No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2022

DAVID E. MERRY, PETITIONER

v.

UNITED STATES OF AMERICA

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

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QUESTION PRESENTED

Whether the Fifth and Sixth Amendments prohibit a federal court from basing (enhancing) a criminal defendant's sentence on conduct for which a jury has acquitted the defendant?

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

United States District Court Northern District of Florida
United States v. David E. Merry
No. 3:19-cr-157-MCR-1
Final Judgment: August 9, 2021

United States Court of Appeals, Eleventh Circuit
United States v. David E. Merry
No. 21-12926
Opinion: August 9, 2022

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PETITION FOR A WRIT OF CERTIORARI

Opinion Below

A copy of the opinion of the United States Court of Appeals for the Eleventh Circuit is included in the Appendix filed with this Petition. The six-page opinion was entered on August 19, 2022, and is non-published. The opinion affirms Petitioner David Merry's conviction following a guilty plea to two counts of receipt and attempt to receive materials containing child pornography, and sentence to 120 months in prison.

Jurisdiction

The judgment of the court of appeals was entered on August 19, 2022. A Petition for Rehearing En Banc was timely filed and was denied by Order of November 18, 2022. The jurisdiction of this Court is invoked under 18 U.S.C. Section 1254(1). A copy of the Order of Denial is included in the Appendix.

Constitutional Provisions Involved

The Fifth Amendment

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall *** be subject for the same offense to be twice put in jeopardy of life or limb; *** nor be deprived of life, liberty, or property, without due process of law ***
>
> U.S. Const. amend. V.

The Sixth Amendment

The Sixth Amendment to the United States Constitution provides in relevant part:

> 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.

Petitioner's Introductory Statement

Petitioner David Merry appealed from a judgment of conviction and sentence to concurrent terms of 120 months followed by lifetime supervised release, an assessment, mandatory AVAA, forfeiture of electronics, and restitution after pleading guilty to two counts of receipt and attempt to receive material containing child pornography in interstate or foreign commerce (two counts for identical, duplicate materials on two devices).

The district court overruled Merry's objection to a five-level upward sentencing adjustment for "pattern of behavior" under Guidelines Section 2G2.2(b)(5) for "engag[ing] in a pattern of activity involving sexual abuse or exploitation of a minor."

The upward adjustment was based solely upon ***alleged almost twenty-year old acquitted-conduct.*** The acquittal was the result of trial testimony that was conflicting and contradictory. Petitioner is incarcerated in FCI Butner Low with a presumptive release date in August 2028.

The issue is the constitutionality of the common sentencing practice that has long troubles jurists: whether sentencing judges can enhance a sentence based on conduct of which a jury acquitted the defendant?

This Court has never directly addressed the question. In a summary disposition in *United States v. Watts*, 519 U.S. 148 (1997) (*per curiam*), a divided Court held that use of acquitted-conduct at sentencing does not offend the Double Jeopardy Clause of the Fifth Amendment. But lower courts including the Eleventh Circuit in this case, have long misinterpreted *Watts* to foreclose all constitutional challenges to the use of acquitted-conduct at sentencing, including violations of Fifth Amendment Due Process and the Sixth Amendment right to trial by jury.

Nonetheless, some Circuits including the Seventh Circuit in *United States v. McClinton, infra,* and an increasing number of distinguished jurists and scholars, including "many circuit court judges and Supreme Court Justices *** have questioned the fairness and constitutionality of allowing courts to factor acquitted-conduct into sentencing calculations." A petition filed on behalf of Dayonta McClnton is presently pending before this Court in Case No. 21-1557, awaiting a decision to accept Dayonta McClinton's petition for writ of certiorari),

This issue has divided lower courts and prompted calls for review by this Court. *E.g., Watts*, 519 U.S. at 170 (Kennedy, J., dissenting); *Jones v. United States*, 574 U.S. 948, 948 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of cert.); *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing *en banc*); *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2009) (Bright, J., concurring).

David Merry's case perfectly illustrates how acquitted-conduct sentencing "guts the role of the jury in preserving individual liberty and preventing oppression by the government." *United States v. Brown,* 892 F.3d 385, 408 (D.C. Cir. 2019) (Millett, J., concurring), because the facts involve not just traditional "facts enhan-

cing the crime of conviction *** Rather, they are facts comprising [a] different crime[s] ***." *United States v. Pimental*, 367 F.Supp.2d 143, 153 (D.Mass. 2005).

In *Blakely v. Washington*, 542 U.S. 296, 306 (2004) this Court called "absurd" the idea "that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it." While dissenting from decisions holding that the Constitution requires jury factfinding in sentencing, Justice Breyer acknowledged that a constitutional violation could arise in what he called "egregious" situations, such as when a judge greatly increases a defendant's sentence based on its own finding that the defendant had committed [the other offense]. *Apprendi v. New Jersey*, 530 U.S. 466, 562 (2000) (Breyer, J., dissenting); *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting) (writing that a judge "sentence[ing] an individual for murder though convicted only of making an illegal lane change" is the "kind of problem that the Due Process Clause is well suited to cure"). This is precisely what happened to David Merry.

Statement of the Case

In February 2020 in the Northern District of Florida, David E. Merry was charged with two counts of receiving and attempting to receive material containing child pornography (18 U.S.C. 2256(8)(A)), that was transported in interstate commerce (18 U.S.C. 2252A(a)(2) and (A)(b)(1)); and two counts of knowingly possessing and accessing with intent to view material containing child pornography (18 U.S.C. 2256(8)(A)), that involved a prepubescent minor and a minor under age 12, shipped in interstate or foreign commerce, in violation of 18 U.S.C. Sections 2252A(a)(5)(B) and A(b)(2).

In June 2020 the case was referred for Rule 11 plea proceedings. Pursuant to a written plea agreement and factual proffer, David Merry pleaded guilty to two counts of receipt of child pornography. The district judge accepted the plea. Merry faced a mandatory minimum five years up to twenty years' imprisonment, and up to lifetime supervised release, and forfeiture. He would be required to register under the SORNA and agreed "…to make full restitution to the victims, if applicable, as determined by the Court."

The factual proffer showed that in February 2019 the Internet Crimes Against Children Task Force (ICAC) in Pensacola, Florida received a "cybertip"

from the National Center for Missing and Exploited Children (NCMEC) about a Google user who possessed multiple child sexual exploitation images on a Google account linked to David Merry.

The Task Force linked Merry to a 2017 investigation involving child exploitation in reference to an abandoned cell phone in Pensacola. A witness found the phone. Attempting to locate the owner to return the phone, the witness looked at the phone's "contacts" and found "David Merry" under "Me." He opened the "gallery" to see if he recognized anyone, and observed what appeared to be images of "child pornography." With a search warrant agents extracted the phone's data, confirmed (1) that the phone belonged to Merry and (2) that he received and possessed child pornography.

They obtained a search warrant for Merry's Google account related to the NEMEC report and found images including a file depicting a naked prepubescent child with tape over her mouth and clothes pins attached to her nipples and genitals; and a file depicting a child between 5 and 9 years old with another female child performing oral sex on her.

In October 2019 a warrant was executed for Merry's residence. Forensic review of his electronic devices revealed child pornography. His laptop had over

3,000 images and videos of child pornography. Internet records linked him to multiple child pornography searches. The phone revealed multiple internet searches for child pornography and images of child erotica.

In December 2019 a grand jury in the Northern District of Florida returned an indictment against Merry for child pornography offenses. He was arrested and was released pending trial with conditions that Pretrial Services could inspect his computers and devices that had internet access. In January 2020 Merry went to United States Probation to have a program to monitor internet activity installed on his new cell phone. The probation officer inspected the phone and discovered internet searches for adult and child pornography websites. Merry said that after his release he purchased a Samsung cell phone and attempted to view child and adult pornography on it. A federal search warrant was obtained for the new phone. It was found to have 2,000 images and videos of child pornography.

At his change of plea hearing it was elicited that Merry was 59 years old, was born in Connecticut, and had a General Associates Degree and a Degree as a Computer Programming Analyst. Also, he was prescribed medication for diabetes, cholesterol, and high blood pressure. When asked whether he did what he was charged with, Merry responded with respect to pleading to two counts, that "they're the same pictures on both [phones], so not necessarily."

The prosecutor argued that it mattered not if they were duplicates. The issue was whether he knowingly received them. Defense counsel explained that after Merry's phone was seized, he bought a new one, and received the same images on the new phone. That explained why there were two counts for identical content. Merry knowingly received the pornography on both.

Sentencing

There were two sentencing hearings in 2021, one in January, the other in July. Both transcripts are included in Petitioner's Appendix. Prior to the January hearing all objections to the PSR had been resolved except for Merry's objection to the 5-level "pattern and practice" upward adjustment for conduct on which Merry was acquitted in 2004 by a Connecticut jury following a jury trial.

At the January hearing the government called as a witness a 27-year old female college student who lived in Connecticut and was studying criminal justice. She said she last saw David Merry in 2004 when she was 10 years old and testified against him in a jury trial for the offense of child sexual molestation. She said that in June 2020 Homeland Security agents came to Connecticut to ask if she knew David Merry. She did. In Connecticut in 2002 Merry was her mother's fiancé. He

lived with them for three months. The witness said it was "great,"she was happy that her mother was getting married, and she finally would have a father like the other children.

At first they played games and it was fun. But then he touched her inappropriately. Once, she said, when she fell asleep in the car, he carried her into the house. At the top of the stairs, he put his hand in her pants, touched her "butt" and caused bleeding, she said.

At eight years old, she said, Merry touched her "in the front" and exposed himself to her when he was naked, just out of the shower. She had never seen a naked man before. In another incident the witness said, after her mother left for work, Merry started a "tickle fight." He grabbed her. She screamed for her mother who had left. He squeezed so hard she could not breathe. Her laughing turned to screaming. He touched her under her clothing. She said she had nightmares, PTSD, flashbacks, and anxiety. She said she told her mother and the police.

The witness also said that she wore onesie pajamas that zipped up the front even in summer because she knew it was difficult to touch her under the onesie. She told her mother she wore the onesie because she was cold.

Merry was charged and was in custody for seventeen months prior to his jury trial. At the 2021 hearing the witness said that in her 2004 trial testimony she

laughed when she said "butt" because, she explained, she was nervous and that's what 10-year old's do. She went to counseling and was diagnosed as autistic. That was found to be relevant in 2021 for sentencing.

On cross-examination, defense counsel elicited that in 2002 the witness reported the incidents to her mother, a teacher, and her pastor. After an investigation, she was placed in foster care. David Merry was charged and was tried by a Connecticut state jury in 2004. The child was a witness for the prosecution. **Merry was acquitted by the jury**.

It also was elicited that when she was 16 years old, the witness connected with her biological father over social media. They met. She testified that there was a sexual abuse incident with her biological father that she reported when she was 17. Her biological father was criminally charged, pleaded guilty plea, and was sentenced to 15 months.

Defense counsel filed the transcript of the 2004 Connecticut trial in which the alleged child victim testified, and Merry was acquitted by the jury. The district judge said that she carefully read and reviewed the transcript.

The prosecution argued the objection to the "pattern" enhancement should be overruled if the court simply weighed the credibility of the alleged victim who had nothing to gain by traveling to Florida to testify and re-live those memories;

and that her testimony was consistent about several incidents of digital penetration. A charge of child pornography, the government argued, showed that the defendant had a penchant for child sex acts. The girl's testimony, the prosecutor argued, validated the charged offense of downloading and possessing child pornography. The judge "did not necessarily agree," **but said that "the guidelines made it relevant."** The transcripts of the 2004 jury trial in Connecticut, over 384 pages, were filed in the Northern District of Florida in connection with the 2021senten-cing proceedings.

The court was concerned. The evidence not only must be credible, but also reliable. And, of course, it was 18 years ago. The court did not impose sentence that day:

> …because I am going to now take this testimony and I am going to compare it to the [2004] trial testimony. I have no choice. That's the position you've put me in, so that's what I need to do.
>
> This is the trial transcript, at least what I was provided, and it's quite lengthy, so I don't know it verbatim. I've recalled a few facts from it, but I'll have to go back through it.
>
> ***
>
> And I will do it. I will do it. That's my job. But I'll do it on a different day.

The prosecutor added:

> …right, to see if there is a pattern of activity of two or more instances. And my suggestion to the Court is that's how she testified when [s]he was 10, and that's how she is testifying when she's 27. Two or more instances, if that's reliability or credible, by a preponderance of the evidence, the issue is resolved.

Defense counsel responded that the 2004 Connecticut jury acquitted Merry based on inconsistencies in witnesses' testimony. The jury heard and saw witnesses, evaluated their credibility, and reached a verdict. The girl said that she reported three incidents right away. But her mother's testimony was that she only knew about one reported incident, and that's when she called the hotline. A witness from the Connecticut Department of Children and Families who examined the child said there was no report of unusual behavior, nightmares, bed-wetting, or wearing onesie pajamas in hot weather. Those things might have been important, but they were not reported. There was nothing in their notes or records about such allegations.

Defense counsel further argued that there was no report of bleeding from the top of the stairs incident, to which the witness testified in 2021. The not-guilty verdict in 2004 was final and appropriate and should have been the final decision on those eighteen year old charges.

Applying 2004 acquitted-conduct to enhance the sentence by five offense levels, resulted in a sentence of 120 months. **The district judge stated on the record that should the enhancement be reversed on appeal, she would sentence Merry to 90 months.**

A sentence increased by 30 months based on a "pattern" upward adjustment for acquitted-conduct was unconstitutional and unjustified. Even one additional day of incarceration is one day too many.

Eleventh Circuit precedent on acquitted-conduct sentencing was adverse to Mr. Merry, but defense counsel made the record, the issue was raised on appeal, and preserved. The charge here was mere receipt of child pornography, not production, not distribution, and not child sexual abuse.

In preparing for the continuation of the sentencing hearing the defense filed two responses to the PSR that were docketed under seal. One was construed as a motion for motion for reconsideration of the order of denial, and it also was denied. On August 5, 2021, **the court sentenced Merry to 120 months, and stated that if the five-level pattern enhancement (based on acquitted-conduct) were to be reversed, Merry's sentence would be 90 months on each count, concurrently**.

Reasons for Granting the Writ

1. The Constitutionality of Considering Acquitted-Conduct At Sentencing Is An Important And Recurring Question That Only This Court Can Resolve

Until this Court resolves this issue, thousands of defendants in state and federal criminal cases will continue to be sentenced in violation of the Constitution. Several state supreme courts apply a different constitutional rule than their regional federal courts, making those defendants' constitutional protections turn on happenstance of which jurisdiction charges them. In many jurisdictions that allow acquitted-conduct sentencing, this will continue to put defendants in the untenable position of having to preserve an issue on which only this Court can grant relief, unnecessarily burdening courts, prosecutors, and defense counsel.

Acquitted-conduct sentencing allows consideration of any "relevant conduct" in determining a sentence, including crimes for which the defendant was acquitted. This practice allows judges to increase prison terms by punishing defendants for charges on which juries found them not guilty.

In an amicus brief in support of Dayonta McClinton's Petition in this Court, seventeen retired federal judges (appointed by both Republicans and Democrats), propose that that the simple, straightforward solution to this problem is for this Court to rule **that no alleged conduct upon which a jury has acquitted a defendant, can be used to enhance the defendant's penalty for any crime**.

Contrary to common sense and constitutional requirements, acquitted-conduct sentencing is standard practice in federal courts. According to the Due Process Institute, forty states and the District of Columbia either implicitly or explicitly permit acquitted-conduct sentencing. Among twenty states that prohibit acquitted-conduct sentencing, only four prohibit the practice by statute or regulatory sentencing guidelines. In six states, court decisions have banned the practice. For example, the Michigan Supreme Court in *People v. Beck,* 939 N.W. 2d 213, 225-26 (Mich. 2019), ended acquitted-conduct sentencing in Michigan. The question in *Beck* was the same issue in the present case: whether a judge could sentence a defendant for a crime for which the defendant was acquitted? The Court held NO, they could not, reasoning that once acquitted of a crime, it violates due process to sentence the defendant as though he had committed that very crime.

Many judges have asserted that acquitted-conduct sentencing violates criminal defendants' Fifth and Sixth Amendment rights to due process and to a jury trial. Before his appointment to this Court, Justice Kavanaugh authored opinions disapproving of acquitted-conduct sentencing. *See, United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (Kavanaugh, J., for the Court):

> Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the right to due process and to a jury trial…

"Many judges and commentators" have observed that "using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system." Those sentences undermine public perceptions of the importance of jury service, and discourage jurors from taking their duties seriously. *See, United States v. Canania*, 532 F.3d 764, 778 & n.4 (8th Cir. 2008), quoting a letter from a juror to the judge calling a sentence based on conduct of which the jury had acquitted the defendant a "tragedy" that denigrates "our contribution as jurors."

Former Justice Antonin Scalia also noted that facts considered against a defendant to extend sentence should be found by the jury or admitted by the defendant, but may not be found by a judge. To the contrary, however, circuit courts across the country have held the practice to be appropriate in accordance with this court's 1997 decision in *United States v. Watts, supra*, ruling that acquitted-conduct sentencing is constitutional and does not violation the double jeopardy clause, citing the United States Sentencing Guidelines Manual.

2. The Decision of the Eleventh Circuit Is Wrong

The use of acquitted-conduct as the specific basis to increase the defendant's offense level, and launch him into a higher guidelines range, and the higher sentence imposed, are at best "constitutionally troubling." That language is in a concurring opinion by Circuit Judge Patricia Millett in *United States v. Brown*, 892

F.3d 385, 408-409 (D.C. Cir. 2018). The sentiment, spirit, intent, and ideas presented in Judge Millett's concurring opinion in *Brown*, albeit on different facts, are compelling, and emphasize the need for change in the Sentencing Guidelines, policies, operations, and underlying Congressional authority.

Judge Millett cited her concurrence in the denial of rehearing *en banc* in an earlier D.C. Circuit opinion in *United States v. Bell*, 808 F.3d 926, 929-930 (D.C. Cir. 2015), wherein she wrote (emphasis added):

> In a constitutional system that relies upon the jury as the great bulwark of our civil and political liberties," **allowing courts at sentencing "to materially increase the length of imprisonment based on conduct for which [a] jury acquitted the defendant guts the role of the jury in preserving individual liberty and preventing oppression by the government.**"

In 2002 the State of Connecticut charged David Merry with sexual assault on a minor. Following seventeen months in pretrial custody, and a jury trial, the jury rendered a verdict of acquittal, NOT GUILTY. In the present case, the court, the prosecution, and the defense all were well-aware that Merry was acquitted of the 18-year old charges against him. He received a more severe punishment in the present case for that charged conduct in spite of the jury's acquittal.

The misguided use of acquitted-conduct to increase sentences has been highlighted in state cases such as *State v. Paden-Battle*, 234 A.3d 332, 344-48 (N.J. Super. A.D. 2020) and in *People v. Beck*, 939 N.W.2d 213, 218-242 (Mich. 2019); and in federal cases such as *United States v. Bell*, *supra*, D.C. Cir, (Kavanaugh, J. and Millett, J., concurring), and *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring).

In *Faust*, Judge Barkett stated her "strong belief … that sentencing enhancements based on acquitted-conduct are unconstitutional under both the Sixth Amendment and the Due Process Clause of the Fifth Amendment." Merry disputed the charges in Connecticut in 2002 because they were not factual. Recognizing that federal case law holds otherwise, he maintained and preserved his constitutional arguments in objection to the "pattern of activity" enhancement.

Guidelines Section 2G2.2 is problematic and leads to many downward variances from the sentencing range in those cases. In 2019 downward variances occurred in 59.9 percent of child pornography cases; the "mean" decrease from the variance was 51 months (40.5 percent); the "median" decrease was 43 months (38.1 percent). For a defendant in Criminal History Category 1, such as Merry, the mean sentence length was 90 months; the median was 72.

Although Section 2G2.2(b)(5) provides a 5-level enhancement for a "pattern of activity involving the sexual abuse or exploitation of a minor," that enhancement may not be applied when the alleged "pattern of activity" is dependent on, a prior conviction or prior conduct that is **not related to the instant federal offense of conviction**. Just as a prior state conviction for lewd and lascivious conduct against a minor child, does not constitute "a pattern of activity involving the sexual abuse or exploitation of a minor," a five-level enhancement for "pattern of activity" is a **specific offense characteristic** which applies "if the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." U.S.S.G. 2G2.2(b)(5).

Here, the alleged "pattern of activity" was based solely on an acquitted alleged Connecticut state offense some 18 years earlier, and was unrelated to the federal pornography crime. The guideline commentary is invalid as applied under the present circumstances as inconsistent with the unambiguous text of Section 2G2.2(b)(5).

Unfortunately for Merry and many others, circuit precedent allowed the government a second bite at the incarceration apple. Knowing full well that he had been acquitted, and thus not convicted of sexual assault on the alleged child

victim, the government urged the court to overrule Merry's objection to the five-level "pattern of activity" enhancement, completely disregarding what the Connecticut jury meant when they found Merry "not guilty."

Pursuant to the defense objection to the proposed enhancement, the court reviewed the testimony of the alleged victim. Following review of the recent testimony, and review of the trial transcripts of the entire 2004 Connecticut trial the court overruled Merry's objection to the "pattern of activity" enhancement. The five-level pattern enhancement significantly increased the advisory range from **108 to 135 months, to a range of 188 to 235 months.**

The court realized that the enhanced upward-adjusted advisory range was far too great, and that guidelines ranges in many if not most internet child pornography cases far exceed reasonable or sufficient. From the enhanced, upward-adjusted range, the court departed downward to 120 months concurrently for both counts; and stated **that should the "pattern of activity" enhancement be reversed, with a range of 108 to 135 months, it would impose a sentence of 90 months (7 ½ years).**

As Judge Millett wrote in *Brown*, 892 F.3d at 409, to be sure, many consi-deratoins at a criminal sentencing such as defendant's background, criminal history

and other mitigating and aggravating factors need be proved only by a preponderance of the evidence. That huge upward adjustment to the guidelines offense level for twenty-year old acquitted-conduct, only had to be proved by a preponderance of the evidence, launching the range to beyond excessive, in violation of fundamental constitutional principles.

As the Constitution intended, the People of Connecticut, a jury of Merry's peers, spoke clearly and loudly that they found him not guilty. Loading acquitted-conduct onto other factors to enhance the sentence turned the jury trial into a sideshow.

In *Bell*, *supra*, 808 F.3d at 932, Judge Millett concurring, eloquently wrote with emphasis added, that:

> Without so much as a nod to the niceties of constitutional process, we incarcerate citizens for greater terms of imprisonment without the inconvenience of having to convince jurors of facts beyond a reasonable doubt. **Increasing incarceration without a conviction is a constitutional anathema**.

The concurring opinion continued stating that our constitutional system of government reposes ultimate power in the People of the United States to preserve and maintain liberty. The ultimate threat to liberty and rule of the People, by the People, and for the People is the power of the government to lock up, punish, and

exercise complete control over its citizens. The genius of the Constitutional protections for criminal defendants, was to prevent such tyranny by ensuring that individual liberties could be stripped away only by a jury upon proof of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362 (1970) (holding that these "rules are historically grounded rights of our system developed to safeguard men from dubious and unjust convictions." *Id*, 397 U.S. 358).

The reasonable doubt standard provides concrete substance for the presumption of innocence – that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." Allowing the government to lock people up for a discrete and identifiable term of imprisonment for criminal charges rejected by a jury is a dagger pointed at the heart of the jury system and limited government. Judge Millett concluded her concurring opinion in *United States v. Brown,* 892 F.3d at 409, as follows:

> I acknowledge that [D.C. **C]ircuit precedent allows the government to engage in this acquitted-conduct alchemy**. *See United States v. Settles*, 53 F.3d 920 (D.C. Cir. 2008). **But I do not have to like it or stay silent about what is, in my view, a grave constitutional wrong.**

(Emphasis added). Appellant echoes the eloquent language of Judge Millett, and respectfully asks this Court to acknowledge that the time has come to prohibit this abhorrent, unfair, unjust, and unconstitutional practice. The issue presented on

behalf of Petitioner David Merry is the same issue that is pending before this Court in Case No. 21-1557 in the Petition filed on behalf of Dayonta McClinton.

3. The Fifth Amendment and the Sixth Amendment Prohibit Consideration of Acquitted Conduct at Sentencing

As a matter of common sense, defendants should not be punished for alleged conduct for which a jury has acquitted them, and judges should not be allowed to effectively overrule jury acquittals. Under the present system judges can and do increase sentences based on judge-found facts applying a standard of proof lower than the reasonable doubt standard that applies to jury decisions.

In a 2014 dissent to the denial of certiorari in *Jones [Thurston, and Ball] v. United States*, 525 U.S. 948 (2014), the Late Justice Antonin Scalia, joined by Justice Ruth Bader Ginsburg, and Justice Clarence Thomas wrote :

> The Sixth Amendment, together with the Fifth Amendment's Due Process Clause requires that each element of a crime be either admitted by the defendant or proved to the jury beyond a reasonable doubt.

Acquitted-conduct-sentencing violates the Sixth Amendment right to jury trial, and the Fifth Amendment Due Process requirement that any fact legally necessary for punishment must be found by a jury beyond a reasonable doubt, unless admitted by a defendant. In addition to undermining the presumption of

innocence, this practice undermines the jury system and the legitimacy of our criminal justice system, and increases the risk of punishing conduct of which the defendant is actually innocent. It ignores the "beyond a reasonable doubt" standard that is central to the criminal justice system. As Benjamin Franklin is attributed with saying, it is better 100 guilty persons escape than that one innocent person should suffer. That quote goes back to Sir William Blackstone and 10 guilty persons go free rather than one innocent person be found guilty. The point is well made either way.

This practice increases what is known as the "Trial penalty" and the government's ability to coerce guilty pleas without proving that it has sufficient evidence to obtain a guilty verdict at trial. This unjust, unconstitutional practice has been allowed to continue for decades.

On January 12, 2022, the Seventh Circuit issued *United States v. McClinton,* which challenged enhanced sentencing based on acquitted-conduct. The Seventh Circuit did not overturn the enhanced sentence because the panel was bound by existing circuit and Supreme Court precedent. The panel strongly indicated, however, that it is time for this Court to resolve the issue of increased sentencing for acquitted-conduct.

Writing for the panel, Judge Rovner observed that the argument against sentencing "[was] not frivolous" because "[i]t preserves for Supreme Court review an argument that has garnered increasing support among many circuit court judges and Supreme Court Justices, who in dissenting and concurring opinions, have questioned the fairness and constitutionality of allowing courts to factor acquitted-conduct into sentencing calculations. This Court's online docket shows that McClinton's petition is pending. The last docket entry was his supplemental brief, filed in late January.

David Merry is not a lone voice in the wilderness challenging this misguided law and unconstitutional sentencing practice. On March 28, 2022, Chairman of the Congressional Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Steve Cohen, addressed the House of Representatives urging the passage of a bill entitled "**The Prohibiting Punishment for Acquitted-conduct Act**," which later passed the House with a vote of 405 to 12. As the Congressional Subcommittee recognized, this problematic constitutional violation should be prohibited. It is unjust for judges to increase sentences based on conduct for which a defendant has not just **not been convicted, but actually was acquitted** by a jury following a trial. The bill was bipartisan and bicameral. In the words of Republi-

can Congressman Kelly Armstrong of North Dakota in November 2021, when the Committee voted to advance the measure:

> The right of criminal defendants to be judged by a jury of their peers is a foundational principle of the Constitution. The current practice of allowing federal judges to sentence defendants [based] on conduct for which they were acquitted by a jury is not right and is not fair.

A similar measure introduced by Senators Dick Durbin (D. Illinois) and Chuck Grassley (R-Iowa) was considered by the Senate Judiciary Committee in June 2021 and has been advanced to the full Senate. It is time for a change and for reform of sentencing statutes and guidelines. The time has come for this Court to resolve this abhorrent, unfair, unjust, and unconstitutional practice.

Sixth Amendment

Acquitted-conduct sentencing affords the government a "second bite at the apple." The Government almost always wins by needing to prove only [the case that it lost,] to a judge by a preponderance of the evidence" *Canania*, 532 F.3d at 776 (Bright, J., concurring.) This diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth amendment. *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting).

Many judges and commentators have observed that using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system. *United States v. Settles, supra*, 530 F.3d at 924 (Kavanaugh, J. for the court) (undermining public perception of the importance of jury service and discouraging jurors from taking their duties seriously).

Only this Court can end this abridgement of the fundamental right to a jury trial and restore the jury's role as the "circuit-breaker in the state's machinery of justice." *Blakely*, 542 U.S. at 306-07.

Fifth Amendment

The Due Process Clause works in conjunction with the Sixth Amendment to guarantee fair sentencing procedures. Just as "any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime and just be found by jury not a judge." *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial of cert.) (due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *In re Winship*, 397 U .S. 358, 364 (1970). The beyond a reasonable doubt "standard provides concrete substance for the presumption of innocence." *Ibid*.

Considering acquitted conduct at sentencing offends the Due Process Clause in several related ways. First the Clause does not permit courts to treat acquitted conduct as a sentencing factor that can be imposed based on facts found by a preponderance of the evidence, thereby eliminating the core procedural protection of proof beyond a reasonable doubt. Several courts have held that revisiting facts that the jury rejected under a preponderance standard deprives the accused of the full benefit of the presumption of innocence. *See, Beck*, 939 N.W. 2d at 225 (conduct that is protected by the presumption of innocence may not be evaluated by using the preponderance of the evidence standard without violating due process). *State v. Marley*, 364 S.E. 2d 133, 138 (NC 1988).

Consideration of acquitted conduct undermines the notice requirement that is at the heart of any criminal proceeding. *Canania*, 532 F.3d at 777 (Bright, J., concurring). If the court is permitted to consider acquitted conduct during sentencing "a defendant can never reasonably know what his possible punishment will be." It is not unreasonable for a defendant to expect that conduct underlying a charge of which he's been acquitted will play no determinative role in his sentencing." *Ibid*.

Adoption of Pleadings in Dayonta McClinton's Pending Case

Petitioner Merry's case for review by this Court already has been argued and presented expertly, extensively, and in exceptionally great detail in the *McClinton* case that is awaiting a decision to accept, decide, and resolve the troubling and oft-criticized issue of acquitted-conduct sentencing.

Petitioner understands that his facts differ from McClinton's whose sentence was substantially increased for a murder that was charged and for which he was tried and acquitted by the jury in the same case for which he was sentenced. Merry's facts differ because his sentence in the 2021 federal prosecution was enhanced based upon other charges lodged in 2002 for which Merry was tried by a state jury in Connecticut in 2004, and was acquitted as to all charges by that Connecticut jury.

In the interest of brevity and judicial economy, and this Court's rules limiting words and pages, Petitioner respectfully seeks leave of Court to adopt and incorporate by reference as though set forth in their entirety herein, the pending Petition for Writ of Certiorari filed by Dayonta McClinton, Case No. 21-1557, as well as his Reply and Supplemental Briefs, and the Amicus Curiae Briefs in support of McClinton submitted by and on behalf of:

(1) Americans for Prosperity Foundation, Dream Corps Justice, National Association of Criminal Defense Lawyers, et al., Amici Curiae;

(2) Due Process Institute, Amicus Curiae;

(3) Brief of 17 Former Federal Judges as Amici Curiae in Support of Petitioner; and

(4) The National Association of Federal Defenders and FAMM, Amici Curiae; and (5) Professor Douglas Berman, Amicus Curiae.

Conclusion

This case presents an ideal opportunity for this Court to address the growing concerns about a persistent practice that has long troubled federal jurists. As Justices Scalia, Thomas, and Ginsburg wrote in *Jones*, "This has gone on long enough." *Jones*, 574 U.S. at 949 (Scalia, J., dissenting from denial of cert.). The Court "should grant certiorari to put an end to the unbroken string of cases disregarding the Constitution and this Court's precedents." *Id*. at 950.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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