No. 24-5339

In the Supreme Court of the United States

SETH ELRED PERRICONE, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

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

Reply to the Brief for the United States in Opposition

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The government ignores that at least four sitting Justices and "[m]any other state and federal judges" consider the question presented to be "important" and have "questioned the practice" of using acquitted conduct to increase a defendant's sentence. *McClinton v. United States*, 143 S. Ct. 2400, 2401 & n. 2 (2023) (Sotomayor, J., respecting the denial of certiorari); *id.* at 2403 (Kavanaugh, J., with whom Gorsuch and Barrett, J.J., join, respecting the denial of certiorari). But it concedes that the Fifth Circuit upheld the procedural reasonableness of Perricone's sentence, including a 150-month increase to his Guidelines range, based on acquitted conduct. Opp. 4; Pet. 10; Pet. App. 17a. Nor does it dispute that the long-awaited amendment by the U.S. Sentencing Commission, U.S.S.G. App. C. Supp., amend. 826 (2024), does not apply to this case.

Instead, the government repeats its rote claim that the concerns regarding the use of acquitted conduct in sentencing in violation of jury-trial rights and due process were resolved by this Court's summary disposition in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam). Not so. *Watts* does not mention either jury-trial rights or due process. And the Court has expressly delimited *Watts*'s reach because that case "presented a very narrow

question regarding the interaction of the Sentencing Guidelines with the Double Jeopardy Clause," without the benefit of full briefing and argument. *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005). The issue of whether the application of a "sentencing enhancement exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment … simply was not presented." *Id*. at 240.

The government acknowledges a split in court decisions and that the acquitted-conduct amendment adopted by the Commission is narrow and incomplete. Yet, it identifies no benefit from further delay nor reason why the Commission—rather than the Court—is the proper authority for resolving this important constitutional question. The practice of acquitted-conduct sentencing really "has gone on long enough." *Jones v. United States*, 574 U.S. 948, 950 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari). The Court should "grant certiorari to put an end to the … cases disregarding the Sixth Amendment" jury-trial right and Fifth Amendment protection of due process. *Id*.

I. The Government's Merits Arguments Provide No Basis to Deny Review.

The government's central argument is that the Fifth Circuit's decision was correct. Opp. 6–7. The government principally relies

on *Watts* but does not acknowledge that decision's limits. The government concedes that *Watts* "specifically addressed a challenge to acquitted conduct based on double-jeopardy principles," Opp. 7, but asserts with scant analysis that the "clear import" of that summary decision was to foreclose Fifth and Sixth Amendment arguments it never mentioned, *id.* Yet, the government is no stranger to *Watts*'s limitations. Not only did the Court acknowledge that *Watts* did not address the jury-trial right, *Booker*, 545 U.S. at 240, but the government agreed, *see* U.S. Br. 7, *United States v. Booker*, 543 U.S. 220 (No. 04-104), 2004 WL 1967056 (Sept. 1, 2004) (stating that *Watts* held "the Double Jeopardy Clause does not prevent the district court from increasing the offense level on the basis of the conduct underlying the acquitted charge"); *id.* at 35 (same).

The government also fails to acknowledge that the reasoning from *Watts* on which it relies—that "a sentencing judge may take into account facts *introduced at trial*" beyond the jury's determination, Opp. 7 (citing *Watts*, 519 U.S. at 152) (emphasis added)—is inapplicable to this case. The question presented does not require the Court to determine whether it is improper for a Guidelines range to ever be enhanced by facts introduced at trial but not found by a jury. Indeed, Perricone's Guidelines were enhanced by 15 lev-

els based on both jury-found conduct (distribution) and facts presented through uncontested testimony and evidence at trial that were not found by the jury (use of computer, number and type of images, etc.). Rather, the question presented strikes at the heart of whether the jury-trial right and due process are violated when a defendant has their sentence increased based on prior acquitted conduct. Here, 12.5 years were added to Perricone's Guidelines range based not on testimony or evidence presented during the federal trial but a presentence report's summary of state charges for which Perricone was acquitted years earlier. Pet. App. 17a.

The government fails to address the increasing support among circuit court judges and Supreme Court Justices for this Court to address the constitutionality of using acquitted conduct to increase a term of incarceration. *See* Pet. 12–13. Nor does the government address state Supreme Court justices' support for resolving the question. *See People v. Beck*, 939 N.W.2d 213, 224–25 (Mich. 2019); *State v. Melvin*, 258 A.3d 1075, 1090 (N.J. 2021) (concluding that the brief, summary *Watts* opinion did not conclusively resolve the constitutionality of acquitted-conduct sentencing). *See* Pet. 12–15. The government's idea that these issues were conclusively resolved without full briefing and argument is impossible to square with Justice Kennedy's comment that the *Watts per curiam* failed to

"confront[ ]" the lawfulness of acquitted conduct sentencing with "a reasoned course of argument" and instead just "shrugg[ed] it off." 519 U.S. at 170 (Kennedy, J., dissenting).

In response to Perricone's Sixth Amendment argument, the government contends that this Court's precedents—the remedial part of *Booker*[1] and *Alleyne*'s[2] distinction between facts and elements—permit consideration of "conduct that was not found by the jury." Opp. 8–9. But enhancing a sentence based on a distinct crime that "the jury expressly disapproved" as a basis for punishment,[3] implicates a *completely distinct* common-law tradition from enhancing a sentence based on information the jury never considered.[4] The government never acknowledges that historical tradition, much less does it address Perricone's argument that this Court's more recent Sixth Amendment cases—that honor that

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[1] Opp. 8 (citing *Booker*, 543 U.S. at 252).

[2] Opp. 8–9 (citing *Alleyne v. United States*, 570 U.S. 99, 133 n.2 (2013)).

[3] *United States v. Bell*, 808 F.3d 926, 929–930 (D.C. Cir. 2015) (Millett., J., concurring in the denial of rehearing en banc).

[4] *See generally Hester v. United States*, 586 U.S. 1104, 1107 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of certiorari) ("It's hard to see why the right to a jury trial should mean less to the people today than it did to those at the time of the Sixth and Seventh Amendments' adoption.").

original understanding of the Sixth Amendment's jury-trial rights—provide a compelling reason to at least expressly limit *Watts* to the Double Jeopardy context. *See* Pet. 19–22; *see also Erlinger v. United States*, 602 U.S. 821, 832–33, 835 (2024) (collecting cases it has overruled that were inconsistent with the "fundamental reservation[s] of power" to the American people under the Fifth and Sixth Amendments).

The government argues that the use of acquitted conduct at sentencing does not contravene a defendant's jury-trial right because, "[i]f consideration of such conduct at sentencing were in fact a re-prosecution of the prior charges, it is difficult to see how *Watts* could have found it compatible with the Double Jeopardy Clause." Opp. 8. But the Court recently rejected a similar attempt to conflate the Double Jeopardy Clause with the jury-trial rights under the Fifth and Sixth Amendments. *Erlinger*, 602 U.S. at 844–45. The "Double Jeopardy Clause … prohibit[s] a judge from even *empaneling* a jury when the defendant has already faced trial on the charged crime." *Id*. at 845. In contrast, "[t]he Fifth and Sixth Amendments' jury-trial rights provide … entirely complementary protections at a different stage of the proceedings by ensuring that, once a jury *is* lawfully empaneled, the government must prove beyond a reasonable doubt to a unanimous jury the facts necessary

to sustain the punishment it seeks." *Id.* The jury is placed "at the heart of our criminal justice system," and the Fifth and Sixth Amendment ensure that a "judge's power to punish would derive wholly from, and remain always controlled by, the jury and its verdict." *Id.* at 831 (quotation omitted).

The government's response to Perricone's Fifth Amendment Due Process arguments likewise turns on the general permissibility of imposing sentencing enhancements based on facts a judge finds by a preponderance of the evidence. Opp. 9. The government asserts that judicial findings by a preponderance of the evidence "do not conflict with a jury's verdict of acquittal," citing only *Watts* (which never mentioned the Fifth Amendment) and a treatise that cites *Watts*. Opp. 9. But *Watts*'s *per curiam* opinion on double jeopardy provides no basis for concluding that the Nation's due process traditions permit judges to consider conduct the jury rejected as a basis for punishment, particularly where drastic increases in punishment (here, increasing the sentence by 12.5 years) pose the risk of "unusual and serious procedural unfairness" that warrant "invocation of the Due Process Clause." *Apprendi v. New Jersey*, 530 U.S. 466, 562–63 (2000) (Breyer, J., dissenting).

Jury-acquitted conduct represents a particular kind of fact protected by the Fifth and Sixth Amendments to "constrain the Judicial Branch, ensuring that the punishment courts issue is not the result of a judicial inquisition." *Erlinger*, 602 U.S. at 832 (cleaned up). Prohibiting the use of acquitted conduct is not a "logically unsound" exception, as the government asserts. Opp. 9. It is a "fundamental reservation of power to the American people," and the Fifth and Sixth Amendments exist as "guardrails" to guide the ongoing experiment of criminal sentencing. *Erlinger*, 602 U.S. at 832.

II. The Split is Real.

The government concedes that there is a "split among state courts," *People v. Rose*, 776 N.W.2d 888, 891 (Mich. 2010) (Kelly, C.J., dissenting), and that the supreme courts of four states—Georgia, Michigan, New Hampshire, and North Carolina—have as a matter of federal constitutional law disallowed the use of acquitted conduct at sentencing in conflict with their corresponding regional federal courts of appeals. *See* Opp. 10–11; Pet. 14–15; *see also McClinton*, 143 S. Ct. at 2401 n.1, 2402 n.4 (Sotomayor, J., respecting the denial of certiorari) (acknowledging criticisms and limits on acquitted conduct by state courts).

The government downplays the split, saying that "[t]wo of those decisions predate *Watts* and are therefore of minimal relevance" and "two others did not cite *Watts*." Opp. 10–11. But that overstates the relevance of *Watts*, which never addressed the due process ramifications of acquitted-conduct sentencing, nor, as this Court has noted, considered whether a judge's "sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment," *Booker*, 543 U.S. at 240 & n.4. The insignificance of the government's proposed distinction is confirmed by the fact that both *People v. Beck*, 939 N.W.2d 213, 224 (Mich. 2019), and *State v. Melvin*, 258 A.3d 1075, 1089–1090 (N.J. 2021), discussed *Watts* at length and concluded that its holding was limited to double jeopardy and did not resolve the jury-trial and due process issues.[5] The government contends that *Beck*'s

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[5] Although *Melvin*'s holding barring acquitted-conduct sentencing was based on the New Jersey constitution, Pet. 15; Opp. 11, the New Jersey Supreme Court concluded as a matter of *federal* law that "*Watts* is not dispositive of the due process" question, nor does it "control" the Sixth Amendment analysis, 258 A.3d at 1089–90.

The government argues that the New Hampshire Supreme Court's statement in *State v. Gibbs*, 953 A.2d 439, 442 (N.H. 2008), that "[*State*

reasoning is "tenuous." Opp. 12. Even if it were, that counsels review to discharge this Court's "principal responsibility" of "ensur[ing] the integrity and uniformity of federal law." *Kansas v. Marsh*, 548 U.S. 163,183 (2006) (Scalia, J., concurring).

Even if the split were limited to *Beck*, that would not be "too shallow to warrant this Court's review." Opp. 12. Indeed, the Court has granted petitions to review shallower splits.[6] Granting certiorari is especially warranted because this conflict divides state courts of last resort from their corresponding federal appellate courts, a type of split this Court has deemed intolerable because

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v.] *Cote* provides greater protection than" *Watts*, indicates "its decisions are rooted in state law." Opp. 11. But the parties' briefing centered on whether later federal decisions like *Booker* had undercut *Watts*. *Compare* Def. Br. 22–23, *State v. Gibbs*, 2008 WL 4186514 (N.H. Mar. 27, 2008) (courts "have questioned the continuing validity of *Watts*" and "recent decisions of the United States Supreme Court have restored the jury to its historic central role in our justice system") *with* State's Br. 18–19, *Gibbs*, 2008 WL 4186515 (N.H. May 2008) ("*Watts* is still good law").

[6] *See, e.g.*, Pet. 11, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, No. 15-290 (Sept. 8, 2015), 2015 WL 5265284 (urging review of "square but shallow" 1–1 circuit split); U.S. Pet. 25, *United States v. Sanchez-Gomez*, No. 17-312 (Aug. 29, 2017), 2017 WL 3809745 (2-1 circuit split); U.S. Pet. 13, *United States v. Ressam*, No. 07-455 (Oct. 4, 2007), 2007 WL 2898699 ("2–1 conflict … merits this Court's review").

the scope of constitutional protections depends on the choice of state or federal forum. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 761–62 (1994) (granting review to resolve 1–1 split).

The issues have been thoroughly discussed and the split will not resolve itself absent this Court's intervention. Nothing is to be gained by continuing to wait.

III. Only the Court Can Resolve the Constitutional Question.

The government concedes that the Commission's long-awaited amendment addressing the use of acquitted conduct is narrow and inapplicable to cases like this one. Yet, it argues no intervention by the Court is necessary without explaining why the Commission—rather than the Court—is the right actor to define the scope of the Fifth and Sixth Amendments. Opp. 12–15; *see also Watts*, 519 U.S. at 158 (Scalia, J., concurring) (highlighting concern that the Commission lacks "authority to decree that information which would otherwise justify enhancement of sentence … may not be considered … if it pertains to acquitted conduct").

Instead, the government argues that the Court's intervention is unnecessary because the Commission's amendment adequately respects "the dual-sovereignty doctrine" and "administrability" concerns. Opp. 14. The Commission's respect for dual sovereignty, however, relies on *Watts* and the Double Jeopardy Clause. Opp. 14;

U.S.S.G. App. C. Supp., amend. 826. But neither addresses the distinct jury-trial and due process rights enshrined in the Fifth and Sixth Amendments. *See Erlinger*, 602 U.S at 844–45; *Booker*, 545 U.S. at 240. As for the administrability concern that parsing between acquitted and convicted conduct may be difficult, the Commission limited the scope of its amendment in deference to concerns raised by "commenters," citing no authority that condones the subjugation of individual rights to administrative convenience. *See* U.S.S.G. App. C. Supp., amend. 826. Indeed, "[t]here is no efficiency exception to the Fifth and Sixth Amendments." *Erlinger*, 602 U.S. at 842.

The government ignores that the Commission's amendment will not avoid "complicated inquiries." This case illustrates why not. There was no testimony or evidence presented during the federal trial addressing whether Perricone had sexually abused a minor on two or more occasions. Instead, the Fifth Circuit affirmed the five-level enhancement under U.S.S.G. § 2G2.2(b)(5) (2021)—increasing Perricone's Guidelines range by 150 months—based on the presentence report's summary recitation of state court documents describing the allegations for which Perricone was acquitted years earlier. *See* Pet. 6; Pet. App. 17a. Thus, the Guidelines will continue to sanction the "practice of allowing a sentencing court to

do exactly what the Fifth and Sixth Amendments forbid." *Erlinger*, 602 U.S. at 840 (rejecting *Shepard* as authority for allowing a judge to review documents to determine ACCA's occasions inquiry).

For the Fifth and Sixth Amendments to remain fundamental guardrails between which criminal sentencing practices remain, it is not enough that the Guidelines "still permit … [but] do[ ] not require" the use of acquitted conduct to enhance a sentence of imprisonment. Opp. 15. To be a proper guardrail, there must be clarity—in the case of acquitted conduct, a proscription against its use to enhance a Guidelines range—to keep sentencing practices from veering off course. It is not the case, as the government urges, that the district court is merely considering the fact of acquittal in the context of examining a defendant's "background, character, and conduct." Opp. 15. Rather, the acquitted conduct is used in a concrete way to calculate an enhanced Guidelines range to which a district court anchors its sentence. For Perricone, the acquitted conduct accounted for 150 months of the 360-month Guidelines sentence the court imposed.

The government notes that this Court has denied petitions presenting this question in the past. Opp. 5 n.1. The only one denied

after *McClinton* occurred prior to the effective date of the 2024 Guidelines.

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The Guidelines to which the district court anchored Perricone's 360-month sentence included a 150-month enhancement based on acquitted conduct from years earlier, a sentencing practice at odds with the jury-trial and due process rights enshrined by the Fifth and Sixth Amendments. This case squarely and cleanly presents an issue that is long overdue for this Court's resolution.

Conclusion

FOR THESE REASONS, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted.

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January 6, 2025