No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ERIC CAIN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Dated: November 28, 2022

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QUESTION PRESENTED

After a jury acquitted the petitioner of a firearms charge, the district court relied on the same conduct to increase his sentence range under the Federal Sentencing Guidelines. Do either the jury trial right contained in the Sixth Amendment or the Due Process Clause of the Fifth Amendment bar a court from imposing a more severe criminal sentence based on conduct that a jury's verdict rejected?

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Eastern District of Kentucky and the United States Court of Appeals for the Sixth Circuit:

- United States of America v. Eric Cain, E.D. Ky. Case No. 6:19-cr-11, Judgment of Sentence entered October 26, 2021
- United States of America v. Eric Cain, Case No. 21-6012, 2022 U.S. App. LEXIS 30417 (6th Cir. November 1, 2022)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Eric Cain respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The United States Court of Appeals for the Sixth Circuit affirmed Cain's conviction and sentence in an opinion not recommended for publication filed on November 1, 2022. United States v. Eric Cain, Case No. 21-6012, 2022 U.S. App. LEXIS 30417 (6th Cir. November 1, 2022)(Pet. App, 1a).

JURISDICTION

The Sixth Circuit's opinion was filed on November 1, 2022. There was no petition for rehearing. The mandate issued on November 23, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves how two of the Constitution's Bill of Rights — the Sixth Amendment's right to trial by jury and the Fifth Amendment's right to due process of law — apply at sentencing.

The Fifth Amendment says "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . " U.S. Const. amend. V. The Sixth Amendment says:"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.

STATEMENT OF THE CASE

Officers in Boone County, Kentucky got Michelle Gilley, a 52-year old woman who used and sold drugs, to buy drugs from Cain—two ounces of methamphetamine for $1100 and a sample of a pink heroin for $40. They gave her $1140 in marked money and watched her meet Cain. Afterwards Gilley gave officers 55.4 grams of 98% pure methamphetamine and 0.23 grams of a mixture of heroin and methamphetamine. (Trial Tr., R. 181, Page ID # 1467-1528, Trial Tr., R. 182, Page ID # 1738–39, 1752–53). Gilley did not see Cain with a gun. (Trial Tr., R. 181, Page ID # 1574, 1576). Cain drove away, but officers using a tracking device stopped him about 20 minutes later. (Trial Tr., R. 182, Page ID # 1806–10, 1819).

When officers approached Cain's car they saw a pistol in a holster on the passenger seat. Cain said that it was his. In the car they found digital scales, plastic baggies, and plastic bags containing heroin, fentanyl, and methamphetamine. Cain also had $1170 in cash, including the $1140 in marked money. (Trial Tr., R. 181, Page ID # 1534, Trial Tr., R. 182, Page ID # 1670–71, 1679, 1762, 1766, 1771–72, 1790–91).

The government charged Cain with six crimes: conspiracy to distribute 50 grams or more of methamphetamine; distributing 50 grams or more of

methamphetamine on December 4, 2018 (the date of the transaction with Gilley and the traffic stop); distribution of heroin on December 4, 2018; possessing with intent to distribute 5 grams or more of methamphetamine on December 4, 2018, possessing with intent to distribute heroin on December 4, 2018; and possessing a firearm in furtherance of the drug trafficking crimes alleged in the indictment. (Indictment, R. 1, Page ID # 1–3).

Cain proceeded to trial. A jury convicted him of all the drug counts, although on one count it found that he possessed less than 5 grams of methamphetamine. The jury acquitted him of the firearm count. (Verdict, R. 165, Page ID # 665–68).

At sentencing the PSR proposed that the trial court use the acquitted conduct to enhance Cain's offense level score by two levels under the sentencing guidelines for possessing a firearm in connection with the drug offenses. Cain objected. He said that using acquitted conduct to increase his Guidelines sentence range violated his right to trial by jury and to have such facts proven beyond a reasonable doubt.(Sentencing Tr., R. 202, Page ID # 2146–50).

The district court overruled the objection. The court calculated Cain's sentencing guideline range at 121–51 months in prison and sentenced him to serve 126 months in prison. (Id., Page ID # 2153–54, 2163–65, 2175).

On appeal Cain challenged the use of acquitted conduct to increase his offense level score under the sentencing guidelines. He argued that Apprendi v. New Jersey, 530 U.S. 466 (2000), and Alleyne v. United States, 570 U.S. 99 (2013), require proof beyond a reasonable doubt of any fact that increases the penalty for a crime and also require that the jury act as the fact finder, not the judge. Cain acknowledged that existing precedent in the Sixth Circuit — United States v. White, 551 F.3d 381, 384–86 (6th Cir. 2008) (en banc) — permits use of acquitted conduct, so long as the conduct is proven by a preponderance of the evidence. He raised the argument in order to preserve it for further review.

The Sixth Circuit declined Cain's invitation to reconsider White in light of Apprendi and Alleyne. Pet. App. 18a–19a. The court affirmed his convictions and sentence.

REASONS FOR GRANTING THE WRIT

When deciding if it will grant a petition for certiorari, the Court considers if the petition presents an important issue "that has not been, but should be, settled by [the] Court." Sup. Ct. R. 10(a).

Several cases are pending before the Court seeking certiorari to reverse the current practice of allowing courts to use acquitted conduct to enhance criminal sentences. See McClinton v. United States, No. 21-1557, Shaw v.

United States, No. 22-122.

The use of acquitted conduct ignores the constitutional rights to a jury trial and due process. Permitting the use of acquitted conduct distorts the operation of the criminal justice system in a way that is manifestly unfair.

The Court should affirm the primacy of the rights to jury trial and to due process. The Court should overrule United States v. Watts, 519 U.S. 148 (1997) to the extent that it permits the use of acquitted conduct at sentencing.

Here, Cain had his Guidelines offense level increased for possessing a firearm in connection with a drug offense, even though the jury acquitted him of possessing a firearm in furtherance of a drug offense.

Under the sentencing guidelines the base offense level score for a defendant convicted of a drug trafficking crime is increased by two levels "if a dangerous weapon, including a firearm was possessed." USSG § 2D1.1(b)(1). The two level increase that the district court applied to Cain's guideline calculations increased his sentence range from 97–121 months (adjusted to 120–121 months because of a statutory mandatory minimum sentence) to 121–151 months. (Sentencing Tr., R. 202, Page ID # 2175).(Compare sentence range for offense level 30, criminal history category I with the range for offense level 32, criminal history category I).

1. Because of the central role that the Sentencing Guidelines play in sentencing, facts that increase a defendant's Guidelines sentencing range and

that involve other criminal conduct should be found by a jury beyond a reasonable doubt.

"Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government." United States v. Haymond, 139 S.Ct. 2369, 2373 (2019) (plurality op.). The rights to a jury trial and to due process mean that any fact which increases the mandatory minimum or maximum penalty for a crime is an element of the crime that the jury must find beyond a reasonable doubt, not a judge by a lesser standard. Apprendi v. New Jersey, 530 U.S. at 483 n. 10, and 490, Alleyne v United States, 570 U.S. at 107–08).[1]

Neither Apprendi nor Alleyne involved the standard of proof for judicial fact finding at sentencing when the fact finding did not change a mandatory minimum or maximum sentence. But because the sentencing ranges determined under the Sentencing Guidelines so powerfully influence sentences, their reasoning should extend to proof of facts about other offenses that affect the sentence range calculated under the Guidelines.

The United States Sentencing Guidelines began their life as mandatory

[1]Proof beyond a reasonable doubt is a fundamental due process right guaranteed by the Fifth Amendment. In re Winship, 397 U.S. 358, 363–64 (1970)

rules governing sentencing. Courts, with few exceptions, had to impose sentences within the range the Guidelines established, without resort to a jury's findings or proof beyond a reasonable doubt. After Apprendi, however, the Court held that the federal mandatory Guidelines were unconstitutional, and as a remedy, made them advisory. They no longer bind the district courts. United States v. Booker, 543 U.S. 220 (2005). But even though district courts have discretion when imposing sentences, their decisions remain subject to appellate review for reasonableness. United States v. Booker, 543 U.S. at 260–62. This review includes review of the procedure the court followed and of the length of the sentence imposed. Gall v. United States, 552 U.S. 38, 50–51 (2007).

A sentence within the guidelines range is presumed to be reasonable, Rita v. United States, 551 U.S. 338 (2007). But because courts review sentences for reasonableness, sentences exist that are substantively reasonable based on judge-found facts, not based on facts found by a jury beyond a reasonable doubt or admitted to by the defendant. Such sentences violate the right to trial by jury. Rita v. United States, 551 U.S. at 370, 371, 380–81 (Scalia, J., concurring in part and concurring in the judgment).

Justice Scalia gave as an example a robbery case where the within-Guidelines sentence was based on a series of judicial fact findings in support

of guideline enhancements that increased the sentence range from 33–41 months to 235–293 months. These facts "are the legally essential predicate for [the] imposition of a 293-month sentence. . . . Were the district judge explicitly to find none of those facts true and nevertheless to impose a 293 sentence. . . the sentence would surely be reversed as unreasonably excessive." Id., at 372–73.[2]

Since Rita the Court has recognized that even though the Sentencing

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[2] Three other justices agreed that substantive reasonableness review makes a Sixth Amendment violation possible and that an as-applied challenge could be raised in such a case. Id., at 365–66, 368.

A majority of the justices dismissed Scalia's argument because they said it relied on a hypothetical not presented in the case. Id., at 353, 366. But when an actual case arose when the district court relied on facts about another offense to significantly increase sentences, the Court declined to grant certiorari. Jones, et al. v. United States, 574 U.S. 948 (2014).

In Jones, a jury convicted the petitioners of distributing crack cocaine and acquitted them of conspiring to distribute drugs. The court found by a preponderance of the evidence that the petitioners had engaged in the charged conspiracy, which meant that the quantity of drugs and the resulting sentence range under the Guidelines was much greater than it otherwise would have been. Jones, et al. v. United States, 574 U.S. at 948.

The court imposed sentences many times longer than those the Guidelines would otherwise have recommended without the facts found by a preponderance of the evidence.

Several states have held that relying on acquitted conduct at sentencing violates federal due process. State v. Melvin, 258 A.2d 1075 (N.J. 2021), People v. Beck, 939 N.W. 2d 213, 225–26 (Mich. 2019), State v. Marley, 364 S.C. 2d 133 (N.C. 1988), State v. Cote, 530 A. 2d 775 (N.H. 1987).

Guidelines are advisory, they play an essential role at sentencing. They are the sentencing court's "starting point and initial benchmark." Molina Martinez v. United States, 136 S. Ct. 1338, 1345 (2016) (quoting Gall v. United States, 552 U.S. at 49. The Guidelines are "the framework for sentencing" and "anchor . . . the district court's discretion." Peugh v. United States, 569 U.S. 530, 542, 549 (2013).

Because courts must accurately calculate the guidelines at sentencing and must justify sentences that differ from those the Guidelines suggest, the Sixth Amendment right to a jury's determination of the facts should apply.

> The post-Booker Guidelines are shadows that loom over judges at sentencing from which judges cannot separate without providing justifications. The Guidelines can be more appropriately characterized as "coercively advisory." Therefore, since courts must accurately calculate Guideline ranges and provide detailed justification for their rejection of the Guidelines in their sentencing decision, the Sixth Amendment is still implicated even under advisory Guidelines.

Eang Ngov, Article: Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing, 75 Tenn. L. Rev. 235, 265 (2009).

A sentence can be "substantively unreasonable" even if it is below the statutory maximum. See e.g., United States v. Singh, 877 F.3d 107, 116–17 (2d Cir. 2017) (5-year sentence substantively unreasonable despite 20-year statutory maximum, see 8 U.S.C. § 1326(b)(2)); United States v. Chandler, 732 F.3d 434, 437, 440 (5th Cir. 2013) (35-year sentence, statutory maximum

of life, see 18 U.S.C. § 2252A(g)); United States v. Cruz-Valdivia, 526 F. App'x 735, 736–37 (9th Cir. 2013) (70-month sentence, 20-year statutory maximum); United States v. Paul, 561 F.3d 970, 973–75 (9th Cir. 2009) (per curiam) (16-month sentence, 10-year statutory maximum).

So, in practice, when a jury finds a defendant guilty of a crime, the sentence the verdict authorizes is not always the same as the sentence the statute authorizes. The verdict only authorizes those sentences that are "substantively reasonable."

Judge (now Justice) Kavanaugh identified two models of sentencing in the Court's decisions. One model says the Court should defer to the legislature in defining crimes and enacting sentencing schemes. The other model says that the jury plays a central role in the criminal process so that facts that affect the sentence are really elements of the offense and must be proven to a jury beyond a reasonable doubt or admitted by the defendant. United States v. Henry, 472 F.3d 910, 920–22 (D.C. Cir. 2007) (Kavanaugh, J., concurring).

The two models conflict. The Court rejected deferring to the legislature in Apprendi and its progeny, but has not extended its holding to judicial fact-finding that does not affect statutory penalties. This leads to Judge (now Justice) Kavanaugh's observation that:

> If the real-elements-of-the-offense approach is correct, however, then current federal sentencing practices may be in tension with the Constitution. That is because the current system—in practice—works a lot like the pre-Booker system: District judges are obliged to apply the Guidelines, and certain facts used to increase a sentence (beyond what the defendant would have received based on the offense of conviction) are found by the judge, not by the jury beyond a reasonable doubt.

United States v. Henry, 472 F.3d at 922. See United States v. Bell, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh and Millett, J.J., concurring in denial of rehearing en banc, but stating that current procedure conflicts with the Fifth and Sixth Amendments).

Yet when sentencing practices conflict with the Constitution, the Constitution should come first. After all, "the Court has long recognized the supremacy of the Constitution with respect to . . . legislative acts repugnant to it." Gamble v. United States, 139 S, Ct. 1960, 1985 (2019) (Thomas, J., concurring) (citation omitted). The Constitution requires that facts that increase a sentence be found by a jury beyond a reasonable doubt.

Here, the district court's fact-finding was contrary to the jury's verdict and increased Cain's Guidelines sentence range. The relatively modest increase in his sentence range makes no difference. Any increase in jail time is prejudicial. Glover v. United States, 531 U.S. 198, 201 (2001). The Court should grant the petition to make clear that the Constitution makes the jury the final arbiter of facts about other crimes that can increase a sentence, not

the judge.

2. Many judges question the validity of using acquitted conduct at sentencing.

Although the circuit courts have endorsed the use of acquitted conduct at sentencing, see Brief of the United States in Opposition, McClinton v. United States, Case No. 21-1557 at 11–12 (collecting cases), the practice has drawn extensive criticism.

As Judge Millett of the D.C. Circuit recently summarized when saying that district courts should not rely on acquitted conduct:

> Many judges and commentators have similarly argued that using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system." Settles, 530 F.3d at 924. Judge Kavanaugh likewise explained that "[a]llowing judges to rely on acquitted * * * 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." Bell, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc); see id., at 927 (remarking that the practice by which a defendant can be acquitted of a crime by a jury of his peers, only to then be sentenced as if he had committed that very crime, is a stubborn "oddit[y] of sentencing law"); see also Watts, 519 U.S. at 164 (Stevens, J., dissenting) (describing sentencing based on acquitted conduct as a "perverse result"); United States v. Baylor, 97 F.3d 542, 550, 321 U.S. App. D.C. 85 (D.C. Cir. 1996) (Wald, J., concurring specially) ([T]he use of acquitted conduct * * * in computing an offender's sentence leaves such a jagged scar on our constitutional complexion that periodically its presence must be highlighted and reevaluated in the hopes that someone will eventually pay attention[.]"); United States v. Mateo-Medina, 845 F.3d 546, 554 (3d Cir. 2017) ("[C]alculating a person's sentence based on crimes for which he or she was not convicted undoubtedly undermines the fairness, integrity, and public

> reputation of judicial proceedings."); United States v. Alejandro-Montanez, 778 F.3d 352, 362–363 (1st Cir.2015) (Torruella, Jr., concurring) ("[I]t is inappropriate and constitutionally suspect to enhance a defendant's sentence based on conduct that the defendant was * * * acquitted of"); United States v. Canania, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) ("Permitting a judge to impose a sentence that reflects conduct the jury expressly disavowed through a finding of 'not guilty' amounts to more than mere second-guessing of the jury–it entirely trivializes its principal fact-finding function."); White, 551 F.3d at 392 (Merritt, J., dissenting) ("[T]he use of acquitted conduct at sentencing defies the Constitution, our common law heritage, the Sentencing Reform Act, and common sense."); United States v. Faust, 456 F.3d 1342, 1353 (11th Cir. 2006) (Barkett, J., specially concurring) (decrying the "pernicious effect of sentencing on the basis of acquitted conduct"); cf. Jones v. United States, 574 U.S. 948, 949, 135 C. Ct. 8, 190 L. Ed. 2d 279 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari) ("[A]ny fact necessary to prevent a sentence from being substantively unreasonable — thereby exposing the defendant to the longer sentence — is an element that must be either admitted by the defendant or found by the jury. It may not be found by a judge."); United States v. Sabillion-Umana, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) ("We admit [our premise] * * * assumes that a district judge may either decrease or increase a defendant's sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant's consent. It is far from certain whether the Constitution allows at least the second half of that equation.").

United States v. Abukhatallah, 41 F.4th 608, 652–53 (D.C. Cir. 2022) (Millett, J., concurring).

The lower courts say that this Court's decision in Watts supports the use of acquitted conduct at sentencing. But Watts does not support the use that courts have made of it. In Watts, the Court said that "acquittal does not

prevent the sentencing court from considering the conduct underlying the acquitted charge, so long as that conduct has been proven by a preponderance of the evidence." United States v. Watts, 519 U.S. at 157. But Watts involved arguments about the interaction of the Guidelines with the Double Jeopardy Clause, not the rights to trial by jury and proof beyond a reasonable doubt. The Court did not have the benefit of full briefing or oral argument. United States v. Booker, 543 U.S. at 240 and n. 4.

Moreover, Watts relied in part on Williams v. New York, 337 U.S. 241 (1949). There the Court upheld a New York statute that gave sentencing judges discretion at capital sentencing to consider information about the offender not presented to the jury. But the Court has since moved beyond Williams. It holds now that sentencing, just like trial, must satisfy the requirements of the Due Process Clause. Gardner v. Florida, 430 U.S. 349, 358 (1977) and that constitutional rights, like the right to counsel, apply at sentencing because it is a critical stage of a criminal case. Lafler v. Cooper, 566 U.S. 156, 165 (2012). Since Watts the Court has reinvigorated the importance of jury factfinding under the Sixth Amendment in determining sentences. United States v. Haymond, 139 S.Ct. at 2375–78 (collecting cases post-Watts). But the lower courts still follow Watts. The Court should grant review to clarify if Watts still has validity, given the changed legal landscape.

See Steven M. Shapiro, et al., Supreme Court Practice 254 (10th Ed. 2013) (noting that the Court often accepts review "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification.").

3. This case is a good vehicle for this Court's review.

Cain objected to the use of acquitted conduct at his sentencing and on appeal. The district court said that it found by a preponderance of the evidence that Cain possessed a firearm during the course of a drug trafficking crime, notwithstanding the jury's verdict of acquittal. Thus, this case squarely presents the issue of the constitutionality of using acquitted conduct at sentencing.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Dated: November 28, 2022

Respectfully submitted,

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APPENDIX