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

REPLY BRIEF FOR THE PETITIONER

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The government does not dispute that the question presented—whether the Fifth and Sixth Amendments prohibit courts from basing a criminal defendant's sentence on conduct underlying a charge for which he has been acquitted—is a critically important and recurring one in both state and federal criminal systems. The government concedes that there is a split between federal appellate courts and state courts of last resort. Br. in Opp. (Opp.) 12-14. And the government does not dispute that the Seventh Circuit upheld petitioner's sentence on the grounds that petitioner committed a murder of which the jury acquitted him, more than tripling his sentence. Opp. 6; Pet. App. 6a.

At bottom, the government can only repeat its shopworn claim that the Fifth and Sixth Amendment issues were resolved by this Court's summary disposition in *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam)—although *Watts* does not even mention either amendment, and this Court has since said that case "presented a very narrow question regarding the interaction of the Sentencing Guidelines with the Double

Jeopardy Clause, and did not even have the benefit of full briefing and argument." *United States* v. *Booker*, 543 U.S. 220, 240 n.4 (2005).

While the government urges this Court to wait for the split to deepen, it has identified no benefit from further delay. More than a dozen federal cases raising the issue have been decided just since the petition was filed. And more petitions will continue to be filed until this Court resolves the split. As the Seventh Circuit observed below, Pet. App. 1a-3a, and *amici* Former Federal Judges note, see Br. of 17 Former Federal Judges as Amici Curiae 1-4, there is "increasing support among many circuit court judges and Supreme Court Justices * * * question[ing] the fairness and constitutionality of allowing courts to factor acquitted conduct into sentencing calculations." Pet. App. 3a-4a. The practice of acquitted-conduct sentencing "has gone on long enough." *Jones* v. *United States*, 574 U.S. 948, 950 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of cert.). The Court should "grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment" jury-trial right and Fifth Amendment protection of Due Process. *Ibid.*

A. The Split Is Real

The government concedes that there is a "split among state courts," *People* v. *Rose*, 776 N.W.2d 888, 891 (Mich. 2010) (Kelly, C.J., dissenting), and that the supreme courts of four states—Georgia, Michigan, New Hampshire, and North Carolina—have as a matter of federal constitutional law "disallowed the use of acquitted conduct at sentencing" in conflict with their corresponding regional federal courts of appeals. Opp. 12; Pet. 15-18.

The government attempts to downplay the split, saying that "[t]wo of those decisions predate *Watts* and are therefore of minimal relevance" and "two others did

not cite * * * *Watts*." Opp. 12. But that overstates the relevance of *Watts*, which *never addressed* the Due Process ramifications of acquitted-conduct sentencing, nor, as this Court has noted, did it consider whether a judge's "sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment," *Booker*, 543 U.S. at 240 & n.4. The irrelevance of the government's proposed distinction is confirmed by the fact that both *People* v. *Beck*, 939 N.W.2d 213, 224 (Mich. 2019), and *State* v. *Melvin*, 258 A.3d 1075, 1089-1090 (N.J. 2021), discussed *Watts* at length and squarely concluded that its holding was limited to double jeopardy and did not resolve the jury-trial and due process issues.[1] The government contends that *Beck*'s reasoning is "tenuous." Opp. 13. Even if it were, that counsels review to discharge this Court's "principal responsibility" of "ensur[ing] the integrity and uniformity of federal law." *Kansas* v. *Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring).

Even if the split *were* limited to *Beck*, that would not be "too shallow to warrant this Court's review." Opp. 13.

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[1] Although *Melvin*'s holding barring acquitted-conduct sentencing was based on the New Jersey constitution, Pet. 17; Opp. 13, the New Jersey Supreme Court concluded as a matter of *federal* law that "*Watts* is not dispositive of the due process" question, nor does it "control" the Sixth Amendment analysis, 258 A.3d at 1089-1090.

The government argues that the New Hampshire Supreme Court's statement in *State* v. *Gibbs*, 953 A.2d 439, 442 (N.H. 2008), that "[*State* v.] *Cote* provides greater protection than" *Watts*, indicates "its decisions are rooted in state law." Opp. 12-13. But *Gibbs*'s briefing centered on whether later *federal* decisions like *Booker* had undercut *Watts*. See Def. Br. at 22-23, *State* v. *Gibbs*, 2008 WL 4186514 (N.H. Mar. 27, 2008) (courts "have questioned the continuing validity of *Watts*" and "recent decisions of the United States Supreme Court have restored the jury to its historic central role in our justice system"); State's Br. at 18-19, *Gibbs*, 2008 WL 4186515 (N.H. May 2008) ("*Watts* is still good law").

Indeed, the government often successfully petitions for review based on shallower splits.[2] That is especially warranted because this conflict divides state courts of last resort from their corresponding federal appellate courts, which this Court has deemed intolerable because the scope of constitutional protections depends on the choice of state or federal forum. See *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994) (granting review to resolve 1-1 split).

The issues have been thoroughly discussed and the split will not resolve itself absent this Court's intervention. Nothing is to be gained by waiting.

B. The Government's Merits Arguments Provide No Basis To Deny Review

The government's central submission is that the Seventh Circuit's decision was correct. Opp. 7-11. The government principally relies on *Watts*, but does not acknowledge that decision's limits. The government concedes that *Watts* "specifically addressed a challenge to acquitted conduct based on double-jeopardy principles," Opp. 9, but asserts with scant analysis that the "clear import" of that summary decision was to foreclose Fifth and Sixth Amendment arguments it never mentioned, *ibid.* Previously, the government acknowledged *Watts*'s limits. See U.S. Br. at 7, *United States* v. *Booker*, 543 U.S. 220 (2005) (No. 04-104), 2004 WL 1967056 (stating that *Watts* held "the Double Jeopardy Clause does not prevent the district court from increasing the offense level on the

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[2] See, *e.g.*, Pet. at 11, *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, No. 15-290 (Sept. 8, 2015), 2015 WL 5265284 (urging review of "square but shallow" 1-1 circuit split); U.S. Pet. at 25, *United States* v. *Sanchez-Gomez*, No. 17-312 (Aug. 29, 2017), 2017 WL 3809745 (2-1 circuit split); U.S. Pet. at 13, *United States* v. *Ressam*, No. 07-455 (Oct. 4, 2007), 2007 WL 2898699 ("2-1 conflict * * * merits this Court's review").

basis of the conduct underlying the acquitted charge"); *id.* at 35 (same).

The government fails to address the "increasing support among circuit court judges and Supreme Court Justices" (Pet. App. 4a), to say nothing of state Supreme Court justices, see *Beck*, 939 N.W.2d at 224-225; *Melvin*, 258 A.3d at 1090, concluding that the brief, summary *Watts* opinion did not conclusively resolve the constitutionality of acquitted-conduct sentencing. See Pet. 12-15. Seventeen more distinguished jurists have added their voices to the growing chorus of those questioning the constitutionality of the practice. See Br. of 17 Former Federal Judges as *Amici Curiae* 1. The idea that those larger issues were conclusively resolved without full briefing and argument is impossible to square with Justice Kennedy's comment that the *Watts per curiam* failed to "confront[]" the lawfulness of acquitted conduct sentencing with "a reasoned course of argument" instead of "shrugging it off." 519 U.S. at 170 (Kennedy, J., dissenting).

In response to petitioner's Sixth Amendment argument, the government contends that this Court's precedents permit consideration of "conduct that was not found by the jury." Opp. 9-10. But enhancing a sentence based on a distinct crime that "the jury expressly disapproved" as a basis for punishment, *United States* v. *Bell*, 808 F.3d 926, 929-930 (D.C. Cir. 2015) (Millett., J., concurring in the denial of rehearing en banc), implicates a *completely distinct* common-law tradition than enhancing a sentence based on information the jury never considered, see generally *Hester* v. *United States*, 139 S. Ct. 509, 511 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of cert.) ("It's hard to see why the right to a jury trial should mean less to the people today than it did to those at the time of the Sixth and Seventh Amendments' adoption."). The government

never acknowledges that historical tradition, much less does it address petitioner's argument that this Court's more recent Sixth Amendment cases—that honor that original understanding—"provide[] a compelling reason to at least limit *Watts* to the Double Jeopardy context, if not overrule it entirely." Pet. 22.

The government's response to petitioner's Fifth Amendment Due Process arguments likewise turns on the general permissibility of imposing sentencing enhancements based on facts a judge finds by a preponderance of the evidence. The government asserts that judicial findings by a preponderance of the evidence "do not conflict with a jury's verdict of acquittal," citing only *Watts* (which never mentioned the Fifth Amendment) and a treatise that cites *Watts*. Opp. 10-11. But that double jeopardy *per curiam* provides no basis for concluding that the Nation's due process traditions permit judges to consider conduct the jury rejected as a basis for punishment, particularly where drastic increases in punishment (here, more than tripling the sentence) pose the risk of "unusual and serious procedural unfairness" that warrant "invocation of the Due Process Clause." *Apprendi* v. *New Jersey*, 530 U.S. 466, 562-563 (2000) (Breyer, J., dissenting).

C. Only This Court Can Resolve The Split

The government argues that the Court's intervention is unnecessary because "Congress *could* pass a statute or the Sentencing Commission *could* promulgate guidelines to preclude such reliance" on acquitted conduct, or individual "sentencing courts" *could* fix this problem by exercising their "discretion" to ignore acquitted conduct "for purposes of imposing a sentence in a given case." Opp. 15-16 (emphases added). But as petitioner has explained, Pet. 18-19, none of those actors can resolve the issue.

To begin, Congress and the Sentencing Commission would affect only *federal* sentencing and could do nothing to address acquitted-conduct sentencing in state courts, which impose the vast majority of criminal sentences. Although the Sentencing Commission finally has a quorum following a three-year hiatus, Opp. 15, it has failed to act on Justice Breyer's suggestion a quarter-century ago that "the Commission could decide to revisit this matter in the future." *Watts*, 519 U.S. at 159 (Breyer, J., concurring). The government fails even to acknowledge Justice Scalia's concerns that the Commission actually *lacks* "authority to decree that information which would otherwise justify enhancement of sentence * * * may not be considered * * * if it pertains to acquitted conduct." *Id.* at 158 (Scalia, J., concurring).

It is of no moment that "Congress currently is considering legislation * * * to prohibit consideration of acquitted conduct at sentencing." Opp. 15. As the government has repeatedly advised this Court, "[t]he speculative possibility that Congress might ultimately enact one of the bills that are still pending in committee should not deter the Court from considering the important questions presented by this case." U.S. Cert. Reply Br. at 8, *United States* v. *Eurodif S.A.*, No. 07-1059 (Apr. 2, 2008), 2008 WL 905193 (citation omitted); U.S. Cert. Reply Br. at 10 n.8, *Gonzales* v. *Duenas-Alvarez*, No. 05-1629 (Sept. 6, 2006), 2006 WL 2581844 (same). Moreover, a "[s]imilar bill[] w[as] introduced in the previous Congress but w[as] not enacted, and there is no evident reason to expect a different result now." U.S. Pet. at 26 n.7, *United States* v. *Clintwood Elkhorn Mining Co.*, No. 07-308 (Sept. 7, 2007), 2007 WL 2608817. This Court routinely grants review despite pending legislation. See, *e.g.*, *United States* v. *Windsor*, 570 U.S. 744 (2013); *TC Heartland LLC* v. *Kraft Foods Grp. Brands LLC*, 137 S.

Ct. 1514 (2017); *Henderson* v. *Shinseki*, 562 U.S. 428 (2011).

As to the lower courts, precedent prohibits judges in many circuits from "excluding acquitted conduct from the information that [they] could consider in the sentencing process." *United States* v. *Ibanga*, 271 F. App'x 298 (4th Cir. 2008) (per curiam); *United States* v. *Vaughn* 430 F.3d 518, 527 (2nd Cir. 2005) (vacating sentence and ordering district court "to consider all facts relevant to sentencing * * * even those relating to acquitted conduct"). Even district judges willing to disclaim consideration of acquitted conduct at sentencing will continue to risk reversal in the other circuits that have yet to wade into the debate. As Judge Millett recently observed, it thus "falls upon the Supreme Court to hold that sentencing defendants based on conduct for which they have been acquitted contravenes the Constitution and to firmly put an end to the practice." *United States* v. *Khatallah*, 41 F.4th 608, 653 (D.C. Cir. 2022) (Millett, J., concurring).

In any event, relying on individual "district court judges * * * willing to risk reversal [and] not disturbed by appellate reversals" would make criminal sentencing "turn on a spin of the judicial assignment wheel"; such a practice is incompatible with a "criminal justice system that touts its procedural fairness." Br. of the Nat'l Ass'n of Federal Defenders & FAMM as Amici Curiae Supporting Pet'r 18, 23.

D. No Vehicle Problem Would Prevent The Court From Resolving This Issue

Finally, the government contends that this case is "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," and thus, "petitioner's sentence would therefore be lawful

even if the question presented were resolved in his favor." Opp. 16-17. That argument does not withstand even momentary scrutiny.

To begin, the government does not dispute that the judgment under review squarely affirmed petitioner's sentence *based on acquitted-conduct sentencing*: "McClinton * * * settle[d] the dispute" over robbery proceeds "by shooting Perry," and "under *Watts* * * * that could be used to calculate McClinton's sentence." Pet. App. 6a. The government is essentially attempting to portray a potential alternative ground for affirmance as a vehicle problem preventing the Court from reaching the question presented. But this Court regularly reviews cases although the petitioner may lose on another ground after an erroneous ruling is corrected. See, *e.g.*, *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201-202 (2012). The government has repeatedly persuaded this Court that "[t]he possibility that [petitioner] might ultimately be denied benefits on another ground would not prevent the Court from addressing the [question presented]. Indeed, the Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues to be decided on remand, if necessary." Cert. Reply Br. at 11, *Astrue* v. *Capato ex rel. B.N.C.*, 566 U.S. 541 (2012) (No. 11-159), 2011 WL 5098759; accord Cert. Reply Br. at 10, *Salazar* v. *Patchak*, 567 U.S. 209 (2012) (No. 11-247), 2011 WL 5856209 (similar).

In any event, the government's theory that petitioner could validly be sentenced based on the "acts and omissions of the *others*," Opp. 16, overlooks the fact that *the jury also acquitted petitioner of that theory of liability*. The government charged petitioner with aiding and abetting the others in robbing and shooting Perry, Pet. App. 23a (charging violation of 18 U.S.C. § 2); the government argued that petitioner was "responsible for everything [his] codefendants are doing, as well," Tr. 399;

and the district court instructed the jury that it should convict petitioner if one of the others robbed and shot Perry "if [petitioner] knowingly participated in the criminal activity and tried to make it succeed," Tr. 456. But the jury acquitted petitioner on *that* theory of liability for Perry's death too. Pet. App. 27a-28a.

The government's alternative theory that petitioner shot Perry in a dispute over proceeds but then did not bother to take the proceeds (Opp. 16) is nonsensical. The government did not raise this argument in the Seventh Circuit, Gov't C.A. Br. 11-14, which therefore did not address it. It is therefore forfeited. See *United States* v. *Jones*, 565 U.S. 400, 413 (2012). The government's *only* theory at trial was that petitioner alone robbed and killed Perry; no one else was charged for the offense. It was undisputed that the drugs had been taken from Perry's body, Tr. 201, 401, and that the shooter took them. Petitioner's sole defense, which the jury plainly accepted, was that cooperating witness Yates "framed" petitioner of the murder and robbery of petitioner's best friend, which Yates had himself committed. Tr. 37, 43. The government's eleventh-hour alternative ground for affirmance provides no basis to insulate the Seventh Circuit's legal error from review.

Lastly, the government notes that this Court has denied petitions presenting this question in the past. Opp. 14. But nearly all of those cases arose before *Beck* and *Melvin* squarely rejected the idea that *Watts* controls the Fifth and Sixth Amendment analysis. Many of those cases, moreover, suffered from genuine vehicle problems that would prevent the Court from reaching the question. *E.g., Ludwikowski* v. *United States*, 141 S. Ct. 872 (2020) (No. 19-1293) (procedural default); *Price* v. *United States*, 140 S. Ct. 2743 (2020) (No. 19-7479) (same); *Bagcho* v. *United States*, 140 S. Ct. 2677 (2020) (No. 19-7001) (statutory mandatory minimum sentence not increased by

consideration of uncharged or acquitted conduct). Many raised only a Sixth Amendment challenge. *E.g.*, *Baxter* v. *United States*, 140 S. Ct. 2676 (2020) (No. 19-6647); *Prezioso* v. *United States*, 140 S. Ct. 2645 (2020) (No. 19-7086).

This case not only raises *both* Fifth and Sixth Amendment challenges; it does so in the context of an enhancement that this Court has recognized is "absurd"—"sentenc[ing] a man for committing murder even if the jury convicted him only of" a lesser offense. *Blakely* v. *Washington*, 542 U.S. 296, 306 (2004); *Apprendi*, 530 U.S. at 562 (Breyer, J., dissenting); *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting). This case thus squarely and cleanly presents an issue that is long overdue for this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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