No. 18-9491

IN THE SUPREME COURT OF THE UNITED STATES

William Trudeau, PETITIONER

v.

United States of America

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

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

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Petitioner William Trudeau respectfully submits this supplemental brief under Supreme Court Rule 15.8 to call the Court's attention to a new case that creates a clear split of authority on the question presented. On July 29th, 2019, the Supreme Court of Michigan held that "due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct

of which he was acquitted" and "sentenc[ing] the defendant as if he committed that very same crime." *People v. Beck*, --- N.W.2d ---, 2019 WL 3422585, at *3, *11 (Mich. July 29, 2019). This decision—which the Michigan Supreme Court expressly premised on federal, and not state, law, *see id.* at *5 n.6—creates a clear split of authority between a state court of last resort and the federal courts of appeals on the question presented. Before the split, this Court's review was important; now, it is imperative. This Court accordingly should grant review in petitioner's case.

1. In *Beck*, the defendant was convicted at trial of being a felon in possession of a firearm and carrying a firearm during the commission of a felony. 2019 WL 3422585, at *4. At the same trial, the jury acquitted him of murder and other firearm offenses. *Id.* At sentencing, the court evaluated the state's evidence and concluded by a preponderance of the evidence that the defendant shot the victim. *Id.* The court relied on this finding to substantially increase the defendant's sentence. *Id.*

On appeal, the Michigan Supreme Court asked: "[o]nce a jury acquits a defendant of a given crime, may the judge, notwithstanding that acquittal, take the same alleged crime into consideration when sentencing the defendant for *another* crime of which the defendant was convicted?" *Id.* at *3. It concluded in no uncertain terms that "the answer is no." *Id.* And because the sentencing court relied in part on acquitted conduct, the Michigan Supreme

Court concluded that the sentence violated the defendant's rights to due process under the U.S. Constitution.[1] *Id.*

In evaluating this question, the Michigan Supreme Court acknowledged that "[f]ederal courts that have addressed the use of acquitted conduct at sentencing have relied almost entirely" on *United States v. Watts*, 519 U.S. 148 (1997), and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). *Beck*, 2019 WL 3422585, at *7. The court held, however, that there were "several problems with relying on those cases for due-process purposes." *Id.*[2] According to the court, *McMillan* did not deal with acquitted conduct in the first place and rests on "extremely shaky foundations" in light of this Court's intervening precedent. *Id.* at *7-9. And the court concluded that it was not bound by *Watts*, crediting this Court's observations in *United States v. Booker* that *Watts* addressed only a double-jeopardy challenge—not a due process challenge—and was

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[1] Because *Beck* arises from a state prosecution, the Michigan Supreme Court relied on the due process protections of the Fourteenth Amendment. Because petitioner's conviction arises from a federal prosecution, he raises his due process challenge under the Fifth Amendment. This is a distinction without a difference, because both the Fifth and Fourteenth Amendments "command[] the same answer." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Unsurprisingly, both the Michigan Supreme Court and this petition rely on the same cases in advocating the same due process principles.

[2] Because the court reversed on due process grounds, it did not reach the question whether the Sixth Amendment permits the use of acquitted conduct at sentencing, although it noted "persistent criticism" of federal courts' uniform acquiescence to the practice. *Beck*, 2019 WL 3422585, at *7 n.10. One concurring Justice wrote separately to express why "consideration of acquitted conduct at sentencing raises serious concerns under the Sixth Amendment" in light of this Court's precedent and the history of the jury right. *Beck*, 2019 WL 3422585, at *11 (Viviano, J., concurring); *see generally id.* at *12-24.

decided without full briefing. *Beck*, 2019 WL 3422585, at *9 (citing *Booker*, 543 U.S. 220, 240 n.4 (2005)); *see* Pet. 7, 13-14 (similar).

The court therefore concluded that no precedent answered the question whether the use of acquitted conduct at sentencing violates due process. *Beck*, 2019 WL 3422585, at *10. Deciding that question "on a clean slate," it held that while judges retain discretion to find uncharged conduct at sentencing by a preponderance of the evidence, "when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent," and "conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process." *Id.*; *see* Pet. 24-25 (similar). Noting the "volume and fervor of judges and commentators who have criticized the practice of using acquitted conduct as inconsistent with fundamental fairness and common sense," the court observed that it did not believe that "existing United States Supreme Court jurisprudence prevents [it] from holding that reliance on acquitted conduct at sentencing is barred by" due process. *Beck*, 2019 WL 3422585, at *10, *11; *see* Pet. 9-10, 11 n.2 (citing cases and commentators in urging the same conclusion).

2. *Beck* renders the case for certiorari even more compelling here. *See* Sup. Ct. R. 10(a). *Beck* creates a clear split between a state court of last resort and the federal courts of appeals, because federal courts have unanimously applied *Watts* to foreclose both due process and Sixth Amendment challenges. *See* Pet. 11-12. Both the majority and the dissent in *Beck* acknowledged as much. Three dissenting Justices in *Beck* argued that the court's

conclusion "directly contradicts existing precedent" from "[f]ederal circuit courts." *Beck*, 2019 WL 3422585, at *29 & n.13 (Clement, J., dissenting). In response, the majority acknowledged that federal courts of appeals believe that *Watts* requires them to reject due process and Sixth Amendment challenges to sentencing based on acquitted conduct. *Id.* at *7 (majority op.). But the majority emphasized that, "[a]lthough lower federal court decisions may be persuasive, they are not binding on state courts." *Beck*, 2019 WL 3422585, at *10 n.20 (alteration in original) (quoting *Abela v. Gen. Motors Corp.*, 677 N.W.2d 325, 327 (Mich. 2004)). It therefore addressed the question without deferring to the reasoning in the lower federal courts, while "recogniz[ing] that [its] holding today represents a minority position." *Id.* at *10.

3. Petitioner's case remains an ideal vehicle for the Court to consider the question presented. This case—in which the sentencing judge relied on [redacted], and made crystal-clear she was "relying on acquitted conduct in sentencing the defendant," [redacted]—cleanly presents the question whether the constitutional rights to due process and a jury trial permit a sentencing court to rely on acquitted conduct. Moreover, petitioner's case presents the question in the context of the federal sentencing system, thereby allowing the Court to consider the interplay of these rights with the federal sentencing statutes and Sentencing Guidelines. The Court need not, and should not, wait for a potential petition for certiorari in *Beck*; petitioner is before the Court now, and resolution of the question presented in a future case would come too late to vindicate his constitutional rights.

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By creating a clear split between a state court of last resort and the federal courts of appeals, the Michigan Supreme Court's decision in 'Beck' heightens the need for this Court's review of the Question II presented. Petitioner's case remains the ideal vehicle to resolve this question and will permit a full resolution of the legal issues in 'Beck', while still permitting this Court the greatest flexibility in considering the relevant constitutional protections or federal statutory issues that bear on the use of acquitted conduct at sentencing.

CONCLUSION

For some reason if this Court so chooses to review another petition on the same issue of 'Acquitted Conduct Sentencing' rather than this defendant's instant petition, then this Court, with regards to Question #I and how it affects and allows and provides a subterfuge for the government and its abusive use of 'Acquitted Conduct Sentencing' in this matter; the Court could just as well order this case back down to the lower court for re-trial based upon the fact that this defendant's Constitutional Rights were violated in that this defendant was deprived of the 'Rosemond' jury instruction that this defendant is entitled to, along with the aiding and abetting instructions given to the jury. Given the fact that this defendant was acquitted of all the other charges accept for the one substantive count, Count 9, which involved no victim, no complainant, no crime and no financial loss; and also given the fact that this defendant has now served a 98 month sentence for a crime of conviction which only warrants 8 to 14 months [if it was a crime to begin with], would bring about judicious economy in that with the benefit of the 'Rosemond' jury instruction this defendant would surely be acquitted at a new trial. Certainly that is, if the government were ever so frivolous and so over-zealous enough to pursue the ludicrous idea of a new trial once again considering all that has happened and transpired with all of the new and trending jurisprudence.

This petition for a writ of certiorari should be granted
Respectfully Submitted,

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