No. 21-8190

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS LUCZAK, 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 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. 1-21) is available at 26 F.4th 387.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2022. The petition for a writ of certiorari was filed on May 12, 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 Northern District of Illinois, petitioner was convicted of

conspiring to participate in a racketeering enterprise, in violation of 18 U.S.C. 1962(d). Judgment 1; Verdict 1. The district court sentenced petitioner to 210 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1-21.

1. Petitioner is a longtime member of the Latin Kings street gang and has held many positions within the gang. Presentence Investigation Report (PSR) ¶ 13. Over the years, petitioner engaged in many criminal acts to further the goals of the gang. See PSR ¶¶ 11-31. Among other things, petitioner attempted to shoot at rival gang members on several occasions, Trial Tr. 1348-1350, 1352-1356, 1361-69; threw a stick of dynamite (which failed to explode) at the house of a rival, id. at 1356-1359; helped to set a rival's car on fire by smashing the rear window and throwing a Molotov cocktail inside, id. at 1369-1372; stole 30 kilograms of cocaine from a cartel stash house, id. at 1372-1376; participated in assaulting a fellow gang member, id. at 2945-2953; drove a 15-year-old gang member into rival territory so the juvenile could attempt to shoot at rivals, who fired first and hit the juvenile in the face before he fired in return, id. at 452-455, 459-462, 2660-2674; and attacked a man at a bar because he looked at a gang leader the wrong way, causing the victim to flee in his car and collide with pedestrians, id. at 463-468, 2541-2557.

Of specific relevance here are two shooting incidents. The first was on June 11, 2000, when petitioner shot and killed Juan

Serratos, a member of a rival gang. PSR ¶ 25. The Latin Kings were targeting Serratos for his role in several attacks on them. Trial Tr. 1010-1012, 1377-1378. Petitioner and other gang members learned that Serratos was in an alley behind a house. Id. at 1009, 1013-1016. Petitioner requested that one of his confederates hand him a firearm, and then petitioner and others drove toward Serratos's reported location. Id. at 1016-1018. Once there, petitioner entered the alleyway and shot Serratos. Id. at 1018-1020. Petitioner returned to the group and announced, "I got him," explaining that he had walked up to Serratos and shot him in the chest. Id. at 1019-1021. Serratos ultimately died as a result of the gunshot wounds. PSR ¶ 25. The following week, petitioner's chapter of the Latin Kings threw a party to celebrate his killing of Serratos. Trial Tr. 1021. There, petitioner bragged: "We finally got him. * * * We don't have to worry about him no more." Id. at 1022. And petitioner took credit for the killing thereafter, when he explained to one of his confederates that "I'm the one who got Johnny Serratos." Id. at 1382.

The second shooting was on June 17, 2009, when petitioner and a confederate were ordered by a higher-up to shoot members of a rival street gang in retaliation for an assault on a Latin Kings member. PSR ¶ 22. Petitioner drove a stolen car into the rival gang's territory and handed his confederate a weapon. Ibid. The duo was surrounded by the rival gang and a shootout ensued. Ibid.

Petitioner and his confederate, who was shot in the face and chest, escaped on foot. Ibid.

2. In December 2018, a federal grand jury charged petitioner with conspiring to participate in a racketeering enterprise, in violation of 18 U.S.C. 1962(d). Second Superseding Indictment 1-16. The indictment included three special findings alleging that the Serratos murder (1) was committed in violation of 720 Ill. Comp. Stat. 5/9-1(a) because petitioner killed Serratos "without lawful justification" while "intending to kill and do great bodily harm to" Serratos and "knowing that such acts would cause death" or "create[] a strong probability of death," Second Superseding Indictment 15; (2) was committed in violation of 720 Ill. Comp. Stat. 5/9-1(b)(11) because Serratos's murder "was committed in a cold, calculated and premeditated manner pursuant to a preconceived plan, scheme and design to take a human life by unlawful means," and petitioner's conduct "created a reasonable expectation that the death of a human being would result," Second Superseding Indictment 15-16; and (3) was committed in violation of 730 Ill. Comp. Stat. 5/5-8-1(a)(1)(d)(iii) because petitioner "personally discharged a firearm that proximately caused * * * death to another," Second Superseding Indictment 16.

After a six-week trial, the jury found petitioner guilty of conspiring to participate in a racketeering enterprise, in violation of 18 U.S.C. 1962(d). Verdict 1. The jury, however, declined to find that any of the three special findings alleged in

the indictment had been proved beyond a reasonable doubt. Verdict 2.

The advisory Sentencing Guidelines specify an offense level for racketeering of either 19 or "the offense level applicable to the underlying racketeering activity." Sentencing Guidelines § 2E1.1(a) (2018). In its presentence report, the Probation Office recommended an offense level of 33, which is the underlying offense level for conspiracy or solicitation to commit murder, § 2A1.5(a), based on the 2009 shootout with the rival gang. See PSR ¶ 42-43. The offense level of 33 resulted in a recommended advisory guidelines range of 168 to 210 months of imprisonment. PSR ¶ 169. The Probation Office's recommendation did not rely on the killing of Serratos in the computation of petitioner's offense level or advisory sentencing range.

The district court, however, found that petitioner's offense level should be 43, which is the underlying offense level for first-degree murder, Sentencing Guidelines § 2A1.1(a) (2018), based on petitioner's role in killing Serratos. Sentencing Tr. 14. The court explained that the government had proved by a preponderance of the evidence that petitioner was responsible for Serratos's murder in light of the trial testimony, forensic evidence regarding the bullet, the celebration of the shooting the following week, and petitioner's motivation to commit the murder. Ibid. The court thus calculated an advisory guidelines range of

life imprisonment, truncated to 240 months of imprisonment, which is the statutory maximum. Id. at 27, 43; see 18 U.S.C. 1963(a).

The district court imposed a below-guidelines sentence of 210 months of imprisonment. Sentencing Tr. 49; Judgment 2. The court observed that 210 months of imprisonment was "the high end of the range that" would have applied "without the murder," and determined that it was "the appropriate" sentence in light of the sentencing factors in 18 U.S.C. 3553(a). Sentencing Tr. 49; see id. at 43-49. The court explained that it would have imposed that sentence even without considering Serratos's murder "because of all of the other factors of [petitioner's] recidivism, his long-term involvement in the gang, his unfortunate return to it on two occasions, and his, what is sad to say, almost fanatical involvement when he was younger." Id. at 49.[1]

3. The court of appeals affirmed. Pet. App. 1-21. As relevant here, the court rejected petitioner's argument that the district court's reliance at sentencing on his involvement in Serratos's murder violated his Sixth Amendment right to a jury trial, where the jury had declined to make the special finding

[1] The transcript records the district court as stating that it would have given the same sentence "even with that murder," Sentencing Tr. 49, and the government thus argued in the court of appeals that the selected sentence would in fact have been different without consideration of the Serratos murder, see Gov't C.A. Br. 48-49. The court of appeals, however, appears to have understood the district court, in context, to be saying that it would have imposed the same sentence even without the Serratos murder, see Pet. App. 18, and the government now agrees that context strongly favors that reading.

related to that murder. Id. at 17-18. The court of appeals explained that petitioner's argument was foreclosed by this Court's decision in United States v. Watts, 519 U.S. 148, 157 (1997) (per curiam). Pet. App. 18.

ARGUMENT

Petitioner renews his contention (Pet. 5-10) that the district court's reliance on acquitted conduct at sentencing violated his Sixth Amendment right to trial by jury. He acknowledges, however, that this Court has upheld a district court's authority to consider such conduct at sentencing. Every federal court of appeals with criminal jurisdiction likewise 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.[2] 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. For the reasons set forth in the government's brief in opposition to the petition for a writ of certiorari in McClinton

[2] Several pending petitions for writs of certiorari also seek review of the question presented. See, e.g., McClinton v. United States, No. 21-1557 (filed June 10, 2022); Shaw v. United States, No. 22-118 (filed Aug. 1, 2022); Karr v. United States, No. 22-5345 (filed Aug. 10, 2022).

v. United States, No. 21-1557, a copy of which is being served on petitioner's counsel, petitioner's constitutional claim does not warrant this Court's review. See Br. in Opp. at 7-16, McClinton, supra (No. 21-1557) (filed Oct. 28, 2022). 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. See Br. in Opp. at 7-11, McClinton, supra (No. 21-1557).

Watts forecloses petitioner's claim, as he acknowledges (Pet. 6), and every federal court of appeals with criminal jurisdiction, including the court below, has recognized that a district court may consider acquitted conduct for sentencing purposes. Pet. App. 17-18; see Br. in Opp. at 11-12, McClinton, supra (No. 21-1557) (listing cases). This Court has repeatedly and recently denied petitions for writs of certiorari challenging reliance on acquitted conduct at sentencing, and the same result is warranted here. See Br. in Opp. at 14-15, McClinton, supra (No. 21-1557) (listing cases); see also Br. in Opp. at 14, Asaro v. United States, 140 S. Ct. 1104 (2020) (No. 19-107) (listing additional cases).

2. In any event, 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 acquitted conduct in sentencing petitioner.

As the court of appeals recognized, "[h]ad [the district court] excluded the murder as relevant conduct, the revised guidelines range would have been 168 to 210 months' imprisonment. Acknowledging this counterfactual possibility, the district court stated the following: 'I actually think the 210, that is the high end of the range without a supervisory role and without the murder, I actually think that's the appropriate place for you.'" Pet. App. 18 (ellipsis omitted). The district court explained that it would have imposed the same 210-month sentence even without considering the murder as relevant conduct "because of all of the other factors of [petitioner's] recidivism, his long-term involvement in the gang, his unfortunate return to it on two occasions, and his, what is sad to say, almost fanatical involvement when he was younger." Sentencing Tr. 49.[3] Petitioner thus cannot show that the district court actually relied on acquitted conduct in determining his sentence, or that he would receive any benefit even if the question presented were resolved in his favor.

[3] As noted above, see p. 6 n.1, supra, the court of appeals' reading of the sentencing transcript, which the government now views as the correct contextual reading, differed from the government's reading below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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