No. 18-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, or under what circumstances, the Sixth Amendment right to jury trial prohibits a federal court from basing a criminal defendant's sentence on a charge for which the jury acquitted him.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Miguel Cabrera-Rangel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a) is unpublished but appears at 730 Fed. Appx. 227. The district court's relevant rulings (Pet. App. 4a) are unreported.

JURISDICTION

The court of appeals issued its opinion on July 9, 2018. Pet. App. 1a. On September 14, 2018, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including November 6, 2018. *See* 18A269. On October 19, 2018, Justice Alito further extended the filing date to and including December 6, 2018. *Id.* This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

The Sentencing Reform Act provides in relevant part: "No limitation shall be placed on the information concerning the . . . 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." 18 U.S.C. § 3661.

INTRODUCTION

A jury's acquittal in a criminal case is meant to be inviolate—an authoritative expression of the community that the defendant should not be punished based on particular allegations. At common law, therefore, a judge could not base a defendant's sentence on charges a jury rejected, even if the acquittal was coupled with a conviction on another charge. Today, "the overwhelming majority of states" maintain this prohibition. *United States v. White*, 551 F.3d 381, 394 & n.5 (6th Cir. 2008) (en banc) (Merritt, J., dissenting) (collecting authorities).

But the Sentencing Reform Act, and the Federal Sentencing Guidelines promulgated pursuant to it, depart sharply from this tradition. They provide "[n]o limitation" on a federal court's ability to sentence a defendant based on allegations a jury has rejected. 18 U.S.C. § 3661; *see also* U.S.S.G. §§ 1B1.3, 1B1.4. And in fact, federal district judges now regularly consider acquitted conduct in setting defendants' sentences.

In *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), the Court held that considering such conduct does not contravene the Fifth Amendment. But *Watts* did not present anything other than a "very narrow" question "regarding the interaction of the Guidelines with the Double Jeopardy Clause." *See United States v. Booker*, 543 U.S. 220, 240 n.4 (2005). In particular, the Court did not consider whether increasing the defendant's sentence based on acquitted conduct transgressed the province of the jury "in violation of the Sixth Amendment" right to jury trial. *Id.* at 240.

As numerous Justices and judges have recently suggested, this Court should end its "silence" on the

Sixth Amendment implications of basing a sentence on acquitted conduct. *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari); *see also infra* at 10-11 (statements from other Justices and judges). This Court's Sixth Amendment jurisprudence—moribund when *Watts* was decided but reinvigorated since—makes clear that allowing a judge to base a defendant's sentence on acquitted conduct is at war with the right to jury trial. That right preserves the jury's common-law function as a "bulwark" between the defendant and the Government, preventing defendants from being subjected to punishment for allegations juries reject. *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). Sentences based on acquitted conduct make a mockery of that design.

STATEMENT OF THE CASE

1. In early 2017, a border patrol agent came across petitioner Miguel Cabrera-Rangel and four others near the Texas-Mexico border. The group scattered, and the agent pursued petitioner. The agent tackled petitioner, and a struggle ensued. Def. C.A. Br. 4-5. After the altercation, the border patrol agent reported, and received treatment for, injuries to his face. *Id.* 6.

2. A federal grand jury returned a two-count indictment against petitioner. Count One charged assault on a federal officer by physical contact inflicting bodily injury, under 18 U.S.C. § 111(a)(1) & (b). Count Two was a lesser-included charge of assault on a federal officer by physical contact, under 18 U.S.C. § 111(a)(1).

Petitioner exercised his constitutional right to jury trial. At trial, the agent testified that petitioner punched him in the face, grabbed the agent's

flashlight, and then struck the agent with the flashlight. Def. C.A. Br. 4-6.

In pretrial interviews introduced into evidence, petitioner conceded that he had an altercation with the agent. Def. C.A. Br. 8-9. But he maintained that he never punched the agent or struck him with the flashlight. *Id.* Physical evidence also cast doubt on the agent's testimony. At trial, forensic examiners testified that they found no fingerprints, DNA, or blood on the flashlight. An investigator also recorded that petitioner was missing two fingers on his left hand—the hand the agent accused petitioner of using to grip the flashlight. Finally, the testimony of the agent's treating physician indicated that the agent's facial injuries could have been caused either by being struck in the face *or* simply by tackling another person. *Id.* 7-11.

The jury ultimately acquitted petitioner of the greater charge, infliction of bodily injury. It convicted him of the lesser-included charge, assault by physical contact. Pet. App. 20a.

3. When a defendant is convicted of a federal crime, the Federal Sentencing Guidelines recommend a sentencing range based on the defendant's offense level and criminal history. When setting the offense level, the Guidelines start with the defendant's offense of conviction. But the Guidelines also require adjustments based on all of the defendant's "relevant conduct." U.S.S.G. § 1B1.3. And pursuant to Congress's directive to place "[n]o limitation" on the information a sentencing court "may receive and consider," 18 U.S.C. § 3661, the Guidelines allow a court to consider *any* relevant conduct it believes occurred, even if the jury acquitted the defendant of

the allegation. *See United States v. Watts*, 519 U.S. 148, 153-54 (1997) (per curiam).

The district court relied on acquitted conduct here. Looking only to the facts encompassed within the jury's verdict, the Guidelines would have produced a base offense level of 10 and an ultimate offense level of 13. *See* U.S.S.G. § 2A2.4. Pairing that offense level with petitioner's criminal history category (IV) would have yielded a Guidelines sentencing range of 24 to 30 months in prison. Def. C.A. Br. 32.[1]

But the presentence report (PSR), prepared by a probation officer who attended the trial, did not set petitioner's recommended sentence in this manner. Instead, the PSR recommended a base offense level of 14 under the guideline for Aggravated Assault—the guideline corresponding to the charge the jury rejected. *See* U.S.S.G. § 2A2.2. The PSR also recommended a 6-level enhancement for the victim sustaining bodily injury and a 4-level enhancement for use of a dangerous weapon (the flashlight). Based on a total offense level of 24, the PSR produced a Guidelines range of 77 to 96 months' imprisonment. Def. C.A. Br. 11-12.

4. Before and during sentencing, petitioner objected on Sixth Amendment grounds to the district court's consideration of acquitted conduct to determine his sentence. Pet. App. 11a-23a; Def. C.A. Br. 12-13. As the judge recognized, there was "no dispute" that

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[1] Petitioner previously suggested the appropriate offense level would have been 15, generating a range of 30 to 37 months. Pet. App. 39a. But that accounting mistakenly included a 2-level enhancement under U.S.S.G. § 2A2.4(b)(2) for sustaining bodily injury, the allegation the jury rejected.

the jury acquitted petitioner of the conduct the PSR relied upon to increase the Guidelines range above 30 months. Pet. App. 29a. The judge nevertheless overruled petitioner's objections, insisting that in her "role as presiding judge over the trial and the sentencing, the law allow[ed her] to take into account all of that conduct." *Id.*

With respect to the acquitted conduct itself, the judge acknowledged that petitioner "made very compelling arguments" at trial and that the jury "went along with" those arguments. Pet. App. 29a. But the judge saw things differently. In her view, the agent's testimony regarding the use of the flashlight was "very credible," and the evidence petitioner introduced "[did]n't really support [his] contention" that he never wielded the flashlight against the agent. *Id.* 29a-30a. Accordingly, the judge imposed a 96-month sentence—the "high end" of the Guidelines range for committing an assault inflicting bodily injury (and the statutory maximum under the U.S. Code for the offense for which he was actually convicted). *See id.* 41a.[2]

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[2] At the end of the sentencing hearing, the district judge remarked that she "would have sentenced [petitioner] to the statutory maximum penalty regardless of the offense level." Pet. App. 44a. But such an alternative suggestion can insulate a sentence from appellate scrutiny only where "the sentence the district court imposed was not influenced in any way" by the Guidelines range the defendant argues was incorrectly calculated. *United States v. Martinez-Romero*, 817 F.3d 917, 924-26 (5th Cir. 2016) (quoting *United States v. Ibarra-Luna*, 628 F.3d 712, 718-719 (5th Cir. 2010)). And here, the district judge explicitly chose 96 months because it was the "high end" of the range calculated according to petitioner's acquitted conduct. Pet. App. 41a. Consequently, the Fifth Circuit paid no heed to the

5. Petitioner appealed his sentence, renewing his Sixth Amendment claim. Pet. App. 2a. He maintained that calculating his advisory Guidelines range based on the charge the jury rejected—and thereby using that range as an anchor for his sentence—violated his right to jury trial. He also stressed that all federal sentences must be substantively reasonable, *see United States v. Booker*, 543 U.S. 220, 264 (2005), and that the Sixth Amendment requires juries to find all facts "essential to the [legality of the] punishment," *Blakely v. Washington*, 542 U.S. 296, 303-06 (2004) (quoting 1 Joel P. Bishop, *Criminal Procedure* § 87, at 55 (2d ed. 1872)). That being so, petitioner contended, the Sixth Amendment does not permit a court to justify an otherwise unreasonable sentence by relying on acquitted conduct.

The Fifth Circuit rejected petitioner's arguments and affirmed. The court of appeals recognized that *Watts* "did not address whether consideration of acquitted conduct at sentencing violates the Sixth Amendment." Pet. App. 2a. But the court of appeals nevertheless treated *Watts* as "foreclos[ing]" the claim that basing a sentence on acquitted conduct contravenes the right to jury trial. *Id.*

Turning to the thread of petitioner's argument relating to the substantive reasonableness of his sentence, the court of appeals did not question that petitioner's sentence would be substantively unreasonable if the allegations rejected in the jury's verdict were set aside. But the Fifth Circuit reaffirmed

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judge's passing comment, instead deciding only whether the district court was constitutionally permitted to consider acquitted conduct at sentencing. *See id.* 2a-3a.

its prior precedent holding that the Sixth Amendment does not prohibit sentences that are substantively reasonable "only if" acquitted conduct is taken into account. Pet. App. 3a (citing *United States v. Hernandez*, 633 F.3d 370, 374 (5th Cir. 2011)).

REASONS FOR GRANTING THE WRIT

I. Sentencing based on acquitted conduct presents a vexing and persistent problem that warrants this Court's review.

As a growing chorus of jurists has recognized, the time has come for this Court to address the Sixth Amendment implications of relying on acquitted conduct in sentencing criminal defendants.

1. Judicial reliance on acquitted conduct is an "important, frequently recurring, and troubling contradiction in sentencing law." *United States v. Bell,* 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc), *cert. denied*, 137 S. Ct. 37 (2016). The Sixth Amendment right to jury trial is designed to protect defendants from prosecutorial and judicial overreach. *See Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). But, under the current federal sentencing system, defendants' sentences can balloon based not on facts proved to their peers beyond a reasonable doubt, but on factual allegations juries have actually *rejected*. *See, e.g.*, *United States v. White*, 551 F.3d 381, 388 (6th Cir. 2008) (en banc) (Merritt, J., dissenting), *cert. denied*, 556 U.S. 1215 (2009) (14-year increase to defendant's sentence); *Bell*, 808 F.3d at 929 (Millett, J., concurring in the denial of rehearing en banc) (10-to-12-year increase). This phenomenon occurs across

the full range of criminal cases, from tax evasion to drug crimes.[3]

Judges' ability to rely on jury-rejected allegations at sentencing also discourages defendants from exercising their right to jury trial in the first place. Where a defendant faces multiple charges, "a hard-fought partial victory" on the more serious charges "can be rendered practically meaningless when that acquitted conduct nonetheless produces a drastically lengthened sentence." *Bell*, 808 F.3d at 932 (Millett, J., concurring in the denial of rehearing en banc). Faced with "no practical upside" to acquittals on greater charges unless they secure acquittals on *all* charges, such defendants face an "almost insurmountable pressure" to accept plea deals. *See id.*

2. Despite entreaties from Members of this Court, no other institutional actor has stepped in to obviate the need to decide whether sentencing defendants based on acquitted conduct violates the Sixth Amendment. In light of "the role that juries and acquittals play in our system," Justice Breyer suggested years ago that the U.S. Sentencing Commission may want to bar the practice. *United States v. Watts*, 519 U.S. 148, 159 (1997) (per curiam) (Breyer, J., concurring). But the Sentencing

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[3] *See, e.g.*, *United States v. Bolton*, No. 17-60502, 2018 WL 5603038, at *11 (5th Cir. Oct. 26, 2018) (tax evasion); *United States v. Grace*, 640 Fed. Appx. 298, 300 (5th Cir. 2016) (corruption-related offenses); *Bell*, 808 F.3d at 929 (Millett, J., concurring in the denial of rehearing en banc) (drug conspiracy); *United States v. Shahid*, 486 Fed. Appx. 915, 916-17 (2d Cir. 2012) (bribery); *United States v. Papakee*, 573 F.3d 569, 576 (8th Cir. 2009) (sexual abuse); *United States v. Dewitt*, 304 Fed. Appx. 365, 368 (6th Cir. 2008) (murder).

Commission has not acted. Nor has Congress amended 18 U.S.C. § 3661.

Similarly, while sitting on the D.C. Circuit, then-Judge Kavanaugh called for district judges themselves to "disclaim reliance" on acquitted conduct. *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc). Yet many district judges have continued to impose sentences based on such conduct. All too often, as in this case, defendants are acquitted on certain charges, only to see judges "brush off the jury's judgment" by "us[ing] the very same facts the jury rejected at trial to multiply the duration of a defendant's loss of liberty." *See id.* at 930 (Millett, J., concurring in the denial of rehearing en banc).

3. As Justices and judges have increasingly emphasized, this "disregard[]" for the Sixth Amendment "has gone on long enough." *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari).

A few Terms ago, three Justices called on the Court to "put an end" to the practice of sentencing defendants based on acquitted conduct. *Id.* Justice Kennedy warned that increasing a sentence based on facts the jury rejected raises concerns of "undercutting the verdict of acquittal." 519 U.S. at 170 (Kennedy, J., dissenting). And this Court's two newest members have expressed similar sentiments. Then-Kavanaugh has posited that increasing a defendant's sentence based on acquitted conduct "seems a dubious infringement of the rights to due process and to a jury trial." *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc). Citing the *Jones* case, then-Judge Gorsuch likewise has maintained

that it is at least "questionable" for a judge to find facts "without the aid of a jury or the defendant's consent." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014).

At least ten other federal appellate judges have expressed similar misgivings, with many also urging the Court to "resolve the contradictions in the current state of [Sixth Amendment] law." *See Bell*, 808 F.3d at 928-32 (Millett, J., concurring in the denial of rehearing en banc); *see also, e.g.*, *United States v. Canania*, 532 F.3d 764, 776-77 (8th Cir.) (Bright, J., concurring), *cert. denied*, 555 U.S. 1037 (2008). Some of these judges have concluded that the use of acquitted conduct at sentencing is flatly unconstitutional, maintaining that the practice "violates both our common law heritage and common sense." *White*, 551 F.3d at 387 (en banc) (Merritt, J., dissenting) (writing on behalf of six judges); *see also, e.g.*, *United States v. Mercado*, 474 F.3d 654, 658-65 (9th Cir. 2007) (Fletcher, J., dissenting), *cert. denied*, 552 U.S. 1297 (2008); *United States v. Faust*, 456 F.3d 1342, 1349-53 (11th Cir.) (Barkett, J., specially concurring), *cert. denied*, 549 U.S. 1046 (2006).

To be sure, no split among the courts of appeals has developed on this Sixth Amendment question. *See Mercado*, 474 F.3d at 657. But the fact that so many federal appellate judges perceive a constitutional infirmity in a recurring and consequential sentencing practice strongly signals that this Court's intervention and guidance is needed.

What is more, the current rule across the courts of appeals derives more from the courts' misperception that they are bound by seemingly broad language in *Watts* than from any considered judgment on the

issue. In *Watts*, the Court stated that "acquittal does not prevent the sentencing court from considering the conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." 519 U.S. at 157. But *Watts* concerned only the Double Jeopardy Clause and did not consider the Sixth Amendment issue. *See United States v. Booker*, 543 U.S. 220, 240 & n.4 (2005).

Needless to say, a given practice can violate one provision of the Constitution even where the Court has held that it does not violate a different provision. For example, although the Court earlier held that grossly excessive punitive damages awards do not violate the Eighth Amendment's Excessive Fines Clause, it later held that such awards do violate the Due Process Clause. *Compare Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 260 (1989), *with BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). And carrying over the Fifth Amendment analysis in *Watts* to the Sixth Amendment is even less justified where, as here, the prior opinion "was rendered without full briefing or argument." *See Hohn v. United States*, 524 U.S. 236, 251 (1998).

The Fifth Circuit and other federal courts of appeals have nonetheless taken *Watts* to "foreclose[]" any claim that sentencing a defendant based on acquitted conduct violates the Sixth Amendment. *See* Pet. App. 2a; *see also, e.g.*, *United States v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *Mercado*, 474 F.3d at 656-57; *Faust*, 456 F.3d at 1348. Only this Court can disabuse them of that notion.

II. The decision below is fundamentally wrong.

A. The Sixth Amendment precludes judges from using acquitted conduct to increase a criminal defendant's sentence.

As this Court has explained, the Sixth Amendment right to trial by jury incorporates the common-law understanding of that right. Both that historical conception and this Court's modern jurisprudence show that the use of acquitted conduct at sentencing violates the Sixth Amendment.

1. A criminal defendant's right to jury trial is "a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). In two ways, this reservation serves as "the great bulwark of [our] civil and political liberties." *See* 3 Joseph Story, *Commentaries on the Constitution of the United States* 652 (1833).

First, the right to jury trial reflects a "profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). In particular, making a criminal defendant's peers the ultimate arbiters of fact is designed to shield the accused from "the corrupt or overzealous prosecutor" or the "compliant, biased, or eccentric judge." *Id.* at 156. "If the defendant preferred the common-sense judgment of a jury . . . he was to have it." *Id.*

Second, the right to jury trial safeguards citizen authority over the extent to which courts may deprive persons of their liberty. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely*, 542 U.S. at 306.

Such popular control over criminal punishment is essential to the Framers' vision of a government by the people. In the words of Alexander Hamilton:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

The Federalist No. 83, at 499 (Clinton Rossiter ed., 1961).

2. The jury carries out its role as the "circuitbreaker in the State's machinery of justice," *Blakely*, 542 U.S. at 306-07, through its unreviewable power to acquit defendants of criminal charges. When the jury acquits, it makes a "legal certification" that "an accused person is not guilty of the charged offense." *Acquittal*, *Black's Law Dictionary* (10th ed. 2014). As this Court has emphasized, "the law attaches particular significance," *United States v. Scott*, 437 U.S. 82, 91 (1978), and "special weight" to a jury's decision to acquit a defendant, *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980).[4] An acquittal is meant to be final and "unassailable." *Yeager v. United States*, 557 U.S. 110, 122-23 (2009).

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[4] The famed acquittal of William Penn and William Mead is illustrative. There, the royal judges threatened to starve the jurors—and later fined and jailed them—to pressure them to change their verdict. But because the jury refused, the judges could not punish the defendants for allegations the jury rejected. *See* Leonard W. Levy, *The Palladium of Justice* 57-60 (1999).

Juries can exercise their constraining power by fine-tuning their verdict to multiple charges before them. By convicting a defendant on one or more charges but acquitting on others, a jury can indicate when it thinks a prosecutor has overreached or when a defendant's conduct otherwise does not warrant punishment on the basis of a particular charge.

This practice has its roots in eighteenth-century England. The jury's "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." *Jones v. United States*, 526 U.S. 227, 245 (1999).

These mixed verdicts—part of our common law "inheritance" that the Sixth Amendment preserves, *Duncan*, 391 U.S. at 154 (quoting *Thompson v. Utah*, 170 U.S. 343, 349-50 (1898))—allowed juries to modulate a defendant's punishment. At common law, each crime carried a determinate sentence, whether it was death, corporal punishment, fines, or some other specified sanction. *See* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 891-92 (1990). Juries generally knew what punishment would result from any given verdict. *See* Judge Nancy Gertner, *A Short History of American Sentencing*, 100 J. Crim. L. & Criminology 691, 692-94 (2010). Therefore, by virtue of the charges on which they acquitted or convicted a defendant, English juries effectively controlled which sanction a defendant would receive—or at least whether the defendant would be punished more harshly or not. *See id.* at 693.

The jury's power to find "an offense less in degree than that charged in the indictment" was "one of the

most important aspects of the jury's prerogative." Julius Goebel, Jr. & T. Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)*, at 673-75 (1944). Take homicide, for instance. By finding a defendant guilty of either murder or manslaughter, English juries made "the choice between capital punishment and branding." John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 304 (1978). Juries similarly dictated sanctions in larceny cases. Through their power to establish the valuation of stolen goods, juries effectively determined defendants' punishments—whether transportation or death, whipping or a short jail term, or branding the thumb. *Id.* at 303-04.

At times, juries exercised their acquittal power (as they do today) because they were unpersuaded by the prosecution's case concerning the greater charge. Other times, they did so in the teeth of the evidence, with the express purpose of mitigating harsh sentences—a practice William Blackstone praised as "pious perjury." *See Apprendi v. New Jersey*, 530 U.S. 466, 479 n.5 (2000) (quoting 4 William Blackstone, *Commentaries on the Laws of England* *238 (1769)). Either way, "the trial jury exercised an important role in what was functionally the choice of sanction, through its power to manipulate the verdict by convicting on a charge that carried a lesser penalty." John H. Langbein, *The Origins of Adversary Criminal Trial* 57-58 (Oxford Press ed. 2003).

3. It is incumbent upon this Court to "preserv[e] [this] ancient guarantee under a new set of circumstances"—namely, the sentencing system prescribed by the Federal Sentencing Guidelines.

United States v. Booker, 543 U.S. 220, 237 (2005); *see also Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014) (emphasizing the Court's equivalent duty in the Fourth Amendment context). And calculating a defendant's sentence according to jury-rejected charges is a direct affront to the integrity of the jury's acquittal.

When a federal court relies on acquitted conduct at sentencing, it "expressly consider[s] facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved." *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005) (Gertner, J.). This is especially true where, as here, a jury has acquitted on a greater offense but convicted on a lesser offense. A single element, or fact, often differentiates the greater from the lesser offense. In such cases, the judge's contrary factual finding tramples the jury's factfinding domain.

Worse yet, a judge who bases a sentence on an acquitted charge nullifies the jury's determination that a defendant should not be punished according to the more serious allegation. After all, the jury can only authorize punishment, or withhold its authorization, through its verdict. *United States v. Mercado*, 474 F.3d 654, 663 (9th Cir. 2007) (Fletcher, J., dissenting). When a judge so directly overrides the jury verdict—the jury's only tool for modulating punishment—the "liberty-protecting bulwark [of the jury] becomes little more than a speed bump at sentencing." *See United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc).

Finally, the use of acquitted conduct at sentencing threatens the legitimacy of the system of trial by jury.

In construing and enforcing constitutional guarantees, this Court frequently considers whether a given practice "undermine[s] public confidence in the fairness of our system of justice." *See Batson v. Kentucky*, 476 U.S. 79, 87 (1986); *see also Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903 (2018) (expressing concern where sentencing practices "seriously affect the fairness, integrity, or public reputation of judicial proceedings").

The use of acquitted conduct at sentencing "rob[s the criminal justice] system of the democratic legitimacy conferred by the jury's role." 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, 26 (2016). It transforms jurors from participants in the system into mere bystanders, "allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing." *United States v. Canania*, 532 F.3d 764, 778 (8th Cir. 2008) (Bright, J., concurring). This defeats the purpose of jury service. It also signals to the public that a defendant's punishment turns entirely on the views of the prosecutor and judge, not the judgment of his peers.[5]

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[5] As one juror wrote about the use of acquitted conduct at sentencing for an eight-month trial in which he served:

> 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. . . . It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the [prosecutor] would have liked them to have been found guilty.

B. Vindicating the right to jury trial is compatible with the realities of modern sentencing.

Some courts of appeals have noted that, unlike the common law, the U.S. Code provisions that govern modern sentencing provide judges with broad statutory sentencing ranges. These courts thus reason that, "[s]o long as the defendant receives a sentence at or below the [applicable] statutory ceiling," the Sixth Amendment poses no barrier to increasing the sentence based on acquitted conduct. *United States v. White*, 551 F.3d 381, 385 (6th Cir. 2008) (en banc). This approach is misguided.

1. It is of course true that modern sentencing differs in some ways from the prevailing model at common law. Not only do judges now customarily select sentences within broad statutory ranges, but they do so based on facts not found by the jury. *See Williams v. New York*, 337 U.S. 241, 247-51 (1949).

But under the Federal Sentencing Guidelines system, courts do not have unbridled discretion within applicable statutory sentencing ranges to impose any sentence they like. *See Gall v. United States*, 552 U.S. 38, 49-50 (2007). Judges are required, in every single case, to calculate and consider the Guidelines range. *See id.* at 51; 18 U.S.C. § 3553(a)(4). And while judges can deviate from that range, the Guidelines' highly regimented and specific numerical prescriptions exert—in the words of an editor of the *Federal Sentencing Reporter*—a "special gravitational pull" in

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Canania, 532 F.3d at 778 n.4 (Bright, J., concurring) (quoting May 16, 2008 Letter from Juror # 6 to The Honorable Richard W. Roberts).

sentencing. *See* Michael M. O'Hear, *Explaining Sentences*, 36 Fla. St. U. L. Rev. 459, 482 (2009). As a result, most federal sentences are either within-Guidelines sentences or are significantly influenced by the Guidelines. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345-47 (2016); *Peugh v. United States*, 569 U.S. 530, 543-44 (2013).[6]

In light of this finely reticulated framework and its consequences, prohibiting judicial consideration of acquitted conduct strikes the proper balance between tailoring sentences to defendants' individual circumstances and preserving Sixth Amendment values. In numerous areas of constitutional law, governmental actors generally have wide governmental discretion, but certain specific considerations are off the table. *See* Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 Hastings L.J. 711, 712 (1994). In the realm of sentencing itself, it is "constitutionally impermissible" for courts to rely on a defendant's race, religion, or political affiliation, *Zant v. Stephens*, 462 U.S. 862, 885 (1983); the fact that the defendant successfully exercised his right to appeal, *North Carolina v. Pearce*, 395 U.S. 711, 723-24 (1969); or that the defendant exercised his right to jury trial, *United States v. Jackson*, 390 U.S. 570, 581-83 (1968); *United States v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982) (describing this prohibition as "well settled"). Given the incompatibility of acquitted conduct with the right to jury trial, such conduct must also be off the table.

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[6] Three-quarters of federal sentences thus far in fiscal year 2018 were imposed according to the Guidelines. *See* U.S. Sentencing Comm'n, Quarterly Data Report 11 tbl.8A (Oct. 22, 2018).

Indeed, recognizing Sixth Amendment limits on sentencing courts' ability to rely on acquitted conduct would further—rather than undercut—the Sentencing Reform Act's goal of "increased uniformity" in sentencing, *United States v. Booker*, 543 U.S. 220, 246 (2005) (Breyer, J.). Under the current system, district judges are free either to rely on or to "disclaim reliance on acquitted or uncharged conduct." *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc). Some judges refuse as a matter of practice to take acquitted conduct into account. *See, e.g.*, *United States v. Wendelsdorf*, 423 F. Supp. 2d 927, 929 (N.D. Iowa 2006); *United States v. Pimental*, 367 F. Supp. 2d 143, 146-47 (D. Mass. 2005). Yet others, like the judge here, have no qualms about relying on acquitted conduct. *See, e.g.*, *United States v. Bolton*, No. 17-60502, 2018 WL 5603038, at *10-11 (5th Cir. Oct. 26, 2018); *United States v. Moment*, No. 17-3149, 2018 WL 4847082, at *2-3 (6th Cir. Oct. 5, 2018); *United States v. Jackson*, No. 16-17119, 2018 WL 4492376, at *2 (11th Cir. Sept. 19, 2018). Barring reliance on acquitted conduct would thus further Congress's goal of imposing comparable sentences where defendants engage in similar conduct resulting in similar jury verdicts.

2. Even if the Sixth Amendment does not categorically prohibit reliance on acquitted conduct, this Court's *Apprendi* jurisprudence prohibits the use of acquitted conduct where, as here, a sentence would be substantively unreasonable but for reliance on facts that the jury rejected.

Under the *Apprendi* rule, juries must find all facts essential to a lawful sentence. The Sixth Amendment

"does not permit a defendant to be 'expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002) (alteration in original) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000)); *see also Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).

While the U.S. Code sets a maximum sentence for every crime, even sentences below that maximum are lawful only if they are "substantive[ly] reasonable[]." *See Gall*, 552 U.S. at 51; *Booker*, 543 U.S. at 261-63. And substantive reasonableness "imposes a very real constraint on a judge's ability to sentence across the full statutory range." *Cunningham v. California*, 549 U.S. 270, 309 (2007) (Alito, J., joined by Kennedy and Breyer, JJ., dissenting).[7] Thus, substantive reasonableness—and not the maximum delineated in the U.S. Code—establishes the ceiling for any lawful federal criminal sentence. *See Rita v. United States*, 551 U.S. 338, 372 (2007) (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment).

Putting the *Apprendi* rule together with the requirement that federal sentences be substantively reasonable dictates that if a particular fact is required to make a federal sentence substantively reasonable, then that fact implicates the Sixth Amendment right

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[7] *See, e.g.*, *United States v. Singh*, 877 F.3d 107, 116-17 (2d Cir. 2017) (5-year sentence was substantively unreasonable where the statutory maximum was 20 years); *United States v. Chandler*, 732 F.3d 434, 437, 440 (5th Cir. 2013) (35-year sentence was substantively unreasonable where the statutory maximum was life imprisonment).

to trial by jury.[8] At the very least, the Sixth Amendment prohibits a judge from relying on facts a jury *rejected* to justify an otherwise unreasonable sentence.

III. This case is an ideal vehicle for resolving the question presented.

For three reasons, this case offers the right opportunity to decide whether, or under what circumstances, the Sixth Amendment prohibits federal judges from basing sentences on acquitted conduct.

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[8] Justice Scalia illustrated this reality with the following hypothetical:

> [T]he base offense level for robbery under the Guidelines is 20, which, if the defendant has a criminal history of I, corresponds to an advisory range of 33-41 months. If, however, a judge finds that a firearm was discharged, that a victim incurred serious bodily injury, and that more than $5 million was stolen, then the base level jumps by 18, producing an advisory range of 235-293 months. When a judge finds all of those facts to be true and then imposes a within-Guidelines sentence of 293 months, those judge-found facts, or some combination of them, are not merely facts that the judge finds relevant in exercising his discretion; they are the legally essential predicate for his imposition of the 293-month sentence. His failure to find them would render the 293-month sentence unlawful. That is evident because, were the district judge explicitly to find *none* of those facts true and nevertheless to impose a 293-month sentence (simply because he thinks robbery merits seven times the sentence that the Guidelines provide) the sentence would surely be reversed as unreasonably excessive.

Rita, 551 U.S. at 371-72 (Scalia, J., concurring in part and concurring in the judgment) (citations omitted).

1. There are no procedural obstacles to reaching the question presented. During sentencing, defense counsel objected to the use of acquitted conduct in calculating petitioner's offense level. Pet. App. 11a-23a. The Sixth Amendment question was the sole issue on appeal, and the Fifth Circuit squarely addressed the claim. *Id.* 1a-3a.

2. The facts of this case place the question of using acquitted conduct at sentencing in stark relief. First, unlike some acquitted conduct cases that arise from a mixed verdict on two unrelated charges, this case involves the classic scenario of a greater and lesser charge. Thus, it is especially clear what factual allegation the jury rejected—namely, the allegation that petitioner caused the agent to suffer bodily injury.

Second, the judge explicitly took this acquitted conduct into account. She acknowledged that the prosecution's evidence in support of the greater charge was, in the "eyes of the jury," not persuasive. *See* Pet. App. 29a. Yet the judge disregarded the jury's findings, stating that in her "role as the presiding judge . . . the law allow[ed her] to take into account all of that [acquitted] conduct." *Id.* She then based her sentence on the very allegation and testimony the jury rejected.

3. The district court's reliance on acquitted conduct had a pronounced effect on petitioner's sentence. His offense of conviction (assault by physical contact) carried a Guidelines range of 24 to 30 months. *See supra* at 5. Yet the judge calculated petitioner's Guidelines range as if he had been convicted of the greater charge (inflicting bodily injury on the border patrol agent). This resulted in a Guidelines range of 77 to 96 months—roughly triple the applicable range for

his offense of conviction. The judge ultimately imposed a sentence of 96 months, the high end of the Guidelines range for the acquitted offense. *See* Pet. App. 41a.

The dramatic effect of using acquitted conduct means that this case also highlights the subsidiary question whether acquitted conduct can be used to justify a sentence that would otherwise be substantively unreasonable. When reviewing a sentence for substantive reasonableness, a court must "take into account the totality of the circumstances, including the extent of any variance" from the Guidelines range that would have applied but for the facts at issue. *Gall v. United States*, 552 U.S. 38, 51 (2007); *see also United States v. Rhine*, 637 F.3d 525, 529 (5th Cir. 2011).

Petitioner's sentence was a sharp departure from the Guidelines range corresponding only to the facts of his conviction. His sentence was *four times* longer than the median federal sentence imposed on defendants convicted of assault in the same criminal history category.[9] It was also more than *three times* longer than the maximum Guidelines sentence for facts encompassed in the offense of conviction. Indeed, the district court sentenced petitioner to the maximum sentence of the Guidelines range for the offense of which he was *acquitted*. In light of all of these touchstones, the Fifth Circuit did not question that the

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[9] U.S. Sentencing Comm'n, Interactive Sourcebook, Sentence Length for Offenders in Each Criminal History Category by Primary Offense Category (2017). The Sentencing Commission calculated a 24-month median for individuals with a criminal history category of IV sentenced to the primary offense category of "Assault" in fiscal year 2017.

bodily injury allegation that the jury rejected is essential to the substantive reasonableness of petitioner's sentence.

This Court should settle once and for all whether hinging a sentence on acquitted conduct in this manner transgresses the Sixth Amendment. And the Court should hold that it does.

CONCLUSION

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

Respectfully submitted,

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November 19, 2018

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-41123
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
July 9, 2018
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff – Appellee

versus

MIGUEL CABRERA-RANGEL,

Defendant – Appellant

Appeal from the United States District Court
for the Southern District of Texas
No. 5:17-CR-198-1

Before HIGGINBOTHAM, JONES, and SMITH, Circuit Judges.

PER CURIAM:[*]

Miguel Cabrera-Rangel appeals the sentence imposed for assault on a federal officer by physical contact. He was acquitted of assault on a federal officer by physical contact inflicting bodily injury.

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Cabrera-Rangel contends that the district court ignored the jury's verdict and impermissibly relied on acquitted conduct. He maintains that the assessment of his base offense level and the application of enhancements under U.S.S.G. § 2A2.2(b)(2)(B) and (3)(E) violated the Sixth Amendment because the determinations were premised on actions of which he was acquitted. Cabrera-Rangel concedes that this claim is foreclosed by *United States v. Watts*, 519 U.S. 148, 157 (1997), and that we have held that *Watts* is valid after *United States v. Booker*, 543 U.S. 220 (2005). He notes, however, that a reevaluation of *Watts* is necessary because it did not address whether consideration of acquitted conduct at sentencing violates the Sixth Amendment and that *Watts* otherwise did not account for principles articulated in *Booker* and later Supreme Court decisions.

A panel of this court may not overrule another panel's decision without en banc reconsideration or a superseding contrary Supreme Court decision. *United States v. Lipscomb*, 299 F.3d 303, 313 n.34 (5th Cir. 2002). We have held that *Watts* remains valid following *Booker*, *see United States v. Jackson*, 596 F.3d 236, 243 n.4 (5th Cir. 2010); *United States v. Farias*, 469 F.3d 393, 399 (5th Cir. 2006), and the Court has not held otherwise, *see Cunningham v. California*, 549 U.S. 270, 274–94 (5th Cir. 2007). Cabrera-Rangel thus has not shown that the district court erred when it considered conduct of which he was acquitted. *See Farias*, 469 F.3d at 399 Cabrera-Rangel contends that his sentence is improper because the district court relied on judge-found facts as to his acquitted conduct; Cabrera-Rangel maintains that, if

only the facts encompassed by the verdict were considered, his sentence is unreasonable. He asserts that his sentence violates the Sixth Amendment and should be vacated.

As Cabrera-Rangel concedes, his claim is foreclosed. Regardless of whether Supreme Court precedent has foreclosed as-applied Sixth Amendment challenges to sentences within the statutory maximum that are reasonable only if based on judge-found facts, our precedent forecloses such contentions. *United States v. Hernandez*, 633 F.3d 370, 374 (5th Cir. 2011).

AFFIRMED.

APPENDIX B

[1]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

THE UNITED STATES OF AMERICA	Case No. 5:17-CR-00198-1
	LAREDO, TEXAS
vs.	FRIDAY
	OCTOBER 27, 2017
MIGUEL CABRERA-RANGEL	11:35 a.m. to 12:50 p.m.

SENTENCING

BEFORE THE HONORABLE DIANA SALDANA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PARTIES:	SEE NEXT PAGE
COURTROOM DEPUTY:	ZACH DAVIS, U.S. MARSHAL
RECORDING OPERATOR:	BEN MENDOZA

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[2] APPEARANCES:

FOR THE GOVERNMENT	U.S. ATTORNEY'S OFFICE Michael Bukiewicz, Esq. 11204 McPherson Road, Ste. 100A Laredo, Texas 78045 956-721-4975
FOR THE DEFENDANT:	FEDERAL PUBLIC DEFENDER'S OFC. Raul Guerra, Esq. Sara Martinez, Esq. 1202 Houston Street Laredo, Texas 78042 956-753-5313
ALSO PRESENT:	Diana Gonzalez Raul Gonzalez Official Court Interpreters
	Delia Gonzalez Case Manager
	Daniel Vella Ruben Chapa U.S. Probation Office
	Zach Davis U.S. Marshal

[3] LAREDO, TEXAS; FRIDAY, OCTOBER 27, 2017, 11:5 [sic] A.M.

(Official Interpreters utilized for translation.)

THE COURT: Miguel Cabrera-Rangel, 17-0198.

MR. GUERRA: Raul Guerra for Mr. Cabrera-Rangel, Your Honor. And Sara Martinez.

(Defendant sworn.)

THE COURT: You are Miguel Cabrera-Rangel?

DEFENDANT CABRERA-RANGEL: Yes, ma'am.

THE COURT: Mr. Cabrera, I need to sentence you for assault on a federal officer by physical contact. Did you get a chance to review the report?

DEFENDANT CABRERA-RANGEL: I don't know what report you're talking about, ma'am.

THE COURT: The one that your lawyer is showing you.

DEFENDANT CABRERA-RANGEL: Oh, yes, ma'am.

THE COURT: Okay. So I need to sentence you. This was a jury trial and I think you're still contesting.

Right, Mr. Guerra?

MR. GUERRA: Yes, Your Honor.

THE COURT: He's contesting the facts.

MR. GUERRA: Yes, Your Honor.

THE COURT: Usually I ask was everything correct. But because there was a trial I'm assuming that the underlying facts that you're contesting and

your attorney is confirming that for me, I'm going to go over your life history, sir, your [4] personal background. And then your criminal record and then your family record. All of that, was that correct?

DEFENDANT CABRERA-RANGEL: Yes, ma'am.

THE COURT: So it says here you're 54. You actually had a birthday last week on Monday, and that you're a native and citizen of Mexico.

DEFENDANT CABRERA-RANGEL: Yes, ma'am.

THE COURT: And you actually have a criminal record that puts you at a Category IV. But a lot of other encounters with law enforcement that were not – that you were not given criminal history points for, and they start in 1984. Which really just shows the extent of the time that you've been in the United States and then why you keep on coming back to the United States, because you've been here since about the age of 21.

And lots of different parts of the country. The first ones that we have here in 34 and 35, those are in Florida. One of these is discharge of a firearm in public. And then in 1990 another one in Florida and this is a DUI. And then a resisting arrest without violence in 1993 in Florida. And then a couple of – well, an illegal entry in '96, that was here in Laredo. And then possession of marijuana in Georgia. So all of these encounters that I've just talked to you about, they don't give you criminal history points, but they're all convictions. And so those start in [5] paragraph 34.

So now we've made it to paragraph 39. And then we've got a couple more illegal entry

misdemeanors in page 10, paragraph 40, 41 and 42. The first two don't give you points. The last one on that page does give you a point. That was in 2008. And all of those are here in Laredo, the last one was in McAllen.

Then in 2012 you have a felony re-entry. That's in Victoria. That one gives you two points. And that, I think, is –

DEFENDANT CABRERA-RANGEL: Excuse me. Excuse me. I have never been through McAllen.

THE COURT: Let me see here. You may – oh, it wasn't McAllen that you crossed through. It looks like you crossed through Pharr, but then they prosecuted you in McAllen. They took you to the court closest to that area, is in McAllen. So it's not crossing through there, but it is – that's where they took you to court. You saw Judge Ormsby. He's a magistrate judge. He's still there. You were – but it says here you crossed the river near Pharr, Texas. And that was in 2008. He gave you time served. He's a very nice man. That was after like two or three misdemeanor illegal entries.

But in any event, after that you had the felony. That one was seven months in custody. I think that's the most [6] at that point that you had been sentenced to, seven months.

Af[t]er that we see you – you get deported through Laredo, but then you're back again in May and you're in Angleton, Texas. And that's a possession of marijuana. That's another two points.

You get deported again or you leave – no, you get deported after the misdemeanor possession of

marijuana and then you're back again. So we have May, June, July, two months later you're back again here in Laredo. And this one you appeared before Judge Garcia and he gave you six months. So that's two points.

And then you get deported again in 2014 through Del Rio. But then you make it back because now you're in Galveston in 2016. And you get prosecuted for a DWI or open alcohol container, it's a misdemeanor. You get two points for that.

You get deported again September the 2nd, 2016. And we end up here in Laredo in this case January 19, 2017. So that was the last deportation, September 2016. October, November, December, January, you were back four months later in this case.

There's a lot of other encounters, so that's where it puts you, at a Category IV. We've got a lot of other encounters with law enforcement where you were either voluntarily returned, deported. Some of these are disturbing. [7] The first one was in 1987. It was assault and battery with intent to kill. It was a felony. It was dismissed. The narrative there says that they were dispatched because of a stabbing. The person had been stabbed in the back. And they then encountered you who had sustained injuries following this physical altercation with the victim. That's in South Carolina.

And then in 1988 you have an aggravated assault felony. The charges were dropped. That is later, that's the following year, but that's also in reference to a stabbing. They say that the operator of

a vehicle identified you and that you had tried to run over this witness. That was dismissed.

And then in '99 we have a possession of alcohol. You get deported. That's in Georgia.

And then we've got a couple of illegal entries here in Laredo. Voluntary returns.

And then in 2001 another incident in Georgia. They deport you to Mexico.

And then in 2003 an apprehension in New Orleans and you get deported.

And then we've got some carrying concealed weapons in the mid-'80s. We don't know the dispositions.

But you look like you have a brother who's a resident alien who's in Galveston. Everybody else, I think, [8] in your family is in Mexico. Actually, you have two brothers. They're both fishermen and they're both in Galveston.

But then your movement back and forth between Laredo and Mexico – or not Laredo, between the United States and Mexico, it's in paragraph 59.

You have a child in Florida. More importantly, you've got seven kids in Mexico. You're married and you've got seven kids in Mexico and they're all citizens of Mexico. The youngest one is seven, the oldest one is 17.

And then it talks here about your two fingers being missing from your left hand because of an automobile accident in 1992.

And it talks a lot about the alcohol consumption that started when you were 16. That you claim you don't have an alcohol problem, but that your criminal record reflects several alcohol-related arrests.

So that's pretty much the extent of your background. That you're a seasonal employee, shrimper, oyster harvester in Galveston and in Port Lavaca. In fact, I think they found you in this case on a boat near Corpus when they encountered you in this case. So that's it.

I'll go over the scoring with you here in a little bit. In fact, I'll probably just let your lawyer do the objections and that's how we'll get into the actual facts. But the way that you're scored right now, you're at a 24/4 [9] which is 77 to 96 months. That's how you're scored.

Would you like to say anything to me before I decide your sentence? And then I'm going to talk to your lawyer about all the objections.

DEFENDANT CABRERA-RANGEL: No, ma'am.

THE COURT: Okay. Okay, Mr. Guerra, let's see here. Let me get to the scoring. Okay. Okay, I'm here. So we are at an offense level 14.

MR. GUERRA: That's correct. That's where the probation officer scored him, Your Honor. And I have an objection to that. But that is where he was scored.

THE COURT: Okay. So what's the objection to the 14?

MR. GUERRA: Your Honor, he's cross referencing based on the Guidelines. He's using 2A –

let me make sure I get the numbering correct here. He's 2A2.2 which is the aggravated assault. Which is the aggravated assault Guideline calculation. And our objection, Your Honor, is that he is – he was convicted of the impeding, obstructing, assaulting which is 2A2.2 – I'm sorry, 2.4. And that has a base offense level of 10. And so, our objection is that basically to use – using this particular Guideline, Your Honor, calls for the Judge to use the Guideline for each separate, unconvicted offense. And so, that's our objection to that.

He was not convicted of the aggravated assault. [10] That is that particular evidence was presented to the jury and they found beyond a reasonable doubt that he was not guilty of that. And so, our objection is that that is a incorrect base offense to start this discussion on, Your Honor.

May I proceed, Your Honor?

THE COURT: Yeah, go ahead.

MR. GUERRA: Okay. So that is one objection, Your Honor.

We have, of course, specific objections to the use of a dangerous weapon which they're including, and the injury, bodily injury, the confession of bodily injury.

But I guess let me begin, Your Honor, if I may, by addressing as I did in my written objection, that we understand that based on current Fifth Circuit case law we're foreclosed in terms of our objection to the use of the acquitted conduct. And, however, we –

THE COURT: And that specifically would be – why don't we just make it clear. That the part that

you're objecting to, the acquitted conduct, I guess, if you will, it's not physical contact, it is the bodily injury.

MR. GUERRA: Yes, Your Honor.

THE COURT: And what would be the other thing?

MR. GUERRA: Well, it's bodily injury and the use of a weapon.

THE COURT: Use of a weapon. Yeah. [11]

MR. GUERRA: He's including both of them, Your Honor.

THE COURT: Yeah, okay.

MR. GUERRA: So, and so we understand –

THE COURT: And those two would have been – would have been under the Count One?

MR. GUERRA: Count One, Your Honor, which was a not guilty Count.

THE COURT: Except that the Count One was forcibly assault, resist, oppose, impede, intimidate and interfere and engaged in acts involving physical contact and use of a deadly or dangerous weapon or inflicting bodily injury. So, I know that you highlighted this in your objection. The Government chose to proceed with inflicting bodily injury?

MR. BUKIEWICZ: Yes, that's correct, Your Honor.

MR. GUERRA: They abandoned the use of a deadly weapon and proceeded with the infliction of bodily injury.

THE COURT: Okay.

MR. GUERRA: And so that is – that's another part of our objection. And not just that, but with regard to the inclusion of – there were two different – two different alleged bodily injuries, Your Honor. The information that was presented to the grand jury, which is the broken nose and the lacerations to the face, and there's the information that was included by Probation which was abandoned by the Government, [12] also, prior to trial, which is the issue of –

THE COURT: Detached retina.

MR. GUERRA: – the detached retina. And we attached a copy of a letter from the ophthalmologist that was provided through discovery by the Government that we believe basically supports our position that that's one of the reasons why they abandoned it. Because this particular expert, the ophthalmologist in that particular letter is saying, well, you have a pre-existing condition that makes you, you know, places you at high risk for this particular ailment. And he does say, however, it could also be caused by this. But it's not definitive. And so, we would imagine that that's why they chose to abandon it prior to trial.

But with regard to the issue having, you know, told the Court as I just did, Your Honor, that we understand that existing Fifth Circuit case law precludes some of these objections that were – or forecloses the objections, I should say. We would like to – we're still trying to – seeking to preserve for the record, Your Honor, for various reasons. And if the

Court will indulge me I wanted to put some things on the record, Your Honor, because it is very important.

In looking at the case law, my understanding based on looking at the case law and looking at some of the arguments that have been made in some other cases that were pending as recently as, I believe, last year in another [13] Circuit, it seems to be that the prevailing consensus is that the *Watts* case was decided on Fifth Amendment grounds. Specifically, the due process issue, whether or not a sentencing court could use basically just a preponderance standard to make a determination and use that conduct in fashioning the appropriate sentence.

The Fifth Circuit case law seems to include the Sixth Amendment, but at my reading of it and, certainly, reading what some of the commentators that have written about the *Watts* case, they seem to say that the whole Sixth Amendment issue was not even addressed by the Supreme Court, Your Honor.

And so, we're focusing our objection on Sixth Amendment grounds, which is his right to a jury trial, which he did have. And for the specific reason that, as we all know, that an acquittal carries a special weight in the American criminal justice system. And so, this particular right of – Sixth Amendment right to a jury trial, Your Honor, is extremely important. It's a – it is a fundamental guarantee of an individual's liberty.

And so, our position, Your Honor, is that enhancement by acquitted conduct basically eviscerates the jury's ability to protect the citizen from government overreaching. And so, in addition to that it diminishes the democratic nature of the

criminal justice system and [14] undermines public confidence in the judicial system. Because we have a jury that is empaneled, comes in, like we saw. The Government gets to present all its evidence. We get to cross examine their witnesses, present whatever defense we have. And at the end of the day they come back as they did with a split verdict with a not guilty on the most serious charge. He was facing up 20 years on that particular charge. They specifically came back and said not guilty. And the Court's instruction was very specific. It said you must find that he inflicted bodily injury, and they said not guilty on that, Your Honor. And so, we can certainly debate what may or may not have gone through their mind. The fact is that they, after the evidence was presented to them, that is the conclusion that they reached. And they found that he did not inflict bodily injury.

And so, our position is that to turn around now and for the Government to say, well, that's good and well, he exercised his right to a jury trial and the jury found that. But, Judge, you can find that he did inflict bodily injury. And so, we think that that's just turning the whole judicial system on its head, Your Honor. And certainly, again, specifically, which is of concern to us, is that it undermines the public confidence in the judicial system.

Additionally, Your Honor, we have concerns with regard to due process and the standard of proof because, [15] again, recognizing that the Supreme Court has said preponderance of evidence is sufficient for sentencing. We don't dispute that. We know that the Supreme Court has said that. But from a very basic standard, Your Honor, we believe that it is

fundamentally unfair to find someone guilty and imprison him on the same strength of evidence as what applies in a civil case, which is exactly what would happen in this case. Because you have a jury – we had the criminal trial, we had a jury look at the evidence under the much higher scrutiny of beyond a reasonable doubt, and they reached a verdict and they said not guilty. And yet, the Government gets to take a second bite and say, well, forget about that, you know, let's just go with the much lower civil standard of preponderance and that's good enough. And we believe, again, that that's just fundamentally unfair, Your Honor, based on our system of government, basically.

And, you know, I found this quote, Your Honor, from a learned professor. It's from an old law review article. And I think, you know, this is just exactly on point in terms of our position. And his argument is that allowing a sentence enhancement for acquitted conduct is tantamount to permitting the judge to enter, for sentencing purposes, a judgment of guilt, notwithstanding the verdict on the counts of acquittal, an action which is barred as inconsistent with the Sixth Amendment right to trial by jury.

[16] And so, we believe that the use – and specifically, I don't want to – you know, there's two different things. There's always the issue of unadjudicated conduct and adjudicated conduct. And I'm focusing on adjudicated conduct, which is what we're talking about with respect to Count One. He was adjudicated. It was a not guilty verdict. And so, with regard to adjudicated conduct our position, Your Honor, is that the preponderance of evidence standard is fundamentally at odds with our system of

justice because it basically dislodges the jury from its crucial role in our criminal justice system. So, that's the second issue.

The next issue, Your Honor, is with regard to double jeopardy. And he is looking at again basically being punished for an offense that he has been found not guilty. And the Government may come back and say after I'm done, well, but he's not because we're not – I know the case law says if it's – anything that goes beyond the statutory max has to be put before a jury, otherwise the judge cannot consider it.

But it's really semantics, in our opinion, Your Honor, because in essence, and you can see it very clearly in this case, in essence the Government's position is, well, you know what, yeah, he had his day in court, the jury came back not guilty, but the case law is very clear. You know, you can use this conduct even though it is adjudicated conduct and he has been adjudicated not guilty. And although it doesn't [17] increase the statutory max, it's going to increase the Guideline range substantially compared to where he would be otherwise.

And so, at the end of the day he's placed in the same predicament. He's going to be looking at a much higher sentence than he would otherwise. Irrespective of the fact that we're not, you know, touching the statutory maximum, he's still looking at a lot more time because the adjudicated not guilty conduct is going to be included, which is what the Government is proposing.

And so, again, we believe that that is – it is a violation of his Constitutional rights, specifically the double jeopardy, Your Honor, that in doing so we are

again really, really just turning the criminal justice system on its head because the whole system of – or the rule, you know, in our criminal justice system is that these judgments reflect our interest in preserving the finality of judgments to protect individuals from government overreach. And so, I may have stumbled on that.

But the point is again that the whole issue of these trials and having a judgment is to preserve, you know, the individual citizens from government overreach. And this is turning it on its head, Your Honor.

So, to reiterate, if we do this, Your Honor, the use of acquitted conduct is tantamount to a redetermination by the [18] sentencing judge of a jury's final verdict. I mean that's what it amounts to. And again, I'm talking about just adjudicated conduct, not unadjudicated conduct.

Finally, Your Honor, this is another issue that I think is very important because in looking at the case law, of course, it says the court can look at unadjudicated conduct, relevant conduct, whatever, you know, whatever term you want to use to put in the proper context, you know, the nature of the offense that he has been or she has been convicted to form – or fashion, I should say, the appropriate sentence.

However, I think there's a big distinction, Your Honor, between using it to conceptualize the offense of conviction and basically redefining the offense of conviction. And I think that's what we're doing in this particular case. Because by Probation using the aggravated assault Guideline calculation, which is

exactly what they've done, our position is that what they're doing is they're redefining his conduct. Which, again, the jury came back in Count Two it is simple assault. I mean not simple assault, but I mean it's assault, a physical contact. And they're using the cross reference for aggravated assault and they're redefining it for a crime that he was not convicted of. And so, that is another objection that we have.

And we believe that – and this goes back to what I told the Court a little while ago, that the use of a [19] Guideline, a cross reference Guideline we would argue is illegitimate because it is – he's in essence being convicted for a separate offense that – I'm sorry, he's being sentenced for a separate offense that he was never convicted of; in this particular case, aggravated assault. He ends up scoring a lot higher. They're specifically using all the enhancements from that particular provision even though the assault provision which is the 2A2.4 provision has some enhancements in and of itself, Your Honor.

And so, it's not like it does not have – the Government's not – doesn't have the ability to use those particular enhancements in that other section. They're two distinct sections and they each have different enhancements. And so, that is our position that by using this cross reference for aggravated assault they're redefining the offense of conviction as aggravated assault and they're violating my client's Sixth Amendment right to a jury trial, Your Honor. Because, again, as I stated earlier, this whole issue of inclusion of this unadjudicated or adjudicated conduct is a distinction without difference because the end result is that Mr. Cabrera is going to end up

being punished more severely. His punishment range is going to be increased because of the consideration of the acquitted conduct. And again, our position is that that violates his Constitutional rights, Your Honor.

[20] So, we're – I gave specific – a little bit more specific in the written motion with regard to the use of the dangerous weapon, Your Honor. Specifically, again in terms of the – that even applying the preponderance standard, we believe that if the Court – as the Court is bound to do, follow current applicable case law, even using the preponderance standard, Your Honor, we believe that with regard to the use of a weapon enhancement the information, the evidence that was presented to the jury, if the Court sees it also in terms of – we have two different things. We have the agent testifying and saying this is how it happened, this is what was used.

But they also – "they" being the Government – also presented the experts. And they presented the two experts from the FBI laboratory. One being the fingerprint analyst and the other one being the DNA expert. And our position is, Your Honor, that their reports and their testimony further supports our conclusion that even based on the preponderance standard that it's – there's not enough there to find that that was used because one testified there are no fingerprints. Not even the agents, not even Agent Platt's fingerprints were found on the flashlight. And he testified that that had been his flashlight for the last five years. And that is just amazing that you would have no fingerprints on a flashlight that a person – his own fingerprints, let alone the alleged

[21] assailant's. And so, DNA – and the Court, of course, presided over the trial, so I'm kind of just repeating what the Court already knows. But the DNA expert, of course, testified that they found some DNA. It wasn't – it was inclusive as to the agent and it definitely was not my client's, Your Honor. And so they have no idea. They know that it's a male DNA, but they have no idea whose DNA that is. And so, we believe that even applying the preponderance standard is still not sufficient with regard to the use of a deadly weapon for the Court to apply that enhancement, Your Honor.

The issue of the bodily injury, I know that, number one, I've already made a distinction between the retina issue which I believe I've already covered and I can certainly, if the Court wants me to, reiterate some of those points. But I believe I made clear that our position is that, number one, they abandoned that particular alleged injury. And now that it's before the Court again we believe that their experts, the treating physicians, ophthalmologist's letter itself, Your Honor, shows that the one person who would know who is the treating physician. He's an expert of eye – eye expert is saying in writing that you have this pre-existing condition, that that in and of itself can account for it. But, yeah, you know, if something happens to you, that may account, too. So it's – that even by a preponderance standard we believe that [22] that's insufficient, Your Honor, for the Court to find that they've met their burden and that that should be included.

With regard to the bodily injury itself, as the Court may recall, when they presented their expert, or I guess that was testified as an expert. I know it

was a treating physician, the fact witness. But the doctor testified under cross and when Ms. Martinez specifically crossed him on that he admitted that it was very possible that the injuries that the agent sustained could have been a result of – could have resulted when he tackled the person and fell to the ground. And so, their expert's own testimony puts into question whether or not anybody really caused those particular injuries, Your Honor.

And so, again we believe that even applying the current preponderance standard that that would be also insufficient. The Government has not met their burden and it would be insufficient. And that, of course, is all part of the record the Court presided over that the Court heard. I believe even the Court asked the doctor a couple of questions, also, if I'm not mistaken. But we believe that they have failed to meet their burden on that front, also, Your Honor.

So, if I may just ask Ms. Martinez if I haven't forgotten.

(Mr. Guerra consulting with Ms. Martinez.)

MR. GUERRA: With regard to the objections, Your [23] Honor, I think that that is what I wanted to put on the record for the Court to consider.

If I may, with regard to the criminal history, if the Court will allow me to make some comments about that, Your Honor. The criminal history that the Court went over, number one, Your Honor, the – as the Court stated, a lot of those are very, very old. You know, 31, 30 years ago, the first one when he was 21 years old. And so, pursuant to our current Guidelines, Probation has followed the Guidelines

and they don't receive any criminal history points as is allowed by the Guidelines. And so, it is criminal history that is very dated, number one. Number two, if the Court looks at the most recent criminal history, Your Honor, most of that is illegal entry. And most of those are misdemeanors. And I think that reflects why in 2012 when the Court in Victoria sentenced Mr. Cabrera-Rangel, he received only a seven month sentence. And I think it's reflective of the fact that a lot of the – those convictions were not receiving criminal history points in 2012. And really, the most recent arrest he had and convictions were all misdemeanor illegal entries, Your Honor, that were considered by the court.

With regard to the more serious arrests that he had that are also very, very dated from almost 30 years ago, from 1987 and – or, actually, 30 years ago, 1987 and almost 30 years ago from 1988. As the Court correctly stated, those [24] were dismissed, Your Honor. I mean we don't dispute that they sound very serious in terms of you look at the actual charge. But at the end of the day these particular jurisdictions, albeit the South Carolina jurisdiction in paragraph 48 or the Florida jurisdiction in paragraph 49, they made the determination after applying the facts to the law of their jurisdiction to dismiss those charges, Your Honor.

And so, we certainly – you know, we have the limited information that's included in there, but obviously being that as the Court said, and we don't dispute that they're serious charges, what is most important to us is that the charging jurisdictions did not proceed. They dropped those charges.

And so, that leads me to believe that there was either an issue of self defense, as might be an issue alluded to paragraph 48 because it says that the defendant, being my client, also had injuries when he was arrested. And so, there certainly is an issue that that was probably – and again, you know, I don't have that information, so I'm just making some assumptions based on the fact that the charges were dismissed, that that is a probability, Your Honor. That they found that it was an issue of self defense and they dismissed it.

With regard to paragraph 49, the same thing. Again, the charges were dropped in 1989. And so, we don't dispute that they're serious, but for whatever reasons the state [25] jurisdictions decided not to proceed, you know.

And I think that is very important for the Court to consider because otherwise, again, you know, we just had a huge discussion about adjudicated conduct with a finding of not guilty being used to prejudice my client and that particular adjudicated not guilty conduct being used to increase his Guideline sentence. And we certainly want to avoid the fact that an arrest in and of itself that resulted in the dropping of charges or the – you know, the case not proceeding in those particular jurisdictions, for that also to have any kind of undue influence on the Court in terms of affecting also his sentence, Your Honor. Because, again, these jurisdictions made the decision to not proceed on these charges for whatever reason. And, you know, anybody can second guess them, but they're the ones that are charged with making those calls and that's what they did.

And so, we would – The criminal history category, Your Honor, he's got nine criminal history points. But, again, I believe – and let me count them real quick, but I believe it's four of the nine are all illegal – illegal re-entry, either the felony or the misdemeanors, Your Honor. And so, – let's see two, four, five. It's actually five criminal history points out of those nine are illegal re-entry cases, Your Honor. And so, those are issues or factors that we would ask the Court to consider, Your Honor, as it fashions a sentence.

[26] And with regard to his family, the Court mentioned and it's included in the PSR, he's got seven minor kids right now that depend on him, Your Honor. And so, as the Court saw in the PSR, when he was here he was primarily working in the shrimping and fishing industry. And he would come to work, send money to his family, go back, spend time with them, come back again, as the Court says, seasonally to work. And so, we would like for the Court to consider those factors, Your Honor.

(Pause in the proceedings.)

THE COURT: Okay. Well, you know, your arguments, you know, are well taken, Mr. Guerra. I appreciate the work that you've put into preparing those objections. I've reviewed them. I've reviewed them yet again before I came on the bench. I reviewed them again this morning. I'm reviewing them again right now.

A couple of things. And, Mr. Bukiewicz, I don't know if you – I know you filed a response and I have that and I looked at the cases that you cited, as well. So, I've got all of that.

And I'm looking at the Probation Officer's response. So the Probation Office decided, you know, they come over here, they come to the trial, they witness, they listen to everything, they take all the reports, they put everything together for the Court. So, the Probation Officer decided to start this off at an offense level 14.

[27] And so, if you look at the Probation Officer's response to the objections, the reason that they did that is – let me see, I think it's to Objection No. 1. So, they summarize your objections and your arguments and they indicate the reason why they did what they did. So, if you can look at the – if you look at the assault provision here under 2A2.1 – let me get back to it – 2A2.3, 2A2.3, excuse me. So, you're right, it's a 7 if the offense involved physical contact or if a dangerous weapon, including a firearm, was possessed and it's used with threat, 7. And so, the verdict was on Count Two involving physical contact, so it's a 7. And then it goes to the specific offense characteristics, which you've highlighted, if the victim sustained bodily injury, increase by 2. That's a 9 because they [sic] other one doesn't apply. It has to be a spouse, an intimate partner or a dating partner or an individual under the age of 16. So, it's increased by 2. So that's 9.

There's a cross reference. So, the Probation Office is doing this. If the conduct constituted aggravated assault, apply 2A2.2. So, they end up going then to 2A2.2, which is where I'll go now. So that base offense level is a 14. And if you look at the definition for aggravated assault it means a felonious assault that involved a dangerous weapon with intent to cause bodily injury with that weapon,

serious bodily injury, strangling, suffocating or attempting to strangle or suffocate or an intent to commit another offense – or another felony; [28] excuse me.

And so, the Probation Officer replies to the objections with "the Border Patrol Agent Platt testified that the defendant struck him in the face with his flashlight during this struggle. The defendant denies doing that. The defendant did admit that he was able to gain possession of the agent's flashlight during the struggle." And so, because of that testimony the Probation Officer thinks that that is an aggravated assault and that's why they went to that cross reference and that's why they start at 14.

So, you've made a couple of points with regard to – that there's not enough under a preponderance standard for the Court to find that there was this aggravated assault. One of them being the DNA, the other being the fingerprints. The lack of the DNA or the lack of the fingerprints.

I presided over the trial. I listened to all of the testimony. I was – quite frankly, I was shocked that the jury did not find the defendant guilty of the first Count – or the second Count, whichever one they acquitted him of.

MR. GUERRA: The first Count, Your Honor.

THE COURT: It was the first Count?

MR. GUERRA: Yes.

THE COURT: Thank you.

The DNA and the fingerprint analysis really did not – I did not think was significant. It was something that the [29] Government decided to do. I don't know why they did that, but they did. The flashlight is not a porous object. There was no testimony as to how long the flashlight stayed out in the field. There was no testimony as to how it was handled when it was picked up. You know, I know that the agent testified that he ran away from the encounter after he was able to free himself from the defendant, and the flashlight was left behind. I don't know when it was found. I don't know how it was found. So this whole notion of there's no DNA and there's no fingerprints, that doesn't really support your contention then that it wasn't used. It doesn't support it at all, in my view.

The defendant – I mean Agent Platt testified that he was hit in the face by his flashlight. I thought that he was very forthcoming, appeared to be honest, truthful, very powerful testimony. He identified his flashlight in the courtroom. But the lack of DNA or fingerprints on the flashlight doesn't support that it wasn't used. Maybe in the eyes of the jury, because you made very compelling arguments and they went along with you on it, they, you know, acquitted him of that conduct. There's no dispute as to that.

But I am still, you know, as my role as the presiding judge over the trial and the sentencing, the law allows me to take into account all of that conduct. And that's why the Probation Office did what they did. I can't – You know, I don't know that it's the Government pushing it. I guess [30] they're responding to your objections, but it's really the Probation Office who evaluated all of the evidence,

sat through the trial and then decided how to score the case.

And so, I do believe that there is sufficient information in here for us to start off at the offense level 14. So that objection is overruled.

The next objection then is if a dangerous weapon was otherwise used, increase by 4. And so the Probation Office indicates what I just stated a little while ago, that Agent Platt testified that he was struck in the face with his flashlight during this struggle. And at some point during the course of all of this the defendant did admit that he was able to gain possession of the flashlight. And I don't think that that was much of a dispute.

And again, you know, I found the agent's testimony to be very credible. And the injuries that were contained or demonstrated in the photographs seem consistent with that type of hit or type of conduct. And so, you know, I think that there is sufficient information in the record to support that enhancement, as well. So that objection is overruled.

And then the last objection then is to this plus 6 for the permanent or life-threatening bodily injury because of the detached retina. So, I understand your argument, you know, about, you know, what the doctor said and that he had this other condition. And I also listened to the testimony, you [31] know, that the doctor, the medical doctor talked about with regard to what type of conduct or what type of things could have caused the injuries to Agent Platt.

You know, I'll note that he's been a Border Patrol agent and – I don't know, I have my notes

here, let me see if I can – 19 years. When he testified, a Border Patrol agent 19 years. And I know one of the points that was made by somebody – maybe it was Mr. Bukiwiecz – is he's had this condition and throughout his 19 years as a Border Patrol agent he hasn't suffered a detached retina. And so, I think that that is – that there's sufficient information in the record even if the Government decided to – well, they abandoned the – they abandoned that part of it, they did not abandon the bilateral nasal bone fracture, which was repaired. But the detached retina, because he's on light duty, he remains on light duty to this day because of the vision in the left eye following that surgery. I think that there's sufficient information that if you get hit in the face with a flashlight that that would then be the cause of the detached retina, considering the fact that he had not had any issues with that even with the pre-existing condition.

You know, I don't know why the Government abandoned that. Maybe they thought that would be too confusing to the jury. It doesn't really matter. The facts are the facts the way that they are contained in the report. And I think that [32] that would be sufficient information for me to make that determination.

The other thing that I, you know, note that's part of the report – and if you just bear with me while I go to that section. This individual, this defendant fled. The encounter, the assault, whatever, however you want to call it, ended when Agent Platt was able to free himself from the defendant. And then Agent Platt ran out. I'm going to find that here. He called for help.

During a search of the area, paragraph 10, agents encountered four undocumented aliens. The defendant was not with the group. He had fled. The four aliens, along with Agent Platt, identified the defendant as the assailant, through interviews and by photograph.

The arrest warrant was issued January the 27th. Issued for the defendant. He wasn't found until February the 13th, and that's when he was found in Corpus Christi.

So, we did not hear from the four undocumented aliens. They were deported. You know, I would hope that if we ever have this type of situation again – and, hopefully, we won't – that the Government or even the defense would ask that these individuals be kept as material witnesses. I understand that at this time the defendant had not been found yet. And so, maybe there was uncertainty as to whether or not he was going to be found and when he was going to be found, and we [33] were going to be holding these undocumented aliens, you know, indefinitely. Probably not. But the only way that this person was identified and eventually found is because he was identified with the help of the other people who were part of the group who, according to this, would have identified him as the person who was involved in this assault.

So, I think that with all of this information that there is enough for me to overrule the objections and to find that the report is accurately scored.

So, it's not – you know, the Probation Office is not, you know, just grabbing these items or these levels out of thin air. I mean they're following the

advisory Guidelines. They're following the information and the evidence that was presented during the course of the trial. And the law allows for the Court to examine that and to use acquitted conduct.

And so, you know, I'll tell you, Mr. Cabrera, you know, if there was any doubt in my mind – and I would hope, you know – you haven't been in front of me other than this time that I had the trial. Any doubts I always give to the defendant, you know, because I believe very strongly in our Constitution. I believe very strongly in defendants leaving this Court feeling like, You know what? this was the outcome, but I feel like I was treated fairly and I was – you know, that's the law and I don't agree with the law, but I was treated fairly. And, you know, that's always my intent, my [34] desire to do that.

And I am not going to ignore, you know, the testimony that I heard, everything that's contained in the report. You know, I don't have any doubt of it. And so, I think that it clearly meets the preponderance standard which I'm required to evaluate in determining sentencing issues.

You know you have a right to appeal. You haven't accepted responsibility for this conduct. You're disputing it. You know, I'm sure you're going to appeal the trial. You know, maybe the guilty verdict on that one Count and whatever errors your appellate section or the Public Defender's appellate section can find. And then you would, you know, have the ability to appeal the sentence. And so, the Fifth Circuit will be able to review it. They're going to get a chance to review it. Your lawyer did a beautiful job of

putting everything on the record that he thinks he needs to put on the record. But I think that it's correctly scored.

I highlighted your background really just for you to recognize and for you to see and for you to maybe evaluate and consider these continued returns to our country where you are not welcome here. You have been deported numerous times. You've been prosecuted numerous times.

Some of this conduct, you know – because your attorney is telling me, Well, it's really old and, you know, don't worry about it – and, you know, we have a DUI in 1990 [35] and then we have one July 23, 2016. That conduct is a danger to the community. It is a danger to the community. And those are convictions. Those are convictions. Those are not things that were not charged that somebody decided not to prosecute you on. Those are convictions. And we all know that drinking and driving is a danger. We see it every day in the news. So you're coming over here. You're committing violations of law as early as 1990, as late as 2016.

And so, you know, the point is that the Government has tried numerous times, you know, to prosecute you for these illegal entries and then to send you home. You have a lot of kids. We want you to stay in Mexico with your kids. It's hard to support them, I understand that. You know, and maybe you're able to make more money over here because your brothers are here and they live over here. I think that both of them who live here, they're resident aliens. You are not one.

And so, you know, I hope that this experience has been a bad enough experience for you so that you, you know, decide that it's not worth it for you to come over here anymore. Because this is definitely conduct that is not welcome. It's not welcome here.

So, I'm looking over my notes, if you'd just bear with me.

(Pause in the proceedings.)

THE COURT: Yeah. And I think the other thing was – [36] and the Fifth Circuit is going to get chance to review the transcript. They'll get a chance to listen to – or not listen to, but to read all of the testimony that was displayed and that was talked about.

And even this whole notion of, well, you know, maybe he got these injuries from, you know, falling down or I think maybe even hitting a rock. The doctor, you know, who testified said that it would be very rare, that it was really more this trauma, blunt force trauma to the head like an intentional – maybe he didn't use those words, but I know that on cross examination there was questions that were made and he testified that it would be rare the way that, Mr. Guerra, you were asking him the questions. But, you know, it is what it is.

And so, I know that your lawyer, you know, feels very strongly and has very well and eloquently argued on your behalf. And, you know, we need individuals like him and Ms. Martinez and people who, you know, are going to bring these issues up to the Court because the Fifth Circuit will get a chance to review this and review the arguments that he's made. And they'll take it all very seriously also

because, you know, we all want, obviously, to follow the Constitution and to make sure that we're protecting the rights, your rights because you're the one who's in custody. You're the one who is serving this sentence. And so, it's a serious case for you and for everybody else.

[37] I know that we, I guess, we always ask if we have a victim if they want to submit a statement. I don't remember, Mr. Chapa.

MR. CHAPA: One was not received, Your Honor, looking in my –

THE COURT: It was not?

MR. CHAPA: No, Your Honor.

THE COURT: Okay.

MR. CHAPA: But I did speak to the –

MALE SPEAKER: Agent Platt is present.

THE COURT: I know he is.

MR. CHAPA: I did speak with him, Your Honor, and I – little synopsis on paragraph – let's see – paragraph 17, Your Honor.

THE COURT: I did read it. Okay. Yeah. No, I remember reading it. I just wasn't sure whether or not there was an actual statement. Okay.

Do you want to say anything? Do you want to – does Agent Platt want to talk to me?

MR. BUKIEWICZ: Your Honor, obviously, I don't want to disagree with anything we've already said because it's consistent with our position. I would say that the criminal history score, if anything, is under-represented. I disagree with counsel regarding all of

these arrests. It's not just that he's an unlucky individual, but he's had a lifetime of [38] crime. And I think the Court has already acknowledged that.

Agent Platt is present and he would like to address the Court.

THE COURT: Okay.

(Agent Platt sworn.)

AGENT PLATT: Your Honor, I wanted to say it has been very hard. The initial surgery on my retina was done on – well, after the assault I experienced floaters in my eye and flashes in the side of my eye. And I went to the, you know, regular eye doctor. He looked in there, he said you have a torn retina, you need to have emergency surgery. So, the very next day, you know, he set me up with a doctor in Corpus. And the very next day I had the surgery. And since then a cataract had formed, so I had to have another surgery August 1st. And now I have to have another procedure next week because there's scarring in my eye which they say is very simple to take care of, but it's a lot to go through.

I've a letter from my wife, also.

THE COURT: Okay.

AGENT PLATT: And that's all I have to say.

THE COURT: And I guess since I have you up here, Agent Platt, that previous condition that they mention in one of the letters is – I didn't get a chance to look it up to see what it is. Do you understand what that previous condition is?

AGENT PLATT: They call it highly myopic, which is – [39] I have bad eyes.

THE COURT: Okay.

AGENT PLATT: I have to wear contacts.

THE COURT: It's the shape of the retina?

AGENT PLATT: I'm not sure on that.

THE COURT: Okay. I think – okay. Let me read this letter that I'll make part of the record.

Do you want to – I hate to make you stand up here while I'm reading this. Do you want to say anything else?

AGENT PLATT: That's all, ma'am.

THE COURT: Okay. Thank you. You can sit down.

(Court reading letter.)

THE COURT: Okay. I've reviewed it. I'll make it part of the record, I guess under seal since I reviewed it. Thank you.

Anything else, Mr. Bukiewicz?

MR. BUKIEWICZ: No, Your Honor.

THE COURT: Anything else, Mr. Guerra? So, I've overruled your objections, for the record.

MR. GUERRA: Your Honor, just one last thing if I may, in terms of, again, just for purposes of the record. Our position, and I understand the Court has already read – I mean ruled. But for purposes of the record our position is that the correct offense base would have been 10, Your Honor. And even assuming for the sake of argument that the Court would have [40] included the enhancements that are allowed by 2A2.4, which we believe is the correct applicable

Guideline section, there would be a total of five additional levels for enhancement that would be for the physical contact and for bodily injury. That would put Mr. Cabrera-Rangel at a maximum – or at a level, I should say, of 15, Category IV, which would be a range of 30 to 37 months. And that is what we believe, Your Honor, would have been the accurate score, just for purposes of the record, Your Honor.

THE COURT: Which provision?

MR. GUERRA: 2A –

THE COURT: The assault? Because I had him at a 10. I'm just curious how you got to 15.

MR. GUERRA: Well, Your Honor – yes, and I noticed the Court was using 2A2.3 which is assault. But in looking at the commentary in terms of the statutory provisions that apply to that, I don't see 18 U.S.C. 111, Your Honor, so I had followed 2A2.4. And it has –

THE COURT: Oh, okay. Obstructing or impeding?

MR. GUERRA: Yes.

THE COURT: Okay.

MR. GUERRA: And that one does have 111 as the applicable statutory provision.

THE COURT: Okay. Okay. Thank you.

MALE SPEAKER: That's correct, Your Honor.

THE COURT: Yes, thank you for correcting me. So, yes. I see that. And thank you for doing that because I had wanted to do that.

So, it's a 10. I'm looking at now 2A2.4. I've been corrected. If the offense involved physical contact or a dangerous weapon was possessed and its use was threatened, increase by 3. And then if the victim sustained bodily injury, increase by 2. Thank you, Mr. Guerra. And that does then cross reference the aggravated assault, so I see now where you get the 15. I appreciate that.

It's a 15, IV and which would be 30 to 37 months. I see that.

MR. GUERRA: Yes, Your Honor.

THE COURT: Okay. So, I do believe, Mr. Cabrera, that your correct score is a 24/IV which is 77 to 96 months. And I'm going to leave you there.

The Probation Department has described, and so has the prosecutor, described factors that would warrant a departure, and that's in paragraph 89. And that would consider all of the criminal conduct that you've been involved in on whether or not your criminal history category is under-represented because of your continued involvement in criminal conduct when you've been here in the United States. And, in fact, probably the biggest highlight to that notion would be the 1990 DUI and then the 2016 DUI. Both of them convictions.

[42] And – let me get to that page. And like I said, a deportation in September and you were arrested – or this offense occurred in January. So, I counted the months, September, October, November, December, January, four months later back in the United States again illegally. And then being involved in this aggravated assault with Agent Platt.

So, I think that that's very well-taken information for the Court with regard to the criminal history category. So you're at 77 to 96 months. And the statutory maximum is eight years.

MR. CHAPA: He's right at the statutory max, Your Honor, so –

THE COURT: Yeah, which is the high end.

MR. CHAPA: The highest that he can get. Yes, Your Honor.

THE COURT: Yeah. That's what I'm looking for. I just want to make sure. Yeah, I see it. Yeah.

So, because of that information that I just highlighted I didn't – well, this score reaches the statutory maximum penalty at a Category IV. So I'm going to leave you here but I'm going to sentence you at the high end to the statutory maximum penalty which is 96 months in custody. It'll be followed by a three-year term of supervised release. I'll impose standard and mandatory conditions of release.

A special condition is going to be that if you get [43] deported, you don't come illegally. And you're going to get deported again, Mr. Cabrera. I'm imposing it as an added deterrent to your returning to the U.S. illegally because you have two brothers who live here and that's strong incentive for you to return to the United States.

I'll impose $100 special assessment. I'm not going to impose a fine because of your inability to pay a fine.

Mr. Cabrera allocuted, right? He didn't want to say anything?

MR. GUERRA: Yes, the Court did ask him, Your Honor. He said he didn't want to say anything.

THE COURT: Yeah. Yeah. They're just telling me, Mr. Cabrera, that they didn't think that you were able to talk, but I think you indicated to me that you didn't want to say anything. And your attorney is confirming that.

But you have kept your right to appeal. It's a free appeal. You know, talk to your lawyer about it. You have 14 days to appeal. Make sure that you file the notice and that way they can start working on all of the transcripts. And, you know, we'll see what happens.

I do wish you luck. I hope that this situation and this encounter has been negative enough for you so that once you are done with your sentence in this case, and once you get deported again, that you don't come back to this country. You're already 54 years old and you've been coming and going [44] for a significant amount of time. And it's really time for you to just stay in your home country and for you not to come back to the U.S. illegally.

So, again, you have 14 days to appeal. It's a free appeal.

Do you want me to recommend a specific facility?

DEFENDANT CABRERA-RANGEL: No, ma'am.

THE COURT: Talk to him and see if he wants to recommend because he has family in Galveston. So, there is a couple of them over there. And then just let the Probation Officer know so that we can include it in the judgment.

MR. GUERRA: Yes, Your Honor.

THE COURT: Okay.

MR. GUERRA: And just for purposes of the record, Your Honor, we object to the sentence imposed for the reasons previously stated in terms of our objections, Your Honor. And that it is greater than necessary and that it's also based on a –

THE COURT: Unacquitted conduct.

MR. GUERRA: Unadjudicated – I'm sorry, adjudicated not guilty conduct. And also that the Court's calculation, in our opinion, Your Honor, that was the wrong base offense level and the enhancements.

THE COURT: Yes. Thank you.

All of those objections I've addressed. All of them [45] were overruled, you know. And I've stated, we've talked a good amount of time and I've talked about your record, Mr. Cabrera.

You know, the other thing that I'll say, too, is I've got – you know, I've got to deter you and others from committing this type of conduct. I have to protect the community. I have to promote respect for the laws of this country and avoid sentencing disparities. But really the other three factors that I identified are very significant. And you're not someone who we've never seen before. You're not someone who hasn't been to court. You're not someone who hasn't been deported. You're not someone who doesn't have a criminal record in the United States. And so, with all of that in mind, you know, this is a serious offense, serious encounter, serious background. You know, and there's a need to

deter, promote respect for the laws of this country, protect the community from all of this type of activity. And, you know, so I think it's sufficient and not greater than necessary. Obviously, there's a dispute as to that, you know.

And that's why we have the appellate court because they have where Mr. Guerra thinks you should be and they have where I held you. And so then they have the analysis that I'll say that I think that even if I'm wrong on all these enhancements, I would have sentenced you to the statutory maximum penalty regardless of the offense level because of your background, your record that you have. The conduct. Even the [46] conduct that was adjudicated and where you were found guilty. You know, the Fifth Circuit will get a chance to evaluate all of that and review it and then, you know, decide what they do. So, we'll see.

But I do wish you luck. And I hope – you know, you're a very quiet man. You've been quiet, you know, even before when I met you and before when we did the trial and even today. So, I don't really feel like I know you the way that I like to get to know people when I'm sentencing them. But that's okay. My hope, you know, and prayer is the same for you, that you're able to look back on your life and that you're able to evaluate it and see how you ended up here. And if there are any issues, you know, that you try and address them so that you can live, you know, a healthy and a fruitful life, but that you do it in your home country, not in the United States illegally. But I wish you luck.

So, you talk to your lawyer. I know it's a harsh sentence and I know that it's – you know, that you're taking it in. You've got brothers in Galveston. They're resident aliens. If you would like for them to maybe go see you, there's some facilities over there that are close by. So, talk to him and see whether or not you want me to recommend that because I can put it in the judgment. So, good luck.

Thank you, Mr. Guerra.

MR. GUERRA: Thank you, Your Honor.

May I be excused, Your Honor?

THE COURT: Yes. Thank you.

MR. GUERRA: Thank you.

(Proceeding concluded at 12:50 p.m.)

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