No. 19-1293

In The
Supreme Court of the United States

MICHAEL LUDWIKOWSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF

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ARGUMENT

The government's opposition to certiorari flows primarily from its assumption that *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), resolved a broad range of constitutional questions implicated by acquitted-conduct sentencing, including the question presented. Br. in Opp. 6-8. It also claims vehicle problems given purported uncertainty about the role acquitted conduct played at Petitioner's sentencing, and the lack of objection on constitutional grounds in the district court. *Id.* at 8-11. None of these contentions has merit.

The government's insistence that the question presented raises "policy concerns" that "do not warrant this Court's intervention" (Br. in Opp. 8) is startling. The validity of acquitted-conduct sentencing under the Due Process Clause and Sixth Amendment jury-trial provision is perhaps the gravest constitutional criminal procedure question unresolved by this Court. Three current Justices have called on the Court to answer it; the four immediate former Justices did so as well. Pet. 8-10. And there is an intractable split of authority on the issue, which the government all but ignores. Certiorari should be granted.

I. An Intractable Split of Authority Has Arisen.

As discussed in the petition (Pet. 11), the Michigan Supreme Court has now prohibited the use of acquitted conduct at sentencing under the federal Due Process Clause, and this Court has declined review. *People*

v. Beck, 504 Mich. 605 (2019), *cert. denied*, 140 S. Ct. 1243 (2020). That creates an intractable split of authority.

Although the government ignores *Beck* here, it references other recent filings in which it argued that *Beck* is an "outlier" and "any conflict it has created remains too shallow to warrant this Court's review." Br. in Opp. 13, *Asaro v. United States* (No. 19-107). But with the courts of appeals bound by circuit precedent despite increasing calls from Justices and federal appellate judges to reexamine acquitted-conduct sentencing, no meaningful deepening of the split may plausibly be expected. Pet. 8-13; *see* Sec. IV(2) below.[1]

II. The Government's View of the Merits Is Not a Reason to Deny Certiorari.

The government resists certiorari with a summary, one-sided view of the merits. Br. in Opp. 6-8. Complete analysis of the question presented must, of course, await merits briefing.

Even the government's cursory discussion inadvertently reveals the infirm foundation of its merits argument, however. It says that "Petitioner asserts that Watts *should be limited* to the double jeopardy context." Br. in Opp. 7 (citing Pet. 14; citation and internal

[1] The government has also argued that *Beck*'s reasoning is "tenuous" because it may have implications for the use of uncharged (rather than acquitted) conduct. Br. in Opp. 13-14, *Asaro* (No. 19-107). 2019 WL 5959533. But that is immaterial here, as Petitioner challenges only the use of acquitted conduct.

quotation marks omitted; emphasis added). In other words, the government starts from the premise that *Watts* is *not* so limited.

But the government never attempts to support its conclusion that *Watts*'s "clear import" extends to other clauses of the Fifth and Sixth Amendments. Br. in Opp. 7. That broad reading is more weight than a per curiam summary reversal, which generated two concurrences and two dissents, can bear. Pet. 14-15. Indeed the Court itself later confirmed that *Watts* decided "a very narrow question" involving double jeopardy. *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005). That is why Justice Kennedy urged the Court, contemporaneously, to "confront[ ]" the broader issue with "a reasoned course of argument" instead of "shrugging it off." *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting).

The government does not acknowledge this. Nor does it acknowledge the chorus of Justices, judges, courts, and scholars who have questioned the broad reading it takes as given. Pet. 8-11.

And the government dispenses with Petitioner's point about the intervening development of this Court's Sixth Amendment jurisprudence by asserting only that it does not bar judicial fact-finding at sentencing. Br. in Opp. 7-8 (discussing *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004)). Inarguably true—and irrelevant. The petition implies no quarrel with judicial fact-finding at sentencing in general; it is limited to acquitted-conduct sentencing. As Petitioner explains below (at

Sec. IV(1)), the record firmly demonstrates that the sentencing court made the very factual finding of concerted action the jury rejected.

The government does not seriously engage with Petitioner's points about the historical import of a jury's verdict of acquittal (Pet. 20-21) either. And it never addresses Petitioner's due process argument (Pet. 25-27). Elsewhere, the government similarly assumes its conclusion by asserting that judicial findings made on a preponderance standard do not "conflict" with a jury's verdict of acquittal. Br. in Opp. 10-11, *Asaro v. United States* (No. 19-107). But that is a merits question the Court should examine—and the government cites no authority other than *Watts* and a treatise citing *Watts* to support its position. *See id.* The government never explains why *Watts* should control the due process issue—much less why it should bar this Court from even deciding the due process issue for the first time.

III. Only this Court Can Resolve the Question Presented.

The government also argues that the Court need not wade into these "policy concerns" because the Sentencing Commission or Congress may obviate them, and because individual district courts may sidestep them. Br. in Opp. 8.

As Petitioner has explained (Pet. 13), no other branch of government, agency, or lower court is likely to resolve the problem. Lower courts risk reversal for

procedural error if they decline to consider acquitted conduct at sentencing. Pet. 13 (citing *United States v. Ibanga*, 271 F. App'x 298 (4th Cir. 2008)); *accord United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005). And the Sentencing Commission has remained silent on the issue in the two decades since Justice Breyer suggested, in *Watts*, that it address it. *Watts*, 519 U.S. at 159 (Breyer, J., concurring).

Nor is Congress likely to obviate the issue. The government says that "Congress currently is considering" a bill to prohibit the use of acquitted conduct to increase a sentence (Br. in Opp. 8)—but that bill has not budged since the day it was introduced, in September 2019. *See* S. 2566, 116th Cong., 1st Sess., §2(a)(1) (introduced and referred to committee Sept. 26, 2019; no further action). Similar bills have failed repeatedly. *See* S. 4, 115th Cong., 2d Sess. (introduced Dec. 4, 2018); H.R. 5785, 115th Cong., 2d Sess. (introduced May 11, 2018); H.R. 4261, 115th Cong., 1st Sess. (introduced Nov. 6, 2017); H.R. 2944, 114th Cong., 1st Sess. (introduced June 25, 2015).

The jury-trial right is one of two "fundamental reservation[s] of power in our constitutional structure" (with the right to vote). *Blakely*, 542 U.S. at 305-06; *see* Pet. 20-21. Given that, the Court is the ultimate arbiter of the scope of that right.[2] While the constitutional

[2] Moreover, as explained in the Reply in support of certiorari in *Asaro*, "the government has often advised this Court that pending legislation is not a reason to deny certiorari, and '[t]he speculative possibility that Congress might ultimately enact' a pending bill 'should not deter the Court from considering the important

avoidance doctrine counsels restraint in reaching constitutional issues when Congress has acted, the Court should not stay its hand when Congress has repeatedly elected not to act. This is not a "policy concern" (Br. in Opp. 8) to be addressed legislatively, but a core constitutional concern to be resolved by the Court.

IV. The Objections the Government Raises Actually Confirm That This Matter Is An Excellent Vehicle.

The government claims this case is an unsuitable vehicle because of (1) purported uncertainty over whether acquitted conduct actually increased Petitioner's sentence, and (2) trial counsel's failure to raise a constitutional objection to the court's doing so. Br. in Opp. 8-11.

On the first point, the Sentencing Guidelines foreclose any uncertainty (as the Court of Appeals recognized), and the government's "relevant conduct" argument defeats itself. On the second, Petitioner respectfully submits that the fact that the case is on plain error is a symptom of the pressing need for review.

1. The government contends that the district court either did, or could have, calculated drug quantity at 958 prescriptions without relying on acquitted

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questions presented.'" Pet. Reply 7-8, *Asaro v. United States* (No. 19-107), 2019 WL 613049 (quoting U.S. Pet. Reply 8, *United States v. Eurodif S.A.* (No. 07-1059), 2008 WL 905193; citing additional examples).

conduct. Br. in Opp. 8-10. Yet the Court of Appeals acknowledged that only five fraudulent prescriptions (rather than the 958 for which Petitioner was sentenced) were "associated with the counts of conviction." App. 11. The U.S. Attorney's Office that prosecuted the case did not challenge that assertion when Petitioner made it in briefing. *Compare* Brief for Appellant, No. 18-1881 (3d Cir.), at 60 & n.19; *with* Brief for Appellee, No. 18-1881 (3d Cir.), at 56-57. It was correct not to.

The government's challenge to the assertion here is based on a false premise: that a court may calculate quantity on a "drug-involved premises" conviction (21 U.S.C. §856) without calculating the quantity involved in the drug offenses the premises were used for. Br. in Opp. 8-9. The Guidelines say the opposite: drug quantity on a premises count is the quantity "applicable to the underlying controlled substances offense[s]" (with one exception, inapplicable here). U.S.S.G. §2D1.8(a)(1).

Here the "underlying [] offenses" were the distribution counts, both conspiracy (acquitted) and substantive (five convictions). App. 85. Had the court excluded acquitted conduct when calculating quantity on the premises count, it would have stopped at the five prescriptions "associated with the counts of conviction." App. 11.

But it did not. It added 953 more. And it arrived at 958 prescriptions by "add[ing] up" purchases for distribution by four alleged co-conspirator drug-dealers, and including sales by alleged co-conspirator David Goldfield—despite the conspiracy acquittal. App. 79-80. The

fact that the court referred repeatedly to the premises count (Br. in Opp. 9-10) is immaterial. It was calculating drug quantity on that count—using acquitted conduct.

The government seems to think the constitutional question is avoided if the court used "relevant conduct" to calculate drug quantity. Br. in Opp. 8-9. That is backwards; "relevant conduct" is how the constitutional problem arose in this case (Pet. 5 & n.1) and arises in many. It is likely the most common way that acquitted conduct increases a Guidelines calculation, because it is central to the Guidelines scheme.[3] When the sentencing court looked to the distribution counts to determine quantity as the Guideline required (U.S.S.G. §2D1.8(a)(1)), the relevant conduct rule governed which conduct the court would hold against Petitioner—with no regard to how the jury saw it.

The court plainly recognized that only "relevant conduct" would justify counting more than five prescriptions—*and* recognized that on this record "relevant conduct" meant acquitted conduct. After the government reviewed trial evidence supporting its count of 958 prescriptions, the court observed "in a moment the defense will be arguing that none of this should count as relevant conduct because the jury

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[3] As Justice Breyer has observed, it embodies the United States Sentencing Commission's "first inevitable compromise" in balancing the "competing rationales behind a 'real offense' sentencing system and a 'charge offense' system." Hon. Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 8-9 (1988).

acquitted Mr. Ludwikowski of conspiracy." App. 54. The court reiterated that formulation, again equating relevant conduct with acquitted conduct, when it ruled. App. 85-87.

The government invoked below, and invokes here, the relevant conduct rule on "jointly undertaken criminal activity." *E.g.*, App. 50-51, 54, 77; Br. in Opp. 8-9 (citing U.S.S.G. §1B1.3(a)(1)(B)). The choice is revealing. That rule requires a court to calculate a Guideline offense level on the basis of all "reasonably foreseeable" acts and omissions of others within the scope of a "criminal plan, scheme, endeavor or enterprise undertaken by the defendant *in concert with others*." U.S.S.G. §1B1.3(a)(1)(B) (emphasis added).[4]

Acting "in concert" with others is the hallmark of conspiracy. *E.g.*, *Rutledge v. United States*, 517 U.S. 292, 300 (1996) ("the plain meaning of the phrase 'in concert' signifies mutual agreement in a common plan or enterprise"); *Grunewald v. United States*, 353 U.S. 391, 404 (1957). In other words, not only did the government's drug quantity calculation require the court to sentence on acquitted conduct—it required the court to make the precise factual finding the jury rejected: that Petitioner mutually agreed, with one or more others, to unlawfully distribute controlled substances.

The court did exactly that. The defense contended that the trial evidence did not prove (even by a

[4] A related relevant conduct provision incorporates that standard by reference, adding the phrase "common scheme or plan." U.S.S.G. §1B1.3(a)(2).

preponderance) the concerted action the relevant conduct rule requires (*e.g.*, App. 65-68, 81-84); the court pushed back in the same vein (*e.g.*, App. 69-72, 82-83). The court articulated its eventual finding in the language of concerted action, referring to a "common plan or scheme in which Mr. Ludwikowski was a participant," to justify including acts "whether done by Mr. Ludwikowski or someone else in a manner that was reasonably foreseeable to him. . . ." App. 86; *see* U.S.S.G. §§1B1.3(a)(1)(B), (a)(2).

The government does not deny that the court found, by a preponderance of the evidence, that Petitioner acted in concert with others.[5] It attempts to avoid the stark alignment between the acquittal and the judicial fact-finding by implying that concerted action is *also* an element of the drug-involved premises offense. Br. in Opp. 9.

That is plainly inaccurate. As a more complete quotation from the jury instruction reflects, the only mens rea required for a premises conviction is the knowledge and intent to allow "others" to "use the place for the purpose of" unlawful controlled substances activity. D. Ct. Doc. 113, at 80-81 (Aug. 17, 2017). No meeting of the minds is required between premises-holder and user—as makes sense in the context of a statute enacted to target so-called "crackhouses." H.R. 5484, 99th Cong., 2d Sess. (Sept. 8, 1986),

[5] Nor did it demur when Petitioner told the Court of Appeals that the court made that finding. *See* Brief for Appellant, supra, at 59; Brief for Appellee, supra, at 56-57. The Court of Appeals acknowledged the point as well. App. 11.

132 Cong. Rec. S. 26473, 26474 (Sept. 26, 1986). The premises conviction does not reflect a jury finding that Petitioner had a "mutual agreement in a common plan or enterprise" (*Rutledge*, 517 U.S. at 300 (defining "in concert")) with the people who used the pharmacy for controlled substances offenses.

The government's attempt to cast doubt on this case's suitability as a vehicle actually highlights its strength as one. The sentencing court used a "relevant conduct" rule that required it to find the very concerted action the jury rejected. The cases are legion in which a jury's acquittal may reflect its doubt on any one of several elements. *See* Pet. 29-30 (discussing *Asaro v. United States*, No. 19-107 (U.S.), *cert. denied*, 140 S. Ct. 1104 (2020)). Here the substantive distribution convictions—and the narrow trial defense (Pet. 4)—make the jury's message unmistakable: it rejected the allegation that Petitioner acted "in concert" with anyone. But its verdict was overturned at sentencing.

2. The government passingly asserts that Petitioner's failure to object on constitutional grounds at sentencing impairs his case's suitability as a vehicle. Br. in Opp. 10-11. Not so. This Court does not hesitate to grant certiorari when a legal issue is squarely presented, even absent a contemporaneous objection. *E.g.*, *Tapia v. United States*, 564 U.S. 319 (2011). When that happens, the Court's routine practice is to decide the legal issue and remand for the court of appeals to determine whether relief is warranted under the plain-error standard. *Tapia*, 564 U.S. at 335 ("Consistent with our practice, *see*, *e.g.*, *United States v. Marcus*, 560

U.S. 258, 266-267, 130 S.Ct. 2159, 2166, 176 L.Ed.2d 1012 (2010), we leave it to the Court of Appeals to consider the effect of Tapia's failure to object to the sentence when imposed. *See* Fed. Rule Crim. Proc. 52(b); *United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).").

Indeed, in *Tapia* it was not even clear whether the district court had erred—as the government (incorrectly) claims is in question here (Br. in Opp. 8-10): "These statements suggest that the court *may have* calculated the length of Tapia's sentence to ensure that she receive certain rehabilitative services. And that a sentencing court may not do." 564 U.S. at 334-35 (emphasis added). But that, too, was left for remand.

Here, the constitutionality of acquitted-conduct sentencing is presented as squarely as it will ever be. Stare decisis has "never been treated as an inexorable command" when this Court examines its own precedents (*Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020))—but it *is* an inexorable command to the lower courts. More than twenty years after *Watts*, even preserved claims of error are receiving short shrift in the courts of appeals—with cursory discussions in nonprecedential orders or opinions. *E.g.*, *United States v. Gotti* (*Asaro*), 767 F. App'x 173, 174-75 (2d Cir. 2019) (Summary Order); *United States v. Martinez*, 769 F. App'x 12, 16-17 (2d Cir. 2019) (three paragraphs, nonprecedential opinion). Preservation in the district court has no material effect on this Court's review, whatever its effect on remand.

"Americans of the [founding] period perfectly well understood the lesson that the jury right could be lost not only by gross denial, but by erosion." *Jones v. United States*, 526 U.S. 227, 248 (1999). If anything, the fact that the case is on plain error review only highlights the urgent need for this Court to thoroughly examine the due process and jury-trial questions: the longer *Watts* stands as the Court's sole comment on acquitted conduct, the more defense counsel perceive constitutional challenges as futile—making review ever less likely and narrowing by silence the rights that define our criminal justice system.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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