No. 18-650

IN THE

Supreme Court of the United States

MIGUEL CABRERA-RANGEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING PETITIONER

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as amicus curiae.[1]

INTEREST OF *AMICUS CURIAE*

The NACDL is a nonprofit voluntary professional bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime. NACDL has a nationwide membership of approximately 9,200. Its many state, provincial, and local affiliate organizations encompass up to 40,000 attorneys. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL frequently appears as amicus curiae before this Court and other federal and state courts, offering its perspective in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than amicus or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief. Petitioner's letter consenting to the filing of amicus curiae briefs generally has been filed with the Clerk's office. Respondent's consent to the filing of this brief without ten days' prior notice is on file with counsel of record.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a ripe opportunity for the Court to address an injustice that threatens to deprive the petitioner's liberty, as it has for innumerable others. Contrary to the meaning of the Court's decision in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), and the Court's more recent precedent addressing the interplay between the Sixth Amendment and the Federal Sentencing Guidelines, *Watts* has been misconstrued to preclude inquiry into whether the Sixth Amendment is violated when a sentencing court uses acquitted conduct to enhance a defendant's sentence.

For two decades *Watts* has been used to preserve a judge's discretion to use acquitted conduct to multiply the length of a criminal sentence by several times over what the Federal Sentencing Guidelines range would be based solely on the jury's conviction and the facts underlying it. In petitioner's case, the trial judge sentenced him to 96 months in prison based on acquitted conduct that dramatically shifted his Guidelines range from 24 to 30 months up to 77 to 96 months.

Watts holds that a court's consideration of acquitted conduct in its determination of a criminal sentence is consistent with the "clear implications of 18 U.S.C. § 3661, the Sentencing Guidelines, and this Court's decisions, particularly *Witte v. United States*, 515 U.S. 389 (1995) . . . ." *Watts*, 519 U.S. at 149. The Court, however, never addressed in *Watts*, *Witte*, or any other decision whether the use of acquitted

conduct to sentence a defendant is consistent with Fifth and Sixth Amendment principles governing standards of proof necessary for conviction and the right to a jury trial.

Since *Watts*, the Court has clarified and very narrowly construed the scope of judicial discretion vis-à-vis the jury's constitutional and fact-finding roles. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are essential elements of a crime and that the Sixth Amendment guarantees defendants the right to have a jury find those facts beyond a reasonable doubt. *Id.* at 490. *Apprendi* made clear that a "fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." *Id.* Later decisions echoed this principle: "[w]hile judges may exercise discretion in sentencing they may not 'inflic[t] punishment that the jury's verdict alone does not allow." *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2350 (2012) (quoting *Blakely v. Washington*, 542 U.S. 296, 304 (2004)).

Jurists—including justices and former justices of this Court—have suggested that judicial fact-finding involving acquitted conduct is constitutionally dubious and that the Court's intervention is needed. In 2015, then-Judge Kavanuagh wrote of his "concern about the use of acquitted conduct at sentencing." *United States v. Bell*, 808 F.3d 926, 927 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc). In 2014, then-Judge Gorsuch wrote that it was "far from certain whether the

Constitution allows" sentence enhancement based on facts a jury did not find. *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014). And in a 2014 dissent from a denial of certiorari, Justice Scalia was joined by Justices Thomas and Ginsburg in writing, "the Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range." *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., dissenting from denial of certiorari, joined by Thomas and Ginsburg, JJ.).

Judges of the courts of appeals also have expressed concern about the overextension of *Watts*. Judge Millet of the D.C. Circuit and Judge Bright of the Eighth Circuit have expressly called for the Court's attention to this issue. *See Bell*, 808 F.3d at 929 (Millett, J., concurring in the denial of rehearing en banc); *United States v. Papakee*, 573 F.3d 569, 577–78 (8th Cir. 2009) (Bright, J., concurring).

Punishing a defendant for acquitted crimes undermines the essential role of the jury and violates the defendant's Sixth Amendment rights. This Court's jurisprudence reflected in *Apprendi* and its progeny cannot be reconciled with the practice of enhancing a sentence based on alleged crimes for which a jury found a defendant not guilty. And yet lower courts, finding themselves bound by *Watts,* continue to permit sentences to be inflated in that manner.

Certiorari should be granted to enable the Court to provide the long-needed clarification of *Watts* consistent with this Court's post-*Apprendi* jurisprudence to protect petitioner's and others' Sixth Amendment rights.

ARGUMENT

I. NEITHER *WATTS* NOR PROCEDURAL OBSTACLES HINDER THE COURT'S CONSIDERATION OF PETITIONER'S SIXTH AMENDMENT CLAIM.

This case presents a stark, clean, and compelling vehicle for the Court to resolve the contradictions between the Sixth Amendment and the practice of judges relying on acquitted conduct to enhance a sentence beyond what a jury's verdict permits. In the twenty-one years since this Court decided *Watts*, lower courts have relied on it to permit the use of acquitted conduct in sentencing, even if doing so extends sentences beyond what the Sixth Amendment permits.[2]

Watts involved challenges by two petitioners to their sentences, respectively, that were enhanced on

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[2] *See e.g.*, *United States v. White*, 551 F.3d 381, 383–84 (6th Cir. 2008) (en banc); *United States v. Mercado*, 474 F.3d 654, 657 (9th Cir. 2007) (The "core principle of *Watts* lives on and [a] district court [may] constitutionally consider . . . acquitted conduct"); *United States v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006) ("[P]re-*Booker* case law made plain that acquitted conduct, proved to the sentencing court by a preponderance of the evidence, may form the basis of a sentencing enhancement.") (citing to *Watts*, 519 U.S. at 157 (internally citing *United States v. Booker*, 543 U.S. 220 (2005))).

the basis of judicially found facts relating to offenses of which they were acquitted by juries. One petitioner challenged the extension of his term based on the judge's finding that he possessed a firearm despite the jury acquitting the defendant of using a firearm in the underlying crime of which he was convicted. *Watts*, 519 U.S. at 149–50. The other petitioner, who was convicted by the jury of involvement in one drug transaction but not a second, challenged the enhancement of her sentence based on the judge's finding at sentencing that sufficient evidence existed that she had been involved in both transactions. *Id.* at 150–51.

The issue before the Court in *Watts* was whether the sentencing courts' reliance on factual findings with respect to the acquitted offenses violated the Fifth Amendment's Due Process and Double Jeopardy Clauses. The Court ruled that "a jury's verdict of acquittal 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.* at 157. The holding on its face seemingly provided bright-line guidance consistent with fully effectuating 18 U.S.C. § 3661, which directs that "no limitation" shall be put on the kind of evidence that a court may "receive and consider for the purpose of imposing an appropriate sentence." But, the import of *Watts* must be viewed through the narrow prism of the question decided by the Court.

Watts addressed only a "very narrow" question "regarding the interaction of the [Sentencing] Guidelines with the Double Jeopardy Clause."

Booker, 543 U.S. at 240 & n.4. *See also Jones,* 135 S. Ct. at 8–9 (Scalia, J., dissenting from denial of certiorari, joined by Thomas and Ginsburg, JJ.) (stating that the use of acquitted conduct in sentencing implicates the Sixth Amendment). The Court in *Watts* did not address "any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment." *Booker*, 543 U.S. at 240.

The decision also preceded the sea change ushered in by the Court's decisions in *Apprendi* and *Booker*, which, together, addressed the application of a defendant's Sixth Amendment rights under the Sentencing Guidelines. In *Apprendi*, the Court held that facts used to increase a prison sentence beyond the statutory maximum for the crime of conviction must be found by a jury on the basis of proof beyond a reasonable doubt. *Apprendi*, 530 U.S. at 469, 490. And, in *Booker*, the Court held that any application of the Sentencing Guidelines that violates the Sixth Amendment cannot stand. *Booker*, 543 U.S. at 243–45.

But in the twenty-one years since *Watts* was decided, the lower courts have deferred to a broad reading of it and foreclosed Sixth Amendment challenges to the use of acquitted conduct to enhance a defendant's sentence in ways contrary to the findings of a jury.

A. Petitioner's case casts in stark relief the grave constitutional concerns that can arise from a judge's use of acquitted conduct at sentencing.

Petitioner's case provides an ideal and straightforward opportunity to set straight *Watts'* import. Indeed, petitioner's case is much like the "stylized" hypotheticals proposed by Justice Scalia to demonstrate sentences "premised on a judge's finding some fact [in violation of the Sixth Amendment]." *Rita v. United States*, 551 U.S. 338, 371 (2007) (Scalia, J., concurring in part and concurring in the judgment).

Justice Scalia's concurrence in *Rita* explained the dramatic extent to which a sentencing judge's fact finding under the preponderance of the evidence standard can unconstitutionally increase a defendant's sentence and undermine the role of the jury. He illustrated his point by taking the example of a hypothetical defendant convicted of robbery facing a possible sentence of 33 to 41 months under the Sentencing Guidelines. *Rita*, 551 U.S. at 371–72. But, at sentencing, the judge recognizes additional aggravating facts not found by the jury, including—"that a firearm was discharged, that a victim incurred serious bodily injury, and that more than $5 million was stolen . . . ." *Id.* The judge's findings yield a sentencing range of 235 to 293 months—six times or more than what it would have been based solely on the jury's robbery conviction without the judge-found facts enhancing the sentence. *Id.* Justice Scalia concluded that, as the judge-found facts "are the legally essential predicate for his imposition of the

293–month sentence . . . , the 293–month sentence . . . would surely be reversed as unreasonably excessive." *Id.*

The facts in the petitioner's case are strikingly similar. The facts underlying the jury's conviction yielded a sentencing range of 24 to 30 months. *See* Pet. App. at 5. The judge-found facts regarding bodily injury and use of a dangerous weapon—facts on which the jury acquitted petitioner on a second charge—inflated the Guidelines range to 77 to 96 months, and the court imposed the statutory maximum of 96 months. *Id.* at 41a; 18 U.S.C. § 111(a). *Id.* These judge-found facts mirror the aggravating facts posed in Justice Scalia's *Rita* hypothetical with one important, and more troubling, difference. In the *Rita* hypothetical, a jury did not find the aggravating facts. In petitioner's case, the jury acquitted him on the charge related to them.

The district court left no doubt in petitioner's case that it used acquitted conduct as a predicate for the sentence it imposed. *See* Pet. App. at 41a ("So you're at 77 to 96 months. And the statutory maximum is eight years . . . . I'm going to sentence you *at the high end* to the statutory maximum penalty which is 96 months in custody.") (emphasis added). And the court not only went beyond using the acquitted conduct to sentence the petitioner to the high end of the Guidelines range for the offense of which he was convicted by the jury, using only the facts underlying that verdict. It took an additional leap to shift the Guidelines range applicable to his conviction to the 77 to 96 month range applicable to the charge of which he was acquitted and delivered the maximum 96-

month sentence. *See id.*; *id.* at 5. That sentence more than tripled the length of incarceration recommended by the Guidelines for the crime of which the jury convicted petitioner, without enhancements based on judge-found facts the jury had rejected.

Justice Scalia, joined by Justices Thomas and Ginsburg, expressed concern about the very kind of result presented by this petition in a dissent from the Court's prior denial of certiorari in a similar case. There, the petitioners had been convicted of distributing small amounts of drugs and acquitted on charges of conspiring to distribute drugs. *Jones*, 135 S. Ct. at 9 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari). The sentencing judge, however, found that they had conspired to distribute drugs and imposed sentences that were many times longer than those the Guidelines would otherwise have recommended. *Id.* In his dissent, Justice Scalia observed that the facts presented by that petition were "particularly appealing . . . because not only did no jury convict these defendants of the offense the sentencing judge thought them guilty of, but a jury *acquitted* them of that offense." *Id.*

The petitioner's sentence here is a startling and transparent example of judicial fact-finding usurping the jury's duty to assess the proof of each element of an offense. And it also potently demonstrates the dramatic increase in a defendant's sentence that can result.

B. This case presents no procedural obstacles.

There are no procedural obstacles in petitioner's case that would prevent the Court from addressing the Sixth Amendment violation that is squarely presented. The petitioner's brief recites that a clear record of his objections was established in the sentencing and appellate proceedings. Pet. App. at 5–6, 11a–23a, 29a. And the proceedings below are not encumbered with prior complex appeals, multiple defendants or sentences, or other questions that muddy the waters. Petitioner's case therefore is the ideal vehicle to "put an end to the unbroken string of cases disregarding the Sixth Amendment." *Jones,* 135 S. Ct. at 9.

II. THE FIFTH CIRCUIT AND OTHER COURTS OF APPEALS HAVE REJECTED PRIOR SIXTH AMENDMENT CHALLENGES IN DEFERENCE TO *WATTS* RATHER THAN ON THE MERITS.

The courts of appeals for at least nine circuits have relied on *Watts* and other precedent to affirm that 18 U.S.C. § 3661 wholly permits the use of evidence of acquitted conduct at sentencing. But the courts' uniformity reflects adherence to *Watts*, not the rejection of the possible merits of a Sixth Amendment challenge to § 3661's application. Some jurists, including Justices of this Court, have explicitly called upon the Court to address whether *Watts* precludes further constitutional challenges to § 3661. Those calls have been echoed by scholars and those in the bar.

A. The lower courts' deference to *Watts* conflicts with this Court's Sixth Amendment jurisprudence.

At least nine circuit courts of appeals have invoked *Watts* to preclude Sixth Amendment challenges to sentence enhancements based on acquitted conduct despite this Court's more recent Sixth Amendment jurisprudence (discussed *infra*, section III.A).[3] *Watts*, however, was not a Sixth Amendment case. The Court issued its *per curiam* decision on narrow Double Jeopardy grounds, as this Court observed in *Booker*, 543 U.S. at 240 & n.4.

The continued vitality of *Watts'* broad interpretation may reflect this Court's instruction that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quidia v. Shearson/American Express,*

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[3] *See e.g.*, *White*, 551 F.3d at 383–84; *Mercado*, 474 F.3d at 657 ("[The]core principle of *Watts* lives on and [a] district court [may] constitutionally consider . . . acquitted conduct."); *United States v. Dorcely*, 454 F.3d 366, 371–72 (D.C. Cir. 2006); *Gobbi*, 471 F.3d at 314 ("Post-*Booker*, the law has not changed . . . ; acquitted conduct, if proved by a preponderance of the evidence, still may form the basis for a sentencing enhancement."); *United States v. Jones*, 194 F. App'x 196, 197–98 (5th Cir. 2006); *United States v. Hayward*, 177 F. App'x 214, 215 (3d Cir. 2006); *United States v. Azhworth*, 139 F. App'x. 525, 527 (4th Cir. 2005) (*per curiam*); *United States v. Price*, 418 F.3d 771, 787–88 (7th Cir. 2005); *United States v. Vaughn,* 430 F.3d 518, 526 (2d Cir. 2005) ("[D]istrict courts may find facts relevant to sentencing by a preponderance of the evidence, even where the jury acquitted the defendant of that conduct . . . .").

Inc., 490 U.S. 477, 484 (1989). Only this Court can lift the implicit seal of approval that *Watts* extended to the unmitigated use of acquitted conduct to enhance criminal sentences.

Justice Scalia recognized as much. In a 2014 dissent from a denial of certiorari in which Justices Thomas and Ginsburg joined, Justice Scalia observed, "the Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range." *Jones*, 135 S. Ct. at 9 (Scalia, J., dissenting from denial of certiorari, joined by Thomas and Ginsburg, JJ.).

B. Several jurists (including Justices of this Court), practitioners, and scholars have written disapprovingly of the overextension of *Watts*.

The suggestion that this Court should grant certiorari in a case such as this one to properly limit *Watts* is not new. A number of jurists (including several current and former Justices) have called attention to the need for guidance from the Court. And many in the bar and academia have argued that imposing enhanced sentences based upon facts not found by a jury deprives defendants of their Sixth Amendment rights.

While on the D.C. Circuit, then-Judge Kavanaugh wrote several times of his "concern about the use of acquitted conduct at sentencing." *Bell*, 808 F.3d at 927 (Kavanaugh, J., concurring in the denial of rehearing en banc); *see also United States v. Settles*, 530 F.3d 920, 923–24 (D.C. Cir. 2008) ("[W]e understand

why defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence . . . ."); *United States v. Henry*, 472 F.3d 910, 918–22 (D.C. Cir. 2007) (Kavanaugh, J., concurring). In 2015, then-Judge Kavanaugh encouraged district court judges to consider rejecting the use of acquitted conduct in sentencing, even if currently prevailing law does not forbid its use: "[E]ven in the absence of a change of course by the Supreme Court, or action by Congress or the Sentencing Commission, federal district judges have power in individual cases to disclaim reliance on acquitted or uncharged conduct." *Bell*, 808 F.3d at 928.

Then-Judge Gorsuch explained in a 2014 opinion that "[i]t is far from certain whether the Constitution allows" a judge to "increase a defendant's sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant's consent." *Sabillon-Umana*, 772 F.3d at 1331. But the defendant-appellant in that case did not challenge the district court's constitutional authority to use judicially found facts at sentencing. *Id.*

Dissenting opinions in *Watts* also raised concerns about the possible legacy that the decision could leave. Justice Stevens declared that the Court's holding compelled a "perverse result." *Watts*, 519 U.S. at 164 (Stevens, J., dissenting). And he lamented that the Court did so via a per curiam order, "without hearing oral argument or allowing the parties to fully brief the issues." *Id.* In a separate dissent, Justice Kennedy observed that the Court's "*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). And he admonished that the issue "ought to be confronted by a reasoned course of argument, not by shrugging it off." *Id.*

And, in 2014, Justice Scalia authored a compelling dissent from this Court's denial of certiorari in *Jones*, observing that "any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge." 135 S. Ct. at 8 (Scalia, J., dissenting from denial of certiorari, joined by Thomas and Ginsburg, JJ.).

Though constrained by the precedential value conferred to *Watts* and related cases, numerous judges on the courts of appeals have stated that *Watts* should be revisited because the Sixth Amendment does not permit a sentence to be extended by a judge's independent finding of facts underlying the acquitted offense.

Judge Millett of the Court of Appeals for the District of Columbia Circuit, for example, delivered a concurrence in *Bell*, one of the decisions in which then-Judge Kavanaugh addressed this issue. Judge Millett squarely asked this Court to halt the incursion on the Sixth Amendment under *Watts*: "For multiple reasons, the 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." *Bell*, 808 F.3d at 929 (Millett, J., concurring in the denial of rehearing en banc).

Judge Millett explained that the existing jurisprudence allowing sentencing based on acquitted conduct threatened the "foundational role of the jury" as "neutral arbiter between the defendant and a government bent on depriving him of his liberty." *Id.*

Judge Millett also challenged the argument that as long as a sentence does not exceed the statutory maximum, a defendant is only being sentenced for the crime he committed. *Id.* at 931. She explained that the argument "blinks reality when, as here, the sentence imposed so far exceeds the Guidelines range warranted for the crime of conviction itself that the sentence would likely be substantively unreasonable unless the acquitted conduct is punished too." *Id.* at 392. She concluded that this Court's post-*Watts* precedent "casts substantial doubt on the continuing vitality of that categorical rule [that a sentencing judge may consider acquitted conduct], at least when acquitted conduct causes a dramatic and otherwise substantively unreasonable increase in a sentence." *Id.*

In *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring specially), Judge Barkett of the Eleventh Circuit "specially" filed a concurring opinion to state emphatically that he was bound by precedent with which he disagreed to uphold the defendant-appellant's sentence. Judge Barkett explained, "I strongly believe this precedent is incorrect, and that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment." *Id.*

Judge Bright of the Eighth Circuit, like Judge Millett, has called for the Court to address the import of the Sixth Amendment in sentencing based on acquitted conduct. "We must end the pernicious practice of imprisoning a defendant for crimes that a jury found he did not commit. It is now incumbent on the Supreme Court to correct this injustice." *Papakee*, 573 F.3d at 577–78 (Bright, J., concurring); *see also United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring). In 2016, Judge Bright further called attention to the "[m]any federal judges [who] have expressed the view that the use of acquitted conduct to enhance a defendant's sentence should be deemed to violate the Sixth Amendment and the Due Process Clause of the Fifth Amendment." *United States v. Lasley*, 832 F.3d 910, 921 (8th Cir. 2016) (Bright, J., dissenting) (collecting cases), *cert. denied*, 137 S. Ct. 823, 196 L. Ed. 2d 608 (2007).

Scholars and practitioners also have denounced the practice of sentencing based on acquitted conduct as a violation of Sixth Amendment rights and have called for an end to the lower courts' overextension of *Watts*. *See, e.g.*, 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 (2016) (collecting comments) ("Several commentators have argued that the use of acquitted conduct cannot withstand Sixth Amendment scrutiny in the wake of the *Apprendi* line of cases."); Lucius T. Outlaw III, *Giving an Acquittal Its Due: Why a Quartet of Sixth Amendment Cases Means the End of United States v. Watts and Acquitted Conduct Sentencing,* 5 U. Denv. Crim. L. Rev 173, 194 (2015) ("For

too long, courts have rested on *Watts* to justify this invidious practice [of acquitted conduct sentencing]."); James J. Bilsborrow, *Sentencing Acquitted Conduct to the Post-Booker Dustbin*, 49 Wm. & Mary L. Rev. 289, 321 (2007) ("[A]s both a constitutional matter and a normative matter the consideration of acquitted conduct at sentencing should be prohibited and *Watts* should be explicitly overruled."); Erica K. Beutler, *A Look at the Use of Acquitted Conduct in Sentencing*, 88 J. Crim. L. & Criminology 809, 846 (1998) ("The use of acquitted conduct in sentencing raises matters of constitutional magnitude which the Court should have addressed."); Brief for Law Professor Douglas A. Berman as Amicus Curiae Supporting of Petitioners at 6, *Jones*, 135 S. Ct. 8 (No. 13-10026) (June 26, 2014) ("The Sixth Amendment's essential check on government powers is eviscerated if Guideline ranges can be significantly enhanced by jury-rejected facts.").

III. THE BROAD LANGUAGE OF 18 U.S.C. § 3661 AND THE SENTENCING GUIDELINES NOTWITHSTANDING, THE SIXTH AMENDMENT FORBIDS EXTENDING A SENTENCE BASED ON ACQUITTED CONDUCT.

Though 18 U.S.C. § 3661 and the Sentencing Guidelines grant broad discretion to sentencing judges, the Sixth Amendment nonetheless prohibits judges from using acquitted conduct to extend a criminal sentence.

A. The Sixth Amendment forbids sentencing based on conduct for which a defendant was acquitted.

Under this Court's post-*Apprendi,* Sixth Amendment jurisprudence, there can be no doubt that an enhanced sentence based on acquitted conduct violates the Sixth Amendment. In *Apprendi*, the Court held that any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are essential elements of a crime and that the Sixth Amendment guarantees defendants the right to have a jury find those facts beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. *Apprendi* made clear that a "fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." *Id.* The Court further expounded that principle in *Blakely v. Washington*, 542 U.S. 296 (2004), and *Alleyne v. United States*, 570 U.S. 99 (2013).

In *Blakely*, the petitioner pleaded guilty to a crime with a 53-month statutory maximum under state law, but the sentencing judge imposed a 90-month sentence after finding facts "neither admitted by petitioner nor found by a jury" to shift that maximum. *Id.* at 303. The Court applied *Apprendi's* rationale to reject the sentence, holding that under the Sixth Amendment, "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 542 U.S. at 313. The Court stated that its ruling rested upon "the need to give intelligible content to the right of jury trial." *Id.* at 305–06.

There are only two meaningful Sixth Amendment differences between *Blakely* and this case. First, a jury acquitted petitioner on the charge related to the allegation for which his sentence was extended. Pet. App. 4–6. In *Blakely*, the defendant pleaded guilty to one charge and admitted facts underlying it. 542 U.S. at 298–99. But it appears, based on a three-day hearing and thirty-two findings of facts made by the sentencing judge, that there was every reason to believe Blakely committed the other bad acts for which his sentence was enhanced. *See id*. at 300. Second, the *Blakely* sentencing judge used judicial fact finding to shift the state statutory maximum, whereas the sentencing judge in petitioner's case shifted the Federal Guidelines range. *Id*. at 300–01; Pet. App. 5–6.

In *Alleyne*, the Court held that a fact that increases a mandatory-minimum sentence is an essential element that jurors must find beyond a reasonable doubt. 570 U.S. 99, 114–15 (2013). The Court explained: "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. *It is no answer to say that the defendant could have received the same sentence with or without that fact*." *Id*. (emphasis added). The Court further illustrated: "[i]t is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical . . . . Similarly, because the fact of brandishing aggravates the legally prescribed range of allowable sentences, it constitutes an element of a separate, aggravated offense that

must be found by the jury, regardless of what sentence the defendant might have received if a different range had been applicable." *Id.* at 115.

The Court's illustrations bear directly upon the core issues of the petition. The facts that the judge relied upon in sentencing the petitioner—facts that the jury found not to be proven beyond a reasonable doubt—were used to inflate petitioner's prescribed sentencing range. But as this Court has made clear, the fact that petitioner "could have received the same sentence with or without that fact" is no remedy to the constitutional violation. *Id.*. The Court's post-*Apprendi* Sixth Amendment jurisprudence cannot be reconciled with the practice of judges relying upon acquitted conduct in sentencing.

B. The broad language of 18 U.S.C. § 3661 and the Sentencing Guidelines do not lie beyond the Sixth Amendment's purview.

In *Watts*, the majority began its analysis with the statutory language of 18 U.S.C. § 3661, which states that "[n]o limitation shall be placed on the information" a sentencing court can receive or consider to determine an appropriate sentence." *Watts*, 519 U.S. at 151 (quoting 18 U.S.C. § 3661). But the plain language of the statute must be applied consistent with constitutional protections. *See United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt

the latter."); *Jones v. United States*, 529 U.S. 848, 857 (2000) (same). To hold otherwise would allow the statute to stand above the Constitution.[4]

A judge's discretion and latitude to consider a broad range of factors as prescribed by § 3661 can be retained, but it cannot transgress a defendant's constitutional rights.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for a writ of certiorari, the Court should grant the petition.

[4] This Court has repeatedly subjected sentencing practices to constitutional scrutiny. *See, e.g.*, *Apprendi*, 530 U.S. at 490; *Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("[T]he sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."); *Townsend v. Burke*, 334 U.S. 736, 740–41 (1948), (finding sentencing on the basis of assumptions concerning a defendant's criminal record "which were materially untrue . . . . is inconsistent with due process of law").

Respectfully submitted,

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