

No. 22-6212

---

IN THE SUPREME COURT OF THE UNITED STATES

---

ERIC CAIN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

---

PETITION FOR REHEARING

---

Kenneth P. Tableman P27890  
Kenneth P. Tableman, P.C.  
Attorney for Petitioner  
71 Maryland Avenue, SE  
Grand Rapids, MI 49506-1819  
(616) 233-0455  
tablemank@sbcglobal.net

---

## PETITION FOR REHEARING

Eric Cain, petitioner, by his attorney Kenneth P. Tableman, respectfully petitions the Court to rehear its order denying his petition for writ of certiorari as provided by Supreme Court Rule 44(2).

On June 30, 2023, the Court denied the petition for writ of certiorari in *McClinton v. United States*, No. 21-1557, one of a series of cases including Cains’s involving the use of acquitted conduct at sentencing. Four Justices issued statements referring to pending Sentencing Commission action.<sup>1</sup>

There is a substantial ground for the Court to rehear and reconsider its decision denying certiorari that the Court apparently has not considered, i.e., that the Sentencing Commission has not acted to amend the guidelines in its current amendment cycle nor does it list acquitted conduct at sentencing as an issue that it plans to take up in its next amendment cycle. See Letter dated April 6, 2023, from Elizabeth E. Prelogar, Solicitor General submitted

---

<sup>1</sup>Justice Sotomayor wrote that if the Sentencing Commission did not act expeditiously to consider the use of acquitted conduct at sentencing the Court may need to take up the constitutional issues presented. Justice Kavanaugh, joined by Justices Gorsuch and Barrett said that the use of acquitted conduct “raises important questions.” He further stated that “the Sentencing Commission is currently considering the issue.” He said that the Court should wait for the Sentencing Commission to act before deciding to grant certiorari in a case involving acquitted conduct. *McClinton v. United States*, No. 21-1557, 600 U.S. \_\_\_\_ (2023).

to the clerk. Although the letter quotes Commission Chair Reeves as saying that the Commission planned to resolve questions involving acquitted conduct next year, the Commission's questions presented for public comment for next year do not include any consideration of acquitted conduct. See Federal Register Document 2023-12991, published June 20, 2023.

Because the Court may have denied certiorari in Cain's case based on the impression that the Commission would take up the issue of the use of acquitted conduct at sentencing, and the Commission has not, the Court should reconsider its decision to deny certiorari in this case, as well as in the six other cases referred to in the Solicitor General's letter whose petitions for certiorari were also denied on June 30, 2023.

July 7, 2023

Respectfully submitted,

Kenneth P. Tableman  
Kenneth P. Tableman, P.C.  
Attorney for Petitioner  
71 Maryland Avenue, SE  
Grand Rapids, MI 49506-1819  
(616) 233-0455  
[tablemank@sbcglobal.net](mailto:tablemank@sbcglobal.net)