

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*

SUPPLEMENTAL BRIEF FOR PETITIONER

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Pursuant to this Court’s Rule 15.8, petitioner submits this supplemental brief to call the Court’s attention to two recent decisions in which additional federal and state judges have added their voices to the chorus of distinguished jurists calling on this Court to address the constitutionality of acquitted-conduct sentencing.

In *United States v. Tapia*, No. 21-1674, 2023 WL 2942922 (Apr. 14, 2023), the Second Circuit affirmed a sentence calculated based on quantities of drugs for which the sentencing judge had found the defendant responsible, despite a jury verdict that had acquitted the defendant of conduct involving any higher drug quantities. The court emphasized that “[w]hile we are bound by precedent in deciding the case before us, we note that several justices and judges have presented a strong case for reconsidering the use of acquitted conduct to determine sentencing.” *Id.* at *2 n.2.

And in *Mackey v. Commonwealth of Virginia*, No. 1091-22-1, 2023 WL 3827798 (Va. Ct. App. June 6, 2023), Judge Lisa Lorish of the Virginia Court of Appeals “questioned the fairness and constitutionality of allowing courts to factor acquitted conduct into sentencing calculations” both as a matter of state and federal law. *Id.* at *10 (Lorish, J., concurring) (quoting *United States v. McClinton*, 23 F.4th 732, 735 (7th Cir. 2022)). The majority there held that this Court’s decision in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), foreclosed the defendant’s Double Jeopardy Clause challenge to acquitted-conduct sentencing, and that the defendant had failed to preserve the argument that reliance on acquitted conduct for sentencing violated the Sixth and Fourteenth Amendments. *Mackey*, 2023 WL 3827798, at *4. In her concurring

opinion, Judge Lorish observed that “[w]hether a judge may increase a defendant’s sentence based on acquitted conduct is an issue of first impression in Virginia,” as “from 1796 to 2021,” a criminal defendant in Virginia “convicted by a jury * * * was sentenced by that jury.” *Id.* at *6 (Loris, J., concurring). Judge Lorish agreed that *Watts* does not answer the Sixth and Fourteenth Amendment questions because, “as the Supreme Court later clarified, *Watts* presented a ‘very narrow question regarding the interaction of the [Federal Sentencing] Guidelines with the Double Jeopardy Clause’ and did not consider whether a judge’s ‘sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment’” or “the implications of acquitted-conduct sentencing for the Due Process Clause.” *Id.* at *7 (alteration in original) (quoting *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005)).

Judge Lorish wrote that a court’s reliance on acquitted conduct to calculate a defendant’s sentence had troubling implications for the Sixth Amendment jury-trial right and Fourteenth Amendment right to due process. As Judge Lorish explained, “[a]llowing a judge to sentence a defendant based on acquitted conduct is simply at odds with the ‘jury’s historic role as bulwark between the State and the accused.’” *Mackey*, 2023 WL 3827798, at *10 (Lorish, J., concurring) (quoting *S. Union Co. v. United States*, 567 U.S. 343, 350 (2012)). In addition, “[a] court’s reliance on acquitted conduct further implicates due process concerns by increasing the risk of inaccurate sentencing.” *Ibid.* Judge Lorish noted that “[t]he Supreme Court has cautioned that even reliance on facts from a prior offense a defendant was *convicted* of may raise concerns about ‘unfairness’ and lead to ‘error.’” *Ibid.* (quoting *Mathis v. United States*, 579 U.S. 500, 512

(2016)). That concern is elevated when the defendant was acquitted of that conduct.

Judge Lorish concluded by emphasizing that “the question of whether judges may constitutionally use acquitted conduct in sentencing must be resolved in an appropriate case.” *Mackey*, 2023 WL 3827798, at *10 (Lorish, J., concurring). *This* is that case.

* * * * *

As Justices Scalia, Thomas, and Ginsburg observed nearly a decade ago: “This has gone on long enough.” *Jones v. United States*, 574 U.S. 948, 950 (2014) (Scalia, J., dissenting from denial of cert.). Only this Court can “put an end to the unbroken string of cases disregarding the Sixth Amendment” and Due Process Clause. *Ibid.*

CONCLUSION

For the foregoing reasons, and those stated in our previous filings, the petition should be granted.

Respectfully submitted.

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