No. 19-1293

In the Supreme Court of the United States

MICHAEL LUDWIKOWSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioner's Fifth and Sixth Amendment rights in considering conduct at issue in a charge that the jury did not find beyond a reasonable doubt, but that the court found by a preponderance of the evidence, in determining his sentence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 944 F.3d 123.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 2019. On February 21, 2020, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including May 3, 2020, and the petition was filed on May 4, 2020 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of maintaining a premises for the illegal distribution of a controlled substance, in violation of 21 U.S.C. 856, and five counts of illegally distributing and dispensing a controlled substance, in violation of 21

U.S.C. 841(a)(1) and (b)(1)(C). Judgment 1; Pet. App. 30-31. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3; Pet. App. 32-33. The court of appeals affirmed. Pet. App. 1-29.

1. Petitioner was a licensed pharmacist who owned and operated Olde Medford Pharmacy and Medford Family Pharmacy in Medford, New Jersey. Presentence Investigation Report (PSR) ¶ 29. As the owner and pharmacist-in-charge, petitioner established all rules and procedures at Olde Medford Pharmacy. See Pet. App. 51, 87-88; see also PSR ¶ 29.

From 2008 to 2013, Olde Medford Pharmacy filled thousands of fraudulent prescriptions for oxycodone. See PSR ¶¶ 46, 72-74; Pet. App. 65. Petitioner—aided after November 2009 by another pharmacist, David Goldfield—would routinely fill oxycodone prescriptions submitted by the same drug dealer or user (often under different and false names) multiple times a week and would regularly fill prescriptions that obviously had been falsified by "wash[ing]" or "bleach[ing]" a previously filled prescription. PSR ¶¶ 30, 32, 47-48, 51; Pet. App. 62. Petitioner and Goldfield never attempted to verify whether the prescriptions were valid. PSR ¶ 51. During the relevant time period, Olde Medford Pharmacy filled approximately 1955 fraudulent prescriptions for oxycodone, 958 of which were filled under petitioner's initials by either petitioner or Goldfield. PSR ¶¶ 73-74; see Pet. App. 56, 60, 78-80, 89. Those 958 prescriptions resulted in the distribution of 114,960 30-milligram pills of oxycodone. PSR ¶ 74; see Pet. App. 79-80.

2. In November 2016, a federal grand jury charged petitioner with one count of conspiring to unlawfully

distribute and dispense a controlled substance, in violation of 21 U.S.C. 846; two counts of maintaining a premises for the illegal distribution of a controlled substance (one count for each of petitioner's pharmacies), in violation of 21 U.S.C. 856; six counts of illegally distributing and dispensing a controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of using a telephone to further a drug offense, in violation of 21 U.S.C. 843(b). Indictment 1-27. Following a 22-day trial, the jury found petitioner guilty of maintaining Olde Medford Pharmacy for the illegal distribution of a controlled substance and five counts of illegally dispensing a controlled substance. Pet. App. 31; see *id.* at 11. The jury acquitted petitioner on the remaining counts, including the conspiracy charge. See *id.* at 11, 30.

The Probation Office prepared a presentence report in accordance with the 2016 edition of the United States Sentencing Commission Guidelines Manual (which was the edition that was in effect at the time) and calculated petitioner's base offense level as 34. PSR ¶ 88. The Probation Office determined the base offense level by calculating the drug quantity involved. See *ibid.*; see also Sentencing Guidelines § 2D1.1(a)(5) (2016). The Probation Office determined that the relevant drug quantity was the 958 fraudulent oxycodone prescriptions that were filled in petitioner's name at Olde Medford Pharmacy—totaling 114,960 pills—which resulted in 3448.8 grams of oxycodone being dispensed. See PSR ¶¶ 74, 88. Stating that petitioner had "conspired to distribute" that amount, the Probation Office calculated a base offense level of 34. PSR ¶ 88; see also Sentencing Guidelines § 2D1.1(a)(5), (c)(3) (2016).

Petitioner objected to that base offense level, arguing that a lower quantity of drugs should be attributed

to him because the jury had not found him guilty on the conspiracy count. See Def. Sent. Mem. 11-12; Pet. App. 56. Although petitioner acknowledged that under Third Circuit precedent "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proven by a preponderance of the evidence," he argued that the government had failed to meet the preponderance standard here. Def. Sent. Mem. 12; see Pet. App. 62-64. Petitioner thus asserted that he should only be held responsible for the quantity of drugs involved in the five distribution counts of which he was convicted and that the base offense level should be 24. See Def. Sent. Mem. 11-12.

The district court overruled petitioner's objection and agreed with the Probation Office and the government that 34 was the correct base offense level. Pet. App. 84-93. The court emphasized that "one of the convictions here was for maintaining a drug premises"—at Olde Medford Pharmacy—and "the proof was more than clear that [petitioner] was the boss, these were his premises." *Id.* at 71. The court observed that "it was shortly after [petitioner] purchased the premises and opened his business in 2008, a year before Goldfield was even hired, that sales of oxycodone by [petitioner] in this pharmacy went through the roof," and that petitioner had "put into place the practice of Goldfield filling certain prescriptions and using [petitioner]'s initials" while "both men worked in the pharmacy." *Id.* at 86-88. The court thus found that "the government ha[d] proved by a preponderance of reliable evidence that there was a course of conduct initiated by the defendant in his premises at Olde Medford Pharmacy, which was

to distribute oxycodone 30 even to those who were presenting fraudulent prescriptions for it." *Id.* at 86. And the court found that "it is fair and reasonable to attribute 958 of these fraudulent prescriptions to [petitioner]" because "[t]hese were either personally filled by him or were filled under the common scheme by Mr. Goldfield in [petitioner's] name with [petitioner's] knowledge and permission, [and] again, with [petitioner's] well-known customers." *Id.* at 90. The court also "reject[ed] the notion that the acquittal on conspiracy precludes the application of the doctrine of relevant conduct" so long as the "relevant conduct is proved by a preponderance of the evidence." *Id.* at 86.

After applying various adjustments, the district court determined that petitioner's total offense level was 38, which resulted in a Guidelines range of 235 to 240 months of imprisonment. Pet. App. 95. The court ultimately imposed a below-Guidelines sentence of 180 months of imprisonment. *Id.* at 32, 110.

3. The court of appeals affirmed. Pet. App. 1-29. On appeal, petitioner argued for the first time that "the use of acquitted conduct as relevant conduct at sentencing violated the Fifth and Sixth Amendments," although he acknowledged that his failure to raise the argument in the district court made it reviewable only for plain error. Pet. C.A. Br. 56 (capitalization and emphasis omitted). Petitioner also recognized that binding Supreme Court and Third Circuit precedent foreclosed this argument. *Ibid.* The court of appeals rejected petitioner's Fifth and Sixth Amendment argument in a footnote, citing *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam). Pet. App. 28 n.5.

ARGUMENT

Petitioner contends (Pet. 14-27) that the district court violated the Fifth and Sixth Amendments by sentencing him based on conduct that the court found by a preponderance of the evidence, but that was at issue in a charge that the jury did not find beyond a reasonable doubt. The court of appeals correctly recognized, however, that this Court's decision in *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), permitted the district court to consider acquitted conduct when imposing petitioner's sentence, and this Court has repeatedly and recently denied petitions for writs of certiorari raising similar claims. The same course is warranted here, particularly because it is not even clear that the district court actually relied on acquitted conduct when sentencing petitioner.

1. This Court has recently and repeatedly denied petitions for writs of certiorari raising the question presented here. See, *e.g.*, *Asaro* v. *United States*, 140 S. Ct. 1104 (2020) (No. 19-107); *Martinez* v. *United States*, 140 S. Ct. 1128 (2020) (No. 19-5346); *Baxter* v. *United States*, No. 19-6647 (Apr. 20, 2020); see also Br. in Opp. at 14, *Asaro*, *supra* (No. 19-107) (Nov. 12, 2019) (collecting additional cases). And for the reasons set forth in the government's briefs in opposition to the petitions for writs of certiorari in *Asaro* v. *United States* and *Martinez* v. *United States*, this case does not warrant the Court's review. See Br. in Opp. at 7-15, *Asaro*, *supra* (No. 19-107); Br. in Opp. at 8-15, *Martinez*, *supra* (No. 19-5346) (Nov. 12, 2019).[*] The court of appeals correctly recognized that this case is controlled by *United*

[*] We have served petitioner with a copy of the government's briefs in opposition in *Asaro* and *Martinez*. Those briefs are also available on the Court's electronic docket.

States v. *Watts*, where this Court explained that under the then-mandatory Sentencing Guidelines, "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." 519 U.S. at 157.

Petitioner asserts (Pet. 14) that *Watts* "does not control this Court's examination of the Question Presented" and should be limited to the double jeopardy context. But, as explained in detail in the government's brief in opposition in *Asaro*, *Watts*'s clear import is that courts may take acquitted conduct into account at sentencing without offending either the Fifth or Sixth Amendments to the Constitution. See Br. in Opp. at 9-12, *Asaro*, *supra* (No. 19-107). And, contrary to petitioner's contention (Pet. 14-27), *Watts*'s resolution of that issue is correct and does not conflict with any other decision of this Court—as every federal court of appeals with criminal jurisdiction has recognized. See Br. in Opp. at 7-12, *Asaro*, *supra* (No. 19-107); Br. in Opp. at 8-13, *Martinez*, *supra* (No. 19-5346).

To the extent that petitioner highlights *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and suggests that they are inconsistent with *Watts* (Pet. 21-22, 25), he is mistaken. In *Apprendi*, this Court held that "[o]ther than the fact of a prior conviction, any fact that *increases the penalty for a crime beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added). In *Blakely*, the Court subsequently extended that principle to a state-law system of mandatory sentencing guidelines. See 542 U.S. at 303-304. But the statutory maximum for petitioner's offenses of conviction is 240

months of imprisonment on each count, see PSR ¶ 168, and the Sentencing Guidelines are advisory rather than mandatory, *United States* v. *Booker*, 543 U.S. 220 (2005). Petitioner's 180-month sentence thus does not exceed the statutory maximum and does not violate *Apprendi*, *Blakely*, or any other decision of this Court.

Petitioner also asserts (Pet. 13) that this Court must step in to "remedy the problem" because the Sentencing Commission "has not done so." But any asserted policy concerns with the correct sentencing scheme do not warrant this Court's intervention. Congress currently is considering a bill to amend 18 U.S.C. 3661 to prohibit consideration of acquitted conduct at sentencing except in mitigation, see S. 2566, 116th Cong., 1st Sess. § 2(a)(1) (as introduced Sept. 26, 2019); the Commission can promulgate Guidelines to preclude reliance on acquitted conduct; and individual sentencing courts retain discretion to consider the extent to which acquitted conduct should carry weight in their assessment of a defendant's "background, character, and conduct" for the purpose of imposing a sentence in a given case, 18 U.S.C. 3661. See Br. in Opp. at 15, *Asaro*, *supra* (No. 19-107); Br. in Opp. at 14-15, *Martinez*, *supra* (No. 19-5346).

2. In any event, even if the question presented warranted this Court's review, this case would be an unsuitable vehicle in which to address it for several reasons.

a. As an initial matter, this petition is a poor vehicle because petitioner has not shown that the district court actually relied on conduct underlying his acquittal or that, if the court did so, it affected his sentence. When calculating the drug quantity for sentencing purposes, the court was authorized to consider all "reasonably foreseeable" acts and omissions of others "within the

scope of the jointly undertaken criminal activity" and "in furtherance of that criminal activity." Sentencing Guidelines § 1B1.3(a)(1)(B) (2016). The jury found petitioner guilty of maintaining Olde Medford Pharmacy for the illegal distribution of a controlled substance, in violation of 21 U.S.C. 856. The jury instructions for that count required the jury to find "that *others* used the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." D. Ct. Doc. 113, at 80 (Aug. 17, 2017) (emphasis added). Petitioner's premises conviction thus involved jointly undertaken criminal activity between petitioner and other individuals such as Goldstein—which in turn indicates that his counts of conviction encompass all 958 prescriptions that either petitioner or Goldstein filled under petitioner's initials at Olde Medford Pharmacy. See Pet. App. 55 (government arguing at sentencing that the evidence "would establish [the] same base offense level of a 34 under either theory, whether you use the maintaining a premises or whether you're using the conduct of the conspiracy as relevant conduct").

The district court thus could properly find a base offense level of 34 based solely on conduct underlying petitioner's premises conviction. Indeed, the court did not clearly rely on conduct that was necessarily the basis of the jury's acquittal on the conspiracy count, because the court repeatedly referred to the premises conviction when discussing the appropriate guidelines range. See, *e.g.*, Pet. App. 71 ("[O]ne of the convictions here was for maintaining a drug premises * * * [and] the proof was more than clear that [petitioner] was the boss, these were his premises."); *id.* at 85 ("Now, the Court in sentencing under the Guidelines, takes into account the conduct of conviction, in this case maintaining premises

for distribution of a controlled substance * * * and the Court also is to take into account relevant conduct."); *id.* at 86 ("[T]he government has proved by a preponderance of reliable evidence that there was a course of conduct initiated by the defendant in his premises at Olde Medford Pharmacy, which was to distribute oxycodone 30 even to those who were presenting fraudulent prescriptions for it."). It is thus not clear that the court actually relied on acquitted conduct when sentencing petitioner, or, in any event, that any reliance on acquitted conduct affected petitioner's base offense level.

b. That record deficiency is particularly acute because, as petitioner has acknowledged, his claim is reviewable only for plain error as he failed to raise it in the district court. See Pet. C.A. Br. 56; Pet. 32. Under the plain-error standard, petitioner has the burden to establish (1) "an error or defect" that (2) is "clear or obvious, rather than subject to reasonable dispute," (3) "affected [his] substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings," and (4) "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (citations and internal quotation marks omitted).

Petitioner cannot satisfy this standard. As petitioner recognized below, any error in considering acquitted conduct at sentencing would not have been clear or obvious based on binding precedent. Pet. C.A. Br. 56. And, even assuming that the district court relied on acquitted conduct *and* clearly erred in doing so, petitioner has not demonstrated that any such reliance affected the outcome of his sentencing—because the base offense level of 34 was correct on the basis of conduct

underlying petitioner's premises conviction. See pp. 8-10, *supra*. Petitioner's inability to demonstrate clear error, that any error affected his substantial rights, or manifest injustice is thus another reason why no further review of his claims is warranted.

c. Petitioner accordingly errs in asserting (Pet. 29-31) that this petition for a writ of certiorari provides a better vehicle for reviewing the question presented than the similar petition in *Asaro* v. *United States*, *supra*, which this Court denied last Term. His attempts to argue otherwise are unsound. Petitioner asserts (Pet. 29-30) that it was not clear that the petitioner in *Asaro* was acquitted of the conduct that the district court later relied on in sentencing. But here, too, it is not clear that the district court relied on acquitted conduct in sentencing petitioner, and, in any event, petitioner's base offense level would have been the same even if it had. Petitioner also notes (Pet. 30-31) that the prior conduct the court relied on in *Asaro* was related to a separate criminal prosecution. But petitioner does not explain why that makes this case a superior vehicle, particularly where the same trial judge presided over both of the *Asaro* petitioner's trials. See Pet. at 4, *Asaro*, *supra* (No. 19-107) (July 22, 2019). For the same reasons that this Court denied certiorari in *Asaro* and numerous other cases raising the same issue, it should deny certiorari here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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