No. 19-6647

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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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 Petitioner continues to rely on the arguments set forth in his certiorari petition in support of his assertion 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. See United States v. Folk*, 754 F.3d 905, 914 (11th Cir. 2014) ("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 . . . ."). By granting the certiorari petition in this case, the Court will have the opportunity to specifically address what constitutes "a *prima facie* showing 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.

For all of the reasons set forth in the certiorari petition, undersigned counsel

asserts that the Petitioner's case is the appropriate case for the Court to reconsider its holding in *United States v. Watts*, 519 U.S. 148, 157 (1997). As explained in the certiorari petition, 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. 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).[1] 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):

- "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.*";

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

- "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).

Undersigned counsel submits that it is appropriate for the Court to reconsider the validity of *Watts* in light of the Court's recent Sixth Amendment holdings. Undersigned counsel again 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.");[2] *United States v. Kandirakis*, 441 F. Supp. 2d 282, 321-329 (D. Mass. 2006) (submitting all enhancement facts, including acquitted conduct, to an advisory jury at

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[2] In *Ibanga*, the court explained that "Justice Stevens's constitutional majority opinion in *United States v. Booker*, 543 U.S. 220 (2005), 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).

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

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.");[3] *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 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

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[3] 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.

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.").[4]

The Petitioner continues to assert 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 v. New Jersey*, 530 U.S. 466 (2000), 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. 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

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[4] *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.'").

> 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.") (emphasis added).

The Petitioner respectfully requests the Court to grant his certiorari petition in order to address the continued validity of *Watts*. 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).[5] The Petitioner prays the Court to grant his certiorari petition and resolve this conflict.

Respectfully Submitted,

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[5] *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).