No. 21-____

IN THE
Supreme Court of the United States

ESTEBAN GASPAR-FELIPE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment's Due Process Clause prohibits a federal court from basing a criminal defendant's sentence on a charge of which a jury acquitted him, as the Michigan Supreme Court has held, or whether, instead, acquitted-conduct sentencing complies with the Fifth Amendment, as 12 federal courts of appeal and the Iowa Supreme Court have held.

2. Whether the Sixth Amendment's right to jury trial prohibits a federal court from basing a criminal defendant's sentence on a charge of which a jury acquitted him.

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Petitioner Esteban Gaspar-Felipe respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 1a-22a) appears at 4 F.4th 330 (5th Cir. 2021). The district court's relevant rulings (Pet. App. 23a-53a, 82a-84a) are unreported.

JURISDICTION

The judgment of the Fifth Circuit was entered on July 13, 2021. Pet. App. 1a. On March 19, 2020, this Court entered a standing order that has the effect of extending the time within which to file a petition for a writ of certiorari in this case to December 10, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person shall … be deprived of life, liberty, or property, without due process of law[.]"

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a … trial, by an impartial jury[.]"

INTRODUCTION

Esteban Gaspar-Felipe was tried before a jury on charges of illegally reentering the United States and for "transportation of illegal aliens." The jury convicted him of those counts. But the prosecution also charged him with an enhancement for criminal conduct resulting in death, even though the death in question was at the hands of police officers who pursued some of the aliens nearly 50 miles away from Mr. Gaspar-Felipe. The jury acquitted Mr. Gaspar-Felipe of that enhancement. Yet a judge nonetheless sentenced Mr. Gaspar-Felipe as if the jury had convicted him of causing the death, more than doubling Mr. Gaspar-Felipe's time in prison.

The Fifth Circuit affirmed Mr. Gaspar-Felipe's sentence, finding it violated neither the Fifth nor Sixth Amendments of the Constitution. All 12 of the federal circuits and the Iowa Supreme Court would reach the same outcome. But, on similar facts, the Michigan Supreme Court has held that acquitted-conduct sentencing violates the federal Fifth Amendment. And this Court's cases and the Founding-era understanding of the role of the jury make clear that the practice violates the Sixth Amendment as well.

This Court should grant certiorari to resolve the question presented. Tell any layperson that Mr. Gaspar-Felipe is serving time for conduct of which a jury acquitted him and they'd be aghast. Indeed, three justices of this Court have expressed doubts about the practice. *See United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part) ("[T]here are good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness.");

United States v. Sabillon-Umana, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) ("far from certain" whether Constitution allows such sentencing); *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., dissenting from denial of certiorari, joined by Justices Thomas and Ginsburg) (acquitted-conduct sentencing "has gone on long enough"). And sentencing based on acquitted conduct slips yet another ace into a deck already stacked against criminal defendants.

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

STATEMENT OF THE CASE

1. On September 7, 2018, a group of 13 people entered the United States illegally. Pet. App. 1a. Mr. Gaspar-Felipe was later identified by two of them as the group's guide. Pet. App. 3a. Once in the United States, they were picked up by two cars, a Chevy pickup and a Chrysler sedan. Pet. App. 1a-2a. Border Patrol agents attempted to stop the cars, but the cars fled, and local police officers pursued the cars. Pet. App. 2a.

Mr. Gaspar-Felipe was in the Chevy pickup, which was disabled early in the chase. *Id.* The Chrysler sedan, on the other hand, continued to flee, reaching speeds of 115 miles per hour, and driving into oncoming traffic. *Id.* Eventually, a spike strip partially flattened the sedan's tires. *Id.* Though the sedan was finally slowing down, police officers fired more than 40 shots at it, killing one of the passengers, Tomas Juan-Tomas. Pet. App. 2a-3a, 55a. At the time Mr. Juan-Tomas was shot, Mr. Gaspar-Felipe had already been left more than 50 miles behind. Pet. App. 80a.

2. Mr. Gaspar-Felipe was charged with one count of illegal reentry and three counts of transporting people who had entered the country illegally "for the purpose of commercial advantage and private financial gain." 8 U.S.C. § 1324(a)(1)(A)(ii) & (B)(i); 8 U.S.C. § 1326; Pet. App. 3a. As to one of the transporting counts, the indictment further charged that it "result[ed] in the death of any person"—Mr. Juan-Tomas. 8 U.S.C. § 1324(a)(1)(A)(ii) & (B)(iv)); Pet. App. 3a.

Mr. Gaspar-Felipe attempted to plead guilty to all counts except for the "resulting in death" enhancement. Pet. App. 17a. But the government refused any plea deal that did not require him to take responsibility for Mr. Juan-Tomas's death. *Id.* Mr. Gaspar-Felipe exercised his right to a jury trial. *Id.*

The jury found Mr. Gaspar-Felipe guilty of the three counts of transporting for commercial gain and of illegal reentry. Pet. App. 4a. But the jury did not believe that Mr. Gaspar-Felipe's conduct had "result[ed] in the death" of Mr. Juan-Tomas, which occurred at the hands of the police, more than 50 miles away from Mr. Gaspar-Felipe. Pet. App. 4a, 80a.

3. The statutes under which Mr. Gaspar-Felipe was convicted authorized anywhere from a fine with no imprisonment to life imprisonment. 8 U.S.C. § 1324(a)(1)(A)(ii) & (B)(iv); 8 U.S.C. § 1326. 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. Gaspar-Felipe was convicted by a jury, the Sentencing Guidelines recommended a range of 10-16 months. Pet. App. 9, 11; U.S.S.G. Ch. 5, Part A (table). The Guidelines also require consideration of all of a defendant's "relevant conduct." U.S.S.G. § 1B1.3. Considering other "relevant conduct"—not challenged in this petition for certiorari—produced a recommended Guidelines range of 27-33 months. *Id.*

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 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 (PSR) thus applied a 10-level enhancement under § 2L1.1(b)(7)(D) because it concluded that Mr. Gaspar-Felipe's conduct resulted in Mr. Juan-Tomas's death—notwithstanding that a jury specifically rejected that conclusion. PSR 9. The presentence report prepared in Mr. Gaspar-Felipe's case thus recommended a range of 78-97 months. PSR 9, 11. As relevant here, Mr. Gaspar-Felipe objected to the consideration of acquitted conduct in the Guidelines calculation on Fifth and Sixth Amendment grounds. Pet. App. 64a-70a.

4. The district court overruled Mr. Gaspar-Felipe's objection and sentenced Mr. Gaspar-Felipe to 78 months—the low end of Sentencing Guidelines range based on Mr. Gaspar-Felipe's acquitted conduct, but more than four times the high end of the Guidelines range based solely on conduct for which Mr. Gaspar-

Felipe had been convicted, and more than twice the recommended range had the court not considered acquitted conduct. Pet. App. 36a-37a; U.S.S.G. Ch. 5, Part A (table); PSR 9, 11. The district court explained that it was allowed to consider acquitted conduct and that it thought the Guidelines range appropriate. Pet. App. 37a, 49a.

5. On appeal, Mr. Gaspar-Felipe challenged the use of acquitted conduct in calculating his sentence under the Fifth and Sixth Amendments. Pet. App. 19a. The Fifth Circuit affirmed the sentence. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

Sentencing based on acquitted conduct violates the Fifth and Sixth Amendments. As the Michigan Supreme Court has explained, sentencing based on acquitted conduct raises Due Process Clause concerns, because the "presumption of innocence" attaches with special force where a jury specifically finds that conduct wasn't proven beyond a reasonable doubt. *People v. Beck*, 939 N.W.2d 213, 225-26 (Mich. 2019). This Court has repeatedly held that increasing a defendant's sentence on the basis of facts that were not proven to a jury beyond a reasonable doubt violates both the Fifth and Sixth Amendments. *See Blakely v. Washington*, 542 U.S. 296, 301 (2004). And the Sixth Amendment envisions a jury with the ability to make not only factual determinations about what the evidence shows but moral judgments about whether a defendant deserves to be punished—judgments that acquitted-conduct sentencing overrides.

Notwithstanding the clear import of doctrine and history, all 12 federal circuits (and some State high

courts) have held that the Constitution sanctions acquitted-conduct sentencing, relying on this Court's opinion in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam). But as this Court and the Michigan Supreme Court have explained, *Watts* "presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause" and did not address the Due Process Clause or the right to trial by jury. *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005); *see Beck*, 939 N.W.2d at 224-25.

This case presents the Court with an excellent opportunity to resolve the questions presented. Doing so is critical: As judges and scholars around the country—including three justices of this Court—have recognized, sentencing based on acquitted conduct undermines confidence in the judiciary and has devastating consequences for defendants. And recent decades have made clear that no other actor—not Congress, not the Sentencing Commission, and not district courts—will eliminate acquitted-conduct sentencing any time soon.

I. This Court Should Resolve Whether Sentencing Based On Acquitted Conduct Violates The Fifth Amendment.

A. Courts Of Last Resort Are Split On The Question Presented.

1. All 12 of the federal courts of appeal with criminal jurisdiction and one State high court have held that sentencing based on acquitted conduct does not violate the Fifth Amendment's Due Process Clause.[1]

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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),

The D.C. Circuit's decision in *United States v. Settles*, 530 F.3d 920 (D.C. Cir. 2008) (Kavanaugh, J.), is illustrative. There, the defendant was convicted of a firearm count but acquitted of various drug-trafficking charges. *Id.* at 922. The advisory Guidelines range for the charge proven beyond a reasonable doubt was 37-46 months. *Id.* But the district court held that the drug-trafficking charges had been proven by a preponderance of the evidence. *Id.* It therefore calculated an advisory range of 57-71 months, factoring in not just the conduct that had been proven beyond a reasonable doubt but also conduct that had *not*—conduct of which a jury acquitted defendant.

On appeal, the defendant argued that sentencing him based on conduct that had been found by a preponderance of the evidence, rather than beyond a reasonable doubt, violated the Fifth Amendment's Due Process Clause. But the D.C. Circuit disagreed: "[A] sentencing judge may consider uncharged or even ac-

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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); *State v. Longo*, 608 N.W.2d 471 (Iowa 2000).

quitted conduct in calculating an appropriate sentence, so long as that conduct has been proven by a preponderance of the evidence and the sentence does not exceed the statutory maximum for the crime of conviction." *Id.* at 923.

The Court acknowledged that acquitted-conduct sentencing seemed at odds with basic notions of due process: "To be sure, we understand why defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence." *Id.* at 923. But it believed its hands to be tied by this Court's decision in *Watts*. *Id.* In *Watts*, this Court held that the federal sentencing statute allowed consideration of acquitted conduct at sentencing, rejecting the notion that Double Jeopardy concerns counseled a different reading of the statute. 519 U.S. at 157. In the course of so holding, this Court wrote: "[A]cquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proven by a preponderance of the evidence." *Id.*

The D.C. Circuit found that language dispositive. *Settles*, 530 F.3d at 923. The remaining federal circuits and the Iowa Supreme Court have similarly held that sentencing based on acquitted conduct does not violate the Due Process Clause. *Supra*, at 8-9 n. 1.

2. In 2019, the Michigan Supreme Court came to the opposite conclusion, holding that sentencing based on acquitted conduct violates the federal Due Process Clause. *People v. Beck*, 939 N.W.2d 213, 225-26 (Mich. 2019). The defendant in that case was charged with murder and five different firearm counts. *Id.* at 216-17. A jury convicted him of two of the firearm counts, but acquitted him of the remaining three firearm

counts and of the murder charge. *Id.* The judge imposed a 240-400-month sentence, relying on the murder charge of which the jury had acquitted the defendant. *Id.*

The Michigan Supreme Court found that sentence violated the federal Due Process Clause. "[W]hen 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." *Id.* at 225. The Michigan Supreme Court specifically rejected the idea that *Watts* had resolved the question:

> [T]hough its language was not always specific about the constitutional right it examined, in a later case the Court made clear that *Watts* addressed only a double-jeopardy challenge to the use of acquitted conduct. Five justices gave it side-eye treatment in *Booker* and explicitly limited it to the double-jeopardy context. … We therefore find *Watts* unhelpful in resolving whether the use of acquitted conduct at sentencing violates due process.

Beck, 939 N.W.2d at 224 (footnote omitted).[2]

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[2] Two other State high courts have concluded that acquitted-conduct sentencing violates the Fifth Amendment. *See State v. Marley*, 364 S.E.2d 133, 138 (N.C. 1988); *State v. Cote*, 530 A.2d 775, 784 (N.H. 1987). Both decisions predate *Watts*, but those courts have reiterated the holding since. *See State v. Cobb*, 732 A.2d 425, 442 (N.H. 1999); *State v. Young*, 775 S.E.2d 291, 308-09 (N.C. 2015). Two more State high courts have concluded that acquitted conduct sentencing violates State law. *See State v. Melvin*, 258 A.3d 1075, 1090-94 (N.J. 2021); *State v. Koch*, 112 P.3d 69, 79 (Haw. 2005).

3. The split on the question presented is both square and fully developed. The Michigan Supreme Court case was procedurally identical to the federal circuit-court cases: A defendant was sentenced within the range allowed by the statute of conviction but well above what the Michigan Sentencing Guidelines—which, like the federal Sentencing Guidelines, are not mandatory—recommended absent consideration of acquitted conduct. *Compare supra*, at 8-10, *with supra*, at 10-11. Yet the federal circuits found no constitutional problem, while the Michigan Supreme Court found a Fifth Amendment violation. The Michigan Supreme Court itself acknowledged the split: "While we recognize that our holding today represents a minority position, one final consideration informs our conclusion: the volume and fervor of judges and commentators who have criticized the practice of using acquitted conduct as inconsistent with fundamental fairness and common sense." *Beck*, 939 N.W.2d at 224.

The split is also fully developed. The 12 federal circuits and Iowa Supreme Court based their decision finding no constitutional violation on an interpretation of this Court's decision in *Watts*, meaning only this Court can correct that error. *See supra*, at 8-10. And because few States allow acquitted conduct at sentencing, and none *require* judges to consider acquitted conduct, the way the federal Sentencing Guidelines do,[3] the six States that have weighed in regarding acquitted conduct sentencing are unlikely to be joined by others any time soon. *See supra*, at 8-9

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

n. 1, 11 n.2. In any event, this Court routinely grants certiorari on far less well-developed splits.[4]

B. Sentencing Based On Acquitted Conduct Violates The Fifth Amendment.

1. Among the fundamental rights protected by the Due Process Clause is the presumption of innocence. *See United States v. Gaudin*, 515 U.S. 506, 514 (1995); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *In re Winship*, 397 U.S. 358, 364 (1970). The "concrete substance for the presumption of innocence" is the requirement of proof beyond a reasonable doubt. *Winship*, 397 U.S. at 363.

The presumption of innocence—and its corresponding requirement of proof beyond a reasonable doubt—is not limited "to those facts which, if not proved, would wholly exonerate the defendant." *See Mullaney v. Wilbur*, 421 U.S. 684, 697 (1975). It also applies where the criminal law draws the distinction between those guilty defendants "subject to substantially less severe penalties"—that is, to those facts that would entitle a defendant to a substantially lesser sentence. *Id.* at 697-98 (citing *Winship*, 397 U.S. at 364).

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[4] *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).

As the Michigan Supreme Court explained, "that presumption is supposed to do meaningful constitutional work as long as it applies." *Beck*, 939 N.W. at 222. "[W]hen a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct," the presumption of innocence continues to apply. *Id.* at 225. "To allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself." *Id.* (quoting *State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988)).

2. Mr. Gaspar-Felipe's sentence violates the Due Process Clause for a second reason. This Court has held that the Due Process Clause requires that any fact that is "essential to the punishment" of a criminal defendant—that raises the maximum sentence to which a defendant may be exposed, raises the minimum sentence, or guides within an authorized range—must be proven beyond a reasonable doubt. *Blakely*, 542 U.S. at 301; *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000); *Alleyne v. United States*, 570 U.S. 99, 103 (2013).

A federal district court cannot sentence a defendant to just any sentence within the range authorized by a statute. Instead, this Court has interpreted the statute establishing the federal sentencing scheme to allow only "substantively reasonable" sentences within the statutory range. *United States v. Booker*, 543 U.S. 220, 261-62 (2005); *Rita v. United States*, 551 U.S. 338, 351 (2007).

This means that 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). Indeed, a sentence may be "substantively unreasonable" even if it is below—even if it is well below—the statutory maximum.[5] So when a defendant is found 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." 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).

When a judge considers acquitted conduct proven only by a preponderance of the evidence 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 only those facts found beyond a reasonable doubt, but seems reasonable in light of the inclusion

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[5] *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).

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 thus unconstitutional. *Id.*

This is just such a case. Considering facts not challenged in this petition, the Guidelines range for Mr. Gaspar-Felipe's sentence would have been 27-33 months in prison. *Supra*, at 6. The district court sentenced Mr. Gaspar-Felipe to 78 months in prison. Without the enhancement attributing Mr. Juan-Tomas's death to Mr. Gaspar-Felipe—conduct that the jury expressly found had not been proven beyond a reasonable doubt—a 78-month sentence would have been substantively unreasonable and thus invalid given the 27-33-month sentencing range.[6] Instead, considering the acquitted conduct, Mr. Gaspar-Felipe's sentence was substantively reasonable, and presumptively so.

The enhancement was thus a "fact that increase[d] the penalty for a crime." *Apprendi*, 530 U.S. at 490. Because it was not proven beyond a reasonable doubt that Mr. Gaspar-Felipe's conduct resulted in Mr.

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[6] *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); *United States v. Miller*, 601 F.3d 734, 739-40 (7th Cir. 2010) (same as to sentence three years higher than guideline range).

Juan-Tomas's death—because, indeed, a jury *acquitted* Mr. Gaspar-Felipe of that conduct—Mr. Gaspar-Felipe's sentence violates the Fifth Amendment.

3. Finally, the Michigan Supreme Court was correct that *United States v. Watts* does not compel a different conclusion. As both that court and this one 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; *see also Beck*, 939 N.W.2d at 224. In holding that consideration of acquitted conduct under the federal sentencing statute did not violate the Double Jeopardy Clause, this Court in *Watts* "failed to consider fully" questions about the Fifth Amendment. *Booker*, 543 U.S. at 240 n.4.

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). Moreover, as Justice Kennedy explained at the time, *Watts* "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*.

Watts also 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. Gaspar-Felipe's offense level by a whopping *ten* levels, more than doubling his sentence. PSR 9, 11; Pet. App. 18a. 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.

II. This Court Should Resolve Whether Sentencing Based On Acquitted Conduct Violates The Sixth Amendment.

Mr. Gaspar-Felipe's sentence violates the Sixth Amendment's jury trial right for two separate and independent reasons. First, a judge, rather than a jury, found facts essential to his punishment. Second, acquitted-conduct sentencing is at odds with the common-law understanding of a jury's role. And for the same reasons *Watts* does not foreclose Mr. Gaspar-Felipe's Fifth Amendment challenge, *see supra*, §I.B.3, it doesn't foreclose his Sixth Amendment challenge, either.

A. First, the same cases that make clear that "any fact (other than a prior conviction) that increases the maximum penalty for a crime" must be proven beyond a reasonable doubt in order to comply with the Fifth Amendment, also make clear that those same facts must be proven to a jury to comply with the Sixth Amendment. *Apprendi*, 530 U.S. at 490; *see supra*, §I.B.2; *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999); *see also Blakely*, 542 U.S. at 303. Mr. Gaspar-Felipe's sentence violates the Sixth Amendment under that line of cases: a 78-month sentence would have

been substantively unreasonable—and thus off-limits—but for conduct of which a jury acquitted him. §I.B.2. The acquitted conduct is thus a fact that "increase[d] the maximum penalty" for Mr. Gaspar-Felipe and that, under *Apprendi* and its progeny, should have been proven to a jury.

B. Mr. Gaspar-Felipe's sentence violates the Sixth Amendment right to a jury trial for a second, independent reason. 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 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 Sixth Amendment right to trial by jury "includ[es] all the essential elements as they were recognized in this country and England when the Constitution was adopted." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020). One of those essential elements was that a jury acquittal is unreviewable. That, in turn, allowed jurors to acquit not only where the evidence did not support a conviction but also where a conviction would offend the juries' sense of the "conscience of the community." *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969).

The notion that a jury acquittal is unimpeachable has deep roots. In *Bushell's Case* in 1670, jurors were

threatened with starvation, fined, and even imprisoned when they refused to change their acquittal vote. *Penn and Mead*, How. St. Tr. 6:952, 963 (1670). When the Court of Common Pleas refused to overturn the verdict, it cemented the unimpeachability of the acquittal verdict. *Id.* at 974, 983-86; *Bushell's Case*, How. St. Tr. 6:999, 1007-12 (1670).[7]

By the end of the eighteenth century, juries routinely acquitted defendants charged with "small offences which are punishable with death," suggesting a moral 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 acquit forgers if they knew a capital sentence awaited. *Id.* at 727-32.

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[7] *See also* 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)) ("[T]hat 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.").

The jury's role as conscience of the community as well as factual arbiter carried over into the New World. 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."[8] Jury instructions[9] and State and federal court opinions[10] 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. As John Adams wrote, "It is not only his right"—the right of the juror, of "Every Man of any feeling or Conscience"—"but his Duty … to find the Verdict according to his own best

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[8] *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.").

[9] *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").

[10] *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).

Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court." Diary of John Adams, vol. 2 (Feb. 12, 1771).[11]

The jury that the Founders enshrined in the Constitution was thus far more than a "utilitarian fact-find[er]." Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 55 (2003). It was a "circuitbreaker in the State's machinery of justice." *Blakely*, 542 U.S. at 306. And the Constitution incorporated that role by guaranteeing the right to trial by jury and by making a verdict of acquittal unreviewable, thereby allowing juries to return acquittals not only where the prosecution fails to meet its burden of proof but also where a conviction would be unjust. *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 tempering its rigor by the mollifying influence of current ethical conventions."); *Kepner v. United States*, 195 U.S. 100, 124-26 (1904).

2. Historically, a jury exercised its power as the "conscience of the community" not only through acquitting a defendant altogether but also through "indirectly check[ing]" the "potential or inevitable severity of sentences" by issuing "what today we would call verdicts . . . to lesser included offenses"—convicting on some counts and acquitting on others. *Jones*, 526 U.S. at 245. At common law, jurors would know the fixed

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[11] Available at https://www.masshist.org/publications/adams-papers/index.php/view/DJA02d003.

penalty attached to each felony. *See* Judge 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* Barkow, *supra*, 152 U. Penn. L. Rev. at 70-71.

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. Today's federal scheme of crime and punishment is far more complex 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 particular conduct. Sentencing based on acquitted conduct overrides that determination. Indeed, it is precisely when evidence supports the charge of which a jury acquitted—thus allowing a judge to sentence based on acquitted conduct—that it is *most* likely that the jury was bringing its own moral compass to bear "in the teeth of both law and fact," *Horning v. District of Columbia*, 254 U.S. 135, 138-39 (1920) (Holmes, J.), rather than acting as a "utilitarian fact-find[er]," Barkow, *supra*, 152 U. Penn. L. Rev. at 55.

By punishing Mr. Gaspar-Felipe for conduct of which a jury acquitted him, the district court eviscerated the jury's role as conscience of the community, not just as factfinder—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. Relying on this Court's opinion in *United States v. Watts*, 12 federal courts of appeal and two State high courts have concluded that the Sixth Amendment allows acquitted-conduct sentencing. *Supra*, at 8-9 n.1; *In re Coley*, 283 P.3d 1252, 1273 (Cal. 2012). But for the same reason *Watts* does not foreclose Mr.

Gaspar-Felipe's Fifth Amendment claim, *see supra*, §I.B.3, it doesn't foreclose his Sixth Amendment claim, either. *Watts* dealt only with whether acquitted-conduct sentencing violates the Double Jeopardy Clause and, in any event, expressly reserved the question whether a sentence that was dramatically increased on the basis of acquitted conduct would be constitutional. *Supra*, §I.B.3.

It is thus clear that this Court need not overrule *Watts* to answer the question presented. 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*, 570 U.S. at 116 (overruling *Harris v. United States*, 536 U.S. 545 (2002)); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)). Regardless, lower courts' uniform reliance on *Watts* makes clear that they cannot meaningfully grapple with the questions presented until this Court clarifies *Watts*.

III. This Case Is A Good Vehicle For Resolving The Questions Presented.

This case is a superior vehicle to many of the petitions that have been filed since 2019, when the split of authority first appeared. Several prior petitions presented procedural obstacles to this Court's review.[12] In other cases, it was unclear whether the conduct used to enhance the defendant's sentence was

[12] *See, e.g.*, Brief in Opposition, *Ludwikowski v. United States*, 141 S. Ct. 872 (2020) (No. 19-1293), 2020 WL 5821347, at *10 (failed to press the issue below); Brief in Opposition, *Michigan v. Fuller*, 141 S. Ct. 873 (2020) (No. 19-1453), 2020 WL 6544969, at

conduct of which a jury had acquitted the defendant.[13] And in still others, consideration of acquitted conduct was not outcome-dispositive.[14]

By contrast, this case cleanly presents the questions whether sentencing based on acquitted conduct violates the Fifth or Sixth Amendments.

First, Mr. Gaspar-Felipe objected to the use of acquitted conduct at sentencing, Pet. App. 64a-70a; did so on both Fifth and Sixth Amendment grounds, *id.*; and preserved the issue before both the district court and the Fifth Circuit, Def-Aplt's Br. 9-10. Both questions were thus pressed and passed upon below.

Second, the conduct that enhanced Mr. Gaspar-Felipe's sentence was the same conduct of which the jury

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*4 (no Supreme Court jurisdiction because State-court order not final).

[13] *See, e.g.*, Petition for Certiorari, *Rosario v. United States*, __ S. Ct. __ (2021) (No. 21-115), 2021 WL 3192521, at *24 (hung jury, rather than verdict of acquittal); Brief in Opposition, *Asaro v. United States*, 140 S. Ct. 1104 (2020) (No. 19-107), 2019 WL 5959533, at *3, 11 (jury acquitted of racketeering; sentence enhanced based on murder and robbery; unclear whether acquittal reflected rejection of murder and robbery predicate acts or rejection of other racketeering elements).

[14] *See, e.g.*, Petition for Certiorari, *Cabrera-Rangel v. United States*, 139 S. Ct. 926 (2019) (No. 18-650), 2018 WL 6065310, at *6 n.2 (sentencing judge remarked that she "would have sentenced [petitioner] to the statutory maximum penalty regardless of the offense level"); Brief in Opposition, *Baxter v. United States*, 140 S. Ct. 2676 (2020) (No. 19-6647), at *5-6 (district court cited "a variety of grounds" for upward variance, many of which did not related to acquitted conduct); Brief in Opposition, *Asaro*, 140 S.Ct. 1104 (No. 19-107), 2019 WL 5959533, at *3-4 (considering not only acquitted conduct but also facts that defendant "remained a powerful player within the Bonanno Family" organized crime enterprise).

acquitted him. The jury was instructed to consider "whether the offense charged in Count Three"—that is, transporting an alien for the purpose of commercial advantage—"resulted in the death of said alien Thomas Juan-Tomas." Pet. App. 97a. It answered, "No." Pet. App. 84a. Sentencing Guideline § 2L1.1(b)(7)(D) applied to Mr. Gaspar-Felipe's case because the district court found that there was a "causal chain" between Mr. Gaspar-Felipe's criminal conduct and Mr. Juan-Tomas's death—precisely the finding the jury rejected. Pet. App. 20-21; 36-37.

Third, the use of acquitted conduct in this case was outcome-dispositive. Without consideration of acquitted conduct, Mr. Gaspar-Felipe's sentencing range would have been 27-33 months. *Supra*, at 6. Considering acquitted conduct, Mr. Gaspar-Felipe's sentencing range was 78-97 months. *Id.* The district court sentenced Mr. Gaspar-Felipe to the low end of that sentencing range, and it justified that sentence based exclusively on the Guidelines range. Pet. App. 51.

That this case involved acquitted conduct changing the suggested Guidelines range—rather than being used as the basis for an upward variance—makes it an ideal vehicle for another reason. The Guidelines are a hybrid. They're not mandatory, of course. *Booker*, 543 U.S. at 231. But they're not purely advisory, either. District court judges are required to begin by calculating the Guidelines range and must explain a final sentence in terms of that range; appellate judges may presume that a within-Guidelines sentence is reasonable; and various procedural hurdles ensure that, in practice, the imposition of a sentence outside the Guidelines range 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 that "anchor" presents a more clear-cut violation of the Fifth and Sixth Amendments than using acquitted conduct to vary from that anchor. *See United States v. Henry*, 472 F.3d 910, 922 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring).

IV. The Time Has Come To Resolve The Important Questions 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.[15] In the years since, those concerns have only become more forceful.[16] Scholars, too, have called

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[15] *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 (D.C. Cir. 1992) (Randolph, J., dissenting in part, concurring in part).

[16] *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.).

for this Court to reexamine whether acquitted-conduct sentencing comports with the Fifth and Sixth Amendments.[17]

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 *Jones*' aftermath, still more judges expressed qualms about the use of acquitted conduct in sentencing.[18]

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[17] *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).

[18] *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 . . . [it would] 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. . . .") *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

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." *Brown*, 892 F.3d at 415 (Kavanaugh, J., dissenting in part); *see also Settles*, 530 F.3d at 924(Kavanaugh, J.); *Henry*, 472 F.3d at 920 (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. *Sabillon-Umana*, 772 F.3d at 1331 (Gorsuch, J.).

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

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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.").

pleaded with the Sentencing Commission to follow that advice.[19] 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).[20]

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 that would outlaw acquitted conduct sentencing has lapsed without a vote, even though it was introduced on a bipartisan basis.[21] There is no reason to believe the next bill

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[19] *E.g.*, 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).

[20] Available at https://www.ussc.gov/policymaking/meetings-hearings/public-meeting-november-9-1993.

[21] *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.

addressing the question will meet a different fate.[22] This Court cannot continue waiting for Congress.

District courts aren't the solution, 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).

3. 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.[23] In a tax evasion case, defendants' sentences were increased by nearly 50% based on charges of which they'd been acquitted.[24] 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 same

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[22] *See* https://www.congress.gov/bill/117th-congress/senate-bill/601 (pending without a vote since July 12, 2021).

[23] *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).

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

enhancement.[25] In drug cases, juries are routinely required 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[26]—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.[27]

4. The consequences for the administration of justice are profound. Both the Fifth and Sixth Amendments were conceived of as critical defenses against tyranny. The requirement of proof beyond a reasonable doubt has long been considered "rightly one of the boasts of a free society," the "prime instrument for reducing the risk of convictions resting on factual error." *Winship*, 397 U.S. at 362-63. Of the jury-trial requirement, John Adams warned that allowing judges, rather than juries "to answer questions of fact as well as law, being few they might be easily corrupted; being commonly rich and great, they might learn to despise the common people, and forget the feelings of humanity, and then the subject's liberty and security would be lost." John Adams, THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 55 (C. Bradley Thompson ed., 2000).

Allowing sentencing based on acquitted conduct turns the requirement of proof beyond a reasonable

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

[26] *Vaughn*, 430 F.3d at 526 (jury found 50-100 kg of marijuana; sentence based on 544 kg of marijuana).

[27] *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).

doubt to a jury—that "'grand bulwark' of English liberties"—into 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). As one judge put the point, "This is jurisprudence reminiscent of *Alice in Wonderland*. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'" *see United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring). 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 sentencing 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 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).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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