No. _____

In the Supreme Court of the United States

DAYONTA MCCLINTON, PETITIONER

v.

UNITED STATES OF AMERICA

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Amy Coney Barrett, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Seventh Circuit:

1. Pursuant to Supreme Court Rule 13.5, petitioner Dayonta McClinton respectfully requests a 60-day extension of time, until Monday, June 12, 2022, within which to file a petition for a writ of certiorari. The United States Court of Appeals for the Seventh Circuit issued its opinion on January 12, 2022. A copy of the opinion is attached. This Court has jurisdiction under 28 U.S.C. § 1254(1).

2. Absent an extension, a petition for a writ of certiorari would be due on April 12, 2022. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case.

3. This case concerns whether the Fifth and Sixth Amendments prohibit a federal court from basing a criminal defendant's sentence on conduct—which, in itself

constitutes an entirely freestanding offense—underlying a charge for which the defendant was acquitted by a jury.

4. This case is essentially the mirror image of *Jones* v. *United States*, 574 U.S. 948 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of cert.), a case in which three members of this Court—Justice Scalia, Justice Ginsburg, and Justice Thomas—dissented from the denial of certiorari. As in that case, petitioner was charged with multiple offenses, and a jury convicted petitioner of the lesser crimes (here, armed robbery), but acquitted him of the far more serious crime (here, murder). *Ibid.* at 948. And, as in *Jones*, the sentencing judge dramatically enhanced petitioner's offense level (here, from a level 23 to level 43) based solely on the judge's finding that petitioner had committed an offense of which the jury had acquitted him. See *ibid.* at 949-50. Petitioner was ultimately sentenced to 228 months (19 years) in prison based on the judge's contradictory factfinding.

5. Petitioner appealed his sentence to the Seventh Circuit Court of Appeals, arguing that his Fifth and Sixth Amendment rights were violated by the district court's factfinding. But the Seventh Circuit panel (Easterbrook, Rovner, and Wood, JJ.) affirmed. The panel held that it was bound by this Court's decision in *United States* v. *Watts*, 519 U.S. 148, 157 (1997) (per curiam), and Seventh Circuit decisions applying *Watts*, which permit sentencing courts to consider acquitted conduct provided the court's findings are supported by a preponderance of the evidence. The Seventh Circuit, however, observed that petitioner's "contention [was] not frivolous," as "[i]t preserve[d] for Supreme Court review an argument that has garnered increasing support among many circuit court judges and Supreme Court Justices, who in dissenting and concurring opinions, have questioned the

fairness and constitutionality of allowing courts to factor acquitted conduct into sentencing calculations." Op. 4.

6. This is an exceptionally important opportunity to correct decades of misapplication of *Watts* by the lower courts. In *Watts*, a fractured Court held that considering acquitted conduct at sentencing did not offend the Double Jeopardy Clause of the Fifth Amendment. 519 U.S. at 154. This Court has clarified that *Watts* "presented a very narrow question" regarding the Double Jeopardy Clause. *United States* v. *Booker*, 543 U.S. 220, 240 n.4. Yet, "[n]umerous courts of appeals [have] assume[d] that *Watts* controls the outcome of both the Fifth *and* Sixth Amendment challenges to the use of acquitted conduct," just as the Seventh Circuit did here. *United States* v. *White*, 551 F.3d 381, 392 n.2 (6th Cir. 2008) (en banc) (Merritt, J., dissenting, joined by five others).

7. Justice Stevens decried this Court's holding in *Watts*—"that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved"—as "repugnant" to the Court's constitutional jurisprudence. 519 U.S. at 170 (Stevens, J., dissenting). And Justice Kennedy questioned this Court's summary approach to the issue in *Watts*, observing that "the case raise[d] a question of recurrent importance in hundreds of sentencing proceedings in the federal court system" that the Court "showe[d] hesitation in confronting," and which "ought to be confronted by a reasoned course of argument, not by shrugging it off." *Ibid.* at 170 (Kennedy, J., dissenting). "At the very least it ought to be said that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal." *Ibid.* A quarter-century has passed

since *Watts*, and this Court has yet to confront this recurring issue of paramount importance in the criminal sentencing regime.

8. As three members of this Court stated in *Jones*, and as the history of the Fifth and Sixth Amendments establishes, "[t]he Sixth Amendment, together with the Fifth Amendment's Due Process Clause, requires that each element of a crime be either admitted by the defendant, or proved to the jury beyond a reasonable doubt." 574 U.S. at 948 (Scalia, J. dissenting from denial of cert.). "Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, and must be found by a jury, not a judge." *Ibid.* Justice Scalia, Justice Ginsburg, and Justice Thomas lamented that "the Court of Appeals have uniformly taken our continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range." *Ibid.* at 949 (emphasis in original). As circuit court judges, Justice Gorsuch and Justice Kavanaugh similarly questioned the fairness and constitutionality of a sentencing judge increasing a criminal defendant's sentence based on acquitted conduct. See *United States* v. *Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part) ("[A] district court may find that the defendant engaged in certain conduct even though the jury acquitted the defendant of engaging in that same conduct. If that system seems unsound—and there are good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness—Congress and the Supreme Court may fix it, as may individual district judges in individual cases."); *United States* v. *Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) ("Allowing judges to rely on acquitted or

uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); *United States* v. *Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) ("It is far from certain whether the Constitution allows * * * a sentencing judge to increase a defendant's sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant's consent").

9. Here, the sentencing court's enhanced sentence was based only on the judge's findings that petitioner *in fact* committed the murder. The decision below used a much lower evidentiary standard to subvert a jury on a critical issue: whether the defendant committed a sufficiently serious crime to warrant lengthy incarceration of nearly two decades. This case presents a question essential to safeguarding constitutional rights of criminal defendants and promoting respect for the criminal justice system. The courts of appeals' misplaced reliance on *Watts* has undermined the fundamental role of the jury. Only this Court can ensure that the right of every person to an impartial jury for the trial of all crimes is protected. "This has gone on long enough. The present petition presents the nonhypothetical case the Court claimed to have been waiting for. And it is a particularly appealing case, because not only did no jury convict th[is] defendant[] of the offense the sentencing judge thought [him] guilty of, but a jury *acquitted* [him] of that offense." *Jones*, 574 U.S. at 949 (Scalia, J., dissenting from denial of cert.). The Court "should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment—or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable." *Ibid.* at 950.

10. Petitioner respectfully requests an extension of time to file a petition for certiorari. Following affirmance by the Seventh Circuit, petitioner engaged specialized Supreme Court counsel who were not previously involved in the case. A 60-day extension would allow counsel sufficient time to fully examine the decision's consequences, research and analyze the issues presented, and prepare the petition for filing. Additionally, newly retained counsel have several other pending matters that will interfere with their ability to prepare and file the petition by April 12, 2022.

Wherefore, petitioner respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari to Monday, June 12, 2022.

March 15, 2022

Respectfully submitted,

/s/ John P. Elwood

John P. Elwood
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000

Elie Salamon
Counsel of Record
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710
(212) 836-8000
elie.salamon@arnoldporter.com

Counsel for Petitioner