

IN THE SUPREME COURT OF THE UNITED STATES

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JUSTIN D. MARTIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

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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 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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No. 22-6736

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-11) is not published in the Federal Reporter but is available at 2022 WL 17078715.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 2022. The petition for a writ of certiorari was filed on February 3, 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 Northern District of Ohio, petitioner was convicted of possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2, and possessing firearms in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i) and 2. Judgment 1. He was sentenced to 280 months of imprisonment, to be followed by four years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 2-11.

1. Petitioner and a codefendant lived together in a house in Akron, Ohio. Pet. App. 2. After receiving complaints that drugs were being trafficked at that location, police conducted a controlled purchase of methamphetamine from the house, and then obtained and executed a warrant to search it. Id. at 3; see Presentence Investigation Report (PSR) ¶¶ 6-8.

In the search, officers found petitioner in one bedroom along with several firearms, body armor, hundreds of dollars in cash, and approximately 103 grams of a substance later confirmed to be methamphetamine. Pet. App. 3. Officers found petitioner's wallet and driver's license in another bedroom, where they also found additional firearms and ammunition, thousands of dollars in cash, more than 900 grams of methamphetamine, and his codefendant. Id. at 3, 6; see PSR ¶ 9 (explaining that officers found a total of 1039.79 grams of methamphetamine and 14 firearms in the residence).

A grand jury in the Northern District of Ohio returned an indictment charging petitioner and his codefendant with possessing with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2, and possessing firearms in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i) and 2. Indictment 1-2. A jury found petitioner and his codefendant guilty on both counts. Verdict 1-2, 4-5.

2. The statutory sentencing range for a violation of 21 U.S.C. 841(a)(1) involving a mixture or substance containing methamphetamine depends on the drug quantity: by default, the range is zero to 20 years of imprisonment; for offenses involving 50 grams or more, the range is five to 40 years of imprisonment; and for offenses involving 500 grams or more, the range is ten years to life imprisonment. 21 U.S.C. 841(b)(1)(A)(viii), (B)(viii), and (C). On a special verdict form, the jury found beyond a reasonable doubt that "the amount of mixture or substance containing a detectable amount of Methamphetamine possessed with the intent to distribute by" petitioner's codefendant was "500 grams or more," and that the amount "possessed with the intent to distribute by" petitioner was less than 500, but not less than 50, grams. Verdict 3, 6.

The Probation Office's presentence report calculated a total offense level of 36 for petitioner, based in part on a determination that petitioner was responsible for the full weight of the drugs found in the house. PSR ¶ 21; see Sentencing

Guidelines § 2D1.1(c)(3). Petitioner objected to that calculation, arguing that the jury's special verdict on drug quantity mandated an offense level four levels lower. Sentencing Tr. 4-5; see PSR at 20 (Addendum). The Probation Office responded that petitioner was responsible for the total amount of drugs found in his residence under Sentencing Guidelines § 1B1.3(a)(1)(B), which defines "relevant conduct." See PSR at 20 (Addendum).

Section 1B1.3(a)(1)(B) defines conduct relevant to a Guidelines calculation to include, "in the case of a jointly undertaken criminal activity," "all acts and omissions of others that were" "within the scope of the jointly undertaken criminal activity," "in furtherance of that activity," and "reasonably foreseeable in connection with that criminal activity," if the acts or omissions "occurred during the commission of the offense of conviction" or "in preparation for that offense." Sentencing Guidelines § 1B1.3(a)(1)(B); see PSR at 20 (Addendum). And the Probation Office found that definition applicable here because petitioner and his codefendant had "engaged in a jointly undertaken criminal activity, as they were both selling methamphetamine, which they were storing in the same residence." PSR at 20 (Addendum).

The district court overruled petitioner's objection and accepted the presentence report's calculation of the total offense level. Sentencing Tr. 6-7, 16. The court observed that "guidelines for relevant conduct are much broader than a specific

finding by the jury as to mandatory minimums.” Id. at 6. And the court explained that “[t]his was, no doubt, a jointly undertaken criminal activity in this case.” Id. at 6-7. Petitioner’s ultimate advisory sentencing range on the drug-trafficking count was therefore 210 to 262 months of imprisonment. Id. at 20; see PSR ¶ 64. The court sentenced petitioner to 220 months of imprisonment on that count, plus another 60 months of imprisonment (the statutory minimum) on the firearms count, to be served consecutively (as required by the statute). Sentencing Tr. 28; see 18 U.S.C. 924(c)(1)(A)(i) and (D)(ii).

3. The court of appeals affirmed. Pet. App. 2-11. Petitioner claimed on appeal that “the Fifth and Sixth Amendments do not permit district court judges to use acquitted conduct when fashioning criminal sentences,” Pet. C.A. Br. 17, and asserted that the district court’s finding by a preponderance of the evidence that petitioner was responsible for all of the methamphetamine found in his residence was “in plain contravention” of the jury’s special verdict, notwithstanding the different “burden[s] of proof” applicable at the trial and sentencing stages, id. at 16. The court of appeals rejected petitioner’s claim, observing that he had “concede[d] [that] this argument is foreclosed by Sixth Circuit and Supreme Court precedent.” Pet. App. 5.

## ARGUMENT

Petitioner renews his contention (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 total amount of drugs found at his house. 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. 10), 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); Sanchez v. United States, No. 22-6386 (filed Dec. 20, 2022); Merry v. United States, No. 22-6815 (filed Feb. 13, 2023). The Sentencing Commission recently proposed amendments to the Sentencing Guidelines addressing the use of acquitted conduct at sentencing, see 88 Fed. Reg. 7180, 7224-7225 (Feb. 2, 2023), and



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 the context of 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). The clear import of Watts, which petitioner does not cite or address, 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).

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has stated that it "intend[s] to resolve questions involving acquitted conduct next year," Remarks as Prepared for Delivery by Chair Carlton W. Reeves 23 (Apr. 5, 2023), [www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230405/20230405\\_remarks.pdf](http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230405/20230405_remarks.pdf).

Petitioner acknowledges (Pet. 10) 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). This Court has repeatedly and recently denied petitions for writs of certiorari challenging reliance on acquitted conduct at sentencing. See id. at 14-15 (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.

2. 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.

The jury's special verdict could have reflected only a finding of reasonable doubt as to whether petitioner personally possessed with intent to distribute 500 grams or more of a mixture containing methamphetamine. See Verdict 6; see also Trial Tr. 360 (instructing the jury that it must "only determine the amounts each Defendant had" and to "make a finding to each Defendant individually"). But the relevant-conduct guideline directs sentencing courts to consider not just a defendant's personal acts and omissions, but also, "in the case of a jointly undertaken criminal activity," certain "acts and omissions of others that

were" "within the scope of the jointly undertaken criminal activity," "in furtherance of that criminal activity," and "reasonably foreseeable in connection with that criminal activity." Sentencing Guidelines § 1B1.3(a)(1)(B).

The jury found that petitioner's codefendant did possess with intent to distribute 500 grams or more of a mixture or substance containing methamphetamine. Verdict 3. Accordingly, even setting aside the different standards of proof, the jury's special verdict is not logically inconsistent or incompatible with the district court's finding that the drug quantity possessed by petitioner's codefendant was relevant conduct for purposes of calculating the advisory sentencing range for petitioner's offenses.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2023