No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL J. BAXTER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. Whether the striking of two out of three black veniremembers demonstrates a "pattern of discrimination" as necessary to satisfy the first step of the inquiry pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986).

2. Whether the calculation of United States Sentencing Guidelines – which is based on acquitted conduct – violates the Sixth Amendment to the Constitution "as applied" to the Petitioner's case because the sentence imposed by the district court fell above the range permitted based solely on the conduct found beyond a reasonable doubt by the jury (i.e., whether this Court's holding in *United States v. Watts*, 519 U.S. 148 (1997), is still good law).

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, MICHAEL J. BAXTER, requests the Court to issue a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals entered in this case on June 13, 2019 (rehearing denied on August 15, 2019). (A-4, A-3).[1]

D. CITATION TO OPINION BELOW

United States v. Baxter, 778 Fed. Appx. 617 (11th Cir. 2019).

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) to review the final judgment of the Eleventh Circuit Court of Appeals.

F. CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause forbids a party from striking potential jurors solely on account of their race. In *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny, this Court articulated a three-part test to evaluate the validity of challenges to peremptory strikes: (1) the moving party must make a *prima facie* showing that a peremptory challenge was exercised on the basis of race; (2) the non-moving party must offer a race-neutral basis for striking the juror in question; and (3) the trial court must determine whether the moving party has shown purposeful discrimination.

The Sixth Amendment to the Constitution provides that "[i]n all criminal

[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

G. STATEMENT OF THE CASE

The Petitioner was charged in an indictment with the following two counts: depriving Darren Glover of the constitutional right to not be subjected to cruel and unusual punishment, pursuant to 18 U.S.C. § 242 (count 1) and falsification of records, pursuant to 18 U.S.C. § 1519 (count 2). (A-30). The charges stemmed from an incident that occurred at a Florida state prison where the Petitioner worked as a correctional officer. The Government alleged that (1) the Petitioner used unlawful force in attempting to subdue a noncompliant inmate and then (2) falsified records regarding the incident.

The case proceeded to a jury trial in January of 2018. During the jury selection proceeding, the trial court disallowed defense counsel's attempt to utilize a peremptory challenge for a particular juror. (A-33-35). At the conclusion of the trial, the jury found the Petitioner *not guilty* of count 1 and guilty of count 2. (A-27-28).

Sentencing was conducted on April 12, 2018. The recommended sentencing range pursuant to the United States Sentencing Guidelines was an imprisonment range of 46 months to 57 months. However, at the sentencing hearing, the district court imposed an upward variance sentence of *60 months'* imprisonment. (A-19-26). In doing so, the district court relied on "acquitted conduct" (i.e., the conduct that formed the basis for count 1 – even though the jury acquitted the Petitioner of that

count).

On direct appeal, the Petitioner raised four claims – two of which are the subject of the instant petition. First, the Petitioner asserted that the district court erred by disallowing defense counsel's peremptory challenge of Juror M. because (a) the Government failed to make a *prima facie* showing that defense counsel's peremptory challenge of Juror M. was exercised on the basis of race and (b) defense counsel's reason for the challenge (Juror M.'s negative body language) was a permissible race-neutral justification for the exercise of the peremptory challenge. Second, the Petitioner asserted that it is improper for a district court to rely upon acquitted conduct as the basis to impose an upward variance sentence (i.e., a sentence *above* the recommended sentencing range pursuant to the United States Sentencing Guidelines). In rejecting the Petitioner's jury selection claim, the Eleventh Circuit held that the Government presented a *prima facie* case of race-based discrimination – even though the record shows that defense counsel only struck two out of the three African Americans on the venire. Regarding the Petitioner's sentencing claim, the district court stated:

> The Supreme Court has held that a district court may consider at sentencing any conduct underlying the defendant's acquitted charge so long as the government proves the occurrence of that conduct by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 157 (1997). We added that the resulting sentence must fall below the maximum statutory penalty authorized by the jury's verdict. *[United States v.] Maddox*, 803 F.3d [1215,] 1220 [(11th Cir. 2015)]. Acquitted conduct may be considered at sentencing because an acquittal does not mean that the defendant was innocent of the charged conduct but only that the jury found that the conduct was not proven beyond a reasonable doubt. *Id.* at 1221. Moreover, the jury's general not-guilty verdict does

not reveal whether it rejected any particular fact, so facts underlying the acquitted charge may still be proven at sentencing by a preponderance of the evidence. *See id.*

Here, as an initial matter, Baxter argues that *Watts* should be overruled, citing to several district court opinions from other circuits disagreeing with *Watts*'s holding that consideration of acquitted conduct may be considered at sentencing. Because *Watts* remains binding precedent, the district court did not violate Baxter's constitutional rights by considering conduct underlying the acquitted excessive force charge as long as the conduct was proven by a preponderance of the evidence and the resulting sentence was below the statutory maximum. *See Watts*, 519 U.S. at 157; *Maddox*, 803 F.3d at 1220.

(A-13-14).

H. REASON FOR GRANTING THE WRIT

The questions presented are important.

1. Whether striking two out of three black veniremembers demonstrates a "pattern of discrimination" as necessary to satisfy the first step of the inquiry pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986).

The first question presented by the Petitioner is

> [w]hether the striking of two out of three black veniremembers demonstrates a "pattern of discrimination" as necessary to satisfy the first step of the inquiry pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986).

At the conclusion of the jury selection proceeding, the following occurred:

> THE COURT: [Juror M.[2]], to the defense.
>
> MR. WAY [defense counsel]: Strike, Your Honor.
>
> MR. GOLDBERG [the prosecutor]: I have a *Batson* challenge. The defense struck [Juror C.] and [Juror M.]. I don't believe [Juror M.] said anything that would disqualify her.
>
> THE COURT: The panel has three African-Americans. Mr. Way struck [Juror C.], who is an African-American. *He did not strike [Juror H.], who is on the jury and is African-American.* He now has struck [Juror M.], who is the third and final African-American. Mr. Way has struck one white, [Juror B.].
> Mr. Way, would you like to tell me the legitimate nondiscriminatory reason for striking [Juror M.]?
>
> MR. WAY: Yes, Your Honor. Did you want me to address [Juror C.] or [Juror M.]?
>
> THE COURT: [Juror M.].
>
> MR. WAY: As to [Juror M.], I have been watching her during the

[2] To protect the privacy of the jurors in question, references to the jurors will be made by using the initial of the juror's last name.

course of the jury selection. She apparently has slight negative body language, and I noticed her arms were crossed and stretching away from [another juror] for a period of time during questioning. I just, in terms of the court's questions, I found that her body language seemed to be tight and negative compared to the other prospective jurors, so I made a note early on as to bad body language. It's just not my preference to have her on the jury, Your Honor.

THE COURT: Tell me about [Juror C.].

MR. WAY: Your Honor, this is the gentleman with a heart condition, who I know the court did make some consideration perhaps having a position for him to have his feet up. He did appear, when he was before the court, he did have sweat on his forehead. He does have health concerns. I thought for a three-day trial, particularly when I am going to want close and careful attention paid on the second full day of the trial, I want a person on the jury that is not distracted and can be alert and attentive. I have the same concern that is going to come up with [another juror], having to go to the bathroom three times an hour.

THE COURT: Mr. Goldberg, I'm going to grant the *Batson* challenge and disallow the strike on [Juror M.], if that's what you want me to do.

MR. GOLDBERG: Yes, Your Honor.

THE COURT: *You'll have to write the red brief and defend that decision, if indeed my finding is overruled.*

The explanation is not supported by the facts. If a defense lawyer could just say, I noticed the body language unacceptable, when I don't think there has been unacceptable body language, if that were a legitimate basis for a race-based strike, then *Batson* might as well be taken out of the book. There's never been a good trial lawyer that couldn't offer that kind of explanation, no matter how much race is the actual reason. So my finding is that that's not true. *It's not a legitimate nondiscriminatory reason*, and I'm prepared to grant the *Batson* challenge and put [Juror M.] on the jury.

Is that what you want me to do?

MR. GOLDBERG: Yes, Your Honor, please. I believe that's a proper interpretation of *Batson*.

THE COURT: I disallow the strike.

Let me say that the law of the Circuit is, first, the Judge

> determines whether a *prima facie* case has been made for the *Batson* challenge; then offers the allegedly offending attorney a chance to explain the challenge; then makes a finding on pretext. I didn't make an explicit finding in the case on a *prima facie* case, but that the government had made a *prima facie* case, and my finding is that this was a race-based challenge. [Juror M.] is Juror Number 6.

(A-33-35) (emphasis added).

This Court described the peremptory challenge as "one of the most important of the rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408 (1894). Peremptory challenges are rooted in English common law. *See* John P. Marks, *Bader v. State: The Arkansas Supreme Court Restricts the Role Religion May Play in Jury Selection*, 55 Ark. L. Rev. 613, 622 (2002). The founders of this country "preserved the English peremptory system to ensure that jurors are impartial and will make determinations solely on the basis of the evidence." Michael J. Plati, *Religion-Based Peremptory Strikes in Criminal Trials and the Arizona Constitution: Can They Coexist?*, 26 Ariz. St. L. J. 883, 885 (1994). "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain v. Alabama*, 380 U.S. 202, 220 (1965). Peremptory challenges are often "exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.'" *Id.* (quoting *Lewis v. United States*, 146 U.S. 370, 376 (1892)). A criminal defendant is guaranteed the right to a trial by an impartial jury, which is accomplished "in part, by the use of the peremptory challenge, which allows both the prosecution and the defense to excuse potential jurors without explanation." *State v. Alen*, 616 So. 2d

452, 453 (Fla. 1993) (citation omitted). In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 150 (1994), Justice O'Connor expressed her concern for the unique importance of the peremptory challenge:

> Limiting the accused's use of the peremptory challenge is a serious misordering of our priorities, for it means we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant not the jurors, who faces imprisonment or even death.

(O'Connor, J., concurring) (citations omitted). "Requiring the defendant to show actual bias – the standard applicable to cause challenges – for the forced expenditure of a peremptory challenge renders the separate statutory grant of peremptory challenges totally meaningless." *Busby v. State*, 894 So. 2d 88, 100 (Fla. 2004). "The fact that some unbiased juror may be excused in the process is an affordable price to pay for removing doubts about a particular juror's impartiality and competence, especially when the vote of one biased juror can make a critical difference." *State v. Davis*, 504 N.W.2d 767, 770 (Minn. 1993).

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court held that excluding members of the venire based on a prospective juror's race violates the Equal Protection Clause of the Constitution. *Batson* and its progeny have established a three-step inquiry to evaluate whether a party's use of peremptory strikes runs afoul of the Constitution, and the Court summarized this inquiry in *Miller-El v. Cockrell*, 537 U.S. 322, 328-329 (2003):

> First, [opponent of the strike] must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race. Second if that showing has been made, the [proponent of the strike] must offer a

> race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether [the opponent of the strike] has shown purposeful discrimination.

(Citations omitted).

The Petitioner submits that the Government in this case failed to make a *prima facie* showing that defense counsel's peremptory challenge of Juror M. was exercised on the basis of race (the first step of the *Batson* inquiry). As explained by the district court during the jury selection proceeding, the panel in this case had three African-Americans: Juror C., Juror H., and Juror M. Although defense counsel struck Juror C. and he attempted to strike Juror M., *defense counsel did not strike Juror H.* In *United States v. Folk*, 754 F.3d 905 (11th Cir. 2014), the court considered a similar scenario where the criminal defendant was arguing that the Government had improperly exercised a peremptory challenge for a discriminatory purpose. In *Folk*, there were also three African-Americans prospective jurors on the panel, and the Government struck two of the jurors. Based on this identical fact pattern, the court expressed doubt that the defendant had made a *prima facie* showing that the peremptory challenge at issue was exercised on the basis of race:

> First, it is unclear whether Folk made a *prima facie* showing that Thomas was struck on the basis of his race. *Batson* held that "a 'pattern' of strikes against black jurors . . . might give rise to an inference of discrimination." 476 U.S. at 97. Also, situations where there is a "total or seriously disproportionate exclusion of [African–Americans] from jury venires" can be so egregious as "to show intentional discrimination." *Id.* at 93 (internal quotation marks omitted).
>
> The facts here do not demonstrate a facially discriminatory pattern of striking black members from the potential jury pool. *Thomas was one of only three black veniremembers, and one of these three was ultimately*

> *seated on the jury. The striking of two out of three black veniremembers does not demonstrate a pattern of discrimination* – particularly since Folk concedes that there were "clear reasons" for striking Hill from the prospective juror pool. And this is not a situation where there was a systematic plan to eliminate black jurors from a pool of veniremen. *Compare Adkins v. Warden*, 710 F.3d 1241, 1255 (11th Cir. 2013) ("[T]he state here used peremptory strikes to exclude nine of eleven potential black jurors, resulting in a strike rate of eighty-two percent.").

Folk, 754 F.3d at 914 (emphasis added). As in *Folk*, in the instant case, "[t]he striking of two out of three black veniremembers does not demonstrate a pattern of discrimination." *Id.* Thus, the district court erred by disallowing defense counsel's strike of Juror M. (and it is therefore unnecessary to address steps two and three of the *Batson* inquiry).[3] *See United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1038 (11th Cir. 2005) ("[T]he establishment of a *prima facie* case is an absolute precondition to further inquiry into the motivation behind the challenged strike.") (citation omitted).

By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to specifically address what constitutes "a *prima facie* showing

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[3] There are several cases where courts have upheld "body language" as a permissible race-neutral justification for the exercise of a peremptory challenge. *See Braxton v. Gansheimer*, 561 F.3d 453, 459 (6th Cir. 2009) ("[B]ody language and demeanor are permissible race-neutral justifications for the exercise of a peremptory [challenge].") (citation omitted); *United States v. Maxwell*, 473 F.3d 868, 872 (8th Cir. 2007) ("'[D]emeanor and body language' may serve as legitimate, race neutral reasons to strike a potential juror."); *United States v. Bentley-Smith*, 2 F.3d 1368, 1374 (5th Cir. 1993) ("[M]any of the judgments made by counsel in picking a jury are purely intuitive and based upon inarticulable factors, or even hunches. Thus, we specifically have approved of such subjective manifestations as eye contact (or absence of the same) as justifications for rejecting a potential juror."); *United States v. Changco*, 1 F.3d 837, 840 (9th Cir. 1993) ("[P]assivity, inattentiveness, or inability to relate to other jurors [are] valid, race-neutral explanations for excluding jurors."). *See also State v. Coleman*, 970 So. 2d 511, 515 (La. 2007) ("Body language has been held to constitute a valid, race-neutral basis for defeating a *Batson* claim.").

that a peremptory challenge has been exercised on the basis of race" for purposes of step one of the *Batson* inquiry. This issue has the potential to affect a substantial number of cases in every jurisdiction.

2. Whether a sentence based on acquitted conduct violates the Sixth Amendment to the Constitution.

The second question presented by the Petitioner is

> [w]hether the calculation of United States Sentencing Guidelines – which is based on acquitted conduct – violates the Sixth Amendment to the Constitution "as applied" to the Petitioner's case because the sentence imposed by the district court fell above the range permitted based solely on the conduct found beyond a reasonable doubt by the jury (i.e., whether this Court's holding in *United States v. Watts*, 519 U.S. 148 (1997), is still good law).

The Petitioner was charged with unjustified use of force (count 1) and falsifying records (count 2). At the conclusion of the trial, the jury found the Petitioner *not guilty* of count 1 and guilty of count 2. Yet, throughout the sentencing hearing, the district court stated that it was basing the sentence that it imposed in this case on the allegations that formed the basis for count 1 – the count for which the Petitioner was *acquitted*:

- "But I do find that [Darren Glover] was not disruptive to the point that any physical force properly could be used against him. *He didn't try to assault Mr. Baxter. Mr. Baxter was behind the desk and came around, and force was used against Mr. Glover for no reason at all.* My finding is that Mr. Baxter willfully inflicted unnecessary brutal force and badly injured Mr. Glover . . . .";
- "As I noted earlier, the Supreme Court has made clear that

acquitted conduct can properly be considered, *and that's so here. So I do consider the force that was used against Mr. Glover.*";

- "This is a case where deterrence may have an effect. . . . *[T]here are people in the Department of Corrections that know that unlawful force is sometimes used, and they need to find out that the punishment for doing it*, that the punishment for giving – making false reports *is substantial.*"

(A-37-40) (emphasis added).

In *Blakely v. Washington*, 542 U.S. 296, 303-304 (2004), the Court extended its previous holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to sentencing guideline schemes (i.e., a guideline maximum can only be increased based on facts (other than a prior conviction) found beyond a reasonable doubt by the jury or admitted by the defendant). In *United States v. Booker*, 543 U.S. 220, 244-246 (2005), the Court recognized that the holding in *Blakely* applied to the United States Sentencing Guidelines, but the Court remedied the problem by holding that the Guidelines are discretionary rather than mandatory.

In *Rita v. United States*, 551 U.S. 338 (2007), the Court considered whether it is appropriate for the courts of appeals to presume that a sentence imposed within a properly calculated United States Sentencing Guidelines range is a reasonable sentence. The Court held that it was permissible for the courts of appeals to use this presumption. *See id.* at 347-356.

The Petitioner submits that based on *Rita*, it is logical to conclude that a sentence that falls outside of the Guidelines range is presumptively unreasonable. The Petitioner further submits that the 60-month sentence in his case is only reasonable due to the existence of judge-found facts – facts for which the Petitioner was acquitted. Absent the judge-found facts – facts that were specifically *rejected* by the jury – the proper sentencing range would be 46 to 57 months' imprisonment and the 60-month sentence would be presumptively unreasonable.

As can be gleaned from the opinions filed in *Rita*, five members of the *Rita* court recognized the viability of an as-applied Sixth Amendment violation under the Guidelines. *See Rita*, 551 U.S. at 365 (Stevens, J., with whom Ginsburg, J., joins (except Part II), concurring); *Rita*, 551 U.S. at 373-376 (Scalia, J., with whom Thomas, J., joins, concurring in part and concurring in the judgment); *Rita*, 551 U.S. at 384-390 (Souter, J., dissenting).

In his concurring opinion, Justice Scalia stated:

> [M]y position is that there will inevitably be some constitutional violations under a system of substantive reasonableness review, because there will be some sentences that will be upheld as reasonable only because of the existence of judge-found facts.

Rita, 551 U.S. at 374 (Scalia, J., with whom Thomas, J., joins, concurring in part and concurring in the judgment). Justice Scalia added:

> The one comfort to be found in the Court's opinion . . . is that it does not rule out as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea.

Id. at 375 (Scalia, J., with whom Thomas, J., joins, concurring in part and concurring

in the judgment).

The Petitioner submits that the concerns addressed by Justice Scalia in *Rita* are present in the instant case. The sentence in the Petitioner's case can be upheld as reasonable only because of the existence of judge-found facts – facts for which the Petitioner was acquitted by the jury. Accordingly, the Petitioner has a valid as-applied Sixth Amendment challenge – his sentence would not be upheld as reasonable on the facts encompassed by the jury verdict.

The Petitioner acknowledges that in *United States v. Watts*, 519 U.S. 148, 157 (1997), the Court held that "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." The Petitioner questions the continued validity of *Watts* in light of the Court's recent Sixth Amendment holdings. The Petitioner notes that a number of district courts have refused to consider acquitted conduct when calculating a reasonable sentence. *See, e.g., United States v. Ibanga*, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006) ("Sentencing a defendant to time in prison for a crime that the jury found he did not commit is a Kafka-esque result.");[4] *United States*

[4] In *Ibanga*, the court explained that "Justice Stevens's constitutional majority opinion in *Booker* expressly questioned the continuing validity of *Watts*":

> Justice Stevens's constitutional majority opinion states, "in neither *Witte* [*v. United States*, 515 U.S. 389 (1995),] nor *Watts* was there any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment." *Booker*, 543 US. at 240. Justice Stevens further noted that *Watts* "presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." *Id.* at 240 n.4 (citation omitted).

v. Kandirakis, 441 F. Supp. 2d 282, 321-329 (D. Mass. 2006) (submitting all enhancement facts, including acquitted conduct, to an advisory jury at sentencing); *United States v. Wendelsdorf*, 423 F. Supp. 2d 927, 936-939 (N.D. Iowa 2006) (rejecting as an abomination the government's proposed sentence increase based on acquitted conduct); *United States v. Coleman*, 370 F. Supp. 2d 661, 668 (S.D. Ohio 2005) ("At sentencing, acquitted conduct should always be considered using a reasonable doubt standard; otherwise, a defendant's Sixth Amendment right to a jury trial is eviscerated."); *United States v. Pimental*, 367 F. Supp. 2d 143, 150 (D. Mass. 2005) ("It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury . . . and also conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing.");[5] *United States v. Gray*, 362 F. Supp. 2d 714, 720 (S.D. W. Va. 2005) (comparing the Guidelines advice against the beyond a reasonable doubt result and rejecting the Guidelines advice if it greatly differs from the beyond a

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Ibanga, 454 F. Supp. 2d at 536 & n.3.

[5] In *Pimental*, the court reasoned:

> [t]o consider acquitted conduct trivializes "legal guilt" or "legal innocence" – which is what a jury decides – in a way that is inconsistent with the tenor of the recent case law. . . . [W]hen a court considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved. . . . To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense – as a matter of law or logic.

Pimental, 367 F. Supp. 2d at 152-153.

reasonable doubt result); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1028 (D. Neb. 2005) ("[T]he court finds that it can never be 'reasonable' to base any significant increase in a defendant's sentence on facts that have not been proved beyond a reasonable doubt."); *United States v. Carvajal*, No. 04 Cr. 222(AKH), 2005 WL 476125, *4, 2005 U.S. Dist. LEXIS 3076, at *10-11 (S.D.N.Y. Feb. 17, 2005) ("I declined to accept the Government's argument that, notwithstanding the jury's verdict that Carvajal was not guilty of actually distributing crack, I should nevertheless consider that the acts necessary for completing the substantive crimes were proved by a preponderance of the evidence.").[6]

The Petitioner submits that his Sixth Amendment rights were violated when the district court considered acquitted conduct in calculating/imposing the sentence in this case. As explained by Judge Ambro, the decision in *Watts* is in tension with *Apprendi* and its progeny:

> [E]ven if the specific holding of *Watts* survives the Supreme Court's *Apprendi* jurisprudence, the practice of considering acquitted conduct might not. That is, even if considering acquitted conduct for sentencing purposes does not violate the Double Jeopardy or Due Process Clause of the Fifth Amendment, doing so might still violate the jury right of the Sixth Amendment as expounded by *Apprendi* and its progeny.

United States v. Grier, 475 F.3d 556, 586 n.34 (3d Cir. 2007) (Ambro, J., concurring). And as explained by Judge Bright in his concurring opinion in *United States v.*

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[6] *See also United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring) (calling acquitted conduct rulings a jurisprudence reminiscent of Alice in Wonderland: "As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'").

Papakee, 573 F.3d 569, 577 (8th Cir. 2009):

> I join the majority's ultimate conclusion in these appeals, but write separately to voice my opposition to the use of acquitted conduct in determining Blackcloud's sentence.
>
> I concur, rather than dissent, because I am bound by prior decisions of this circuit that expressly permit a district court to use acquitted conduct at sentencing. But I am aware of no post-*Booker* authority from the Supreme Court that authorizes the use of acquitted conduct.
>
> Not long ago, I wrote extensively that the use of acquitted conduct violates the Sixth Amendment. *See United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) (noting the Supreme Court's affirmation of the centrality of the jury in the criminal-justice system and that "[a] judge violates a defendant's Sixth Amendment rights by making findings of fact that either ignore or countermand those made by the jury"). I also believe that use of acquitted conduct to enhance a sentence violates the Due Process Clause of the Fifth Amendment. *See id.* at 777 (Bright, J., concurring) ("[T]he consideration of 'acquitted conduct' undermines the notice requirement that is at the heart of any criminal proceeding.").
>
> I will not repeat here my concurrence in *Canania*. But I will reiterate that "the use of 'acquitted conduct' at sentencing in federal district courts is uniquely malevolent." *Id.* (Bright, J., concurring). We must end the pernicious practice of imprisoning a defendant for crimes that a jury found he did not commit. It is now incumbent on the Supreme Court to correct this injustice.

(Bright, J., concurring) (footnote and one citation omitted). *See also* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1714 (1992) ("Most lawyers, as well as ordinary citizens unfamiliar with the daily procedures of criminal law administration, are astonished to learn that a person in this society may be sentenced to prison on the basis of conduct of which a jury has acquitted him, or on the basis of charges that did not result in conviction.").

The Petitioner respectfully requests the Court to grant the instant petition in

order to answer this important question. The need for guidance from the Court on this issue is acute, as the issue has the potential to affect a substantial number of cases in every jurisdiction. Within the federal judiciary, there is a conflict between circuit courts continuing to permit the consideration of acquitted conduct pursuant to *Watts* and district courts refusing to consider acquitted conduct (in light of the Court's recent Sixth Amendment decisions).[7] The Petitioner prays the Court to grant his petition and resolve this conflict.

[7] *See United States v. Scheiblich*, 346 F. Supp. 3d 1076, 1082 (S.D. Ohio 2018) ("[T]he Court would be remiss if it did not take the opportunity to note that the use of conduct neither admitted to by the defendant nor found by the jury creates profoundly troubling Constitutional issues."), *rev'd*, 2019 WL 4254615 (6th Cir. Sep. 9, 2019).

I. CONCLUSION

The Petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully Submitted,

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