No. 22-6815

IN THE SUPREME COURT OF THE UNITED STATES

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

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 it found by a preponderance of the evidence, but that a jury in a prior case had not found beyond a reasonable doubt, in determining his sentence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-8)[1] is not published in the Federal Reporter but is available at 2022 WL 3570925. The order of the district court is not published in the Federal Supplement but is available at 2021 WL 1312581.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2022. A petition for rehearing was denied on November 18,

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[1] The appendix to the petition for a writ of certiorari is not consecutively paginated. Citations of that appendix thus use the pagination of the pdf document available on the Court's electronic docket.

2022 (Pet. App. 12). The petition for a writ of certiorari was filed on February 13, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Florida, petitioner was convicted on two counts of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2) and (b)(1). Judgment 1. He was sentenced to 120 months of imprisonment, to be followed by a life term of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 3-8.

1. In February 2019, the National Center for Missing and Exploited Children forwarded a "CyberTip" to federal task force officers in Pensacola, Florida, informing them that petitioner's Google account likely contained images of child pornography. Presentence Investigation Report (PSR) ¶ 17; see United States v. Rosenow, 50 F.4th 715, 725 (9th Cir. 2022) (describing the statutory CyberTip system), cert. denied, 143 S. Ct. 786 (2023). The investigating officer discovered that petitioner had been the subject of two previous police reports involving child pornography: in 2016, a library patron reported that petitioner was viewing inappropriate images of a child on a public computer, and in 2017, police found an apparently abandoned black LG cellphone belonging to petitioner that contained suspected images of child pornography. PSR ¶¶ 20-24.

Finding the cellphone "to be of renewed interest" in light of the CyberTip, the officer obtained a search warrant for the phone; the resulting search revealed hundreds of images of child pornography. PSR ¶ 24; see PSR ¶¶ 24-26. The officer then obtained a search warrant for petitioner's Google account and his home; the resulting searches revealed thousands of images and videos of child pornography across petitioner's email account, laptop, and tablet. PSR ¶¶ 27-32.

In December 2019, a federal grand jury in the Northern District of Florida returned an indictment charging petitioner on one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2) and (b)(1), and one count of possessing with intent to view child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Indictment 1-2. In January 2020, a probation officer discovered that petitioner had obtained thousands of additional images and videos of child pornography while on pretrial release, in violation of the conditions of that release. PSR ¶¶ 34-37.

In February 2020, a grand jury returned a superseding indictment adding an additional count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2) and (b)(1), and an additional count of possessing with intent to view child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Superseding Indictment 1-3. Petitioner pleaded guilty to the two counts of receiving child pornography, and the government dismissed the two possession counts. Judgment 1.

2. The Probation Office's presentence report recommended a five-level enhancement to the offense level under the advisory Sentencing Guidelines because petitioner had "engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." Sentencing Guidelines § 2G2.2(b)(5) (2018); see PSR ¶ 61. The Guidelines commentary explains that a qualifying "pattern" means "any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation * * * resulted in a conviction for such conduct." Sentencing Guidelines § 2G2.2 comment. (n.1) (2018).

The Probation Office's recommendation was based on petitioner's prior sexual abuse of C.L., a then-eight-year-old girl, in 2002. See PSR ¶¶ 38-44. At the sentencing hearing in this case, C.L. (now an adult) testified that petitioner had "put his fingers inside her vagina and anus 'multiple times.'" 2021 WL 1312581, at *2. That testimony was consistent with what C.L. previously had said in a June 2020 interview and in her testimony in a 2004 trial, where she recounted an incident when petitioner "put his thumb in her anus and moved it around," PSR ¶ 40; two incidents when he "put his finger inside her vagina," PSR ¶ 41; see PSR ¶ 42; and an incident when petitioner "exposed himself to C.L. by pointing at his penis," PSR ¶ 42.

Petitioner objected to the enhancement, observing that in that 2004 trial, a Connecticut jury had acquitted him on two counts

of first-degree sexual assault of a minor and two counts of risking injury to a minor, all of which stemmed from two of the incidents involving C.L. See 2021 WL 1312581, at *1; see also Pet. App. 4-5; cf. D. Ct. Doc. 53-1, at 378-381 (Nov. 2, 2020) (copy of state-court trial transcript). Petitioner argued that "a defendant's prior acquitted conduct should not be used in calculating his Guidelines range in a subsequent case." 2021 WL 1312581, at *1.

The district court overruled that objection. 2021 WL 1312581. Citing, among other authorities, this Court's decision in United States v. Watts, 519 U.S. 148 (1997) (per curiam), the district court observed that "long-standing precedents of the Supreme Court and the Eleventh Circuit establish that a sentencing court may consider uncharged, dismissed, and/or acquitted conduct in calculating an appropriate sentence, so long as the conduct is proved by a preponderance of the evidence and the sentence does not exceed the statutory maximum for the crime of conviction." 2021 WL 1312581, at *1.

The district court found that "C.L.'s sworn testimony at the sentencing hearing [in this case] alone is sufficient to establish by a preponderance of the evidence that [petitioner] knowingly engaged in two or more separate instances of sexual acts with a minor victim." 2021 WL 1312581, at *2. The court observed that, in addition, C.L.'s testimony "was materially corroborated by the transcript of her testimony at [petitioner's] criminal jury trial in 2004." Id. at *3. The court accordingly determined that

"[b]ased on C.L.'s testimony in 2004 and 2021, which the [c]ourt finds credible, the [c]ourt readily concludes that [petitioner] knowingly engaged in two or more separate sexual acts with a C.L., a minor victim under the age of 12, in 2002." Ibid.

Petitioner's resulting advisory sentencing range was 188 to 235 months of imprisonment. See PSR ¶ 108; 7/22/21 Sentencing Tr. 4. The district court sentenced petitioner to 120 months of imprisonment, to be followed by a life term of supervised release. Judgment 2-3; see D. Ct. Doc. 72, at 2 (Aug. 5, 2021) (revised sentencing order). The court stated that it would impose a 90-month sentence, to be followed by ten years of supervised release, if the five-level enhancement were later deemed inapplicable. D. Ct. Doc. 72, at 2; see 7/22/21 Sentencing Tr. 20-21.

3. The court of appeals affirmed. Pet. App. 3-8. The court observed that petitioner's Fifth and Sixth Amendment challenges to the district court's reliance on his abuse of C.L. as the basis for the offense-level enhancement "conflict[ed] with binding precedent." Id. at 6 n.2 (citing Watts, 519 U.S. at 157, and circuit precedent). And the court of appeals rejected petitioner's alternative arguments that his prior conduct "was too remote in time and too different in nature to warrant the enhancement." Id. at 7; see id. at 7-8.

ARGUMENT

Petitioner renews his contention (Pet. 14-29) 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 2002 incidents in which he sexually molested C.L. for which he had not been proven guilty beyond a reasonable doubt in his 2004 trial. 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. 3, 14), every federal court of appeals with criminal jurisdiction has recognized that authority. This Court has repeatedly denied petitions for writs of certiorari in cases raising the question presented, and it should follow the same course here.[2]

1. For the reasons set forth in the government's brief in opposition to the petition for a writ of certiorari in McClinton

[2] 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); Martin v. United States, No. 22-6736 (filed Feb. 3, 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 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.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230405/20230405_remarks.pdf.

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. 3, 15) 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) 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), and Blakely v. Washington, 542 U.S. 296 (2004) -- likewise lacks merit. See Br. in Opp. at 9-10, McClinton, supra (No. 21-1557). Petitioner's 120-month sentence lies well within the default sentencing range for the offenses to which he pleaded guilty in this case -- five to 20 years of imprisonment on each count, see 18 U.S.C. 2252A(b)(1) -- and thus does not violate Apprendi, Blakely, or any other decision of this Court.

2. Petitioner acknowledges (Pet. 3, 14) 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. 14, 17, 27) 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), is misplaced. Beck is an outlier and its reasoning is tenuous, see Br. in Opp. at 13-14, McClinton, supra (No. 21-1557), and the other state decisions that petitioner cites either predate Watts, do not cite Watts, or rely on state law, see id. at 12-13. Nor do petitioner's policy considerations (Pet. 14, 16) counsel in favor of further review. See Br. in Opp. at 15-16, 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 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.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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