No. 20-____

IN THE
Supreme Court of the United States

ERICK ALLEN OSBY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether basing a criminal defendant's sentence on charges of which the jury acquitted him violates the Fifth or Sixth Amendments.

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Petitioner Erick Allen Osby respectfully petitions this Court for a writ of certiorari to review the judgment of the Fourth Circuit in this case.

OPINIONS BELOW

The Fourth Circuit's opinion (Pet. App. 1a-4a) is unpublished but appears at 832 F. App'x 230 (2020). The district court's relevant rulings (Pet. App. 5a-90a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 2020. Pursuant to this Court's March 19, 2020 order, the time to file this petition was extended to 150 days, to June 1, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. 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[.]"

The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person shall…be subject for the same offense to be twice put in jeopardy of life or limb; … nor be deprived of life, liberty, or property, without due process of law[.]"

INTRODUCTION

Erick Allen Osby was indicted on seven charges, convicted of two, and acquitted of five. But his sentence was exactly the same as it would have been had he been convicted by the jury of all seven charges—and three times as high as it would have been had the judge considered only the two charges of which the jury convicted Mr. Osby.

Tell any lay person that Mr. Osby is serving time for charges of which a jury acquitted him and they'd be aghast. Federal judges around the country—including three justices of the current Court—have expressed similar dismay. And rightly so. Sentencing based on acquitted conduct is at odds with this Court's Fifth and Sixth Amendment case law and the Founding-era understanding of a jury's role. And sentencing based on acquitted conduct slips yet another ace into a deck already stacked against criminal defendants.

This Court has, to date, declined to review this troubling sentencing practice. To the extent this Court has been waiting on Congress or the United States Sentencing Commission, neither has given any indication that they will tackle this issue any time soon. To the extent this Court has been waiting for a split of authority, a square split now exists—the Michigan Supreme Court has broken ranks with all 12 of the federal circuits and held that acquitted conduct sentencing is unconstitutional. And to the extent this Court has been awaiting an appropriate vehicle to address the question presented, this case is that vehicle: The question was preserved below, and, unlike petitions this Court has considered in recent years, there are no procedural obstacles to review.

This Court should grant certiorari and hold that Mr. Osby's sentence violates the Constitution.

STATEMENT OF THE CASE

1. On September 18, 2018, police searched a hotel room after a housekeeper saw a gun, money, and drugs in the room. Presentence Investigation Report (PSR) ¶¶8-12. Though Mr. Osby had paid for part of the stay at the hotel room, the hotel room was not registered to him. Transcript of Jury Trial Proceedings, Vol. 1, Dist. Ct. Dkt. #87, at 191-92.

Nine days later, on September 27, 2018, police officers pulled over a car after a separate controlled buy put the car under surveillance. PSR ¶14. Officers arrested Mr. Osby, who was in the back seat. PSR ¶¶13-14. A search of the car revealed another gun, more money, and more drugs. PSR ¶¶15-16.

2. Mr. Osby was indicted on seven counts. Four of the counts stemmed from the evidence found in the hotel room on September 18—three counts of possession with intent to distribute the drugs and one count of possession of a firearm in furtherance of drug trafficking. PSR ¶3. Three of the counts stemmed from the evidence found in the car on September 27—two counts of possession with intent to distribute the drugs and one count of possession of a firearm in furtherance of drug trafficking. PSR ¶3.

Mr. Osby exercised his right to a jury trial. PSR ¶4. After a three-day trial, the jury convicted Mr. Osby on only two of the seven counts—the two counts of possession with intent to distribute the drugs found in the car on September 27. Pet. App. 114a-115a. The jury acquitted Mr. Osby of the possession of a firearm charge for the gun found in the car on September 27.

Pet. App. 115a. And the jury acquitted him of all four counts related to the drugs and gun found in the hotel room on September 18. Pet. App. 113a-114a.

3. The statute under which Mr. Osby was convicted authorized anywhere from probation with no imprisonment up to 20 years' imprisonment on each count. PSR at 1. Because many federal statutes authorize a similarly wide range, district courts depend on the federal Sentencing Guidelines—an "elaborate, detailed" set of rules to calculate a recommended sentence within the broad range authorized by statute—to ensure uniformity and proportionality. *See United States v. Molina-Martinez*, 136 S. Ct. 1338, 1342 (2016).

Based solely on the counts for which Mr. Osby was convicted by the jury—the two counts of possession with intent to distribute the drugs found in the car—Mr. Osby's advisory guideline range would have been 24 to 30 months in prison. Pet. App. 93a-94a; U.S.S.G. Ch. 5, Part A (table).

But the Guidelines don't stop at the offense of conviction. They also require adjustments to that recommended range based on all of a defendant's "relevant conduct." U.S.S.G. § 1B1.3. Because "relevant conduct" for sentencing purposes need only be proven to the judge by a preponderance of the evidence, whereas the jury considers whether conduct is proven beyond a reasonable doubt, "relevant conduct" under the Guidelines can include conduct of which a jury acquitted a defendant. *See United States v. Watts*, 519 U.S. 148, 153-54 (1997) (per curiam).

The presentence report prepared in Mr. Osby's case thus recommended a significantly higher

sentence than 24-30 months, because it calculated a guideline range based on conduct of which a jury acquitted Mr. Osby. PSR ¶101. Mr. Osby objected to the guideline calculation on several grounds, including that the Fifth and Sixth Amendments forbade the use of acquitted conduct in calculating his sentence. Pet. App. 94a-98a.

4. At the sentencing hearing, Mr. Osby again objected to the use of acquitted conduct for sentencing. Pet. App. 18a-26a. The district court overruled the objection, saying that it had to "follow the law as it is right now and allow acquitted conduct to be at least considered." Pet. App. 26a.

The district court then proceeded to calculate Mr. Osby's recommended guideline range based on the acquitted conduct. Finding that Mr. Osby possessed all the drugs in the hotel room with the intent to distribute—crimes of which the jury had acquitted him—the court increased the recommended guideline range to 57-71 months. Pet. App. 26a-28a; PSR ¶¶26, 101; U.S.S.G. Ch. 5, Part A (table). The guideline range increased to 70-87 months when the district court applied an enhancement for "maintaining a premise for the purpose of manufacturing or distributing" drugs, even though the jury acquitted Mr. Osby of all charges related to the "premise" in question (the hotel room). Pet. App. 55a-57a; PSR ¶28; U.S.S.G. Ch. 5, Part A (table). And the district court further increased the sentencing range based on Mr. Osby's possession of a firearm, even though the jury acquitted Mr. Osby of both firearm counts. Pet. App. 26a-28a; PSR ¶27; U.S.S.G. Ch. 5, Part A (table). The final sentencing range was 87-108 months—more than triple the 24-30-month guideline range had the

court considered only the conduct for which a jury convicted Mr. Osby. PSR ¶101; Pet. App. 61a.

The district court explained its decision to sentence Mr. Osby within that range as follows:

> Congress, the President have said we want you to apply Sentencing Guidelines, and in applying those guidelines there are certain factors you are to consider… And the Supreme Court, so far at least, has said you can consider those facts that may have also been presented to a jury and on which a jury said I can't find that the defendant is guilty beyond a reasonable doubt… If the Supreme Court tells me they have changed that law at some point in the future, that's fine, and that's what I'll do.

Pet. App. 79a. The district court imposed the lowest sentence within the recommended guideline range, 87 months, or more than seven years. *Id.*

5. On appeal, counsel for Mr. Osby filed an *Anders* brief challenging the use of acquitted conduct under the Fifth and Sixth Amendments but recognizing that binding Fourth Circuit precedent foreclosed those arguments. Pet. App. 2a. The Fourth Circuit affirmed Mr. Osby's sentence. Pet. App. 3a.

REASONS FOR GRANTING THE PETITION

I. Sentences Based On Acquitted Conduct Violate The Fifth And Sixth Amendments.

Mr. Osby's sentence violates the Fifth and Sixth Amendments for two separate and independent reasons. First, but for consideration of the conduct of which a jury acquitted him, Mr. Osby's sentence would be unlawful. Because a judge, rather than a

jury, found facts essential to his punishment, his sentence is unconstitutional. §I.A. Second, at the time of the Founding, an acquittal by a jury was universally understood to reflect not only a factual determination about the evidence presented by the prosecution but also a moral judgment that the defendant should not be punished. Considering acquitted conduct at sentencing is thus inconsistent with the common-law understanding of the meaning of a jury acquittal and violates the Sixth Amendment. §I.B.

Notwithstanding the clear import of this Court's Sixth Amendment cases and the common-law history of the right to trial by jury, the federal courts of appeals unanimously sanction the use of acquitted conduct in sentencing based on this Court's decision in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam).[1] But the circuits have badly misinterpreted

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[1] *See United States v. Gobbi*, 471 F.3d 302, 313-14 (1st Cir. 2006); *United States v. Vaughn*, 430 F.3d 518, 526-27 (2d Cir. 2005), *cert. denied*, 547 U.S. 1060 (2006); *United States v. Ciavarella*, 716 F.3d 705, 735-36 (3d Cir. 2013), *cert. denied*, 571 U.S. 1239 (2014); *United States v. Grubbs*, 585 F.3d 793, 798-99 (4th Cir. 2009); *United States v. Farias*, 469 F.3d 393, 399-400 & n.17 (5th Cir. 2006), *cert. denied*, 549 U.S. 1272 (2007); *United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc), *cert. denied*, 556 U.S. 1215 (2009); *United States v. Waltower*, 643 F.3d 572, 575-78 (7th Cir.), *cert. denied*, 565 U.S. 1019 (2011); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States v. Mercado*, 474 F.3d 654, 656-58 (9th Cir. 2007), *cert. denied*, 552 U.S. 1297 (2008); *United States v. Magallanez*, 408 F.3d 672, 683-685 (10th Cir.), *cert. denied*, 546 U.S. 955 (2005); *United States v. Siegelman*, 786 F.3d 1322, 1332-33 & n.12 (11th Cir. 2015), *cert. denied*, 577 U.S. 1092 (2016); *United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1140 (2009).

Watts, which did not answer the question presented, and only this Court can correct that misimpression. §I.C.

A. This Court's Cases Make Clear That Mr. Osby's Sentence Is Unconstitutional.

"[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). In the federal system, the "maximum penalty for a crime" isn't always the maximum specified by the statute. *See Gall v. United States*, 552 U.S. 38, 51 (2007). Instead, the "maximum penalty for a crime" is the highest sentence that is "substantively reasonable"—a sentence that may be below the statutory maximum. *Id.* Whether a sentence is "substantively reasonable" turns on facts about the defendant and the crime. *Id.*

When certain facts about the defendant or crime are necessary to render a sentence "substantively reasonable," those facts thus "increase[] the maximum penalty for a crime." In this case, the facts necessary to render Mr. Osby's sentence "substantively reasonable" were not proven to a jury beyond a reasonable doubt; indeed, the jury explicitly rejected those facts. His sentence thus violates the Fifth and Sixth Amendments.

1. This Court has frequently emphasized the importance of the right to trial by jury. Juries serve as "an inestimable safeguard against the corrupt or

overzealous prosecutor and against the compliant, biased, or eccentric judge," *see Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); they are "circuitbreaker[s] in the State's machinery of justice," *see Blakely v. Washington*, 542 U.S. 296, 306 (2004); and they safeguard fundamental liberties just as surely as the right to vote, *see United States v. Haymond*, 139 S. Ct. 2369, 2375 (2019) (plurality op.).

The Fifth Amendment's Due Process Clause works in concert with the Sixth Amendment's jury trial right to secure the Constitution's guarantee "that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring); *see Jones*, 526 U.S. at 243 n.6. The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt." *Winship*, 397 U.S. at 364.

This Court has repeatedly affirmed that the Fifth and Sixth Amendments together require that "any fact that increases the penalty for a crime" must be proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see Blakely*, 542 U.S. at 303. Those facts may be labeled "sentence enhancements," "aggravating factors," or something else altogether. *See Apprendi*, 530 U.S. at 478; *Ring v. Arizona*, 536 U.S. 584, 602 (2002). They may raise the maximum sentence, raise the minimum sentence, or guide within an authorized sentencing range. *See Apprendi*, 530 U.S. at 469; *Alleyne v. United States*, 570 U.S. 99, 103 (2013); *Blakely*, 542 U.S. at 301. What matters is that the fact is "essential to the punishment" of a criminal defendant. *Blakely*, 542 U.S. at 301.

2. A federal district court cannot sentence a defendant to just any sentence within the range authorized by a federal statute. Instead, this Court has interpreted the statute establishing the federal sentencing scheme to allow only "substantively reasonable" sentences within that range. *United States v. Booker*, 543 U.S. 220, 261-62 (2005); *Rita v. United States*, 551 U.S. 338, 351 (2007). A sentence that is within the range recommended by the Sentencing Guidelines is presumptively reasonable. *Rita*, 551 U.S. at 347. Conversely, unexplained and dramatic deviations from the Guidelines range are substantively unreasonable. *See, e.g.*, *United States v. Ofray-Campos*, 534 F.3d 1, 42-43 (1st Cir. 2008); *United States v. Aleo*, 681 F.3d 290, 300-02 (6th Cir. 2012).

Critical to that scheme is the premise that a sentence may be "substantively unreasonable" even if it is below—even if it is well below—the statutory maximum.[2] So when a jury finds a defendant guilty beyond a reasonable doubt of a crime, the authorized sentencing range is not always the full range of penalties authorized by statute. Instead, the range is only those sentences that are "substantively reasonable."

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[2] *See, e.g.*, *United States v. Singh*, 877 F.3d 107, 116-17 (2d Cir. 2017) (5-year sentence substantively unreasonable despite 20-year statutory maximum, *see* 8 U.S.C. §1326(b)(2)); *United States v. Chandler*, 732 F.3d 434, 437, 440 (5th Cir. 2013) (35-year sentence, statutory maximum of life, *see* 18 U.S.C. § 2252A(g)); *United States v. Cruz-Valdivia*, 526 F. App'x 735, 736-37 (9th Cir. 2013) (70-month sentence, 20-year statutory maximum); *United States v. Paul*, 561 F.3d 970, 973-75 (9th Cir. 2009) (per curiam) (16-month sentence, 10-year statutory maximum).

When a judge considers acquitted conduct in choosing a sentence within the statutorily authorized range for the crime of conviction, she thus risks imposing a sentence that would be substantively unreasonable in light of the jury's findings alone, but seems reasonable in light of the inclusion of the acquitted conduct. As Justice Scalia put the point, "[u]nder such a system, for every given crime there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant." *Rita*, 551 U.S. at 372 (Scalia, J., concurring). "*Every* sentence higher than that is legally authorized only by some judge-found fact" and is thus unconstitutional. *Id.*

4. This is just such a case. Considering only the facts found by the jury beyond a reasonable doubt, the guideline range for Mr. Osby's sentence would have been 24 to 30 months in prison. *Supra*, 5-6. The district court calculated the guideline range to be 87 to 108 months, and sentenced Mr. Osby to 87 months in prison. A reviewing court looking solely at the facts found by the jury beyond a reasonable doubt would no doubt find Mr. Osby's sentence—nearly three times the high end of the recommended guideline range and 4.5 years longer than the highest recommended sentence, without any explanation by the district court—substantively unreasonable.[3]

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[3] *See, e.g.*, *Ofray-Campos*, 534 F.3d at 42-43 (sentence 2.5 times greater than guideline range substantively unreasonable without "an especially compelling reason"); *Aleo*, 681 F.3d at 300-02 (same; preference for "strongest possible deterrence" not sufficiently compelling); *United States v. Miller*, 601 F.3d 734, 739-40 (7th Cir. 2010) (sentence three years higher than

Here, of course, the sentencing court explicitly looked to more than just the facts found by a jury. Looking to conduct of which a jury acquitted Mr. Osby, the resulting guideline range was 87 to 108 months. The district court's sentence, 87 months, was within that range and thus presumptively reasonable.

Without the hotel room conduct and the firearm possession enhancement—conduct of which the jury expressly found Mr. Osby not guilty—an 87-month sentence would have been substantively unreasonable and thus invalid. With that conduct, that sentence was valid, and presumptively so. The hotel room conduct and firearms enhancements were thus "fact[s] that increase[d] the penalty for a crime." *Apprendi*, 530 U.S. at 490. Because the hotel room conduct and the firearms enhancements were not proven to a jury beyond a reasonable doubt—because, indeed, a jury *acquitted* Mr. Osby of that conduct—Mr. Osby's sentence violates the Fifth and Sixth Amendments.

B. Considering Acquitted Conduct At Sentencing Eviscerates The Common-Law Role Of The Jury.

Mr. Osby's sentence violates the Sixth Amendment right to a jury trial for a second reason as well. For centuries, a jury verdict of acquittal has conveyed both a factual determination (about what the prosecution has proven) and a moral determination (about what conduct a defendant should be punished for). When the Founders included the right to a jury trial in the Constitution, they meant a jury that

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guideline range substantively unreasonable without "sufficiently compelling" justification).

brought its own moral compass to bear on the defendant's fate. Even if allowing a judge to use acquitted conduct at sentencing isn't at odds with the jury's factual determination, *see Watts*, 519 U.S. at 156-57, it is at odds with the moral determination reflected in the decision to acquit. It is therefore at odds with the jury trial right as it was understood by the Founders.

1. The notion that a jury's verdict reflects a moral as well as a factual judgment has deep roots. In 1670, a jury acquitted William Penn and William Mead, Quakers who had been locked out of their meeting house by police and forced to preach on the street, of charges of unlawful assembly. *Penn and Mead*, How. St. Tr. 6:952, 968 (1670). The jurors were threatened with starvation, fined, and even imprisoned, but they refused to change their vote. *Id.* at 963. When the Court of Common Pleas granted jurors' habeas petitions and refused to overturn the verdict, it cemented the special status of a jury acquittal. *Id.* at 974, 983-86; *Bushell's Case*, How. St. Tr. 6:999, 1007-12 (1670). As one treatise put the point, "that question which has made such a noise, viz. whether a jury is finable for going against their evidence in court, or the direction of the judge? I look upon that question, as dead and buried, since *Bushell's Case*, in my Lord Vaughan's reports." Thomas A. Green, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 260 n.231 (1985) (quoting Giles Duncombe, TRYALS PER PAIS: OR THE LAW OF ENGLAND CONCERNING JURIES BY NISI PRIUS &C., WITH A COMPLEAT TREATISE ON THE LAW OF EVIDENCE 443 (2d ed. 1682)).

The prerogative of the jury to render a verdict reflecting a moral judgment was part and parcel of a jury trial by the time of the Founding. By one count, fully a quarter of death-eligible felonies resulted in acquittals—and tellingly, those acquittals attached "mostly to small offences which are punishable with death," suggesting a judgment that the punishment did not fit the crime. Leon Radzinowicz, A HISTORY OF ENGLISH COMMON LAW & ITS ADMINISTRATION FROM 1750 93-94 (1948) (quoting Patrick Colquhoun, A TREATISE ON THE POLICE OF THE METROPOLIS 23-24 (4th ed. 1797)). Jurors exercising their moral prerogative ultimately tempered some of the harshest features of the Bloody Code, the statute book punishing most crimes by death. For instance, in 1830, hundreds of bankers wrote to the House of Commons begging that forgery no longer be punished with death, because jurors would simply refuse to convict forgers if they knew a capital sentence awaited. *Id.* at 727-32.

That role as moral as well as factual arbiter carried over into the New World. The British Crown attempted to force violators of the notorious Stamp Act to go to trial without a jury, because it was understandably certain that colonial juries would quickly acquit even the most brazen of tax evaders. Andrew Joseph Gildea, *The Right to Trial by Jury*, 26 Am. Crim. L. Rev. 1507, 1508 & n.4, 1511 n.17 (1989). When an eighteenth-century jury acquitted John Peter Zenger of libel despite a construction of the governing law that should have given them no choice but to convict, that jury was celebrated throughout the colonies. Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 Wis. L.

Rev. 377, 393-94 (1999). The most popular legal dictionary in the new United States included the principle that jurors "may not only find things of their own knowledge, but they go according to their consciences" in its definition of the word "jury."[4] And jury instructions[5] and State and federal court opinions[6] from the Founding era all took for granted the jury's power to "judge the law"—that is, to evaluate not only the facts in a particular case but whether the law itself was just.

2. One specific way the jury imposed its moral determination at trial was through "indirectly check[ing]" the "potential or inevitable severity of sentences" by issuing "what today we would call verdicts . . . to lesser included offenses." *Jones*, 526 U.S. at 245. At common law, jurors would know the fixed penalty attached to each felony. *See* Judge

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[4] *Jury*, Giles Jacob, New Law Dictionary: Containing the Interpretation and Definition of Words and Terms Used in the Law (J. Morgan ed., 1782) ("[T]he law supposes the jury may have some other evidence than what is given in court, and they may not only find things of their own knowledge, but they go according to their consciences."); *see also Jury*, Noah Webster, 2 American Dictionary of the English Language (1st ed. 1828) ("Petty juries, consisting usually of twelve men, attend courts to try matters of fact in civil causes, and to decide both the law and the fact in criminal prosecutions.").

[5] *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 3-4 (1794) (Chief Justice Jay instructed the jury of their right "to determine the law as well as the fact in controversy").

[6] *See, e.g.*, *Coffin v. Coffin*, 4 Mass. 1, 25 (1808); *United States v. Poyllon*, 27 F. Cas. 608, 611 (D.N.Y. 1812); *United States v. Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va. 1817); *Harrison Dance's Case*, 19 Va. (5 Munford) 349, 363 (1817); *Commonwealth v. Worcester*, 20 Mass. (3 Pick) 462, 474-75 (1826); *State v. Snow*, 18 Me. 346, 348 (1841).

Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. Crim. L. & Criminology 691, 692-94 (2010). By selecting which felonies, if any, of which to convict a defendant, a jury thus not only determined guilt but also essentially selected the defendant's sentence. *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Penn. L. Rev. 33, 70-71 (2003).

That sort of fine-tuning of a defendant's sentence, too, has deep historical roots. Overseeing a trial for theft in the eighteenth century, Lord Mansfield famously urged a jury to find the value of the stolen trinket less than 40 shillings so as not to trigger a capital sentence. *See* Lord Campbell, 3 THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 477-78 (7th ed. 1878). When the prosecutor objected that the "*fashion*, alone, cost [] more than double the sum," Lord Mansfield responded, "God forbid, gentleman, we should hang a man for *fashion's sake*." *Id.* Lord Mansfield's jury at the Old Bailey was no anomaly. Blackstone wrote that "the mercy of juries will often . . . bring in larceny to be under the value of twelvepence, when it is really of much greater value" so as not to trigger a mandatory death sentence. 4 WILLIAM BLACKSTONE, COMMENTARIES *238-39.

Thus, a juror in eighteenth-century England might "downvalue from grand to petty larceny," especially "when the goods were of relatively small amount or when the accused was a married woman or a family man"; a juror on this side of the Atlantic might "persistently" refuse to convict a defendant of first-degree murder, opting for a verdict of manslaughter

in order to avoid an execution. John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 54-55 (1983); *see, e.g.*, *State v. Bennet*, 2 Tread. 693, 5 S.C.L. 515 (S.C. 1815).

3. Jurors today aren't as able to calibrate sentences as they were at common law, of course. Today's federal scheme of crime and punishment is far more complex and opaque than the equivalent scheme at the time of the Founding.

But a jury verdict of acquittal is still a determination that a defendant should not be punished for a particular set of conduct, and the unreviewability of that judgment is a feature, not a bug, of our constitutional design. *See United States ex rel. McCann v. Adams*, 126 F.2d 774, 775-76 (2d Cir. 1942) (Learned Hand, J.) ("[S]ince if [the jury] acquit[s] their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law by the mollifying influence of current ethical conventions.").

Sentencing based on acquitted conduct overrides that determination. Indeed, it is precisely when judges sentence based on acquitted conduct—that is, where the evidence is persuasive to a judge despite acquittal—that it is *most* likely that the jury was exercising its ancient prerogative to bring its own moral compass to bear "in the teeth of both law and fact." *See Horning v. District of Columbia*, 254 U.S. 135, 138-39 (1920) (Holmes, J.).

By nonetheless punishing Mr. Osby for the conduct of which a jury acquitted him, the district court in this

case eviscerated the jury's role as an independent moral compass—the role it has played for centuries, and the role the Founders had in mind when they enshrined the jury trial right in the Constitution. *See Blakely*, 542 U.S. at 306 (citing Federalist Papers and papers of John Adams and Thomas Jefferson).

C. *Watts* Did Not Resolve The Question Presented In This Case.

In *United States v. Watts*, this Court held that the federal sentencing statute allowed consideration of acquitted conduct at sentencing. 519 U.S. at 157. In the course of so holding, this Court wrote: "[A]cquittal does not prevent the sentencing court from considering the conduct underlying the acquitted charge, so long as that conduct has been proven by a preponderance of the evidence." *Id*. The courts of appeals have taken that broad language out of context to conclude that *Watts* forecloses *any* challenge to the use of acquitted conduct sentencing. That's wrong, for at least three reasons.

First, as this Court has explained, *Watts* "presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause." *Booker*, 543 U.S. at 240 n.4. It was thus "unsurprising" that *Watts* "failed to consider fully" questions about the Fifth and Sixth Amendments. *Id.* Were there any doubt, the fact that the *Watts* court "did not even have the benefit of full briefing or oral argument" counsels in favor of reading the decision narrowly. *Id.*; *see Connecticut v. Doehr*, 501 U.S. 1, 12 n.4 (1991) ("A summary disposition does not enjoy the full precedential value of a case argued on the merits and disposed of by a written opinion."); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (same).

Moreover, as Justice Kennedy explained at the time, "the *per curiam* opinion shows hesitation in confronting the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted." *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting). That hesitation further supports a narrow reading of *Watts*.

Second, *Watts* rested its holding in part on the notion that Guidelines "sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction." *Id.* at 154. In this case, Mr. Osby's sentence was not simply increased because of the "manner in which he committed the crime of conviction" (possessing a firearm during the course of the drug offense linked to the drugs found in the car on September 27, 2018). *Supra*, 5-8. Rather, his sentence was also increased based on an *entirely separate* "crime of which he was not convicted"—possession of drugs found in a hotel room nine days before the crime for which Mr. Osby was convicted. *Id*. By its own terms, then, *Watts* does not govern this case.

Finally, *Watts* expressly declined to address cases involving "extreme circumstances," that is, cases where acquitted conduct "would dramatically increase the sentence." 519 U.S. at 156 & n.2. As an example of the kind of "extreme circumstance[]" it was not addressing, this Court cited to a case in which consideration of acquitted conduct increased a defendant's base offense level by four, from 26 to 30. *Id.* at 156 n.2 (citing *Kinder v. United States*, 504 U.S. 946, 948-49 (1992) (White, J., dissenting from denial

of certiorari)). In this case, acquitted conduct increased Mr. Osby's offense level by a whopping *12* levels, adding more than five years to his sentence. PSR ¶35; Pet. App. 93a-94a. Because this case features the exact sort of "extreme circumstance[]" the *Watts* court specifically declined to address, *Watts* did not decide the question presented here.

In short, this Court need not overrule *Watts* to answer the question presented here. But it is worth noting that this Court has not hesitated to overrule sentencing cases that predate its revolution in Sixth Amendment jurisprudence. *See, e.g.*, *Alleyne v. United States*, 570 U.S. 99, 116 (2013) (overruling *Harris v. United States*, 536 U.S. 545 (2002)); *Ring*, 536 U.S. at 609 (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)). Regardless, the circuit courts' uniform reliance on *Watts* makes clear that the lower courts cannot meaningfully grapple with the question presented until this Court clarifies *Watts*.

II. The Time Has Come To Resolve The Important Question Presented.

1. For decades, courts and scholars have exhorted this Court to consider whether using acquitted conduct at sentencing comports with the Constitution. Before *Watts*, judges on the courts of appeals expressed doubts about the use of acquitted conduct at sentencing.[7] In the years since, those concerns have

[7] *United States v. Lombard*, 102 F.3d 1, 5 (1st Cir. 1996); *United States v. Baylor*, 97 F.3d 542, 551 (D.C. Cir. 1996) (Wald, J., concurring specially); *United States v. Silverman*, 976 F.2d 1502, 1527 (6th Cir. 1992) (Merritt, J., dissenting); *id.* at 1533-34 (Martin, J., dissenting); *United States v. Lanoue*, 71 F.3d 966, 984 (1st Cir. 1995); *United States v. Boney*, 977 F.2d 624, 647

only become more forceful.[8] Scholars, too, have called for this Court to reexamine whether reliance on acquitted conduct at sentencing comports with the Fifth and Sixth Amendments.[9]

In 2014, Justices Scalia, Thomas, and Ginsburg dissented from the denial of certiorari in *Jones v. United States*, 135 S. Ct. 8 (2014). "This has gone on long enough," they wrote, referring to this Court's deferral of the question presented. *Id.* at 9. "We should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment." *Id.* In

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(D.C. Cir. 1992) (Randolph, J., dissenting in part, concurring in part).

[8] *See, e.g.*, *United States v. Canania*, 532 F.3d 764, 778 (8th Cir. 2008) (Bright, J., concurring); *United States v. Mercado*, 474 F.3d 654, 663 (9th Cir. 2007) (Fletcher, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring); *United States v. Safavian*, 461 F. Supp. 2d 76, 83 (D.D.C. 2006) (Friedman, J.); *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) (Kelley, J.); *United States v. Coleman*, 370 F. Supp. 2d 661, 671 (S.D. Ohio 2005) (Marbley, J.); *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005) (Gertner, J.).

[9] See, e.g., Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of A Foreign Tribunal*, 27 Geo. Mason L. Rev. 719, 734, 745-46 (2020); Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, And What Can Be Done About It*, 49 Suffolk U. L. Rev. 1, 3 n.15, 29 (2016); Hon. John Paul Stevens (Ret.), *Some Thoughts About A Former Colleague*, 94 Wash. U.L. Rev. 1391, 1393-94 (2017); Hon. Jon O. Newman, *The Federal Sentencing Guidelines: A Good Idea Badly Implemented*, 46 Hofstra L. Rev. 805, 821-22 (2018); Andrew Delaplane, *"Shadows" Cast by Jury Trial Rights on Federal Plea Bargaining Outcomes*, 57 Am. Crim. L. Rev. 207, 221 (2020); Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235, 258-69 (2009).

Jones' aftermath, still more judges expressed qualms about the use of acquitted conduct in sentencing.[10]

Among that chorus were two justices of this Court. Then-Judge Kavanaugh wrote that increasing a defendant's sentence based on acquitted conduct "seems a dubious infringement of the rights to due process and to a jury trial." *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc). He reiterated those doubts two years later, explaining that "there are good reasons to be concerned about the use of acquitted conduct in sentencing, both as a matter of appearance and as a matter of fairness" and calling on the Supreme Court to "fix it." *United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018)

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[10] *See United States v. Frederickson*, 988 F.3d 76, 95 (1st Cir. 2021) (Barron, J., dissenting); *United States v. Sumerour*, No. 3:18-CR-582, 2020 WL 5983202, at *4 (N.D. Tex. Oct. 8, 2020) (Scholer, J.) ("[I]f the Court were to accept the Government's argument . . . the Court would effectively undermine the jury's role and render meaningless its unanimous 'not guilty' verdict . . ."); *United States v. Bertram*, No. 3:15-cr-00014, 2018 WL 993880, at *6 (E.D. Ky. Feb. 21, 2018) (Van Tatenhove, J.) ("[T]he long democratic tradition of using juries as fact finders is central to maintaining confidence in the process. Juries almost always get it right. And judges are wise to respect that . . .") *aff'd in part, vacated in part, remanded*, 900 F.3d 743 (6th Cir. 2018); *United States v. Lasley*, 832 F.3d 910, 920-21 (8th Cir. 2016) (Bright, J., dissenting) ("[C]onsideration of 'acquitted conduct' undermines the notice requirement that is at the heart of any criminal proceeding."); *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in denial of rehearing en banc) ("[T]he time is ripe for the Supreme Court to resolve the contradictions in Sixth Amendment and sentencing precedent, and to do so in a manner that ensures that a jury's judgment of acquittal will safeguard liberty as certainly as a jury's judgment of conviction permits its deprivation.").

(Kavanaugh, J., dissenting in part); *see also United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (Kavanaugh, J.); *United States v. Henry*, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring). Similarly, then-Judge Gorsuch, relying on the *Jones* dissent, observed that "[i]t is far from certain whether the Constitution allows" the use of uncharged or acquitted conduct at sentencing. *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.).

2. The need for this Court's intervention has been further heightened in the past two years, because a split in authority now exists. In 2019, the Supreme Court of Michigan held that the Fifth Amendment bars sentencing courts from using acquitted conduct to enhance a defendant's sentence. *People v. Beck*, 939 N.W.2d 213 (Mich. 2019). That court explained that "when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent," and "conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process." *Id.* at 225. The Supreme Court of Michigan specifically distinguished *Watts*, explaining that "[a]s we must, we take the Court at its word" and assume that *Watts*, despite some broad language, dealt only with the question whether the use of acquitted conduct violates the Double Jeopardy Clause. *Id.* at 224.

The Supreme Court of Michigan joins three other State high courts that have outlawed consideration of acquitted conduct at sentencing on the basis of the

federal Fifth and Sixth Amendments and is the first State high court to outlaw the use of acquitted conduct while expressly grappling with *Watts*. *See State v. Cobb*, 732 A.2d 425, 442 (N.H. 1999); *Bishop v. State*, 486 S.E.2d 887, 897 (Ga. 1997); *State v. Marley*, 364 S.E.2d 133, 138 (N.C. 1988).

The split is fully developed. All 12 federal circuits with criminal jurisdiction have weighed in and concluded that the use of acquitted conduct at sentencing complies with the Fifth and Sixth Amendments. Each of the 12 circuits based their decision on an interpretation of this Court's decision in *Watts*, meaning only this Court can correct that error. *See supra*, §I.C. And Michigan is one of the handful of States where the question presented will arise—few States allow acquitted conduct at sentencing, and none *require* judges to consider acquitted conduct as part of a presumptively reasonable sentencing range, the way the federal Sentencing Guidelines do.[11] And in any event, this Court routinely grants certiorari where there is only one court on a given side of a split.[12]

3. The past two decades make clear that this Court, and no other actor, will need to address the

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[11] *See* Nora V. Demleitner, et. al., SENTENCING LAW & POLICY 284 (2d ed. 2007); *White*, 551 F.3d at 394 n.5 (Merritt, J., dissenting).

[12] *See, e.g.*, Petition for Certiorari, *Borden v. United States*, No. 19-5410 (U.S. July 24, 2019), 2019 WL 9543574 (3-1 split); Petition for Certiorari, *Stokeling v. United States*, 139 S. Ct. 544 (2019) (No. 17-5554), 2017 WL 8686116 (1-1 split); Petition for Certiorari, *Thompson v. Clark*, No. 20-659 (U.S. Nov. 6, 2020), 2020 WL 6712185 (7-1 split); Petition for Certiorari, *United States v. Haymond*, 139 S. Ct. 2369 (2019) (No. 17-1672), 2018 WL 3032900 (10-1 split).

problem of acquitted conduct in sentencing. Nearly a quarter century ago, Justice Breyer suggested that the United States Sentencing Commission bar the practice. *Watts*, 519 U.S. at 159 (Breyer, J., concurring). Every year since, the Federal Public and Community Defenders have pleaded with the Sentencing Commission to follow that advice.[13] Yet the Sentencing Commission has not considered an amendment that would bar consideration of acquitted conduct since 1993. *See* Minutes of Public Meeting, United States Sentencing Commission (Nov. 9, 1993) https://www.ussc.gov/policymaking/meetings-hearings/public-meeting-november-9-1993.

Justice Scalia believed that the Sentencing Commission was not statutorily authorized to resolve the problem but that Congress could do so. *Watts*, 519 U.S. at 158 (Scalia, J., concurring). But this Court cannot wait any longer for Congress, either. In each of the last four congressional sessions, legislation introduced to outlaw acquitted conduct sentencing has died in committee, even though it was often

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[13] Letter from Michael Caruso, Chair, Federal Defender Guideline Committee, to the Honorable Charles R. Breyer, Commissioners, United States Sentencing Comm'n, at 24-26 (Feb. 19, 2019); Letter from Marjorie A. Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 24-31 (July 15, 2013); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 33-36 (July 23, 2012); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 2-6 (June 6, 2011); Statement of Alan DuBois & Nicole Kaplan Before the U.S. Sentencing Comm'n, Atlanta, Ga., at 24-26 (Feb. 20, 2009).

introduced on a bipartisan basis.[14] There is no reason to believe a 2021 bill addressing the question will meet a different fate. This Court cannot wait for Congress to resolve a problem of this Court's own making.

District courts won't resolve the problem for this Court, either. Then-Judge Kavanaugh exhorted district courts to "disclaim reliance" on acquitted conduct. *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing en banc). But at best, leaving the question to district courts would leave the most fundamental of constitutional guarantees to the vagaries of a judge's discretion—precisely the opposite of what the Founders intended. And appellate courts have made clear that a district court that entirely disclaims reliance on acquitted conduct will be subject to reversal—after all, the Guidelines themselves require consideration of that conduct. *See, e.g.*, *United States v. Ibanga*, 271 F. App'x 298 (4th Cir. 2008); *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005).

4. As a result, sentences are enhanced by acquitted conduct with troubling frequency and across a range of cases. Consideration of acquitted conduct can add years—sometimes upward of a decade—onto a defendant's sentence.[15] In a tax evasion case,

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[14] *See, e.g.*, S.601, 117th Cong.; H.R. 1621, 117th Cong.; S.2566, 116th Cong.; H.R. 8352, 116th Cong. §60406; S.4, 115th Cong.; H.R. 5785, 115th Cong. §6006; H.R. 4261, 115th Cong. §407; H.R. 2944, 114th Cong. §105.

[15] *See Bell*, 808 F.3d at 929 (Millet, J., concurring in denial of rehearing en banc) (10-year increase in sentence); *United States v. White*, 551 F.3d 381, 388 (6th Cir. 2008) (en banc) (Merritt, J., dissenting) (14-year increase in sentence).

defendants' sentences were increased by nearly 50% based on charges of which they'd been acquitted.[16] In a conspiracy case, one defendant acquitted of a firearm enhancement was sentenced to the same term as a co-defendant whom the same jury convicted of that firearm enhancement.[17] In drug cases, juries are routinely given special interrogatories that require them to find a precise quantity of drugs that a particular defendant distributed (and, conversely, to acquit of any higher amount), but judges sentence defendants based on quantities multiple times—sometimes many multiple times[18]—the amount found by the jury. And in a disturbing number of cases, defendants acquitted of murder have been sentenced as though they were convicted of taking a life.[19]

5. The consequences for the administration of justice are profound. The right to a jury trial, conceived of as the "'grand bulwark' of English liberties" has become nothing more than a "speed bump at sentencing." *Jones*, 526 U.S. at 246; *Bell*, 808 F.3d at 929 (Millett, J., concurring in denial of rehearing en banc). Try explaining to a lay person that "a jury verdict of 'not guilty' . . . may not mean a thing." *United States v. Canania*, 532 F.3d 764, 778 (8th Cir. 2008) (Bright, J., concurring); *see United*

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[16] *United States v. Bolton*, 908 F.3d 75, 96 (5th Cir. 2018).

[17] *United States v. Juarez-Ortega*, 866 F.2d 747, 749 (5th Cir. 1989).

[18] *United States v. Vaughn*, 430 F.3d 518, 526 (2d Cir. 2005) (jury found 50-100 kg of marijuana; sentence based on 544 kg of marijuana).

[19] *See United States v. Gotti*, 767 F. App'x 173 (2d Cir. 2019); *United States v. Dewitt*, 304 F. App'x 365 (6th Cir. 2008); *United States v. Lombard*, 72 F.3d 170 (1st Cir. 1995).

States v. Frias, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring) ("This is jurisprudence reminiscent of *Alice in Wonderland*. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'"). Jurors themselves understandably wonder why they bothered serving when a judge can simply ignore an acquittal. *See Canania*, 532 F.3d at 778 n.4 (Bright, J., concurring) (quoting May 16, 2008 Letter from Juror #6 to the Honorable Richard W. Roberts).

Sentencing based on acquitted conduct also further tilts the playing field against criminal defendants. Prosecutors have an incentive to bring every conceivable charge against a defendant, because they know they will get a second bite at the apple during the sentencing phase even if they fail to persuade a jury of a defendant's guilt the first time around. *United States v. Faust*, 456 F.3d 1342, 1353 (11th Cir. 2006) (Barkett, J., dissenting). And allowing acquitted conduct to be used at sentencing makes the incentives for a defendant to plead guilty still greater, because even going to trial and securing an acquittal may not result in a lesser sentence. *Bell*, 808 F.3d at 929 (Millett, J., concurring in denial of rehearing en banc).

III. This Case Is An Ideal Vehicle For Resolving The Question Presented.

This Court has denied several petitions presenting this question in recent years. But this case is a uniquely good vehicle for addressing the question presented for three reasons.

1. First, there are no procedural obstacles to reaching the question presented. Unlike other

petitions this Court has seen,[20] Mr. Osby objected to the use of acquitted conduct at sentencing, Pet. App. 18a-26a; did so on both Fifth and Sixth Amendment grounds; *id.*; and preserved the issue before the Fourth Circuit, Pet. App. 2a.

Moreover, unlike recent petitions this Court has denied, acquitted conduct was clearly dispositive in the resulting sentence.[21] In one recently denied petition, the sentencing judge remarked that she "would have sentenced [petitioner] to the statutory maximum penalty regardless of the offense level." Petition for Certiorari, *Cabrera-Rangel v. United States*, 139 S. Ct. 926 (2019) (No. 18-650), 2018 WL 6065310, at *6 n.2. It was thus unclear whether acquitted conduct in fact played any role in the sentence. In this case, by contrast, the judge explained that he was constrained by this Court's precedent to incorporate acquitted conduct into the guideline range, and he sentenced Mr. Osby to the lowest sentence within that range. *Supra*, 7.

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[20] *See, e.g.*, Brief in Opposition, *Ludwikowski v. United States*, 141 S. Ct. 872 (2020) (No. 19-1293), 2020 WL 5821347, at *10; Brief in Opposition at 9, *Musgrove v. United States*, 139 S. Ct. 591 (2018) (No. 18-5121).

[21] *Compare with* Brief in Opposition, *Ludwikowski v. United States*, 141 S. Ct. 872 (2020) (No. 19-1293), 2020 WL 5821347, at *8-10; Petition for Certiorari at 19, *Rayyan v. United States*, 139 S. Ct. 264 (2018) (No. 18-5390) (guilty plea; no jury acquittal); Brief in Opposition, *Gjeli v. United States*, 138 S. Ct. 700 (2018) (No. 17-6826), 2017 WL 1232256, at *26-35; Brief in Opposition, *Daugerdas v. United States*, 138 S. Ct. 62 (2017) (No. 16-1149), 2017 WL 2773843, at *13; Brief in Opposition, *Siegelman v. United States*, 577 U.S. 1092 (2016) (No. 15-353), 2015 WL 7424096, at *17-18.

In another recently denied petition, a district court varied upward based in part on its belief that petitioner had committed a robbery and a murder, two of the predicate acts underlying a racketeering conspiracy charge of which petitioner had been acquitted. Brief in Opposition, *Asaro v. United States*, 140 S. Ct. 1104 (2020) (No. 19-107), 2019 WL 5959533, at *3. But it wasn't at all clear that the jury had acquitted petitioner of the murder and robbery, or whether, instead, the jury had found that the Government had failed to prove one of the other elements of the racketeering charge—the existence of a criminal enterprise, for instance. *Id.* at *11. As a result, it wasn't clear that the sentencing enhancement was based on conduct of which a jury had actually acquitted petitioner. In this case, by contrast, the conduct that enhanced Mr. Osby's sentence was precisely the same conduct of which the jury acquitted him. For instance, the jury acquitted Mr. Osby of "possession with intent to distribute" the heroin, fentanyl, and cocaine found in the hotel room. Pet. App. 13a-14a. Yet his sentence was hiked based on "possession with intent to distribute" those exact drugs. PSR ¶26; *see* U.S.S.G. § 2D1.1.

2. Second, the acquitted conduct in this case changed the applicable guideline range. By contrast, many of the petitions this Court has denied came from cases where acquitted conduct did not change the guideline range but formed part of the judge's explanation for an upward variance.[22] In such cases,

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[22] *See* Petition for Certiorari at 2, *Baxter v. United States*, 140 S. Ct. 2676 (2020) (No. 19-6647); Petition for Certiorari, *Gresham v. Tennessee*, 139 S. Ct. 2724 (2019) (No. 18-1359), 2019 WL 1916158, at *1-2; Petition for Certiorari, *Wilkerson v. United*

it's difficult to pinpoint the role that acquitted conduct played as opposed to other considerations mentioned by the judge as the basis for the upward variance. In one recently denied petition, for instance, the district court gave "particular weight" to the ostensibly acquitted conduct but also considered that petitioner had "remained involved in loan-sharking up until 2013," that he "boasted of being a 'wise guy' for numerous years," and that he has "remained a powerful player within the Bonanno Family," an organized crime enterprise. See Brief in Opposition, *Asaro*, 140 S. Ct. 1104 (No. 19-107), 2019 WL 5959533, at *3-4. In this case, by contrast, the guideline calculation makes crystal clear where and to what extent acquitted conduct influenced the sentence.

A case involving a change to the suggested guideline range is an ideal vehicle for another reason. The Guidelines are something of a hybrid. They're not mandatory, of course—judges have discretion to choose sentences outside the specified range. *Booker*, 543 U.S. at 231. But they're not purely advisory, either. District court judges are required to begin by calculating the guideline range and must explain a final sentence in terms of its deviation from the range; appellate judges may presume that a within-Guidelines sentence is reasonable; and various procedural hurdles ensure that, in practice, the imposition of a non-Guidelines sentence is uncommon. *Peugh v. United States*, 569 U.S. 530, 541-44 (2013). As a result, the Guidelines serve as an "anchor" for the final sentence. *Molina-Martinez*, 136 S. Ct. at 1345. Using acquitted conduct to alter the "anchor" for the

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States, 574 U.S. 935 (2014) (No. 14-234), 2014 WL 4253043, at *6.

final sentence presents a more clear-cut violation of the Fifth and Sixth Amendments than using acquitted conduct to vary from that anchor. *See Henry*, 472 F.3d at 922 (Kavanaugh, J., concurring).

3. Finally, this case is an ideal vehicle to answer the question presented because it features acquitted conduct arguably separate from the conduct for which Mr. Osby was convicted. As explained *supra*, §I.C, this Court's opinion in *Watts* was, by its terms, limited to sentencing enhancements that "increase [a defendant's] sentence because of the manner in which he committed the crime of conviction," rather than "for crimes of which he was not convicted." 519 U.S. at 154-55. In this case, the hotel room conduct for which Mr. Osby was punished was a "crime[] of which he was not convicted," rather than a "manner in which he committed the crime of conviction," and thus his case falls outside the scope of *Watts*. By contrast, many of the petitions this Court has previously denied unquestionably involved acquitted conduct that went only to the "manner in which [the defendant] committed the crime of conviction."[23]

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[23] *See* Petition for Certiorari, *Ludwikowski*, 141 S. Ct. 872 (No. 19-1293), 2020 WL 2510293, at *3-6; Petition for Certiorari, *Gresham v. Tennessee*, 139 S. Ct. 2724 (2019) (No. 18-1359), 2019 WL 1916158, at *2; Petition for Certiorari, *Cabrera-Rangel v. United States*, 139 S. Ct. 926 (2019) (No. 18-650), 2018 WL 6065310, at *24; Petition for Certiorari at 16, *Thurman v. United States*, 139 S. Ct. 278 (2018) (No. 18-5528); Petition for Certiorari at 2-3, *Muir v. United States*, 138 S. Ct. 2643 (2018) (No. 17-8893); Petition for Certiorari at 7-8, *Iwuoha v. United States*, 138 S. Ct. 1990 (2018) (No. 17-7295); Petition for Certiorari, *Siegelman*, 577 U.S. 1092 (No. 15-353), 2015 WL 5562685, at *5-8.

CONCLUSION

Seven years ago, Justices Scalia, Thomas, and Ginsburg predicted that courts of appeals would take this Court's "continuing silence" to suggest that "the Constitution *does* permit" sentencing based on acquitted conduct. *Jones*, 135 S. Ct. at 9 (Scalia, J., dissenting from denial of certiorari). That prediction has come true. The time has come for this Court to answer the question presented, and this case is the rare, perfect vehicle that will allow it to do so.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1, 2021