

No.: _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2022

David E. Merry,
Petitioner,

vs.

The United States of America,
Respondent

_____ /

MOTION TO PROCEED ON PETITION FOR WRIT OF CERTIORARI
IN FORMA PAUPERIS

Petitioner David E, Merry, through undersigned CJA counsel, moves the Court pursuant to Rule 39 of the Rules of the United States Supreme Court, for leave to proceed *In Forma Pauperis* for his Petition for Writ of Certiorari. As good grounds in support of this motion Petitioner states:

Petitioner is presently in the custody of the United States Bureau of Prisons, at FCI Butner Low, serving a sentence of 120 months that was imposed following a plea of guilty to two counts of receiving materials containing child pornography.

Mr. Merry was charged in this case in 2019 and has been represented by appointed counsel throughout the proceedings. In the district court he was represented by Assistant Federal Defender Thomas Keith. See Docket No. 12, appointing the Federal Public Defender in January 2020; and see Docket No. 81, appointing undersigned in August 2021, as counsel for purposes of appeal. Both orders of appointment are attached at the end of this motion for the Court's review.

Mr. Merry is still indigent. His financial situation has not improved since he was arrested and was incarcerated, and proceeded with appointed counsel appointed in the district court and on appeal.

The Petition that is filed on behalf of Mr. Merry's behalf presents a highly meritorious question for this Court's review. That same issue has been pending before this court on Petition for Writ of Certiorari filed by Dayonta McClinton in this Court's Case No. 21-1557, awaiting a decision to be made whether to take the case.

The issue presented is whether considering acquitted conduct for purposes of increasing or enhancing a defendant's sentence is violative of the Fifth and Sixth Amendment rights to due process and to trial by jury. At least four amicus briefs have been filed on behalf of Petitioner McClinton, and many judges have weighed in on the issue.

Petitioner Merry's reasons for granting the writ include that the constitutionality of considering acquitted conduct at sentencing is an important and recurring question that only this Court can resolve; that the decision of the Eleventh Circuit affirming Mr. Merry's enhanced sentence is wrong; and that the Fifth Amendment and the Sixth Amendment prohibit consideration of acquitted conduct at sentencing.

As we argue in the petition, 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 McClinton 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 enhancing 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 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.

Accordingly, for the foregoing reasons, and based on the highly meritorious the arguments and authorities in his Petition for Writ of Certiorari, David Merry respectfully prays that this Honorable Court will grant this motion and will allow him to proceed before this Court on Petition for Writ of Certiorari *In Forma Pauperis* through his CJA-appointed counsel.

Respectfully submitted,

/s/ Sheryl J. Lowenthal

Sheryl J. Lowenthal, CJA Counsel for Petitioner

221 East Government Street

Pensacola, Florida 32502-6018

850-912-6710

The Florida Bar No. 163475

Email: sjlowenthal@appeals.net

Dated: February 12, 2023

So. Florida Office: 9130 S Dadeland Boulevard Suite 1511 Miami, FL 33156-7851

Ph: 305-670-3360 Fax: 305-670-1314

Attachments to the Motion

Docket No. 12

Order appointing the Federal Public Defender, Northern District of Florida to represent Mr. Merry in the district court.

Docket No. 81

Order appointing undersigned counsel to represent Mr. Merry as as Counsel on Appeal in the Eleventh Circuit Court of Appeals.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

vs.

Case No. 3:19cr157/MCR

DAVID E. MERRY

ORDER

The above-named Defendant having appeared before the court, and having been examined by the undersigned, and the court having determined from the sworn testimony of the Defendant that said Defendant is qualified for appointment of counsel pursuant to the provisions of the Criminal Justice Act, it is hereby **ORDERED**:

The **FEDERAL PUBLIC DEFENDER**, Blount Building, Suite 200, 3 West Garden Street, Pensacola, Florida 32502, telephone number (850) 432-1418, is appointed to represent this Defendant and serve as counsel of record in the above-styled cause. Further proceedings will be held before the United States District Court **AS DIRECTED**. The Defendant is presently in custody. If a Criminal Justice Act (CJA) panel attorney is selected by the Public Defender as Defendant's attorney, this order authorizes payment of the CJA attorney for work on behalf of Defendant from the time that attorney was contacted by the Public Defender to take the case and agreed to take the case, even though that work predated this order. The pretrial

service officer is hereby authorized to provide copies of the Defendant's criminal history to counsel for both parties.

DONE and **ORDERED** this 23rd day of January 2020.

/s/ Elizabeth M. Timothy

ELIZABETH M. TIMOTHY

CHIEF UNITED STATES MAGISTRATE JUDGE

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

UNITED STATES OF AMERICA

v.

DAVID MERRY

CASE NO. 3:19cr157/MCR

REFERRAL AND ORDER

Referred to Judge M. Casey Rodgers on August 30, 2021

Motion/Pleadings: MOTION TO WITHDRAW AND TO APPOINT
CJA COUNSEL

Filed by Defendant, FPD on August 27, 2021 Doc. # 80

Response _____ on _____ Doc. # _____

_____ Stipulated _____ Joint Pleading
_____ Unopposed _____ Consented

JESSICA J. LYUBLANOVITS
CLERK OF COURT

/s/ Kathy Rock

Deputy Clerk: Kathy Rock

On consideration, the motion is GRANTED, as requested. CJA counsel, attorney Sheryl Lowenthal, is appointed as counsel for purposes of appeal.

DONE and ORDERED this 30th day of August 2021.

M. Casey Rodgers

**M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE**