No. 19-6265

IN THE
Supreme Court of the United States

ALEX KNIGHT,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Court now has before it at least four fully briefed cases seeking certiorari review raising similar concerns with the lower courts' rampant and near-universal practice of using acquitted conduct to enhance a defendant's sentence. *See Martinez v. United States*, No. 19-5346 (filed July 20, 2019); *Asaro v. United States*, No. 19-107 (filed July 22, 2019); *Knight v. United States*, No. 19-6265 (filed Oct. 11, 2019); *Michigan v. Beck*, No. 19-564 (filed Oct. 23, 2019). The issue is an important one, deserving of the Court's attention and review, and the Court should exercise its discretion to grant review in Petitioner's case. This case presents the issue most cleanly and directly, in a manner that would afford meaningful relief to both the Petitioner and many other defendants who have had their sentences unconstitutionally enhanced on the basis of conduct for which a jury acquitted them.

I. The Clear Split in Authority and Constitutional Importance of the Question Presented Merit Review

The government does not dispute that there now exists a clear split in authority regarding the constitutionality of using acquitted conduct at sentencing. *See* Br. in Opp. at 13, *Asaro v. United States*, No. 19-107 (filed Nov. 12, 2019) (acknowledging the split in authority before categorizing it as "too shallow" to warrant review). Instead, the government quarrels with the novelty of the Michigan Supreme Court's decision. *See id.* ("*Beck* not only is an outlier decision, but appears to be the first of its kind."). But the reasoning advanced by the Michigan Supreme Court in *Beck* is not "an outlier" nor "the first of its kind." It is in line with the

cacophony of complaints advanced by numerous Justices, judges, and commentators alike, calling into question the constitutionality of enhancing a sentence on the basis of acquitted conduct. Pet. 11–12. As a result, this Court's review is necessary and clearly warranted.[1]

II. This Case Presents the Best Vehicle to Review the Question Presented

The government spends the bulk of its brief in opposition explaining why Petitioner's case "would be a poor vehicle in which to review the question presented." Br. in Opp. 5. The government argues that the four-level enhancement for possessing a firearm in connection with another felony offense would still apply even without the consideration of acquitted conduct, and also that, in any event, any error in applying the enhancement was harmless. Both arguments fail and should give the Court no pause. This case is the best and cleanest vehicle to address whether the Fifth and/or Sixth Amendments are violated when a district court increases a criminal defendant's sentence based upon conduct for which a jury has acquitted him.

1. The government explicitly concedes that the district court relied upon acquitted conduct to enhance Petitioner's sentence (Br. in Opp. 3) before arguing that "the four-level enhancement would have been appropriate even had the district court not relied on the drug-trafficking that it found by a preponderance of the evidence

[1] In contending that certiorari is unwarranted in this case, the government adopts the arguments made in its Briefs in Opposition in *Asaro v. United States*, No. 19-107 (filed July 22, 2019) and *Martinez v. United States*, No. 19-5346 (filed July 20, 2019). Br. in Opp. 5. In reply to those arguments, Petitioner adopts and incorporates by reference the petitioner's Reply in *Asaro* (filed Nov. 18, 2019).

but which the jury did not find beyond a reasonable doubt." Br. in Opp. 7. More specifically, the government contends that even if Petitioner is correct and his sentence cannot be enhanced on the basis of drug trafficking—conduct for which he was specifically acquitted by a jury—he would still not be entitled to any meaningful relief before the district court because the four-level enhancement could be applied "on the ground that petitioner possessed the firearm and ammunition 'in connection with' the *simple possession* offense for which he was convicted." *Id.* at 5–6 (emphasis added). The government is wrong.

As an initial matter, the four-level enhancement in U.S.S.G. § 2K2.1(b)(6)(B) applies only when a defendant possesses a firearm "in connection with another *felony offense*." (emphasis added). The lesser-included offense Petitioner was found guilty of committing—simple possession of a controlled substance in violation of 21 U.S.C. § 844(a)—is a misdemeanor. *See Abuelhawa v. United States*, 556 U.S. 816, 822 (2009) (noting that in 2006, Congress "downgraded simple possession of a controlled substance to a misdemeanor"). And though the Guidelines define "another felony offense" to include "any federal, state, or local offense . . . punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained," U.S.S.G. § 2K2.1(b)(6)(B) cmt. n.14(C), there is no evidence in the record suggesting that the offense of conviction, itself a federal misdemeanor, qualifies as a felony offense at the state or local level. Thus, based on the record before this Court, the offense of conviction cannot support the enhancement.

But even assuming arguendo that Petitioner's conviction for possession of a controlled substance could serve as the basis for the four-level enhancement, application of the enhancement would still be erroneous.

a. First, the facts referenced by the government are legally insufficient to support the enhancement. In order for the four-level enhancement to apply on the basis of possession of a firearm "in connection with" drug possession, the firearm must have "facilitated, or had the potential of facilitating" the drug possession. U.S.S.G. § 2K2.1 cmt. n.14(A). And, "mere proximity between a firearm and drugs possessed for personal use cannot support the § 2K2.1(b)(6)(B) enhancement" without "something more." *United States v. Bishop*, 940 F.3d 1242, 1251–52 (11th Cir. 2019).

The "something more" proffered by the government here is simply the number of baggies of heroin possessed as well as their street value, and Petitioner's spontaneous statement that he was given the weapon for protection. Br. in Opp. 6–7. But those factors—even when considered together—do not definitively satisfy the "something more" required to support application of this fact-bound enhancement, a conclusion supported by the government's own cited-to caselaw. *See United States v. Jenkins*, 566 F.3d 160, 164 (4th Cir. 2009) (affirming application of the enhancement only after noting that defendant carried both the loaded firearm and drugs on his person when venturing out "onto a public street, near where a gun had recently been fired, close to midnight" in an "environment suggest[ing] that there was a heightened need for protection"); *United States v. Angel*, 576 F.3d 318, 320–23 (6th Cir. 2009)

(upholding application of the enhancement only after finding that defendant was engaged in manufacturing marijuana and noting that multiple loaded firearms and ammunition were found "in close proximity to" the marijuana plants so as to "facilitate the manufacture of marijuana, protect the product, and embolden [the defendant]"); *United States v. Gibbs*, 753 F. App'x 771, 774–77 (11th Cir. 2018) (finding application of the four-level enhancement erroneous where pills and a firearm were found inside defendant's home because the relationship between the gun and drugs "was more akin to 'accident or coincidence'") (citing *Smith v. United States*, 508 U.S. 223, 228 (1993)). None of the circumstances identified above in support of application of the enhancement are present in this case.

Here, the relationship between the gun and the drugs is nothing more than a mere "accident or coincidence." *Smith*, 508 U.S. at 228. The guns and drugs were both found inside the apartment, and there is no evidence that Petitioner ever took them outside separately or together; there is no evidence that the apartment was protected by a home-alarm system or otherwise fortified in any other way; the gun was tucked away in a shoebox on the top shelf of a bedroom closet and not immediately accessible from the kitchen where the drugs were found; and, there is no fingerprint or DNA evidence on the firearm to indicate that Petitioner ever actually physically handled the firearm. The evidence just does not support a finding—even by a preponderance of the evidence—that the firearm somehow facilitated Petitioner's simple possession of heroin for personal use. *See United States v. Shields*, 664 F.3d 1040, 1045 (6th Cir. 2011) (refusing to apply the enhancement

where a defendant was found in possession of a controlled substance and admitted that "he had a gun for personal protection").

Moreover, the government's arguments in support of application of the enhancement on the basis of drug possession at base rely once again upon conduct for which Petitioner was acquitted by a jury. The government argues that the firearm found in Petitioner's closet helped to protect Petitioner and the drugs because the quantity and street value of the drugs were "many times the amount consistent with personal use." Br. in Opp. 6. That is, the enhancement applies because what was found in Petitioner's home can only be consistent with something more than personal use, and in that case, Petitioner of course needed a firearm for protection. But to allow the government to succeed on this argument would once again trample the jury's express finding that Petitioner possessed the drugs found in his apartment for personal use—he did not engage in drug trafficking nor possess a firearm in furtherance of drug trafficking.

Further, that this analysis is so fact-bound is yet another reason why the government's argument that this case is a "poor vehicle" should be disregarded. The only incontrovertible fact here is that the district court erroneously relied upon acquitted conduct in enhancing Petitioner's sentence. While the government is now propounding new reasons for why Petitioner would ultimately not be entitled to relief on remand, its arguments are not absolute nor supported by the vast majority of caselaw. Were the Court to resolve the question presented in Petitioner's favor, he

would absolutely be entitled to a remand and, more likely than not, tangible sentencing relief.

b. Second, applying the four-level enhancement for possessing a firearm "in connection with" possession of a controlled substance would also necessarily rely upon acquitted conduct because of the interplay between § 2K2.1(b)(6)(B) and 18 U.S.C. § 924(c)(1). In clarifying its definition of "in connection with" in § 2K2.1(b)(6)(B), the Sentencing Commission "adopted the language from *Smith v. United States*, 508 U.S. 223 (1993)," itself a case interpreting the language of § 924(c)(1). *United States v. Carillo-Ayala*, 713 F.3d 82, 93 (11th Cir. 2013). *See also United States v. Schmitt*, 770 F.3d 524, 539 (7th Cir. 2014) ("We have previously looked to 18 U.S.C. § 924(c)(1) to guide our understanding of § 2K2.1(b)(6)(B)."). Here, because Petitioner was specifically charged with and acquitted of the § 924(c)(1) offense, and because the language of § 2K2.1(b)(6)(B) draws from § 924(c)(1), it would be contrary to the jury's verdict to enhance Petitioner's sentence on the basis of conduct for which he was specifically acquitted.

2. Additionally, the government is wholly incorrect in asserting that "it is questionable whether petitioner would be entitled to relief—or that the result would ultimately be different at any resentencing—even if he were to prevail on the question presented." Br. in Opp. 7. The government's harmless error argument is clearly controverted by the Court's holding in *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016), that "[w]hen a defendant is sentenced under an incorrect

Guidelines range . . . the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error."

Here, the government does not contest—nor can it—that Petitioner's Guidelines range would be lower without application of the four-level enhancement premised on conduct for which the jury had just acquitted Petitioner. Without the four-level enhancement, Petitioner's offense level would have been 14, resulting in a Guidelines range of 27–33 months' imprisonment instead of the 41–51 months' imprisonment he faced with application of the enhancement. As a result, and contrary to the government's assertions otherwise, if Petitioner were to prevail on the question presented, he would most certainly be entitled to relief—at a minimum, to a recalculation of his Guidelines range. *See Molina-Martinez*, 136 S. Ct. at 1346 ("In most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome.").

3. Finally, of the petitions pending, this case is the best and cleanest vehicle to resolve the question presented, both procedurally and factually. *See* Pet. 23–27. The issue was fully raised and preserved in the lower courts, and resolution of the question presented in favor of the Petitioner will result in tangible and meaningful relief.

Unlike *Michigan v. Beck*, wherein the question presented raises only a due process challenge to the use of acquitted conduct at sentencing, *see* Pet. at i, *Michigan v. Beck*, No. 19-564 (filed Oct. 23, 2019), the question presented here challenges the

use of acquitted conduct at sentencing as violative of both due process and the Sixth Amendment's jury-trial right, affording the Court the most flexibility in considering the issue. Additionally, the petition here presents only one question that specifically addresses the constitutionality of using acquitted conduct to enhance a sentence, unlike the petition in *Martinez*, which raises four issues, three of which deal specifically with the facts and circumstances of that particular petitioner's trial. *See* Pet.at i, *Martinez v. United States*, No. 19-5346 (filed July 20, 2019).

This case also does not suffer from the same vehicle infirmities identified in *Beck* as plaguing the petitioner in *Asaro*. *See* Br. in Opp. at 22–25, *Michigan v. Beck*, No. 19-564 (filed Dec. 30, 2019). Petitioner here was directly charged with, and expressly acquitted of, the contested conduct that the judge considered while sentencing him—that is drug trafficking and possessing of a firearm in furtherance of a drug trafficking crime.[2] Petitioner here was also sentenced on the basis of conduct for which the jury had just acquitted him *in the same case*. That is, after the jury heard and roundly rejected the government's allegations that Petitioner had engaged in drug trafficking and possessed a firearm while so doing, Petitioner was sentenced as though he had engaged in drug trafficking with a firearm—a brazen rejection of the jury's express findings.

[2] This same issue potentially plagues the petitioner in *Martinez*. There, too, the petitioner was never directly charged with, nor expressly acquitted of, the contested conduct that the judge considered while sentencing him (an alleged murder). Instead, the petitioner was charged with and expressly acquitted of federal witness tampering. Br. in Opp. at 3–4, *Martinez v. United States*, No. 19-5346 (filed Nov. 12, 2019).

Finally, the use of acquitted conduct at sentencing affected Petitioner in a way that is unique from both *Beck* and *Asaro* because here, the acquitted conduct was used to quantifiably increase Petitioner's advisory Guidelines range, not just as one factor among the many considered when determining the extent of a variance, if any, under 18 U.S.C. § 3553(a). In *Asaro*, the Second Circuit specifically noted: "Even . . . accept[ing] Asaro's argument that a sentencing judge cannot consider unrelated acquitted conduct, his claim is without merit." App. at 4a, *Asaro v. United States*, No. 19-107 (filed July 22, 2019). No such finding exists here. Because the district court clearly relied upon acquitted conduct to enhance Petitioner's sentence—a contention the government does not dispute—his Guidelines range was higher than it otherwise would have been. As a result of this procedural error, if Petitioner prevails on the question presented, his sentence must be vacated and the case remanded for resentencing.

The lower courts indisputably relied on conduct for which Petitioner had been specifically acquitted in enhancing his sentence—an error that is constitutionally prohibited.

CONCLUSION

The clarion call for review of the question presented is too loud to ignore. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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