No. _____

IN THE
# Supreme Court of the United States

LAWRENCE OAKIE,
a/k/a LBJ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

JASON J. TUPMAN
Federal Public Defender
MOLLY C. QUINN
Chief Appellate Attorney, *Counsel of Record*
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
101 South Main Street, Suite 400
Sioux Falls, South Dakota 57104
molly_quinn@fd.org
605-330-4489

Attorneys for Petitioner

## QUESTION PRESENTED

Whether the use of acquitted conduct to determine a defendant's sentence violates the Fifth and Sixth Amendments.

## LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

## RELATED PROCEEDINGS

*United States v. Oakie*, No. 3:18-cr-30039, United States District Court for the District of South Dakota. Judgment entered January 13, 2020.

*United States v. Oakie*, No. 20-1118, United States Court of Appeals for the Eighth Circuit. Judgment entered April 12, 2021.

## TABLE OF CONTENTS

Appendix

## TABLE OF AUTHORITIES

Page(s)

### United States Supreme Court Cases



### United States Court of Appeals Cases

**United States District Court Cases**



**State Cases**



**Constitutional Provisions**



**United States Code**

**Other Authorities**

## PETITION FOR A WRIT OF CERTIORARI

Lawrence Oakie respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-5a) is reported at 993 F.3d 1051. The district court's relevant rulings (App. 6a-55a) are unreported.

## JURISDICTION

The court of appeals entered judgment on April 12, 2021. Oakie received an extension of time to file a petition for rehearing. The court of appeals denied his timely petition for rehearing *en banc* on June 11, 2021. This petition is timely filed under the Court's March 19, 2020 and July 19, 2021 orders, which extended the deadline for all petitions for writs of certiorari to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing if said judgment or order was issued prior to July 19, 2021. This court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.

## INTRODUCTION

Petitioner Lawrence Oakie was sentenced to eight years in prison based in large part on conduct for which he had been acquitted by a jury several years before the present case. In 2016, Oakie was charged with sexual abuse of a child. He exercised his right to a jury trial and was acquitted of the original charge and the lesser-included offense. Two years later, Oakie was charged with sexual abuse of a different child. The conduct underlying his acquittal in the earlier case was used against him in multiple ways at trial and, as relevant here, at sentencing. The sentencing court relied on the acquitted conduct to enhance Oakie's Guideline range under the United States Sentencing Guidelines and to select a sentence in the middle of that range.

The use of acquitted conduct to enhance a defendant's sentence in this way violates the Sixth Amendment right to trial by jury and the Fifth Amendment right to due process. This Court has never addressed the Sixth Amendment and due process issues raised here. This is an important question of federal law that can only be settled by this Court, and this case presents the ideal opportunity to do so.

## STATEMENT OF THE CASE

**1. Prior Acquitted Conduct.** In 2016, Oakie was charged with aggravated sexual abuse of a child in the United States District Court for the District of South Dakota. *See United States v. Oakie*, No. 3:16-cr-30066 (D.S.D.). He exercised his right to a jury trial, and the jury acquitted him of both the original charge and the

lesser-included offense of abusive sexual contact. No. 3:16-cr-30066, Dkt. 72 (May 5, 2017).

**2. Present Federal Prosecution.** Two years later, Oakie was charged with three counts of abusive sexual contact of a different child. *See* Indictment, Dist. Ct. Dkt 2.[1] All three counts arose out of a two-minute incident in September 2017. *See* App. 2a; Transcript of Jury Trial, Vol. II, at 68, 116-36, Dist. Ct. Dkt. 131. The jury found Oakie guilty of all three counts. App. 2a.

**3. Sentencing.** At sentencing, the district court used Oakie's acquitted conduct from the 2016 case to enhance his sentence. App. 2a. In calculating Oakie's advisory Guideline range, the district court applied a five-level enhancement for engaging in a pattern of activity involving prohibited sexual conduct under USSG § 4B1.5(b)(1). App. 2a, 28a-32a. The only basis for the enhancement was the acquitted conduct underlying the 2016 case. App. 29a-32a; PSR, Dist. Ct. Dkt. 120, at ¶ 28. The enhancement nearly doubled Oakie's Guideline range, increasing it from 51 to 63 months to 87 to 108 months. App. 2a.

The district court also considered the acquitted conduct in selecting a sentence in the middle of the enhanced Guideline range. The district court emphasized that Oakie "does have as part of his history another incident with a ten-year-old who reported and testified to and then testified again in a second trial to being sexually abused by Mr. Oakie in a way that for a ten-year-old was largely

[1] All citations to "Dist. Ct. Dkt." are to the docket in *United States v. Oakie*, No. 3:18-cr-30039 (D.S.D.).

consistent." App. 48a. The district court sentenced Oakie to 96 months in prison. App. 50a.

**4. Appeal.** On appeal, Oakie argued that the use of acquitted conduct to enhance his Guideline range and sentence violated his Fifth and Sixth Amendment rights. The court of appeals rejected that argument, holding that under the law of the circuit, the use of acquitted conduct at sentencing did not violate Oakie's constitutional rights. App. 4a ("Nor, under the 'settled [law] in this circuit,' did a constitutional problem arise when the court considered Oakie's 'acquitted conduct [at] sentencing.'" (quoting *United States v. Papakee*, 573 F.3d 569, 576 (8th Cir. 2009)). The court of appeals had jurisdiction under 28 U.S.C. § 1291. Oakie timely filed a petition for rehearing *en banc*. The court of appeals denied his petition in a summary order. App. 56a. This petition for a writ of certiorari follows.

## REASONS FOR GRANTING THE PETITION

The use of acquitted conduct to enhance a defendant's sentence violates the Sixth Amendment right to trial by jury and the Fifth Amendment right to due process. For years, current and former members of this Court and other federal judges have articulated the due process and Sixth Amendment concerns raised by the use of acquitted conduct at sentencing, but this Court has never addressed the full range of constitutional concerns raised by this practice. There is now a deep and fully developed split of authority between the federal courts of appeals, which have rejected constitutional challenges to the use of acquitted conduct at sentencing, and the high courts of several states, which have held that the use of acquitted conduct

at sentencing violates the defendant's constitutional rights. This case presents the ideal opportunity for the Court to finally resolve the constitutionality of the use of acquitted conduct at sentencing.

## I. The Fifth and Sixth Amendments prohibit the use of acquitted conduct at sentencing.

### A. Sixth Amendment right to trial by jury

The Sixth Amendment right to trial by jury "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Id.* at 306. This right is "the heart and lungs, the mainspring and the center wheel of our liberties." *United States v. Haymond*, 139 S. Ct. 2369, 2375 (2019) (plurality opinion) (internal quotation omitted). To allow a sentencing judge to use conduct that was considered and rejected by a jury to increase the defendant's sentence for a different conviction "is at war" with this fundamental right. *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in denial of rehearing *en banc*).

Over the last twenty years, this Court has repeatedly reaffirmed the central role of the jury in the criminal justice system, particularly as it relates to sentencing. *See Haymond*, 139. S. Ct. 2369 (holding that mandatory revocation sentence based on judicial fact-finding violates the Fifth and Sixth Amendments); *Alleyne v. United States*, 570 U.S. 99 (2013) (holding that any fact that increases the mandatory minimum sentence for a crime must be submitted to the jury); *United*

*States v. Booker*, 543 U.S. 220 (2005) (holding that mandatory Federal Sentencing Guidelines violate the Sixth Amendment); *Blakely*, 542 U.S. 296 (holding that any fact essential to a punishment must be submitted to the jury); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact other than a prior conviction that increases the maximum sentence for a crime must be submitted to the jury).

The clear implication of these cases is 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 and then relies on these factual findings to enhance the defendant's sentence." *United States v. Canania,* 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring); *see also United States v. Mercado*, 474 F.3d 654, 658-65 (9th Cir. 2007) (Fletcher, J., dissenting). This practice allows the government to try its case twice—first before the jury and then before the judge. *Canania*, 532 F.3d at 776 (Bright, J., concurring). If the government loses its case before the jury, it can retry those counts on the more generous preponderance of the evidence standard before the judge. *Id.* This "amounts to more than mere second-guessing of the jury—it entirely trivializes its principal fact-finding function." *Id.* In other words, it "renders the jury a sideshow." *United States v. Brown*, 892 F.3d 385, 409 (D.C. Cir. 2018) (Millett, J., concurring). "Without so much as a nod to the niceties of constitutional process, the government plows ahead incarcerating its citizens for lengthy terms of imprisonment without the inconvenience of having to convince jurors of facts beyond a reasonable doubt." *Id.* The use of acquitted conduct in this manner violates the Sixth Amendment.

### B. Fifth Amendment right to due process

The use of acquitted conduct at sentencing also violates the Due Process Clause of the Fifth Amendment. *See People v. Beck*, 939 N.W.2d 213, 216 (Mich. 2019), *cert. denied sub nom. Michigan v. Beck*, 140 S. Ct. 1243 (2020) ("Once acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime."); *see also State v. Melvin*, 258 A.3d 1075, 1093-94 (N.J. 2021) ("We hold that the findings of juries cannot be nullified through lower-standard fact findings at sentencing. . . . Fundamental fairness simply cannot let stand the perverse result of allowing in through the back door at sentencing conduct that the jury rejected at trial.") (applying state constitution).

The consideration of acquitted conduct undermines the fair notice requirement at the heart of due process. *United States v. Lasley*, 832 F.3d 910, 922 (8th Cir. 2016) (Bright, J., dissenting). "A defendant should have fair notice to know the precise effect a jury's verdict will have on his punishment." *Canania*, 532 F.3d at 777 (Bright, J., concurring). "It cannot possibly satisfy due process to permit the nullification of a jury's not guilty verdict . . . by allowing a judge to thereafter use the *same* conduct underlying that charge to enhance a defendant's sentence." *Id.* "In determining guilt or innocence, the jury thus serves not only as a fact-finder but as a means of providing a defendant with notice as to his possible punishment." *Id.* "And a judge's subsequent use of acquitted conduct all but eviscerates this latter notice function." *Id.* (cleaned up). *Cf. Apprendi*, 530 U.S. at 563 (Breyer, J., dissenting) (noting that there may be situations where "unusual and serious

procedural unfairness" in sentencing violates the Due Process Clause). The use of acquitted conduct at sentencing violates the fundamental fairness guaranteed by the Due Process Clause.

## II. *Watts* did not resolve the Fifth Amendment due process and Sixth Amendment concerns presented in this case.

In *United States v. Watts*, this Court held that the use of acquitted conduct at sentencing does not violate the Double Jeopardy Clause. 519 U.S. 148, 157 (1997) (per curiam). While the courts of appeals uniformly have interpreted *Watts* as foreclosing *any* constitutional challenge to the use of acquitted conduct,[2] the Court did not address whether this practice violates the Due Process Clause or the Sixth Amendment. Indeed, the Court has emphasized the narrowness of the holding in *Watts*. *Booker*, 543 U.S. at 240 n.4 ("*Watts*, in particular, 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."). *Watts* simply did not address whether the use of acquitted conduct violates the Due Process Clause or the Sixth Amendment. *Id.* at 240; *United States v. Papakee*, 573 F.3d 569, 577 n.3 (8th Cir. 2009) (Bright, J., concurring); *United States v. White*, 551

[2] *United States v. Gobbi*, 471 F.3d 302, 313-14 (1st Cir. 2006); *United States v. Vaughn*, 430 F.3d 518, 525-27 (2d Cir. 2005); *United States v. Ciavarella*, 716 F.3d 705, 735-36 (3d Cir. 2013); *United States v. Grubbs*, 585 F.3d 793, 798-99 (4th Cir. 2009); *United States v. Farias*, 469 F.3d 393, 399-400 (5th Cir. 2006); *United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc); *United States v. Waltower*, 643 F.3d 572, 574-78 (7th Cir. 2011); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States v. Mercado*, 474 F.3d 654, 656-58 (9th Cir. 2007); *United States v. Magallanez*, 408 F.3d 672, 683-85 (10th Cir. 2005); *United States v. Faust*, 456 F.3d 1342, 1347-48 (11th Cir. 2006); *United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008).

F.3d 381, 391-92 (6th Cir. 2008) (Merritt, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring). This Court need not overrule *Watts* to answer the question presented in this case.

### III. The time has come for the Court to resolve the constitutionality of the use of acquitted conduct at sentencing.

For years, current and former members of this Court have urged the Court to consider the Fifth and Sixth Amendment implications of the use of acquitted conduct at sentencing. *See, e.g.*, *Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., joined by Thomas, J. & Ginsburg, J., dissenting from denial of certiorari) (urging the Court to "grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment" by allowing judge-found facts to enhance a sentence); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (stating that "[i]t is far from certain whether the Constitution allows" courts to select a sentence "based on facts the judge finds without the aid of a jury or the defendant's consent"); *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing *en banc*) (noting that "[a]llowing 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," but stating that resolving this issue would require a significant revamp of the Court's sentencing jurisprudence).

Other federal judges have joined the chorus. *See, e.g.*, *Lasley*, 832 F.3d at 920-23 (Bright, J., dissenting); *Bell*, 808 F.3d at 928-32 (Millett, J., concurring in denial

of rehearing *en banc*); *White*, 551 F.3d at 391-97 (Merritt, J., dissenting); *Mercado*, 474 F.3d at 658-65 (Fletcher, J., dissenting); *Faust*, 456 F.3d at 1349-53 (Barkett, J., specially concurring). They agree that only this Court can resolve the constitutionality of the use of acquitted conduct at sentencing. *See, e.g.*, *Bell*, 808 F.3d at 932 (Millett, J., concurring in denial of rehearing *en banc*) ("[O]nly the Supreme Court can resolve the contradictions in the current state of the law."); *Papakee*, 573 F.3d at 578 (Bright, J., concurring) ("It is now incumbent on the Supreme Court to correct this injustice.").

The need for this Court's intervention has become more apparent in recent years as the high courts of a number of states have held that the use of acquitted conduct to enhance a defendant's sentence violates the due process and jury trial rights enshrined in state constitutions and the Federal Constitution, demonstrating a deep and fully developed split of authority on this issue. In September, the Supreme Court of New Jersey held that sentencing based on acquitted conduct violates the state constitution's fundamental guarantee of due process. *Melvin*, 258 A.3d at 1091, 1093-94. The court concluded:

> We hold that the findings of juries cannot be nullified through lower-standard fact findings at sentencing. The trial court, after presiding over a trial and hearing all the evidence, may well have a different view of the case than the jury. But once the jury has spoken through its verdict of acquittal, that verdict is final and unassailable. The public's confidence in the criminal justice system and the rule of law is premised on that understanding. Fundamental fairness simply cannot let stand the perverse result of allowing in through the back door at sentencing conduct that the jury rejected at trial.

*Id.* at 1093-94.

Similarly, in 2019, the Supreme Court of Michigan held that the Fourteenth Amendment's due process clause bars the use of acquitted conduct at sentencing. *Beck*, 939 N.W.2d at 227 ("We hold 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."). The *Beck* court explained that "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 to allow the sentencing court to use that conduct at sentencing "is fundamentally inconsistent with the presumption of innocence itself." *Id.* at 225 (quoting *State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988)).

New Jersey and Michigan joined three other state high courts in prohibiting the use of acquitted conduct at sentencing. *See Bishop v. State*, 486 S.E.2d 887, 897 (Ga. 1997); *State v. Marley*, 364 S.E.2d 133, 138 (N.C. 1988); *State v. Cote*, 530 A.2d 775, 784-85 (N.H. 1987). With all twelve federal circuits relying on *Watts* to reject constitutional challenges to the use of acquitted conduct at sentencing, there is an established split of authority on this important question of federal law, and only this Court can resolve it.

## IV. This case is an ideal vehicle for the question presented.

This case squarely presents the Fifth and Sixth Amendment issues involved in the use of acquitted conduct at sentencing. The sentencing court nearly doubled Oakie's Guideline range (increasing it from 51 to 63 months to 87 to 108 months) based on conduct for which he had been acquitted by a jury just two years earlier.

Further compounding the effect of the acquitted conduct on his sentence, the sentencing court then selected a sentence in the middle of the Guideline range based in part on the acquitted conduct. The acquitted conduct had a dramatic effect on Oakie's sentence. This case is an ideal vehicle for the question presented.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 5th day of November, 2021.

Respectfully submitted,

JASON J. TUPMAN
Federal Public Defender
By:

*/s/ Molly C. Quinn*
Molly C. Quinn, Chief Appellate Attorney
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
101 South Main Avenue, Suite 400
Sioux Falls, SD 57104
molly_quinn@fd.org
Phone: (605) 330-4489

*Counsel of Record for Petitioner*