No. 21-1557

In the Supreme Court of the United States

DAYONTA MCCLINTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioner's Fifth and Sixth Amendment rights in considering conduct at issue in a charge that the jury did not find beyond a reasonable doubt, but that the court found by a preponderance of the evidence, in determining his sentence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 23 F.4th 732.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2022. On March 22, 2022, Justice Barrett extended the time within with to file a petition for a writ of certiorari to and including June 11, 2022. The petition for a writ of certiorari was filed on June 10, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted on one count of conspiring to obstruct commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a); and one count of brandishing a firearm

during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Pet. App. 9a. He was sentenced to 228 months of imprisonment, to be followed by three years of supervised release. *Id.* at 11a-12a. The court of appeals affirmed. *Id.* at 1a-8a.

1. On October 13, 2015, petitioner and five accomplices, including Malik Perry, agreed to rob a CVS drugstore in Indianapolis in order to steal narcotic pills. Presentence Investigation Report (PSR) ¶ 14. Five of the six robbers, including petitioner, carried firearms during the robbery. *Ibid.* They held the customers at gunpoint, demanding their phones and personal items. PSR ¶¶ 14-15. They also went behind the pharmacy counter and demanded that pharmacy employees provide them with various controlled substances. PSR ¶ 16. The robbers received only a small number of drugs because the majority of the controlled substances they wanted were kept in a time-delay safe. *Ibid.*

After the robbers fled, they drove to a nearby alley, where petitioner and Perry started arguing about how to divide among the group the small amount of drugs they had obtained from the CVS. Pet. App. 2a; PSR ¶ 18. Perry declared that he was going to keep all of the drugs for himself and exited the car. *Ibid.* Petitioner followed Perry out of the car and shot him multiple times, including once in the back of the head, killing Perry. *Ibid.* Petitioner grabbed the drugs. 9/10/19 Trial Tr. 212. The next day, petitioner told another person "that he shot Perry" after the robbery. Pet. App. 2a.

2. In August 2018, a federal grand jury charged petitioner with two counts of conspiring to obstruct commerce by robbery, in violation of 18 U.S.C. 1951(a) and 2; one count of brandishing a firearm during and in re-

lation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii) and 2; and one count of causing death to another through the use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(j)(1) and 2. Pet. App. 21a-24a. One robbery count, as well as the brandishing count, were based on the CVS robbery. *Id.* at 21a-22a. The other robbery and firearm counts were based on petitioner's robbery and fatal shooting of Perry in relation to that robbery. *Id.* at 23a. Following a three-day trial, the jury found petitioner guilty on the two CVS-related counts, but not guilty on the two Perry-related counts. *Id.* at 25a-28a.

Before sentencing, the Probation Office calculated petitioner's base offense level under the advisory guidelines as 43. PSR ¶ 31. The robbery guideline provides that the base offense level for a conviction under 18 U.S.C. 1951 is 20, Sentencing Guidelines § 2B3.1(a) (2018), but also contains a "Cross Reference" specifying an offense level of 43, which is the base offense level for first-degree murder, "[i]f a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States," § 2B3.1(c); see § 2A1.1. The guidelines instruct that whether to apply such "cross references in Chapter Two * * * shall be determined" by considering "relevant conduct." § 1B1.3(a); see § 1B1.2(b).

The guidelines define "[r]elevant [c]onduct" to include "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," Sentencing Guidelines § 1B1.3(a)(1)(A) (2018), as well as, "in the case of a jointly undertaken criminal activity," "all acts and omissions of others that were" "within the scope of," "in

furtherance of," and "reasonably foreseeable in connection with" that jointly undertaken criminal activity, § 1B1.3(a)(1)(B). In either case, qualifying acts or omissions include those "that occurred * * * in the course of attempting to avoid detection or responsibility for that offense." § 1B1.3(a)(1). The Probation Office determined that the killing of Perry would have qualified as murder under 18 U.S.C. 1111 and was relevant conduct with respect to the CVS robbery, thereby triggering the cross-reference and the accompanying calculation of a base offense level of 43. PSR ¶ 23.

3. At sentencing, petitioner objected to that calculation, arguing that Perry's death could not be considered relevant conduct because the government presented insufficient evidence that petitioner personally killed Perry. Pet. App. 30a-31a. Petitioner also argued that the Fifth and Sixth Amendments preclude a sentencing court from relying on conduct underlying a charge on which a defendant was acquitted. *Id.* at 36a-37a. The district court overruled petitioner's objections, finding by a preponderance of the evidence that Perry's killing was relevant conduct under the advisory guidelines. *Id.* at 42a-43a.

The district court observed that relevant conduct includes both "acts and omissions committed * * * by the defendant" and "acts and omissions of the others" involved in "a jointly undertaken criminal activity, which this was." Pet. App. 43a. The court explained "that those [circumstances] apply," *ibid.*, and that Perry's killing satisfied them "regardless of who killed Mr. Perry" because even if petitioner did not himself pull the trigger, "Perry was still killed during the course of the robbery, which [petitioner] participated in," *id.* at 42a. The court additionally found that Perry's killing

"occurred in the course of attempting to avoid detection or responsibility" for the CVS robbery "because of the close proximity following the robbery of the CVS, while they were leaving the CVS, and before the parties went their separate ways." *Id.* at 43a; see *id.* at 43a-44a ("So they were still—the conduct was still taking place in—at the end of the robbery."). And the court observed that "[a] co-conspirator who is killed during the offense can be considered a victim for purposes of applying the cross-reference." *Id.* at 39a.

The district court also rejected petitioner's constitutional arguments, explaining that under binding circuit precedent, "[r]elevant conduct may include" the conduct underlying "crimes where the charges have been dismissed" or "crimes for which the defendant has been acquitted." Pet. App. 39a. The court also explained that holding petitioner accountable for Perry's murder under relevant-conduct principles did not necessarily pose "any conflict [with] the jury's verdict." *Id.* at 42a. The court observed that the jury acquitted petitioner on charges of "robbery of Malik Perry and causing Mr. Perry's death in relation to the robbery of Malik Perry"; that the jury could have found "that [petitioner] did not attempt to rob Mr. Perry, that he just shot him"; and that such a finding "would have been a homicide, which petitioner was not charged with." *Ibid.*; see *id.* at 44a (reiterating distinction between the robbery-related charges and a murder charge).

The district court accordingly accepted the Probation Office's calculations and determined that petitioner's offense level was 43, which resulted in an advisory guidelines range of life imprisonment on the robbery count, truncated to 240 months, which was the statutory maximum for that count. Pet. App. 44a; see

PSR ¶ 73. The court imposed a below-guidelines sentence of 144 months of imprisonment on that count. Pet. App. 11a, 51a. The brandishing count carried a separate mandatory 84-month statutory minimum sentence, to be served consecutively. See PSR ¶¶ 71-72. The court imposed that minimum sentence, resulting in a total sentence of 228 months of imprisonment. Pet. App. 11a, 51a.

4. The court of appeals affirmed. Pet. App. 1a-8a. Petitioner argued, among other things, that the district court's reliance on the killing of Perry to apply the murder cross-reference was unconstitutional because the jury had acquitted petitioner of the robbery and firearms charges with respect to that killing. See Pet. C.A. Br. 15-19. The court of appeals rejected that argument, explaining that "[this] Court has 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.'" Pet. App. 3a (quoting *United States* v. *Watts*, 519 U.S. 148, 157 (1997) (per curiam)). The court of appeals observed that its own holdings "have followed this precedent, as they must." *Ibid.* (citing *United States* v. *Slone*, 990 F.3d 568 (7th Cir.), cert. denied, No. 20-8280, 2021 WL 4508213 (Oct. 4, 2021)).

The court of appeals also determined that the district court did not commit clear error in finding that Perry's murder was relevant conduct. Pet. App. 5a-6a. The court of appeals had "no doubt that under [this Court's decision in *United States* v. *Watts*], the murder was relevant conduct that could be used to calculate [petitioner's] sentence." *Id.* at 6a.

ARGUMENT

Petitioner renews his contention (Pet. 23-28) that the district court's reliance on acquitted conduct at sentencing violated his Fifth Amendment right to due process and his Sixth Amendment right to trial by jury. This Court, however, has upheld a district court's authority to consider such conduct at sentencing. And as petitioner correctly acknowledges, every federal court of appeals with criminal jurisdiction has recognized sentencing courts' authority to rely on conduct that the judge finds by a preponderance of the evidence but that the jury does not find beyond a reasonable doubt. This Court has repeatedly denied petitions for writs of certiorari in cases raising the issue and should follow the same course here.* In any event, this case would be an unsuitable vehicle in which to address the question presented because the record does not clearly establish that the district court actually relied on acquitted conduct in sentencing petitioner.

1. When selecting an appropriate sentence, a district court may, consistent with the Fifth and Sixth Amendments, consider conduct that was not intrinsic to the underlying conviction. Although the Sixth Amendment requires that, other than the fact of a prior conviction, "any fact that increase[s] the prescribed statutory maximum sentence" or the statutory "minimum sentence" for an offense "must be submitted to the jury and found beyond a reasonable doubt," *Alleyne* v. *United States*, 570 U.S. 99, 106, 108 (2013) (plurality opinion),

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* Several pending petitions for writs of certiorari also seek review of the question presented. See, *e.g.*, *Luczak* v. *United States*, No. 21-8190 (filed May 12, 2022); *Shaw* v. *United States*, No. 22-118 (filed Aug. 1, 2022); *Karr* v. *United States*, No. 22-5345 (filed Aug. 10, 2022).

judges have broad discretion to engage in factfinding to determine an appropriate sentence within a statutorily authorized range, see, *e.g.*, *id.* at 116 (majority opinion) ("[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."); *United States* v. *Booker*, 543 U.S. 220, 233 (2005) ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."); see also 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

Contrary to petitioner's contention (Pet. 23-28), neither the Fifth Amendment nor the Sixth Amendment precludes sentencing courts from finding facts about relevant conduct under this framework when the defendant is acquitted of that conduct under a higher standard of proof at trial. As this Court explained in *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), in addressing judicial factfinding under the then-mandatory federal Sentencing Guidelines, "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." *Id.* at 157. The Court observed that under the pre-Guidelines sentencing regime, it was "'well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted,'" and that "[t]he Guidelines did not alter this aspect of the sentencing court's discretion." *Id.*

at 152 (citation omitted). And the Court explained that a jury's determination that the government failed to prove a fact beyond a reasonable doubt does not have preclusive effect in contexts in which a lower standard of proof applies. *Id.* at 156 ("[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.") (citation omitted).

Petitioner's effort (Pet. 10, 20-22) to characterize *Watts* as an inapposite double-jeopardy case lacks merit. Although *Watts* specifically addressed a challenge to acquitted conduct based on double-jeopardy principles, its clear import is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution. See *Watts*, 519 U.S. at 157; see also, *e.g.*, *Alabama* v. *Shelton*, 535 U.S. 654, 665 (2002); *United States* v. *Grubbs*, 585 F.3d 793, 798-799 (4th Cir. 2009) (describing *Watts* as "clear Supreme Court * * * precedent holding that a sentencing court may consider uncharged and acquitted conduct in determining a sentence, as long as that conduct is proven by a preponderance of the evidence"), cert. denied, 559 U.S. 1022 (2010). Indeed, *Watts* is incompatible with petitioner's core premise: that consideration of acquitted conduct as part of sentencing contravenes the jury's verdict or punishes the defendant for a crime for which he was not convicted. If consideration of such conduct at sentencing were in fact a re-prosecution of the prior charges, it is difficult to see how *Watts* could have found it compatible with the Double Jeopardy Clause.

This Court's decision in *United States* v. *Booker* confirms that a judge may constitutionally base a defendant's sentence on conduct that was not found by the jury, so long as the sentence is at or below the statutory

maximum. In discussing the type of information that a sentencing court could consider under the advisory guidelines, *Booker* made no distinction between acquitted conduct and other relevant conduct. See, *e.g.*, 543 U.S. at 252 (emphasizing the need to consider all relevant conduct to achieve "the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways"). To the contrary, after emphasizing the judge's "broad discretion in imposing a sentence within a statutory range," *id.* at 233, *Booker* cited *Watts* for the proposition that "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found unproved (beyond a reasonable doubt)," *id.* at 251 (emphasis omitted). And after *Booker*, the majority opinion in *Alleyne* v. *United States* expressly distinguished "facts that increase either the statutory maximum or minimum" from those "used to guide judicial discretion in selecting a punishment 'within limits fixed by law.'" 570 U.S. at 113 n.2 (citation omitted). The Court made clear that although the latter "may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing." *Ibid.*

Petitioner's Fifth Amendment argument (Pet. 24-28) is likewise unsound. Notwithstanding that judges have historically enjoyed discretion to impose sentences based on additional facts found by a preponderance of the evidence at sentencing, petitioner essentially proposes (Pet. 26-28) to create an exception for factual findings that conflict with a jury's acquittal. That exception is logically unsound because factual findings that satisfy the preponderance standard do not conflict with a jury's verdict of acquittal under the more demanding beyond-

a-reasonable-doubt standard. See *Watts*, 519 U.S. at 156; cf. 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4422, at 634 (3d ed. 2016) (explaining that an acquittal is not issue preclusive in civil cases when the standard of proof is lower, and that the same rule "applies also when further criminal proceedings do not require proof beyond a reasonable doubt").

No logical conflict or inconsistency exists between the government's proving that petitioner more likely than not killed Perry, on the one hand, and its failure to prove beyond a reasonable doubt that he did so in connection with the robbery of Perry, on the other. Indeed, the jury's prior general verdict of acquittal does not necessarily reflect any specific finding as to the killing, as opposed to other elements of the offense. For instance, as the district court observed, because the firearms charge required proving that the killing was in connection with the robbery, the jury could have acquitted petitioner on that charge based solely on a finding of reasonable doubt as to the robbery charge, even if it found that petitioner in fact shot and killed Perry. See Pet. App. 41a-42a. And petitioner's approach would moreover be unsound as a practical matter, as it would either apply solely to crimes that the prosecution did in fact charge, thereby creating a substantial incentive for prosecutors to submit less conduct to a jury, or also apply to related conduct that the prosecution could have charged but did not, which would invite a complicated and ahistorical parsing of facts.

2. As petitioner acknowledges (Pet. 18 & n.2; see Pet. 11-15), every federal court of appeals with criminal jurisdiction has recognized, after *Booker*, that a district court may consider acquitted conduct for sentencing purposes. See, *e.g.*, *United States* v. *Gobbi*, 471 F.3d

302, 313-314 (1st Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 526-527 (2d Cir. 2005) (Sotomayor, J.), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Ciavarella*, 716 F.3d 705, 735-736 (3d Cir. 2013), cert. denied, 571 U.S. 1239 (2014); *United States* v. *Grubbs*, 585 F.3d 793, 798-799 (4th Cir. 2009), cert. denied, 559 U.S. 1022 (2010); *United States* v. *Farias*, 469 F.3d 393, 399-400 & n.17 (5th Cir. 2006), cert. denied, 549 U.S. 1272 (2007); *United States* v. *White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc), cert. denied, 556 U.S. 1215 (2009); *United States* v. *Waltower*, 643 F.3d 572, 575-578 (7th Cir.), cert. denied, 565 U.S. 1019 (2011); *United States* v. *High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States* v. *Mercado*, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 552 U.S. 1297 (2008); *United States* v. *Magallanez*, 408 F.3d 672, 683-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Siegelman*, 786 F.3d 1322, 1332-1333 & n.12 (11th Cir. 2015), cert. denied, 136 S. Ct. 798 (2016); *United States* v. *Settles*, 530 F.3d 920, 923-924 (D.C. Cir. 2008), cert. denied, 555 U.S. 1140 (2009).

Instead, petitioner cites (Pet. 15-18) decisions from the Supreme Courts of Georgia, New Hampshire, North Carolina, and New Jersey. Two of those decisions predate *Watts* and are therefore of minimal relevance. See *State* v. *Cote*, 530 A.2d 775 (N.H. 1987); *State* v. *Marley*, 364 S.E.2d 133 (N.C. 1988). Two others did not cite this Court's decision in *Watts*, let alone attempt to distinguish it. See *Bishop* v. *State*, 486 S.E.2d 887 (Ga. 1997), cert. denied, 522 U.S. 1119 (1998); *State* v. *Cobb*, 732 A.2d 425 (N.H. 1999). Indeed, the Supreme Court of New Hampshire has since clarified that its earlier decision in "*Cote* provides greater protection than that provided to a defendant in * * * *Watts*"—a statement best

read as clarifying that its decisions are rooted in state law and thus do not create a conflict on the federal constitutional question presented here. *State* v. *Gibbs*, 953 A.2d 439, 442 (2008). The same is true of *State* v. *Melvin*, 258 A.3d 1075 (N.J. 2021), which expressly relied on state, not federal, law. *Id.* at 1094 (explaining that the "State Constitution offers greater protection against the consideration of acquitted conduct in sentencing than does the Federal Constitution").

Petitioner cites (Pet. 16-17) the Supreme Court of Michigan's decision in *People* v. *Beck*, 939 N.W.2d 213 (2019), cert. denied, 140 S. Ct. 1243 (2020) (No. 19-564), which held that "due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted." *Id.* at 227. *Beck* not only is an outlier decision, but appears to be the first of its kind. *Beck* concluded that the sentencing court erred in relying on conduct underlying a murder charge directly before the jury in the same case. *Id.* at 225. To the extent that *Beck* could be read to further preclude Michigan state courts from considering acts included as additional support for a racketeering charge in a prior case, any conflict it has created remains too shallow to warrant this Court's review.

Moreover, *Beck*'s reasoning is tenuous. In the court's view, "when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent," and reliance on acquitted conduct at sentencing "'is fundamentally inconsistent with the presumption of innocence itself.'" *Beck*, 939 N.W.2d at 225 (citation omitted). But an individual is equally "presumed innocent"

when he is never charged with a crime in the first place. *Ibid.* The logical implication of the *Beck* majority's reasoning would therefore preclude a sentencing court from relying on *any* conduct not directly underlying the elements of the offense on which the defendant is being sentenced. Yet *Beck* itself acknowledged that "[w]hen a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard." *Ibid.* The majority did not attempt to explain that logical inconsistency in its reasoning.

This Court has repeatedly and recently denied petitions for writs of certiorari challenging reliance on acquitted conduct at sentencing. See, *e.g.*, *Gaspar-Felipe* v. *United States*, 142 S. Ct. 903 (2022) (No. 21-882); *Rosario* v. *United States*, 142 S. Ct. 233 (2021) (No. 21-115); *Slone* v. *United States*, No. 20-8280, 2021 WL 4508213 (Oct. 4, 2021); *Osby* v. *United States*, 142 S. Ct. 97 (2021) (No. 20-1693); *Bell* v. *United States*, 141 S. Ct. 1239 (2021) (No. 20-5689); *Ludwikowski* v. *United States*, 141 S. Ct. 872 (2020) (No. 19-1293); *Price* v. *United States*, 140 S. Ct. 2743 (2020) (No. 19-7479); *Rhodes* v. *United States*, 140 S. Ct. 2678 (2020) (No. 19-7215); *Bagcho* v. *United States*, 140 S. Ct. 2677 (2020) (No. 19-7001); *Baxter* v. *United States*, 140 S. Ct. 2676 (2020) (No. 19-6647); *Prezioso* v. *United States*, 140 S. Ct. 2645 (2020) (No. 19-7086); *Norman* v. *United States*, 140 S. Ct. 2555 (2020) (No. 19-6589); *Knight* v. *United States*, 140 S. Ct. 1135 (2020) (No. 19-6265); *Martinez* v. *United States*, 140 S. Ct. 1128 (2020) (No. 19-5346); *Asaro* v. *United States*, 140 S. Ct. 1104 (2020) (No. 19-107); *Cabrera-Rangel* v. *United States*, 139 S. Ct. 926 (2019) (No. 18-650); see also Br. in Opp. at 14,

Asaro, *supra* (No. 19-107) (listing additional cases). The same result is warranted here.

3. Petitioner asserts that "this Court's intervention" is required to resolve the question presented because "every federal court of appeals with criminal jurisdiction [has] foreclosed these claims" and "each has refused" "to reconsider the issue en banc." Pet. 18; see Pet. 18 n.2. But that uniformity on the question presented is a reason to deny review, not to grant it. See Sup. Ct. R. 10.

Nor is this Court's intervention necessary to address any of petitioner's asserted policy concerns. Cf. Pet. 18-20. Congress could pass a statute or the Sentencing Commission could promulgate guidelines to preclude such reliance. See *Watts*, 519 U.S. at 158 (Breyer, J., concurring); *United States* v. *Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (per curiam) (Kavanaugh, J., concurring in the denial of rehearing en banc). Indeed, Congress currently is considering legislation to amend 18 U.S.C. 3661 to prohibit consideration of acquitted conduct at sentencing except in mitigation, see H.R. 1621, 117th Cong., 1st Sess. (passed the House 405-12 on March 28, 2022); S. 601, 117th Cong., 1st Sess. (introduced in the Senate on July 12, 2021), and petitioner's concern (Pet. 18-19) that the Sentencing Commission "lack[s] a quorum" and "thus cannot act" is no longer true, see Press Release, United States Sentencing Commission, *Acting Chair Charles Breyer, Incoming Chair Judge Carlton W. Reeves Applaud Senate Confirmation of New Commissioners* (Aug. 5, 2022), www.ussc.gov/about/news/press-releases/august-5-2022. And while sentencing courts must recognize the potential relevance of acquitted conduct, they retain discretion to consider the extent to which such conduct should carry

weight in their assessment of each defendant's "background, character, and conduct" for the purpose of imposing a sentence in a given case. 18 U.S.C. 3661; see *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc).

4. At all events, this case would be an unsuitable vehicle in which to review the question presented because the record does not clearly establish that the district court actually relied on conduct underlying petitioner's acquittal in sentencing him.

For one thing, the district court found that its reliance on Perry's killing as relevant conduct "would [not] be inconsistent" with the jury's verdict because petitioner was charged with "the robbery of Malik Perry and causing Mr. Perry's death in relation to the robbery of Malik Perry." Pet. App. 42a. Accordingly, both counts required the jury to find that petitioner attempted to rob Perry, and acquittal on those counts thus could have reflected only a finding by the jury that "[petitioner] did not attempt to rob Mr. Perry, that he just shot him." *Ibid.* A finding that petitioner actually killed Perry is therefore compatible with the jury's verdict.

More important, as the district court explained, "in the case of a jointly undertaken criminal activity, which this was," the Guidelines' definition of "relevant conduct" includes certain "acts and omissions of the *others*" who were involved in that joint criminal activity. Pet. App. 43a (emphasis added); see Sentencing Guidelines § 1B1.3(a)(1)(B) (2018). Applying those principles here, the court determined that even if petitioner did not himself pull the trigger, "Perry was still killed during the course of the [CVS] robbery, which [petitioner] participated in," and thus "[petitioner's] relevant conduct as a

member of the conspiracy includes the murder of Malik Perry." Pet. App. 42a. The court accordingly agreed with the government that the murder was relevant conduct "regardless of who actually killed Malik Perry." *Id.* at 39a; see *id.* at 39a-43a.

Treating Perry's killing as relevant conduct for sentencing purposes thus would not conflict with petitioner's acquittal on the robbery and firearms counts even if one were to (incorrectly) view the jury's acquittal as an affirmative finding of petitioner's innocence of Perry's murder. And petitioner's sentence would therefore be lawful even if the question presented were resolved in his favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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