No. 22-118

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IN THE

SUPREME COURT OF THE UNITED STATES

MARQUIS SHAW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

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PETITIONER'S REPLY

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November 2022

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The court of appeals ruled that it was bound by this Court's decision in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), as well as by Circuit precedent, to reject petitioner Marquis Shaw's argument that he was improperly sentenced based on "acquitted conduct." Appx. A3a. The government defends that decision based on "the clear import of *Watts*," BIO 6, without so much as citing this Court's opinion in *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005), which directly rejected any such broad overreading of *Watts*.[1] The time has come for this Court to step in and settle once and for all the festering problem of federal courts' imposing an enhanced sentence on the basis of purported facts squarely rejected in the verdict of the jury at a trial in the same case. The Brief in Opposition ("BIO") offers no persuasive reason not to select petitioner Shaw's case as the vehicle for an authoritative resolution of this issue. Indeed, his inclusion of a non-constitutional ground for decision makes his petition a more attractive choice.[2]

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[1] Nor is *Booker* mentioned in the Solicitor General's brief opposing certiorari in *McClinton v. United States* (No. 21-1557), which it essentially incorporates into its Brief in Opposition in Mr. Shaw's case. *See* BIO 6–7.

[2] However, as set forth in the petition (at 38), if the Court instead grants certiorari in *McClinton* or any other pending case presenting the "acquitted conduct" issue, it should at least hold Mr. Shaw's petition pending decision of that case.

Marquis Shaw was sentenced to decades of imprisonment – a *de facto* life sentence – based on conduct that the jury rejected in its verdicts at trial. The Brief in Opposition ("BIO") repeats or incorporates the government's oft-reiterated but utterly unpersuasive arguments why acquitted-conduct sentencing is not unlawful, BIO 6–7, all of which were anticipated and thoroughly debunked in the petition. Petitioner will not repeat his own merits arguments in this Reply.

Responding to petitioner's non-constitutional issue-preclusion argument, the government denigrates the significance of an acquittal (and thus of the Sixth Amendment right to trial by jury) by contending that the jury's favorable verdict constitutes "a finding that a reasonable doubt exists as to a certain fact." BIO 7. That perspective is utterly wrong. Reasonable doubt is the *rule of decision* that a jury must employ in making its findings, but the *finding* the jury makes after applying that constitutional rule concerns a *fact* in the real world. *See* Pet. 26 n.17. As this Court held in *Nelson v. Colorado*, 581 U.S. 218 (2017), the presumption of innocence is a substantive guarantee. Even when based solely on trial error and not on evidentiary insufficiency, an appellate reversal or successful post-conviction challenge restores a defendant to that legal status, not to a state of mere official doubt about guilt. *Id.* As a result, this Court held, the Due Process Clause forbids any deprivation of property. *Id.* Surely, it follows that the same constitutionally protected state of legal innocence attaches to an acquitted defendant, when faced with sentencing on other counts, to guard against any deprivation of

liberty[3] that can be squarely traced to facts determined by the verdicts of not guilty.

The ordinary rule of collateral estoppel for civil cases, which sometimes takes account of a difference in burdens of proof that may exist in a subsequent proceeding, *see* BIO 8, citing *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), has no bearing here. The "acquitted conduct" issue concerns a subsequent stage of the same (or a related) criminal case. The jury's "verdict," in other words, determines – as the etymology of that legal term implies – *the truth* about the allegation; it does not merely serve to pass judgment on the persuasiveness of the prosecution case as presented at a certain trial.

The government's Brief in Opposition misreads the record when it asserts that the Questions Presented were not sufficiently raised or pressed below, and that the issue of acquitted conduct does not directly arise on the facts of petitioner's case. First, as highlighted in the wording of the second Question Presented[4] and addressed in the petition itself, Pet. 32–33, petitioner's non-constitutional argument against the use

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[3] The same liberty interest is not at stake when the prosecution offers evidence at a trial – for a proper purpose and otherwise in keeping with the Rules of Evidence – of conduct that underlay a prior acquittal. Compare *Dowling v. United States*, 493 U.S. 342, 348–49 (1990).

[4] "(2) *In avoidance of the constitutional question*, do the rules of issue preclusion, as applied in federal criminal cases, bar imposition of an aggravated sentence on a factual predicate necessarily rejected by the jury at trial in the same case?" Pet. i (emphasis added).

of “acquitted conduct” at sentencing is one the Court would be bound by its own precedent to consider prior to deciding this federal criminal case, perhaps unnecessarily, on constitutional grounds. Accordingly, that this argument was not advanced or addressed below (BIO 7) is of little consequence. And second, the record shows that defense counsel did, albeit in passing and without elaboration, object to the use at sentencing of acquitted conduct; his objection was not solely to the determination of “relevant conduct” under the U.S. Sentencing Guidelines. *Compare* BIO 4 *with* Sent.Tr. 30–31 (“[H]e was acquitted [of all the violence, including murder], and the Government is now attempting, essentially, to relitigate the trial *and, in part,* calling things relevant conduct.”).

Finally, in positing that petitioner’s case “would be an unsuitable vehicle in which to review the questions presented,” BIO 9, the government advances a red herring. We have not contended that the conduct of which the verdicts show Mr. Shaw to stand legally acquitted, for purposes of applying the carefully-framed and limited constitutional (or non-constitutional) rule we propose (Pet. 34–35), was any killing *per se*. *Compare* BIO 9. The petition carefully and fairly recognizes that what the verdicts of acquittal “necessarily establish” in this case is that any violence in which Mr. Shaw may have engaged (which the federal jury did not determine one way or the other) was not committed in furtherance of gang activity (that is, of the alleged racketeering enterprise) nor was Mr. Shaw part of a drug conspiracy that the gang allegedly also constituted. Pet. 8–9, 10, 28, 34, 37.

The government does not deny that the sentencing court – in contradiction to those verdicts – attributed

to petitioner a culpable role in all of the gang's drug dealing since 2002, thus adding some ten years to his suggested sentence for the offenses of conviction, prior to application of the special "career offender" rule. *See* Pet. 9, 27; BIO 10. Courts commonly vary downward from the draconian "career offender' guideline ranges; here, Mr. Shaw fell into that category solely on account of a long-ago marijuana conviction (*see* Pet. 7 n.4; App.2a), a classic situation for such a downward variance. Yet the sentencing court imposed on petitioner Shaw a 35-year prison term that was five years *above* the bottom of the suggested career offender range. Had petitioner's proposed acquitted conduct rule been applied, the permissible extent of "relevant conduct" would have been substantially reduced. The non-"career" range would have been some ten years less (Level 24, not 34; *see* Pet. 37) and the impact of the "career offender" range (Level 37) that much more disproportionate (and thus more likely to trigger a variance). It is thus completely unrealistic to discount the likelihood that the sentencing court's reliance on "acquitted conduct," even as petitioner proposes that concept be narrowly defined, may have had a substantially injurious "effect on his ultimate sentence." BIO 10.

For all these reasons, the Brief in Opposition fails in each of its attempts to defeat the rationale for issuing a writ of certiorari in this case. The Court should grant the petition.

CONCLUSION

The petition of Marquis Shaw for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 18, 2022