No. __-_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ROGER CLAYTON WHITE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

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

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

Whether the right to jury trial as guaranteed by the Sixth Amendment is violated when the district court increases the defendant's guideline range on the basis of conduct of which the jury acquitted him.

Whether a sentence whose reasonableness on appeal necessarily depends on judge-found facts violate a defendant's right to jury trial under the Sixth Amendment.

Whether the Sentencing Reform Act prohibits a court from increasing a defendant's sentence on the basis of conduct of which the jury acquitted him.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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Petitioner Roger Clayton White respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the en banc United States Court of Appeals for the Sixth Circuit (Pet. App. A) is published at 551 F.3d 381. The transcript of the sentencing hearing in the district court is contained in the Appendix as E.

JURISDICTION

The judgment of the court of appeals was entered on December

24, 2008. Pet. App. A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

The relevant portions of the Sentencing Reform Act and the United States Sentencing Guidelines are reproduced at Pet. App. F and G.

STATEMENT OF THE CASE

Petitioner Roger Clayton White was convicted by a jury of one count of armed bank robbery and one count of possession of a firearm with an obliterated serial number. The jury acquitted petitioner of conspiracy to commit bank robbery charging as an overt act the discharge of a firearm inside the bank, conspiracy to use and carry a firearm in relation to a bank robbery, and two counts of aiding and abetting the use and discharge of a firearm. Notwithstanding the jury's finding of not guilty, and over petitioner's objection, the district court increased petitioner's sentence under the United States Sentencing Guidelines from eight years to 22 years based on its

finding by a preponderance of the evidence that the conduct involving use of a firearm, of which the jury acquitted petitioner, occurred. In a divided en banc decision, the Sixth Circuit rejected Mr. White's claim that the district court violated his right to jury trial under the Sixth Amendment.

A. Factual Background and Relevant Trial Evidence

On April 17, 2002, petitioner was the driver of the getaway car in the robbery of the Maysville Security Bank & Trust Company in Maysville, Kentucky. While petitioner waited in the car outside the bank, petitioner's brother and his brother's girlfriend entered the bank. Once inside, petitioner's brother discharged a gun and took over $100,000 in cash. Pet. App. B. After the robbery, petitioner drove the car during a high-speed chase by the police, during which one of the passengers discharged a firearm from the passenger side of the car. Pet. App. B. The chase ended "when White crashed his car into a road block, and the car burst into flames." Pet. App. B. At that point, petitioner's brother attempted to murder his girlfriend by firing the gun at her head, then turned the weapon on himself and died instantly. Petitioner was arrested without further incident.

Petitioner was named in six counts of an eight count superseding indictment returned on August 14, 2002, charging him with one count of conspiracy to commit armed bank robbery, in violation of 18 U.S.C. § 2113(d); one count of armed bank robbery, in violation of 18 U.S.C. § 2113(a); conspiracy to use and carry a firearm in relation to a bank robbery, in violation of 18 U.S.C. § 924; two counts of aiding and abetting the use and discharge of a firearm, in violation of 18 U.S.C. § 924 and 18 U.S.C. § 2; and one count of possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k).

Petitioner testified at trial that he was forced to participate in the robbery, and the jury was instructed on the defense of duress. On January 30, 2003, the jury returned a verdict of guilty on two counts: bank robbery and possession of a firearm with an obliterated serial number. The jury acquitted petitioner of every count charging use of a firearm in connection with the robbery. Pet. App. D.

B. Sentencing

The district court sentenced Mr. White on May 23, 2003. Based on the jury verdict and a finding that Mr. White perjured himself when he testified that he had been coerced into participating in the bank robbery as the getaway driver, the adjusted offense level under the United States Sentencing Guidelines was 28, with a range of 78 to 97 months in Criminal History Category I. Pet. App. A. However, finding

by a preponderance of the evidence that petitioner was also accountable for the conduct of which the jury had specifically acquitted him, the district court added seven levels for aiding in his brother's discharge of the gun inside the bank, under §§ 1B1.3(a)(1)(A) and 2B3.1(b)(2) of the Guidelines, and another three levels for aiding a passenger in the getaway car in firing "at least two gunshots at a pursuing police car," under §§ 1B1.3(a)(1)(B) and 3A1.2 of the Guidelines. Pet. App. A.

Expressly relying on these findings, the district court increased petitioner's offense level to 38, with a range of 235 to 293 months in Criminal History Category I, and sentenced petitioner to 264 months in prison, a sentence 167 months or approximately 14 years longer, than the top of the guideline range applicable to the facts found by the jury. Pet. App. A.

C. Proceedings on appeal

Petitioner challenged his conviction and sentence on appeal. On May 31, 2005, the Sixth Circuit affirmed the convictions, but remanded for resentencing in light of United States v. Booker. On September 22, 2005, the district court resentenced Petitioner to 264 months' incarceration. Pet. App. E.

Petitioner appealed, arguing that the district court had violated his Sixth Amendment right to jury trial by increasing his sentence

based on its findings of fact of the crimes of which the jury had acquitted him. On October 5, 2007, a panel of the Sixth Circuit affirmed the sentence, but noted that "two members of the panel agreed to an opinion reversing the defendant's 14 year upward adjustment based specifically on conduct for which the jury had acquitted the defendant." Pet. App. C. However, since another panel had upheld the use of acquitted conduct while petitioner's appeal was pending, the court could not issue its previously agreed-upon opinion. The panel stated that it "strongly recommends that counsel for the defendant file a petition for en banc rehearing on the question of whether the continuing use of acquitted conduct as a sentencing enhancement violates United States v. Booker." Pet. App. C.

Petitioner sought rehearing en banc, which was granted. Before the en banc court, petitioner argued that the use of acquitted conduct to calculate his guideline range and to impose a sentence of 264 months within that range violated his Sixth Amendment right to jury trial by depriving him of his right to have a jury confirm or reject every accusation and his right to a sentence wholly authorized by the jury's verdict, and constituted an as-applied Sixth Amendment violation. He further argued that the court could avoid these grave constitutional

questions by interpreting the Sentencing Reform Act not to authorize the use of acquitted conduct to calculate the guideline range.[1]

On December 24, 2008, a divided en banc court, voting nine to six, upheld the use of acquitted conduct to calculate the guideline range. United States v. White, 551 F.3d 381 (6th Cir. 2008) (en banc). The majority rejected petitioner's contentions, holding that the use of acquitted conduct, found by a preponderance of the evidence, did not violate the Sixth Amendment. Judge Merritt, joined by five other judges, wrote in dissent that the use of acquitted conduct violates the Sixth Amendment jury trial right and also presents an "as-applied" violation. The dissent stated:

> White's sentence is arguably even more problematic than the sentence in [Justice Scalia's] hypothetical because the jury actually acquitted White of the conduct that led to more than half of his sentence, but the Sixth Amendment violation is identical. White's 22-year sentence is made possible only by reference to judge-found facts about the discharge of firearms during the crime. Absent those facts, the recommended Guidelines range would be 78 to 97 months.

Pet. App. A.

REASONS FOR GRANTING THE PETITION

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[1]Petitioner also argued that his right to proof beyond a reasonable doubt under the Due Process clause was violated. He does not renew that argument here.

The question whether a district court may rely on acquitted conduct in calculating the guideline range under the United States Sentencing Commission's Guidelines Manual has not been decided by this Court. Nevertheless, the courts of appeals have become entrenched in the mistaken belief that this Court's decision in Watts prevents them from holding that a district court is prohibited from basing a defendant's guideline range on conduct of which a jury acquitted him. At the same time, the courts of appeals are deeply divided within their ranks, and several district courts have declined to consider acquitted conduct because it eviscerates the jury's work. Only this Court can correct the mistaken view in the courts of appeals that Watts allows the consideration of acquitted conduct, and bring order to the lower courts.

The Sixth Circuit's holding that the district court may consider acquitted conduct in calculating the guideline range is wrong. The use of acquitted crimes to calculate petitioner's guideline range deprived him of his right to have a jury confirm or reject every accusation, and of his right to a sentence wholly authorized by the jury's verdict. When a judge uses acquitted conduct to calculate the guideline range, he necessarily finds facts beyond the elements of the

offense of conviction, and "[w]hether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence." Blakely v. Washington, 542 U.S. 296, 305 n.8 (2004) (emphasis in original); see also Cunningham v. California, 549 U.S. 270, 290 (2007). The overwhelming majority of states do not use acquitted conduct in sentencing, even in indeterminate systems. And though some states allow the practice, no state system requires it. The federal system stands alone in doing so.

It is no answer that the federal sentencing guidelines are now "advisory." Factfinding under the guidelines remains determinate, and there will inevitably be sentences whose legitimacy turns on the existence of facts that were not found by the jury beyond a reasonable doubt. This is just such a case. Petitioner's sentence was increased by 14 years based on conduct of which the jury acquitted him. That sentence could not be upheld as substantively reasonable absent consideration of those facts, as the six dissenting judges of the en banc court below concluded.

This Court can avoid the serious Sixth Amendment concerns presented by this case by holding that the plain language of the Sentencing Reform Act demonstrates that Congress did not intend

that the guideline range for the offense of conviction would be increased based on separate offenses of which the defendant was acquitted. No language in the Act allows, much less requires, acquitted conduct to be used in calculating the guideline range.

Finally, this case presents a particularly good vehicle for considering this question of exceptional importance, affecting hundreds of defendants. Based on the conduct of which petitioner was acquitted, the district court added ten levels to the guideline offense level that applied to his offenses of conviction, increasing his guideline range from 78 to 97 months to 253 to 293 months, and sentencing him within that range to an additional fourteen years.

I. THIS COURT HAS NOT DECIDED, BUT SHOULD NOW DECIDE, WHETHER THE RIGHT TO TRIAL BY JURY PROHIBITS SENTENCING COURTS FROM RELYING ON ACQUITTED CONDUCT TO CALCULATE THE GUIDELINE RANGE.

In Witte v. United States, 515 U.S. 389 (1995), this Court held that the Double Jeopardy Clause does not bar prosecution for conduct that had been the basis for a sentencing enhancement in a separate case. Two years later, without full briefing or argument, the Court held in Watts that the Double Jeopardy Clause does not prohibit a sentencing court from considering acquitted conduct to calculate a defendant's guideline range. Watts v. United States, 519 U.S. 148, 156 (1997). The

holdings in both Witte and Watts were premised on this Court's decision in Williams v. New York, 337 U.S. 241 (1949), now codified at 18 U.S.C. § 3661, that "[n]o limitation shall be placed on the information . . . which a court of the United States may receive and consider." According to the Watts majority at the time, "[t]he Guidelines did not alter this aspect of the sentencing court's discretion." 519 U.S. at 151-52.

The Court did not address in Watts whether relying on acquitted conduct violated the Sixth Amendment right to jury trial. See United States v. Booker, 543 U.S. 220, 240 (2005). At the same time, Justice Breyer recognized that the Guidelines' treatment of acquitted conduct is in conflict with the jury trial right. See Watts, 519 U.S. at 159 (suggesting that the Commission revisit the issue "[g]iven the role that juries and acquittals play in our system") (Breyer, J., concurring). Justice Kennedy stated in dissent that "to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal." Id. (Kennedy, J., dissenting).

The majority in Booker emphasized that in neither Watts nor Witte "was there any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the

Sixth Amendment," that "Watts, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument," and that "[i]t is unsurprising that we failed to consider fully the issues presented to us in these cases." Booker, 543 U.S. at 240 & n.4.

Since Watts was decided, the Court has issued a series of opinions emphasizing the exceptional importance of the jury's structural role as it relates to punishment, and in the process has reshaped our conception of the federal sentencing system in place since 1987. See Cunningham v. California, 549 U.S. 270 (2007); Booker, 543 U.S. at 220; Blakely v. Washington, 542 U.S. 296 (2004); Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000); see also Jones v. United States, 526 U.S. 227 (1999). As explained in these cases, the Sixth Amendment guarantees a sentence that is wholly authorized by the jury's verdict. Cunningham, 549 U.S. at 290 ("If the jury's verdict alone does not authorize the sentence . . . the Sixth Amendment requirement is not satisfied."); Blakely, 542 U.S. at 306 (Apprendi "ensures that the judge's authority to sentence derives wholly from the jury's verdict"); Apprendi, 530 U.S. at 483 n.10 ("The judge's role in sentencing is

constrained at its outer limits by the facts alleged in the indictment and found by the jury."). As a result, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the statutory maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Booker, 543 U.S. at 244.

The Court has still not addressed whether the right to a sentence wholly authorized by the jury verdict prohibits a sentencing court from finding facts the jury declined to find and using those facts to calculate the guideline range. Booker, 543 U.S. at 240 (recognizing that it has not addressed whether the use of acquitted conduct to calculate the guideline range violates the Sixth Amendment).

II. THIS COURT SHOULD DECIDE THE ISSUE BECAUSE THE COURTS OF APPEALS ARE ENTRENCHED IN THE MISTAKEN BELIEF THAT WATTS PREVENTS THEM FROM HOLDING THAT THE SIXTH AMENDMENT PROHIBITS THE USE OF ACQUITTED CONDUCT, AND THE LOWER COURTS ARE DEEPLY DIVIDED WITHIN THEIR RANKS.

1. The very premise of Watts has since been rejected by this Court. In Blakely, the Court held that Williams v. New York (now codified at 18 U.S.C. § 3661), provided no support for judicial factfinding in a determinate guideline system because that case "involved an indeterminate-sentencing regime that allowed a judge (but did not

compel him) to rely on facts outside the trial record," and the judge could "giv[e] no reason at all" for the sentence imposed. Blakely, 542 U.S. at 305 (internal citations and quotation marks omitted). The current federal system is not an indeterminate sentencing regime. Sentencing courts are required to correctly calculate the guideline range as directed by the Guidelines Manual, to use that range as the starting point and initial benchmark, and to explain any deviation from it. Gall v. United States, 128 S. Ct. 586, 594, 596-97 (2007). The courts of appeals may, and the Sixth Circuit does, presume that range to be reasonable. Rita v. United States, 551 U.S. 338 (2007); United States v. Vonner, 516 F.3d 382, 389-90 (6th Cir. 2008) (en banc).

Although Watts did not hold that consideration of acquitted conduct in sentencing is permissible under the Sixth Amendment, and although Blakely rejected its premise, the courts of appeals have considered themselves bound by Watts and have uniformly held that a sentencing court may rely on acquitted conduct to calculate the guideline range without violating the Sixth Amendment. See, e.g., United States v. White, 551 F.3d 381, 386 (6th Cir. 2008) (en banc); United States v. Smith, 261 Fed. Appx. 921 (8th Cir. 2008); United States v. Mercado, 474 F.3d 654, 657 (9th Cir. 2007); United States v. Dorcely, 454

F.3d 366, 371 (D.C. Cir. 2006); United States v. Gobbi, 471 F.3d 302, 314 (1st Cir. 2006); United States v. Jones, 194 Fed Appx. 196, 197-98 (5th Cir. 2006); United States v. Hayward, 177 Fed. Appx. 214, 215 (3d Cir. 2006); United States v. Ashworth, 139 Fed. Appx. 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); United States v. McIntosh, 232 Fed Appx. 752, 757 (10th Cir. 2007) (applying United States v. Magallanez, 408 F.3d 672, 684-85 (10th Cir. 2005)).[2] But, as recognized by the dissenting judges in the court below, "the [] simple and single-minded reliance on Watts as authority for enhancements based on acquitted conduct is obviously a mistake." See White, 551 F.3d at 392 (Merritt, J., dissenting).

While this mistake has become entrenched in the law, there is deep division within the courts regarding the use of acquitted conduct at sentencing. For example, Judge Barkett of the Eleventh Circuit Court of Appeals recognized that "the holding of Watts, explicitly disavowed by the Supreme Court as a matter of Sixth Amendment law, has no bearing on [sentence enhancements based on acquitted

[2] Only the Court of Appeals for the Eleventh Circuit has recognized that Watts does not control the question for purposes of the Sixth Amendment, but nevertheless held that the Sixth Amendment does not prohibit the sentencing court from relying on acquitted conduct. United States v. Duncan, 400 F.3d 1297, 1304-5 & n.7 (11th Cir. 2005).

conduct] in light of the Court's more recent and relevant rulings in Apprendi, Blakely, and Booker," but was bound by Circuit precedent to concur in the court's judgment that the Due Process Clause does not prohibit the use of acquitted conduct at sentencing. United States v. Faust, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring). In her view, however, "it perverts our system of justice to allow a defendant to suffer punishment for a criminal charge for which he or she was acquitted." Id. at 1350 (Barkett, J., concurring). She described the practice as "cruel and perverse," id. at 1353, "trivializ[ing] 'legal guilt' or 'legal innocence,' reducing the jury's role to the relative importance of low-level gatekeeper." Id. at 1350 (quotation marks omitted).

In the Ninth Circuit, Judge Fletcher wrote that "[d]espite [the] clear limitation of Watts' holding, the majority here applies Watts to the Sixth Amendment issue before us, ignoring Booker's requirement that the jury's verdict alone must authorize a defendant's sentence. This application defies logic." United States v. Mercado, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting). In her opinion, "[t]o hold that any sentence beneath the statutory maximum is acceptable is not enough." Id. at 664 (Fletcher, J. dissenting).

Writing in concurrence for the en banc court for the Third Circuit, Judge Ambro wrote that, although he believed the court to be bound by Watts, the better rule would be that:

> constitutional protections apply not only to those facts that authorize the "statutory maximum" (as phrased by Apprendi), but to every fact (save prior convictions) identified by the law itself as deserving of additional punishment, no matter what that fact may be called. Only in this way can the principles of Apprendi – followed through in Blakely, Booker, and, most recently, Cunningham – be fully respected.

United States v. Grier, 475 F.3d 556, 574 (3d Cir.) (en banc) (Ambro, J., concurring) (considering the question under the Due Process Clause of the Fifth Amendment), cert. denied, 128 S. Ct. 106 (2007). "In effect," he wrote, "we have a shadow criminal code under which, for certain suspected offenses, a defendant receives few of the trial protections mandated by the Constitution." Writing in dissent in the same case, Judge McKee, joined by Judge Sloviter, described the majority's decision as without precedent or persuasive rationale, and "a regrettable erosion of a criminal defendant's constitutional right to due process." Id. at 600 (McKee, J., dissenting).

In the Eighth Circuit, Judge Bright described as "uniquely malevolent" "the unfairness perpetuated by the use of 'acquitted conduct' at sentencing in federal courts." United States v. Canania, 532

F.3d 764, 776 (8th Cir.) (Bright, J., concurring), cert. denied, 129 S. Ct. 609, 2008 U.S. LEXIS 8424 (2008). Judge Bright only "reluctantly" concurred under binding Circuit precedent, and expressed his view that "[p]ermitting a judge to impose a sentence that reflects conduct the jury expressly disavowed through a finding of 'not guilty' amounts to more than mere second-guessing the jury – it entirely trivializes its principal fact-finding function. . . . [and] deprives a defendant of adequate notice as to his or her possible sentence."). Id. (Bright, J., concurring). He "urge[d] the Supreme Court to re-examine [the use of acquitted conduct to enhance a sentence] forthwith." Id.

In the en banc court below, Judge Merritt, joined by five other judges, wrote in dissent that the current system of permitting facts that were rejected by the jury to serve as the basis for the guideline calculation operates as an "incremental degradation" of the jury right, "sever[ing] the 'invariable linkage of punishment with crime'" and "eviscerat[ing] the jury's longstanding power of mitigation, a close relative of jury nullification." White, 551 F.3d at 393-94 (Merritt, J., dissenting) (quoting Apprendi v. New Jersey, 530 U.S. 466, 478-79 (2000)).

With the decision of the court below, all the courts of appeals have now considered and rejected the claim that the Sixth Amendment

prohibits the use of acquitted conduct at sentencing. They have done so, however, under the mistaken belief that Watts requires this result, and with deep misgivings withing their ranks about its constitutionality.

2. Several district courts have refused to punish a defendant for conduct of which he was acquitted. For example, Judge Gertner of the District of Massachusetts found that "it makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury and also conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing." United States v. Pimental, 367 F. Supp. 2d 143, 150 (D. Mass 2005) (emphasis in original) (internal citation omitted).

Judge Marbley of the Southern District of Ohio concluded that "considering acquitted conduct would disregard completely the jury's role in determining guilt and innocence." United States v. Coleman, 370 F. Supp. 2d 661, 672 (S.D. Ohio 2005) ("In sum, the jury explicitly did not authorize sentencing pursuant to fraudulent conduct, and this Court will neither marginalize that finding nor allow the government another opportunity to make a failed case."), vacated on other grounds sub

nom. United States v. Kaminski, 501 F.3d 655 (6th Cir. 2007).

Judge Hellerstein of the Southern District of New York declined to consider acquitted conduct out of respect for the jury's verdict. United States v. Carvajal, No. 04-cr-222, 2005 U.S. Dist. LEXIS 3076 (S.D.N.Y. Feb. 17, 2005), aff'd sub nom. United States v. Acosta, 502 F.3d 54 (2d Cir.), cert. denied, 128 S. Ct. 1097 (2008).

Only this Court can correct the now entrenched error of the courts of appeals and bring order to the discord currently reigning in the lower courts.

III. THE SIXTH CIRCUIT'S DECISION IS INCORRECT.

A. THE USE OF ACQUITTED CONDUCT TO CALCULATE THE GUIDELINE RANGE EVISCERATES THE JURY'S ROLE AS THE "GREAT BULWARK" AGAINST THE POWER OF THE STATE.

1. The Framers guaranteed an absolute right to trial by jury in both the original Constitution and the Bill of Rights. See U.S. Const. Art. III, § 2, cl. 3; U.S. Const. amend. VI. They intended the jury to "stand between the individual and the power of the government." Booker, 543 U.S. at 237. They "knew from history and experience that it was necessary to protect against unfounded criminal charges brought

to eliminate enemies and against judges too responsive to the voice of higher authority." Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968). They "understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases." Booker, 543 U.S. at 238-39 (quoting The Federalist No. 83, p. 499 ©. Rossiter ed.1961) (A. Hamilton)). They "carried this concern from England, in which the right to a jury trial had been enshrined since the Magna Carta." Id. at 239.

Colonial juries played a crucial role in resisting English authority before the Revolution, acquitting and mitigating the fixed punishments then in effect in politically motivated trials. "This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part." Jones v. United States, 526 U.S. 227, 245 (1999) (citing 4 W. Blackstone, Commentaries on the Laws of England 238-39 (1769)). Measures to bar the right to jury trial and to limit opportunities for jury nullification were attempted, resisted, and eventually unsuccessful, leaving juries in control of both

the factfinding role and the ultimate verdict by applying law to fact. Id. at 247-48.

In this context, the Framers intended the right to jury trial as both an individual right of persons accused of crime, and a structural allocation of political power to the citizenry. To function as intended, the jury was to "confirm the truth of every accusation" and "draw the ultimate conclusion of guilt or innocence," United States v. Gaudin, 515 U.S. 506, 510, 514 (1995), and punishment was to be derived from the jury verdict alone. Blakely, 542 U.S. at 306; see also Apprendi, 530 U.S. at 479-80 & n.5. Only then could the jury "exercise the control that the Framers intended" and "the people's ultimate control . . . in the judiciary" be assured. Blakely, 542 U.S. at 306. "The jury could not function as the circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish." Id. at 306-07 (emphasis in original).

2. The use of acquitted crimes to calculate the guideline range deprives a defendant of his right to have a jury confirm or reject every accusation. All nine justices in Booker agreed that, at least as to

elements of crimes of which the defendant is accused, the jury must confirm the truth of every accusation. 543 U.S. at 239; id. at 327-28 (Rehnquist, C.J., dissenting). Indeed, the Framers could not have intended to guard against governmental oppression through criminal juries with ultimate power to confirm or reject the truth of every accusation, to acquit even in the face of guilt, and to partially acquit to lessen unduly harsh punishment, only to allow an administrative agency, prosecutor and judge to then nullify the jury's acquittal. Doing so eviscerates the "fundamental reservation of power" in the jury and prevents it from "exercis[ing] the control that the Framers intended." Blakely, 542 U.S. at 306. And doing so by ignoring the "[e]qually well founded ...companion right to ... proof beyond a reasonable doubt" is no answer. Apprendi, 530 U.S. at 478. Like other "'inroads upon the sacred bulwark of the nation,'" the use of acquitted crimes to calculate the guideline range is "'fundamentally opposite to the spirit of our constitution.'" Booker, 543 U.S. at 244 (quoting 4 Blackstone 343-44).

3. The use of acquitted crimes to calculate the guideline range deprives a defendant of his right to a sentence wholly authorized by the jury's verdict. The Sixth Amendment guarantees a sentence that is wholly authorized by the jury's verdict. See Cunningham, 549 U.S. at 290 ("If the jury's verdict alone does not authorize the sentence . . . the Sixth Amendment requirement is not satisfied."); Blakely, 542 U.S. at

306 (Apprendi "ensures that the judge's authority to sentence derives wholly from the jury's verdict"); Apprendi, 530 U.S. at 483 n.10 ("The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury."). When a court uses acquitted crimes to calculate a guideline range, the court "is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved," and "they are facts comprising different crimes, each in a different count." United States v. Pimental, 357 F. Supp. 2d 143, 152-53 (D. Mass. 2005).

4. The common law heritage underlying the jury's absolute power over its own verdict is reflected in the fact that the overwhelming majority of states do not use acquitted conduct int sentencing, see Phyllis J. Newton, Building Bridges Between the Federal and State Sentencing Commissions, 8 Fed. Sent'g Rep. 68, 69 (1995), even in indeterminate systems. See Nora V. Demleitner et al., Sentencing Law and Policy 284 (2d ed. 2007) ("Although indeterminate sentencing systems typically allow judges to consider prior misconduct at sentencing, many states make an exception for acquitted conduct."). And though some states allow the practice, no state system requires it, "much less mandate an increased presumptive sentencing range because of acquitted conduct," as the federal system does. See White, 551 F.3d at 394 & n.5 (Merritt, J., dissenting).

John Steer, General Counsel of the United States Sentencing Commission at its inception and recently retired Vice Chair, acknowledges that "the federal guidelines [are] alone among sentencing reform efforts in using acquitted conduct to construct the guideline range," and now believes that acquitted conduct should be excluded from the guideline calculation. See John R. Steer, An Interview with John R. Steer: Former Vice Chair of the U.S. Sentencing Commission, 32 Champion 40 (Sept. 2008). The American Law Institute and the American Bar Association also formally oppose the use of acquitted conduct at sentencing. See ALI, Model Penal Code: Sentencing, Tentative Draft No. 1, § 6B.06 (approved May 16, 2007); ABA Standards for Criminal Justice, Sentencing, § 18-3.6 (3d ed. 1994).

B. A SENTENCE THAT DEPENDS FOR ITS LEGALITY ON JUDGE-FOUND FACTS VIOLATES THE SIXTH AMENDMENT.

That the Court made the federal sentencing guidelines "advisory" in Booker, 543 U.S. at 245-46, does not solve the Sixth Amendment problem. Factfinding under the guidelines remains determinate. The "district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," and "to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." Gall v. United States, 128 S. Ct. 586, 596 (2007). When the judge "decides that an outside-Guidelines sentence

is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance," must give "a more significant justification [for] a major departure . . . than a minor one," and "must adequately explain the chosen sentence." Id. at 597.

In other words, to "calculate" the guideline range "correctly," the judge must, according to the Guidelines Manual, re-examine facts of crimes rejected by the jury, and once the judge finds those facts, must assign the number of points the Guidelines require. The district court in this case considered acquitted conduct in calculating petitioner's guideline range under USSG § 1B1.3(1)(A) & (B) (providing that the guideline range is to be determined on the basis of "all acts and omissions . . . aided [and] abetted . . . by the defendant," and "in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity"). See also, e.g., USSG § 1B1.3(a)(2) (for "offenses of a character for which § 3D1.2(d) would require grouping of multiple counts," offense level determined on the basis of "all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan"); id., comment. (n.3) ("this provision does not require the defendant, in fact, to have been convicted of multiple counts"); id., comment. (backg'd)

("Relying on the entire range of conduct, regardless of the number of counts . . . on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses.").

Although the guideline range is "advisory," the factfinding required to "calculate" it is determinate, as the judge has no discretion not to "calculate" it "correctly," i.e., as the Guideline Manual requires. The judge must then use this "calculation" as the "starting point and the initial benchmark," and must justify any "deviation" from it with a sufficiently compelling reason. This factfinding necessarily affects sentence length because the guideline range is the only factor under § 3553(a) affixed with a number and that serves as the "benchmark" from which both sentencing and appellate review proceed. Gall, at 594-96 (appeals courts review "the degree of variance" and "the extent of a deviation from the Guidelines"); Nelson v. United States, 129 S. Ct. 890, 891-92 (2009) ("[T]he sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter."). By contrast, the "indeterminate-sentencing regime upheld in Williams . . . allowed a judge (but did not compel him)

to rely on [extra-record] facts," or "no reason at all." Blakely, 542 U.S. at 305.

When a judge uses acquitted conduct to calculate the guideline range, he necessarily finds facts beyond the elements of the offense of conviction, and "[w]hether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence." Blakely, 542 U.S. at 305 n.8 (emphasis in original); see also Cunningham, 549 U.S. at 281, 290 ("[U]nder the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge.").

While an appellate court may presume a within-Guidelines sentence to be reasonable, Rita v. United States, 551 U.S. 338, 127 S. Ct. 2456, 2462-63 (2007), a sentence that would not be upheld as substantively reasonable but for the consideration of facts not found by the jury violates the Sixth Amendment. See id., 551 U.S. at ___, 127 S. Ct. at 2478 (Scalia, J., concurring); id., 551 U.S. at ___, 127 S. Ct. at 2473 (Stevens, J., concurring). In Gall, Justice Scalia emphasized that "the Court has not foreclosed as-applied constitutional challenges to sentences" and that "[t]he door . . . remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of

a fact found by the sentencing judge and not by the jury." Gall, 128 S. Ct. at 603 (Scalia, J., concurring).

In their concurring opinion in Rita, Justices Scalia and Thomas explained how review for substantive reasonableness on appeal would inevitably produce sentences whose legitimacy turns on the existence of certain facts that were neither admitted by the defendant nor proved to a jury beyond a reasonable doubt. As illustrated by a hypothetical, such facts "are not merely facts that the judge finds relevant in exercising his discretion; they are the legally essential predicate" for the imposition of the sentence. Rita, 551 U.S. at ___, 127 S. Ct. at 2477 (Scalia, J., and Thomas, J., concurring).

This is the very case foretold by Justices Scalia and Thomas, made even more problematic because the jury actually acquitted petitioner of the conduct used to increase his term of imprisonment by fourteen years. As explained by the dissenting judges below:

> White's 22-year sentence is made possible only by reference to judge-found facts about the discharge of the firearms during the crime. Absent those facts, the recommended sentence would be 78 to 97 months. Against that backdrop, a 264-month sentence would certainly be reversed as unreasonable.

White, 551 F.3d at 390 (Merritt, J., dissenting).

Justice Scalia has urged this Court to apply Booker forthrightly when the reasonableness of the sentence depends on judge-found facts. In United States v. Conatser, 514 F.3d 508 (6th Cir.), cert. denied sub nom.

Marlowe v. United States, 129 S. Ct. 450, 451 (2008), a panel of the court below upheld a sentence that depended solely on judge-found facts. In dissenting from denial of certiorari, Justice Scalia described the outcome as "fall[ing] short of what we have held the right to trial by jury demands: 'Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.'" Marlowe v. United States, 129 S. Ct. 450, 451 (2008) (Scalia, J., dissenting from denial of certiorari) (quoting Booker, 543 U.S. at 244).

In this case, the 22-year sentence imposed depends for its legality on the very facts rejected by the jury. The six judges of the en banc court below who addressed this question concluded that the sentence could not be upheld as substantively reasonable absent consideration of those facts. See White, 551 F.3d at 390 (Merritt, J., dissenting). The majority failed to address this issue at all. This Court should decide that the sentence violates the Sixth Amendment.

C. THE CONSTITUTIONAL QUESTION CAN BE AVOIDED BECAUSE THE PLAIN LANGUAGE OF THE SENTENCING REFORM ACT DOES NOT AUTHORIZE CONSIDERATION OF ACQUITTED CONDUCT.

This Court can avoid the serious Sixth Amendment concerns presented by this case by holding that the plain language of the Sentencing Reform Act (the Act) demonstrates that Congress did not

intend that guideline ranges for a given offense of conviction would be increased based on separate offenses of which a defendant was acquitted. No language in the Act allows, much less requires, the use of acquitted conduct to calculate the guideline range.

Congress directed the Sentencing Commission, when formulating the Guidelines, to take into account "the circumstances under which the offense was committed" and the "nature and degree of the harm caused by the *offense*," and to "avoid[] unwarranted sentencing disparities among defendants . . . who have been found guilty of similar criminal conduct," 28 U.S.C. §§ 994(c)(2), (3), 991(b)(1)(B) (emphasis supplied). It directed the courts to "impose a sentence sufficient, but not greater than necessary . . . to reflect the seriousness of the offense" and "to provide just punishment for the offense," and in doing so to consider the "nature and circumstances of the offense," and "the need to avoid unwarranted sentence disparities among defendants . . . who have been found guilty of similar conduct," 18 U.S.C. § 3553(a)(1), (2)(A), (6) (emphasis supplied).

The term "offense" was left undefined in the Act, and is thus "give[n] its ordinary meaning." United States v. Santos, 128 S. Ct. 2020, 2024 (2008). A "straightforward reading" of the word "offense" means the "offense of conviction." Hughey v. United States, 495 U.S. 411, 416 (1990).

Despite the plain language and its ordinary meaning, the Sentencing Commission has expanded the meaning of "offense" to incorporate uncharged, dismissed, and acquitted offenses beyond the "offense of conviction." See USSG § 1B1.1, comment. (n.1(H)) (defining the term "offense" to mean the offense of conviction plus all relevant conduct under § 1B1.3). In doing so, the Commission exceeded its authority. See United States v. LaBonte, 520 U.S. 751, 757 (1997) (commentary "at odds" with plain statutory language "must give way"); Stinson v. United States, 508 U.S. 36, 45, 47 (1993) (commentary that is inconsistent with a statute is invalid).

Significantly, in the only reference in the Act to punishment for a conspiracy and its objects (analogous to "jointly undertaken criminal activity" in USSG § 1B1.3(a)(1)), Congress directed the Commission to "insure that the guidelines" reflect the "general inappropriateness of imposing consecutive terms of imprisonment for conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation." 28 U.S.C. § 994(l)(2). Congress could not have intended that it would be generally inappropriate to impose consecutive sentences for a conviction for conspiracy and a conviction for its object, but to intend at the same time that a defendant convicted only of a substantive offense be sentenced to the equivalent of consecutive sentences for an acquitted

conspiracy and its various objects committed, or allegedly committed, by others.[3]

Title 18 U.S.C. § 3661 provides simply that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Section 3661 does not say that acquitted conduct may or must be used in calculating a determinate guideline range. Further, the Sentencing Commission has interpreted this statute as applying only "[i]n determining the sentence within the guideline range, or whether a departure is warranted." USSG § 1B1.4. This Court has recognized that the principle reflected in § 3661 is not applicable to judicial factfinding to calculate a determinate guideline range. See Blakely v. Washington, 542 U.S. 296, 305 (2004).

[3] Likewise, in the only reference in the Act to offenses in the "same course of conduct" (the phrase used in USSG § 1B1.3(a)(2)), Congress directed the Commission to "insure that the guidelines" reflect the "appropriateness of imposing an incremental penalty for each offense" when the "defendant is convicted of . . . multiple offenses committed in the same course of conduct" or "multiple offenses committed at different times." 28 U.S.C. § 994(l)(1) (emphasis supplied). Congress could not have intended such incremental punishment for multiple offenses of conviction, but at the same time the equivalent of consecutive sentences for uncharged and acquitted offenses. Although the Court summarily rejected this argument in Watts, see 519 U.S. at 154; id. at 168-69 (Stevens, J., dissenting), the significance of this statutory provision has not been decided in the context of the Sixth Amendment, and the Court should reconsider it in any event with full briefing and argument.

Finally, Congress directed the Commission to establish sentencing policies and practices that "assure the meeting of the purposes of sentencing," including "the need . . . to promote respect for the law." 28 U.S.C. § 991(b)(1)(A); 18 U.S.C. § 3553(a)(2)(A). Congress was concerned about respect for law from both the public's and the defendant's perspective. In discussing that concern, as elsewhere, the Senate Report tied respect for law to the offense of which the defendant was convicted:

> From the defendant's standpoint the sentence should not be unreasonably harsh under all the circumstances of the case and should not differ substantially from the sentence given to another similarly situated defendant convicted of a similar offense under similar circumstances.

S. Rep. No. 98-225, at 75-76 (1983).

Punishing a defendant for acquitted crimes undermines respect for law. This Court has called it an "absurd result" that a person could be sentenced "for committing murder, even if the jury convicted him only of possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene." See Blakely v. Washington, 542 U.S. at 306. That is precisely what occurred here. And in the case of acquitted crimes, the jury's verdict is, as a matter of perception and for all practical purposes, overturned. See, e.g., United States v. Ibanga, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) ("[M]ost people would be shocked to find out that even United States citizens can be

(and routinely are) punished for crimes of which they were acquitted."), rev'd, 2008 U.S. App. LEXIS 6980 (4th Cir. Apr. 1, 2008); United States v. Coleman, 370 F. Supp. 2d 661, 668 (S.D. Ohio 2005) ("A layperson would undoubtedly be revolted by the idea that, for example, a person's sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he has been acquitted.").

This erodes the moral authority of the criminal justice system, is directly contrary to what ordinary citizens take for granted, and promotes contempt for law, as many courts and judges have noted. In a letter to a district court judge published in The Washington Times on June 29, 2008, a juror complained bitterly that the defendants were later sentenced based on charges of which the jury had acquitted them:

> It seems to me a tragedy that one is asked to serve on a jury, serves, but then finds their work may not be given the credit it deserves. We, the jury, all took our charge seriously. We virtually gave up our private lives to devote our time to the cause of justice, and it is a very noble cause as you know, sir. . . . What does it say to our contribution as jurors when we see our verdicts, in my personal view, not given their proper weight. It appears to me that the defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the [prosecutor's] office would have liked them to have been found guilty. Had they shown us hard evidence, that might have been the outcome, but that was not the case.

See Jim McElhatton, A $600 drug deal, 40 years in prison, The Washington Times, June 29, 2008, at M04;[4] see Canania, 532 F.3d 764, 778 & n.4 (Bright, J., concurring) (quoting the letter from Juror # 6 as evidence that the use of acquitted conduct is perceived as unfair and "wonder[ing] what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing"); see also United States v. Settles, 530 F.3d 920, 923-24 (D.C. Cir. 2008) ("[W]e understand why defendants find it unfair [and] [m]any judges and commentators have similarly argued that using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system."), cert. denied, 2009 U.S. LEXIS 620 (Jan. 21, 2009).

Even if the Act were susceptible to a construction contemplating the use of acquitted conduct to calculate the guideline range, this Court should not adopt it. Where 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, the Court's duty is to adopt the latter. Jones v. United States, 526 U.S. 227, 239 (1999). The avoidance canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative

[4] The letter is available at http://video1.washingtontimes.com/video/docs/letter.pdf.

which raises serious constitutional doubts." Martinez v. Clark, 543 U.S. 371, 381 (2005).

Applying the avoidance canon to the Sentencing Reform Act, the Court should presume that Congress did not intend acquitted crimes to be used in calculating the guideline range. This is especially so where an agency, here, the Sentencing Commission, adopts an interpretation in the "absence of an affirmative intention of Congress clearly expressed." See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-501, 504, 507 (1979); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); BE&K Constr. Co. v. NLRB, 536 U.S. 516, 537 (2002).

This Court in Rita recognized the potential application of the doctrine of constitutional avoidance as it debated whether the canon should be applied in that case. Rita's sentence did not qualify for an as-applied Sixth Amendment challenge, though other cases described by Justice Scalia would. See Rita v. United States, 551 U.S. 338, 127 S. Ct. 2456, 2477-78 (2007); id., 551 U.S. 338, 127 S. Ct. at 2473 (Stevens, J., concurring); id., 551 U.S. 338, 127 S. Ct. at 2478-79 & n.4 (Scalia, J., concurring). This is just the case foretold by Justice Scalia.

IV. THIS CASE PRESENTS A PARTICULARLY GOOD VEHICLE FOR CONSIDERING WHETHER DISTRICT COURTS CAN CONSIDER ACQUITTED CONDUCT IN CALCULATING THE GUIDELINE RANGE.

The exceptionally important question whether the Sixth Amendment prohibits a court from using acquitted conduct to increase a sentence remains an open question after Watts and Booker. The courts of appeals are entrenched in the mistaken belief that Watts prevents them from deciding the question. At the same time, they are deeply divided within their ranks. The question is not only ripe for review by this Court, but is "of recurrent importance in hundreds of sentencing proceedings in the federal criminal system." Watts, 519 U.S. at 170 (Kennedy, J., dissenting). The federal sentencing system stands alone in requiring judges to increase guideline ranges based on acquitted conduct.

This case presents a particularly good vehicle for addressing the questions presented. Petitioner was convicted of bank robbery and possession of a firearm with an obliterated serial number, but was acquitted of every count that charged use of a firearm in connection with the bank robbery. Based on the conduct of which petitioner was acquitted, the district court added ten levels to the guideline offense level that would otherwise have applied to his offenses of conviction, increasing his guideline range from 78 to 97 months to 253 to 293 months. Petitioner was sentenced within the guideline range to 264 months in prison, approximately 14 years longer than the sentence

authorized by the jury verdict alone. That sentence would be substantively unreasonable absent the judge's factual findings.

CONCLUSION

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

Respectfully submitted,

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