

No. 22-6212

IN THE SUPREME COURT OF THE UNITED STATES

ERIC CAIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioner's Fifth and Sixth Amendment rights in considering conduct at issue in a charge that a 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. 1a-24a) is not published in the Federal Reporter but is available at 2022 WL 16579603.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 2022. The petition for a writ of certiorari was filed on November 28, 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 Eastern District of Kentucky, petitioner was convicted of conspiring to possess with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 846; distributing 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1); distributing a mixture or substance containing heroin and methamphetamine, in violation of 21 U.S.C. 841(a)(1); possessing with intent to distribute less than five grams of methamphetamine, in violation of 21 U.S.C. 841(a)(1); and possessing with intent to distribute a mixture or substance containing heroin and fentanyl, in violation of 21 U.S.C. 841(a)(1). Judgment 1. He was sentenced to 126 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-24a.

1. On November 27, 2018, a confidential source told police in Florence, Kentucky, that during the previous six months, she had consistently purchased methamphetamine from petitioner. Presentence Investigation Report (PSR) ¶ 7; see Pet. App. 1a-2a. The source also stated that petitioner had made efforts to sell her heroin. PSR ¶ 7. In a subsequent telephone call recorded by the police, petitioner asked the source about mixing heroin with methamphetamine to create a pink substance. Ibid.; see Pet. App. 2a.

On December 4, 2018, in a controlled buy, petitioner sold the source 55.4 grams (approximately two ounces) of 98% pure crystal methamphetamine for \$1100 and 0.23 grams of the pink mixture of heroin and methamphetamine for \$40. PSR ¶ 9; Pet. App. 4a. Police arrested petitioner in a traffic stop after he left the controlled buy. PSR ¶ 10; Pet. App. 4a-5a. Police saw a loaded Colt .45 firearm on the front passenger seat, which petitioner admitted was his. PSR ¶ 10; Pet. App. 5a. And the police found a box containing 3.38 grams of a pink substance later found to be a mixture of heroin, fentanyl, and methamphetamine; 11.781 grams of 100% pure methamphetamine; and drug paraphernalia. PSR ¶¶ 10, 13; Pet. App. 5a.

In February 2019, a federal grand jury in the Eastern District of Kentucky returned an indictment charging petitioner with conspiring to possess with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 846; distributing 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1); distributing a mixture or substance containing heroin and methamphetamine, in violation of 21 U.S.C. 841(a)(1); possessing with intent to distribute five grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1); possessing with intent to distribute a mixture or substance containing heroin and fentanyl, in violation of 21 U.S.C. 841(a)(1); and possessing a firearm in furtherance of those drug trafficking crimes, in violation of 18 U.S.C. 924(c)(1)(A). Indictment 1-3. A jury found

petitioner guilty on all five drug-related counts, although on the methamphetamine-possession count, the jury found that the drug quantity was less than five grams. Verdict 1-3. The jury acquitted petitioner of the firearm charge. Verdict 3-4.

2. The Probation Office's presentence report calculated a total offense level of 32, which included a 2-level enhancement to the base offense level for his drug offenses applicable when "a dangerous weapon (including a firearm) was possessed." Sentencing Guidelines § 2D1.1(b)(1); see PSR ¶¶ 19, 26. Application Note 11 to Section 2D1.1 states that "[t]he enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." The final advisory guidelines range was 121 to 151 months of imprisonment. PSR ¶ 63. Petitioner was also subject to a statutory-minimum sentence of 120 months of imprisonment on the first two counts of conviction, which involved jury findings that 50 grams or more of methamphetamine were involved in each offense. PSR ¶ 62; see 18 U.S.C. 841(b)(1)(A).

At sentencing, the district court rejected petitioner's objection to the Section 2D1.1(b)(1) firearm enhancement. Sentencing Tr. 4-13. The court found that "[t]he evidence at trial established by a preponderance of the evidence that the defendant did, in fact, possess the firearm found on the passenger seat." Id. at 12. The court observed that petitioner "admitted to the officers the gun was his"; was the driver and "sole occupant of

the vehicle"; and had "dominion and control over both the car and the contents," which included not just the firearm but "the box containing the drugs" and drug paraphernalia. Ibid.; see id. at 12-13. The court also found that petitioner failed to show that "it was clearly improbable that the firearm was not connected to his drug trafficking," because the loaded gun was found within a few feet of illegal drugs and the proceeds from his recent sale of methamphetamine. Id. at 13.

The district court also rejected petitioner's argument that his acquittal on the Section 924(c) charge precluded application of the enhancement, explaining that under United States v. Watts, 519 U.S. 148 (1997) (per curiam), and circuit precedent, a court may rely for sentencing purposes on conduct that the jury declined to find beyond a reasonable doubt for purposes of a conviction, as long as the court finds the conduct "by a preponderance of the evidence." Sentencing Tr. 5; see id. at 4-8. The court observed that the jury's acquittal could have been based on the view that petitioner "did possess [the firearm] but perhaps the proof wasn't sufficient to establish beyond a reasonable doubt that it was in furtherance of the drug trafficking crime." Id. at 5. The court sentenced petitioner to 126 months of imprisonment (six months above the statutory minimum), to be followed by five years of supervised release. Id. at 46-47; Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-24a. As relevant here, petitioner argued that application of the firearm

enhancement violated the Fifth and Sixth Amendments in light of petitioner's acquittal on the Section 924(c) count, though he acknowledged that "[t]he district court correctly stated existing precedent," under which a "sentencing court may use acquitted conduct, so long as the acquitted conduct is proven by a preponderance of the evidence." Pet. C.A. Br. 22; see id. at 21-25. The court of appeals panel declined to reconsider its precedent. Pet. App. 18-19a.

The court of appeals further observed that "the firearm enhancement applies to a broader range of conduct than does § 924(c)(1)(A)." Pet. App. 19a. The court explained that "the Guideline enhancement requires a 'connection' between the weapon and the offense, but the criminal statute requires that the weapon be used 'in furtherance of' the offense." Ibid. (brackets omitted). The court also noted the district court's suggestion that "the jury may have acquitted [petitioner] of the § 924(c)(1)(A) charge because it could not find the 'in furtherance of' requirement satisfied beyond a reasonable doubt." Ibid. "Given this distinction," the court of appeals continued, "the district court did not err in applying the enhancement notwithstanding [petitioner's] acquittal of the firearm charge." Ibid.

ARGUMENT

Petitioner renews his argument (Pet. 4-15) that the district court's reliance for sentencing purposes on the presence of the

firearm violated his Fifth Amendment right to due process and his Sixth Amendment right to trial by jury. This Court, however, has upheld a district court's authority to consider conduct that the court finds by a preponderance of the evidence, but that a jury did not find beyond a reasonable doubt, in fashioning an appropriate sentence. And as petitioner correctly acknowledges (Pet. 12), every federal court of appeals with criminal jurisdiction has recognized that authority. 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. This Court has repeatedly denied petitions for writs of certiorari in cases raising the issue, and it should follow the same course here.*

1. For the reasons set forth in the government's brief in opposition to the petition for a writ of certiorari in McClinton v. United States, No. 21-1557, a copy of which is being served on petitioner's counsel, petitioner's constitutional challenges to

* Several pending petitions for writs of certiorari seek review of similar issues. See, e.g., McClinton v. United States, No. 21-1557 (filed June 10, 2022); Luczak v. United States, No. 21-8190 (filed May 12, 2022); Shaw v. United States, No. 22-118 (filed Aug. 1, 2022); Karr v. United States, No. 22-5345 (filed Aug. 10, 2022); Bullock v. United States, No. 22-5828 (filed Oct. 11, 2022); Sanchez v. United States, No. 22-6386 (filed Dec. 20, 2022). The Sentencing Commission has recently proposed amendments to the Sentencing Guidelines addressing the use of acquitted conduct at sentencing. See 1/18/23 Letter from Elizabeth B. Prelogar, Solicitor General, to Scott S. Harris, Clerk, McClinton, supra (No. 21-1557).

the use of acquitted conduct at sentencing do 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). Petitioner's attempt (Pet. 13-15) to characterize Watts as an inapposite double-jeopardy case lacks merit.

The clear import of Watts is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution. See 519 U.S. at 157. And its reasoning is incompatible with petitioner's premise that consideration of acquitted conduct as part of sentencing contravenes the jury's verdict or punishes the defendant for a crime for which he was not convicted. See Br. in Opp. at 9-10, McClinton, supra (No. 21-1557).

Petitioner's suggestion (Pet. 6-10) that Watts is inconsistent with decisions of this Court concerning the constitutional requirements necessary for applying a higher statutory sentencing range -- such as Apprendi v. New Jersey, 530 U.S. 466 (2000), United States v. Booker, 543 U.S. 220 (2005),

Rita v. United States, 551 U.S. 338 (2007), and Alleyne v. United States, 570 U.S. 99 (2013) -- likewise lacks merit. See Br. in Opp. at 9-10, McClinton, supra (No. 21-1557). Petitioner's 126-month sentence lies within the default sentencing range for his offense and thus does not violate Apprendi, Booker, Rita, Alleyne, or any other decision of this Court.

2. Petitioner acknowledges (Pet. 12) that no federal court of appeals has agreed with his position. Instead, every federal court of appeals with criminal jurisdiction has recognized that a district court may consider acquitted conduct for sentencing purposes. See Br. in Opp. at 11-12, McClinton, supra (No. 21-1557) (listing cases). Petitioner's reliance (Pet. 8 n.2) on state-court decisions, including the Supreme Court of Michigan's decision in People v. Beck, 939 N.W.2d 213 (2019), cert. denied, 140 S. Ct. 1243 (2020) (No. 19-564), is misplaced. Beck is an outlier and its reasoning is tenuous, see Br. in Opp. at 13-14, McClinton, supra (No. 21-1557), and the other state decisions that petitioner cites either predate Watts, do not cite Watts, or rely on state law, see id. at 12-13.

This Court has repeatedly and recently denied petitions for writs of certiorari challenging reliance on acquitted conduct at sentencing. 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). The same result is warranted here.

3. At all events, 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 both lower courts observed, the jury's acquittal on the Section 924(c) offense could have reflected only a finding of reasonable doubt as to the statutory "in furtherance of" element, which is not a requirement for applying the differently worded guidelines enhancement.

As the court of appeals observed, "the firearm enhancement applies to a broader range of conduct than does § 924(c)(1)(A)," because the enhancement requires only a "'connection' between the weapon and the offense," as opposed to a "'furtherance'" of it. Pet. App. 19a (brackets omitted); see Sentencing Guidelines § 2D1.1 comment. n.11(A) (explaining that "[t]he enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense"). Accordingly, even setting aside the different standards of proof, the jury's not-guilty verdict on the firearm count is not logically inconsistent or incompatible with the district court's application of the enhancement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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