No. 22-6386

IN THE SUPREME COURT OF THE UNITED STATES

FRANK SANCHEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH 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-7a) is reported at 42 F.4th 970.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2022. A petition for rehearing was denied on September 22, 2022 (Pet. App. 8a). The petition for a writ of certiorari was filed on Dec 20, 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 District of South Dakota, petitioner was convicted of abusive sexual contact with a child in Indian country, in violation of 18 U.S.C. 1153, 2244(a)(1), and 2246(3). Judgment 1. He was sentenced to 87 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-7a.

1. In 2006, petitioner sexually molested his then-nine-year-old daughter, J.S. Presentence Investigation Report (PSR) ¶¶ 11-12. On one occasion, outside of Marty, South Dakota, J.S. and petitioner were sleeping in the same bed when petitioner started to kiss J.S., touched her vagina over her underwear, and moved her hand onto his penis over his underwear. PSR ¶ 11; see Pet. App. 2a; 6/22/22 Trial Tr. 114; 6/24/22 Trial Tr. 423. On a second occasion, in Wagner, South Dakota, petitioner climbed into bed with J.S. and moved her hand onto his penis over his underwear. PSR ¶ 12; see Pet. App. 2a. Those incidents were first reported to law enforcement in 2019. PSR ¶ 13.

J.S.'s half-sister, S.K.M., similarly reported in 2019 that petitioner had sexually molested her in 1996, when she was ten years old. PSR ¶¶ 7-8, 13. On two occasions in Lake Andes, South Dakota, while S.K.M.'s mother was at work, petitioner entered S.K.M.'s bedroom and touched her vagina with his hand. PSR ¶ 7; see Pet. App. 2a; 6/24/22 Trial Tr. 423. In another incident in

a vehicle around the same time, petitioner pulled S.K.M. onto his lap against his erect penis. PSR ¶ 8.

Also in 2019, a woman named G.D. reported that petitioner had sexually molested her in 1984, when she was six years old. PSR ¶ 14; see 6/23/22 Trial Tr. 211. Petitioner entered G.D.'s bedroom one night, "placed his hands inside her underwear and placed his finger in her vagina." PSR ¶ 14.

2. In December 2019, a federal grand jury in the District of South Dakota returned an indictment charging petitioner with one count of aggravated sexual abuse of a child under the age of 12 in Indian country, in violation of 18 U.S.C. 1153, 2241(c), and 2246(2); and two counts of abusive sexual contact of a child in Indian country, in violation of 18 U.S.C. 1153, 2244(a)(1), and 2246(3). Indictment 1-2. One of the abusive-sexual-contact counts was based on the first 2006 incident involving J.S.; the other abusive-sexual-contact count and the aggravated-sexual abuse count were based on the 1996 incidents involving S.K.M. in her bedroom. Ibid.

At trial, the district court admitted (pursuant to Federal Rules of Evidence 413 and 414) evidence of the second 2006 incident involving J.S., the incident in the vehicle involving S.K.M., and the 1984 incident involving G.D., all of which were uncharged. Pet. App. 2a-3a; see Fed. R. Evid. 413, 414 (permitting evidence of similar crimes in sexual-assault and child-molestation cases). The jury found petitioner guilty on the count involving J.S., but

acquitted on the two counts involving S.K.M. Verdict 1-2; see Pet. App. 3a.

3. The Probation Office's presentence report recommended, among other things, imposition of a five-level enhancement under Section 4B1.5(b)(1) of the advisory Sentencing Guidelines. PSR ¶ 38. That provision applies when to a defendant who "engaged in a pattern of activity involving prohibited sexual conduct" and meets certain other requirements. Sentencing Guidelines § 4B1.5(b). The Guidelines Manual explains that the requisite "pattern of activity" exists "if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor." Sentencing Guidelines § 4B1.5 comment. n.4(B)(i).

Petitioner objected to the enhancement, claiming that its application would violate his Fifth and Sixth Amendment rights by enhancing his sentence based on conduct underlying the counts involving S.K.M. on which the jury did not return a guilty verdict. See Sentencing Tr. 17-18. The government responded that "[J.S.'s] testimony alone, those two sexual abuse incidents that she testified about -- that's enough for the pattern enhancement to apply." Id. at 18. The government "also sa[id] the Court can find that [S.K.M.'s] testimony on two or three occasions -- that also establishes the pattern," and "[s]o does [G.D.'s] testimony about the one time [petitioner] sexually abused her." Ibid.

The district court overruled petitioner's objection and applied the five-level enhancement, stating that "I find here that

there were two instances with [J.S.]" and that "I also believe that the evidence has shown by a preponderance of the evidence that there was sexual -- prohibited sexual conduct with [S.K.M.] and with [G.D.]." Sentencing Tr. 19; see id. at 18-19.

With the five-level enhancement, petitioner's total offense level was 27, with a resulting advisory guideline range of 70 to 87 months of imprisonment. Sentencing Tr. 47. The district court sentenced petitioner to a within-guidelines term of 87 months of imprisonment, to be followed by five years of supervised release. Id. at 55-56.

The district court explained that "in deciding your sentence today, because it's such a breach of trust to engage in this conduct with your daughter, I think a sentence at the top end of your guideline range of 87 months is appropriate here." Sentencing Tr. 55. The court further explained to petitioner that "more than to anyone else, as a dad you owe a duty to protect your daughter, to keep her safe, to make sure that she stays a bright light. And here you did not fulfill that duty. * * * I listened to you today, and you accept no responsibility for what happened. There was no apology to your daughter." Id. at 54.

4. The court of appeals affirmed. Pet. App. 1a-7a. Among other things, the court rejected petitioner's constitutional challenge to "the district court's consideration of acquitted conduct at sentencing," observing that "our precedent forecloses this argument." Id. at 7a.

ARGUMENT

Petitioner contends (Pet. 4-11) that the district court violated his Fifth Amendment right to due process and his Sixth Amendment right to trial by jury by relying for sentencing purposes on the two sexual acts against S.K.M. underlying counts that the jury did not find beyond a reasonable doubt. 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. 7-8 & n.2, 11), 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 question presented, and it should follow the same course here.*

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* 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); Cain v. United States, No. 22-6212 (filed Nov. 28, 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).

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 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. 7-8) 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. 5-6) 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), Blakely v. Washington, 542 U.S. 296 (2004), United States v. Booker, 543 U.S. 220 (2005), 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 87-month sentence lies within the default sentencing range for his offense and thus does not violate Apprendi, Blakely, Booker, Alleyne, or any other decision of this Court.

2. Petitioner acknowledges (Pet. 7-8 & n.2, 11) 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). Petitioner's reliance (Pet. 10-11) 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), and the Supreme Court of New Jersey's decision in State v. Melvin, 258 A.3d 1075 (2021), is misplaced. Beck is an outlier and its reasoning is tenuous, see Br. in Opp. at 13-14, McClinton, supra (No. 21-1557); Melvin expressly relied on state law, not federal law, see id. at 13; and

the other state decisions that petitioner cites either predate Watts or do not cite Watts, 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 an initial matter, the jury's acquittal on the counts involving S.K.M. could have reflected only a finding of reasonable doubt as to whether the incidents occurred in "Indian country," which petitioner disputed at trial and on appeal. Pet. App. 3a-4a; see 6/24/22 Trial Tr. 470-471 (petitioner's oral motion for judgment of acquittal); 6/24/22 Trial Tr. 623-626 (petitioner's closing argument disputing that the offenses took place in Indian country and asserting, among other things, that maps of Indian country from 2018 did not necessarily reflect Indian country boundaries in 2006 or 1996). But a prior occasion of prohibited sexual conduct with a minor can establish a pattern of activity under the advisory guidelines irrespective of where it took place. See Sentencing Guidelines § 4B1.5(b) & comment. n.4(B)(ii).

Accordingly, even setting aside the different standards of proof, the jury's not-guilty verdict on the counts involving S.K.M. is not logically inconsistent or incompatible with the district court's application of the enhancement in reliance on the conduct underlying those counts.

In addition, the enhancement was justified even without considering the acquitted conduct involving S.K.M. The advisory Guidelines specify that "a pattern of activity involving prohibited sexual conduct" for purposes of applying the enhancement is established "if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor." Sentencing Guidelines § 4B1.5 comment. n.4(B)(i). The evidence at trial demonstrated, and the district court at sentencing found by a preponderance of the evidence, that petitioner engaged in prohibited sexual conduct with a minor on at least six separate occasions: the three incidents involving S.K.M. in or around 1996, the two 2006 incidents involving J.S., and the 1984 incident involving G.D. See Sentencing Tr. 18-19. Therefore, even disregarding the two incidents involving S.K.M. that underlay the counts on which the jury found petitioner not guilty, petitioner still would have "engaged in prohibited sexual conduct with a minor" on more than the "two separate occasions" needed to apply the five-level enhancement. Sentencing Guidelines § 4B1.5 comment. n.4(B)(i).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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