

No. 22-5345

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In the Supreme Court of the United States

October Term, 2022

GARY PAUL KARR, *PETITIONER*,

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR WRIT OF CERTIORARI  
TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**PETITIONER'S REPLY TO THE BRIEF FOR THE  
UNITED STATES IN OPPOSITION**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

INTRODUCTION ..... 1

ARGUMENTS AND AUTHORITIES ..... 2

    I. *Watts* did not address, let alone resolve, whether the use of acquitted conduct at sentencing violates the Fifth Amendment right to due process and the Sixth Amendment right to a jury trial, and there is a split of opinion among lower courts..... 2

    II. *Karr*'s is a good case for resolving the issue presented. .... 3

CONCLUSION..... 4

## TABLE OF AUTHORITIES

### Cases

<i>McClinton v. United States</i> , No. 21-1557 .....	1, 2
<i>People v. Beck</i> , 939 N.W.2d 213 (Mich. 2019).....	2
<i>State v. Melvin</i> , 258 A.3d 1075 (N.J. 2021).....	2
<i>United States v. Booker</i> , 543 U.S. 220 (2005) .....	2
<i>United States v. Karr</i> , No. 21-50219, 2022 WL 1499288, (5th Cir. 2022).....	1
<i>United States v. Lasley</i> , 832 F.3d 910 (8th Cir. 2016) .....	3
<i>United States v. Watts</i> , 519 U.S. 148 (1997) .....	1, 2, 3
<i>United States v. White</i> , 551 F.3d 381 (6th Cir. 2008) .....	3

### Constitutional Provisions

U.S. Const. amend. V.....	1, 2, 3
U.S. Const. amend. VI .....	1, 2, 3

## INTRODUCTION

The United States Court of Appeals for the Fifth Circuit held that it was bound by this Court’s decision in *United States v. Watts*, 519 U.S. 148 (1997), to reject Petitioner Gary Karr’s argument that being sentenced based on “acquitted conduct” violates the due process clause of the Fifth Amendment and the jury trial right of the Sixth Amendment. Karr asks the Court to grant a writ of certiorari to resolve this important recurring question of federal law that *Watts* did not address and about which federal and state court judges have expressed grave concerns. Indeed, the Fifth Circuit panel in Karr’s case noted that “distinguished jurists have called *Watts* into question.” See *United States v. Karr*, No. 21-50219, 2022 WL 1499288, \*1 n.1 (5th Cir. 2022). In *McClinton v. United States*, No. 21-1557, which raises the same issue as Karr, seventeen former federal judges filed an amicus curiae brief in support of the petitioner’s position.<sup>1</sup>

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<sup>1</sup> *McClinton* has been distributed for conference on December 2, 2022. Should this Court grant certiorari in *McClinton* or another pending case presenting the “acquitted conduct” issue, it should at least hold Mr. Karr’s petition pending that decision.

The Government urges the Court to deny Karr’s petition, as well as McClinton’s, arguing that *Watts* resolved the issue; no split exists among the lower courts; and Karr’s case is an unsuitable vehicle for addressing the question presented. Karr replies.

## ARGUMENTS AND AUTHORITIES

### **I. *Watts* did not address, let alone resolve, whether the use of acquitted conduct at sentencing violates the Fifth Amendment right to due process and the Sixth Amendment right to a jury trial, and there is a split of opinion among lower courts.**

The Government argues that the Court should not grant certiorari in Karr’s case because *Watts* resolved the issue presented. B.I.O. at 11–12 (citing B.I.O. at 9–16, *McClinton v. United States*, No. 21-1557). While the federal courts of appeals have interpreted *Watts* in such a way, this Court has indicated otherwise. *See United States v. Booker*, 543 U.S. 220, 240 & n.4 (2005). In *Booker*, the Court recognized that *Watts* “presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause” and not whether the use of acquitted conduct violated the Sixth Amendment’s jury trial right. *Id.* State courts of last resort have held that *Watts* is not controlling. *See, e.g., People v. Beck*, 939 N.W.2d 213, 216, 227 (Mich. 2019) (finding that *Watts* did not address constitutional rights to due process or a jury trial); *State v. Melvin*, 258 A.3d 1075, 1089–90 (N.J. 2021) (same, regarding

due process right). Individual learned judges within the federal circuits disagree on whether *Watts* is controlling. See, e.g., *United States v. Lasley*, 832 F.3d 910, 920–21 (8th Cir. 2016) (Bright, J., dissenting); *United States v. White*, 551 F.3d 381, 386–97 (6th Cir. 2008).

The Government’s arguments that *Watts* settles the question presented and that there is no split of opinion in the lower courts are unpersuasive. There is significant confusion in the lower courts, and only this Court can resolve it.

## **II. Karr’s is a good case for resolving the issue presented.**

The Government argues that this case is not a good vehicle for resolving the question presented because “the record does not clearly establish that the district court actually relied on acquitted conduct” in sentencing Karr. B.I.O. at 10. In the district court, Karr objected, under the Fifth and Sixth Amendments, to the district court increasing his sentence by more than 30 years based on murders of which the jury had acquitted him. In overruling Karr’s constitutional objections, the district court cited *Watts*, noting that if the law gets changed “then we might all be back here again at some point.” In affirming the district court’s decision, the Fifth Circuit cited *Watts*. The constitutional issues are clearly presented in Karr’s case.

**CONCLUSION**

For these reasons, Karr asks the Court to grant a writ of certiorari.

Respectfully submitted.

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