to contest the accusation, treats silence as proof,

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[34] Pet. App. 2a.
[35] *Id.* (quoting *United States v. Vanderwerfhorst*, 576 F.3d 929, 936 (9th Cir. 2009)).
[36] *Id.* (citing *Vanderwerfhorst*, 576 F.3d at 935–37).

and accepts as "reliable" any accusation that shares a victim with the offense of conviction. The Sentencing Commission has disclaimed any role in fixing the problem. This case, which arises from an open plea with no appeal waiver, presents the question on a clean and fully preserved record.

A. Whether a federal sentencing court may draw conclusions about pending state charges, without giving the defendant a fair opportunity to contest the accusations at a state trial, is a constitutional question only this court can resolve.

1. Broad sentencing discretion has always been paired with a meaningful chance to rebut.

Sentencing courts may consider a wide range of information, much of it inadmissible at trial. *Williams v. People of State of N.Y.* held that due process does not confine a sentencing judge to evidence tested in open court.[37] Congress codified that tradition in 18 U.S.C. § 3661, and the Guidelines echo it.[38]

But this Court has never treated that discretion as unlimited. Due process forbids a sentence resting on "assumptions concerning [the defendant's] criminal record which were materially untrue."[39] It forbids a sentence "founded at least in part upon misinformation of constitutional magnitude."[40] It also casts doubt on a sentence imposed "at least in part, on the basis of information which [the

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[37] *Williams v. People of State of N.Y.*, 337 U.S. 241, 246–47, 250–51 (1949).
[38] U.S.S.G. § 1B1.4; *see also* U.S.S.G. § 6A1.3 (Policy Statement).
[39] *Townsend v. Burke*, 334 U.S. 736, 741 (1948).
[40] *United States v. Tucker*, 404 U.S. 443, 447 (1972).

defendant] had no opportunity to deny or explain."[41] The Guidelines carry a consistent promise: when a sentencing factor is "reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor."[42]

Those principles work only when the defendant can invoke them; a defendant who faces a federal sentencing while separate state charges are pending cannot challenge the pending charges without consequence. *Williams* itself stressed that the defendant there never challenged the accuracy of the information and never asked for "a chance to refute or discredit any of [it] by cross-examination or otherwise."[43] The traditional rule presumes a defendant who can speak up when the information is wrong. A defendant facing a separate pending prosecution cannot refute the allegations against him at federal sentencing without giving up the rights he is entitled to at his impending jury trial.

2. *Watts* and its progeny assume a defendant who either had a trial or can contest the conduct at sentencing.

In *United States v. Watts*, this Court held that a jury's acquittal does not bar a sentencing court from considering the underlying conduct if it is proved by a preponderance of the evidence.[44] But the defendant in *Watts* had his trial. The judge who found the facts had heard the evidence tested by cross-examination, and

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[41] *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (plurality opinion).
[42] U.S.S.G. § 6A1.3(a).
[43] *Williams*, 337 U.S. at 244.
[44] *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam).

the defendant had every opportunity to present a defense. This Court later cautioned that *Watts* decided only a "very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause," without the benefit of full briefing or oral argument.[45] Similarly, *Nichols v. United States* approved consideration of a defendant's past criminal behavior for an uncounseled misdemeanor DUI conviction where no jail time was served, but nothing in *Nichols* prevented the defendant from contesting that behavior at sentencing.[46]

Pending charges are different in kind. When the state elects to prosecute, a defendant is presumed innocent. Anything said at the federal sentencing while the state case is pending can be used against the defendant at the state trial. The federal court's finding operates as a preliminary adjudication of the state case, just under a lower standard, on untested hearsay, with the accused effectively unable to speak. This Court's sentencing cases have not yet addressed this situation.

B. The decision below forces defendants to surrender one constitutional right to assert another.

This Court in *Simmons* found it "intolerable that one constitutional right should have to be surrendered in order to assert another."[47] In *Simmons*, the Court resolved that tension by barring the government from using a defendant's suppression-hearing testimony against him at trial.[48] No comparable protection

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[45] *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005).
[46] *Nichols v. United States*, 511 U.S. 738, 747–48 (1994).
[47] *Simmons v. United States*, 390 U.S. 377, 394 (1968).
[48] *Id.*

exists for a defendant who must decide whether to contest pending-charge allegations at federal sentencing or preserve his trial rights at a later state court trial.

The privilege against self-incrimination applies at sentencing. In *Mitchell v. United States*, the Court recognized that "[w]here the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony."[49] After the Government suggested that an adverse inference was appropriate for a defendant remaining silent on the issue of a drug amount at sentencing, this Court "decline[d] to adopt an exception for the sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime."[50] The Court held that "[t]he Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege."[51]

Mr. Franklin's dilemma was sharper than Ms. Mitchell's. His exposure was not limited to an increase in the federal sentence; he faced a separate, pending prosecution for child abuse charges where, if proven beyond a reasonable doubt in the state, could mean up to a life sentence consecutive to his federal sentence. Had Mr. Franklin testified to deny the allegations he would have handed the state a preview of his defense and forfeited his Fifth Amendment rights in the state case.

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[49] *Mitchell v. United States*, 526 U.S. 314, 326 (1999).
[50] *Id.* at 328.
[51] *Id.* at 330.

The only way to protect his rights in the state case was to remain silent at federal sentencing, which is exactly what his counsel told the sentencing court.[52]

The Ninth Circuit's rule turns that silence into proof. Under *Vanderwerfhorst*, the defendant bears the burden of showing that challenged information is false or unreliable, and a defendant who "sat idly without disputing the overwhelming aggravating evidence" cannot meet it.[53] Mr. Franklin was prejudiced because he could not offer any factual basis to contradict the allegations without compromising his state trial and the Ninth Circuit therefore found there was a "minimal indici[a] of reliability beyond mere allegation" due to "consistent" allegations (the same alleged victim in the state case for separate conduct). A defendant who invokes the privilege therefore loses automatically under *Vanderwerfhorst*. That is the adverse inference *Mitchell* forbids, and the kind of penalty that "cuts down on the privilege by making its assertion costly."[54]

Workable alternatives exist to preserve due process rights at both federal sentencing and the future state jury trial. A sentencing court could defer sentencing, or the contested finding, until the state charges are resolved. It could extend *Simmons*-style protection to a defendant's sentencing testimony. It could also note that the charges are pending (and that the defendant is presumed innocent) and clearly abstain from both: 1) making any findings that the defendant committed the charged acts; and 2) using the charges as a basis to increase a

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[52] Pet. App. 23.
[53] *Vanderwerfhorst*, 576 F.3d at 936.
[54] *Griffin v. California*, 380 U.S. 609, 614 (1965); *see Mitchell*, 526 U.S. at 328–30.

sentence.[55] Nothing in 18 U.S.C. § 3661 requires a federal court to adjudicate a pending state charge. The district court here took none of these paths and disregarded Mr. Franklin's presumption of innocence. It found the charges "most likely" true on a record Mr. Franklin could not contest and relied, at least in part, on those uncontested allegations to increase the sentence.

C. The Ninth Circuit's reliability test is wrong and conflicts with the Second Circuit.

1. A common alleged victim does not corroborate a different, more serious crime.

The Ninth Circuit found the untried allegations reliable because they were "consistent with Franklin's admitted conduct."[56] The admitted conduct was producing inappropriate images, but the images do not depict rape or any hands-on child abuse. The only "consistency" between the offenses of conviction and the state charges is that they involve the same alleged victim. Under the panel's reasoning, any conviction involving a victim would corroborate any separate accusation involving the same victim, and the "minimal indicium of reliability beyond mere allegation" would be satisfied by the allegation itself.

The Second Circuit requires more. In *United States v. Juwa*, the defendant pleaded guilty to a federal child-pornography offense while state sexual-abuse charges involving a child relative remained pending.[57] The district court relied on

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[55] *See Vanderwerfhorst*, 576 F.3d at 936.
[56] Pet. App. 2.
[57] *United States v. Juwa*, 508 F.3d 694 (2d Cir. 2007).

those charges to impose a sentence far above the Guidelines range.[58] The Second Circuit vacated the sentence, holding that it "was impermissible for the district court to simply assume the multiple charges to be true and to enhance [the] sentence accordingly," and that "an indictment or a charge within an indictment, standing alone and without independent substantiation, cannot be the basis upon which a criminal punishment is imposed."[59]

The Ninth Circuit reached the opposite result for Mr. Franklin on a weaker record. Unlike Mr. Franklin, Mr. Juwa had agreed to plead guilty to one hands-on child abuse charge in his state case.[60] The Second Circuit still held that the remaining state charges, supported by nothing beyond the indictment, could not be used to justify the federal sentence.[61] Mr. Juwa's multiple charges in the state involved the same alleged victim, but the Second Circuit did not find that commonality sufficient to establish independent substantiation. Although Mr. Franklin admitted no hands-on offenses, the Ninth Circuit found them reliable because they were "consistent" with the federal offenses of conviction for child-pornography-related offenses.

The decision below also departs from the distinction the Ninth Circuit itself drew in *Vanderwerfhorst*. There, the district court merely observed that similar allegations continued to "swirl around" the defendant. The Ninth Circuit held that this "observation of [an] uncontested fact is readily distinguishable from sentencing

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[58] *Id.*
[59] *Id.* at 701.
[60] *Id.* at 698.
[61] *Id.* at 701.

[the defendant] based on an assumption that he in fact committed the predicate acts."[62] The district court here did the latter. It found that Mr. Franklin's conduct "did involve, most likely, actual touching."[63]

2. The "demonstrably made the basis" test conflicts with *Tucker*'s "at least in part" standard.

The Ninth Circuit held that the district court did not "demonstrably" make the state allegations the basis of the sentence because it "relied primarily on other factors."[64] Although it is unclear how the Ninth Circuit determined how the district court weighed which factors, this Court's cases ask a different question. Due process is violated when a sentence is "founded at least in part" on unreliable information,[65] or imposed "at least in part" on information the defendant had no opportunity to deny or explain.[66] A "demonstrably made the basis" has two problems: 1) it lets courts rely on untested accusations so long as those accusations are not the main reason for the sentence; and 2) it's difficult to apply unless a sentencing court is detailed and explicit when stating the basis for the sentence. That is not the rule this Court has announced.

Under the correct standard, the answer is not close. The district court named the hands-on allegations in explaining its sentence.[67] It imposed the statutory maximum, fifteen years above the mandatory minimum, on a first-time offender.

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[62] *Vanderwerfhorst*, 576 F.3d at 936.
[63] Pet. App. 49.
[64] Pet. App. 2. (As in Juwa, it is difficult to
[65] *Tucker*, 404 U.S. at 447.
[66] *Gardner*, 430 U.S. at 362 (plurality opinion).
[67] Pet. App. 49.

The Government defended the sentence on appeal as tethered to punish the untried conduct. The allegations were, at a minimum, part of the basis for Mr. Franklin's sentence.

D. The Sentencing Commission deliberately left charged-but-untried conduct unaddressed, so only this Court can resolve the question.

In *McClinton*, three Justices voted to deny review because the Sentencing Commission was then considering the use of acquitted conduct, and Justice Sotomayor warned that the Court "may need to take up the constitutional issues presented" if the Commission did not act.[68] The Commission has now acted. Its amendment leaves Mr. Franklin's situation untouched.

Amendment 826 added a single sentence to the Guidelines: "[r]elevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction."[69] The Commission explained that "[a]cquitted conduct is unique," and that the amendment "does not comment on the use of uncharged, dismissed, or other relevant conduct."[70] Mr. Franklin falls outside the amendment in every respect. His conduct was charged but never tried, not acquitted (yet). The charges were in state court, not federal court. The district court relied on the conduct in choosing a sentence under 18 U.S.C. §§ 3553(a) and 3661,

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[68] *McClinton*, 143 S. Ct. at 2403 (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., respecting the denial of certiorari); *id.* at 2402–03 (Sotomayor, J., respecting the denial of certiorari).
[69] U.S.S.G. § 1B1.3(c).
[70] U.S.S.G. App. C, amend. 826 (Reason for Amendment).

not in calculating the Guideline range. Mr. Franklin never had a state jury trial, so we will never know whether he would have been acquitted on his state charges because the state voluntarily dismissed the case after Mr. Franklin's federal sentencing.

The Commission's own reasoning supports review. It limited the amendment to federal acquittals in part because of "concerns about administrability," recognizing that "federal courts may have greater difficulty making this determination if it involves proceedings that occurred in another jurisdiction and at different times."[71] That concern is at its peak here. There was no state proceeding for the federal court to evaluate—only untested accusations. The Commission also acted to promote "respect for the law" and the "perceived fairness" of the criminal justice system.[72] Those concerns are stronger when the defendant has never been heard at all and cannot contest the allegations.

Most important, the Commission cannot solve this problem. Its amendment reaffirms that "nothing in the Guidelines Manual abrogates a court's authority under 18 U.S.C. § 3661."[73] Appellate courts have held that even acquitted conduct remains available when a court selects a sentence under § 3553(a).[74] Because Congress has provided that "[n]o limitation shall be placed" on sentencing

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[71] *Id.*
[72] *Id.* (quoting *McClinton*, 143 S. Ct. at 2401 (Sotomayor, J., respecting the denial of certiorari)).
[73] U.S.S.G. § 6A1.3 cmt.; U.S.S.G. App. C, amend. 826.
[74] *United States v. Ralston*, 110 F.4th 909, 921 (6th Cir. 2024); *United States v. Ware*, 141 F.4th 970, 974 n.2 (8th Cir. 2025); *United States v. Texidor*, 164 F.4th 248, 255 (3d Cir. 2026).

information, any limit must come from the Due Process Clause. Only this Court can enforce it.

E. The question recurs whenever a separate pending criminal prosecution is unresolved at the time of federal sentencing.

Parallel state and federal prosecutions are routine. They are especially common in child-exploitation cases, where the United States prosecutes the possession or production of images and the state prosecutes hands-on abuse allegations. It is not unusual for the state to wait until the federal case ends, then decide whether to dismiss the state case. In those instances, the federal sentencing hearing becomes the only forum to adjudicate the state accusation.

The problem is not confined to child-exploitation cases or to the Ninth Circuit. In June 2026, the Fifth Circuit summarily affirmed a 180-month drug sentence—roughly five times the top of a 30-to-37-month Guidelines range—after the district court relied in part on state charges, including a murder charge, that had been dismissed without trial.[75] At Mr. Lujan's sentencing the Government even presented witnesses to testify regarding the state murder charge.[76] Unlike Mr. Lujan's case, the Government presented no corroborating evidence of the state charges against Mr. Franklin and the charges remained pending at the time of sentencing, so he could not safely contest them.

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[75] *United States v. Lujan*, No. 25-50608, slip op. at 2 (5th Cir. June 8, 2026) (per curiam) (unpublished) (holding the defendant's constitutional challenge foreclosed by *United States v. Hernandez*, 633 F.3d 370, 373–74 (5th Cir. 2011)).

[76] *See* Petition for Writ of Certiorari, *Lujan v. United States*, No. 26-5783 (U.S. Oct. 6, 2026).

The prosecution's sequencing produces a troubling incentive to bootstrap the state punishment onto the federal sentence without a state trial. A state may never try the charges if the federal sentence is long enough, as the prosecutor here suggested.[77] Victims' families, understandably, may urge the federal court to impose a sentence that makes a state trial unnecessary, as the child's father did here.[78] The result is that a serious felony is effectively adjudicated without a jury, without confrontation, under a preponderance standard, and against a defendant who cannot safely speak. Particularly for a person accused of a morally reprehensible crime like child rape, this process denigrates the "perceived fairness" and "respect for the law" this Court and the Commission seek to promote. Courts have long recognized that relying 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."[79] That concern applies with even greater force when the accused has been charged and is still waiting for his trial.

F. This case is an excellent vehicle.

First, the question was pressed and passed upon at every stage. Mr. Franklin objected at sentencing that he could not rebut the allegations because of the pending state case.[80] He then argued on appeal that the district court's finding violated his presumption of innocence and his right to be sentenced on reliable

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[77] Pet. App. 8.
[78] Pet. App. 37–38.
[79] *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc).
[80] Pet. App. 20, 23.

information. The Ninth Circuit squarely held that the district court's consideration of the allegations "did not violate due process."[81] We strongly disagree.

Second, the question is outcome-determinative. The district court imposed the statutory maximum on a 68-year-old first-time offender, and it named the untried conduct in explaining why.[82] The Government defended the sentence on appeal as punishment for that unproven conduct. If due process forbade the finding, the sentence cannot stand.

Third, the record is clean. Mr. Franklin pleaded guilty without a plea agreement, so no appeal waiver complicates review. The relevant facts are undisputed: the state charges were pending and untried, Mr. Franklin did not admit the conduct, the Government acknowledged his limited ability to contest the allegations, and the district court found the hands-on abuse "most likely" true.[83]

Fourth, the question is narrower than those in recent petitions this Court has declined to review. Mr. Franklin does not ask the Court to revisit *Watts* or to hold that a fact needed to sustain a sentence as reasonable on appeal must be found by a jury. *Cf. Ghanem v. United States*, No. 25-970 (U.S. June 29, 2026) (denying certiorari); *Lujan*, slip op. at 2 (rejecting as foreclosed an as-applied Sixth Amendment challenge). Mr. Franklin asks only whether due process permits a sentencing court to find a defendant guilty, even on a preponderance standard, of a pending charge he cannot safely contest. That question can be answered without

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[81] Pet. App. 2.
[82] Pet. App. 49, 51.
[83] *See* Pet. App. 21–22, 49.

disturbing the broad sentencing discretion recognized in *Williams* and codified in § 3661.

Mr. Franklin will be 70 years old in November 2026. His thirty-year sentence is, in practical terms, a life sentence. It rests in part on a crime no jury has found he committed, charged in a case no court has tried, and he could never fairly defend himself against those charges. The Court should grant review.

Conclusion

For the reasons above, the Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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