No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2022

DAVID E. MERRY, PETITIONER

v.

UNITED STATES OF AMERICA

PETITIONER DAVID MERRY'S REPLY
TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION
With Incorporated Appendix

SHERYL J. LOWENTHAL
Counsel of Record
Sheryl J. Lowenthal, Attorney at Law
221 East Government Street
Pensacola, Florida 32502-6018
Phone: 850-912-6710
sjlowenthal@appeals.net
The Florida Bar No. 163475

South Florida Office: 9130 S Dadeland Blvd. Suite 1511 Miami FL 33156-7851
305-670-3360

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Petitioner's Reply to the Government's Response in Opposition

The question presented by David E. Merry is whether the Fifth and Sixth Amendments of the United States Constitution prohibit a federal court from basing, increasing, or enhancing a criminal defendant's sentence for conduct for which a jury in another jurisdiction acquitted the defendant after hearing the testimony and evidence, and observing the witnesses at a jury trial?

As this reply is prepared, there are several petitions already pending before this Court that present the identical issue of the constitutionality of sentencing for acquitted conduct. Six of the cases, *McClinton v. United States*, No. 21-1557; *Luczak v. United States*, No. 21-8190; *Shaw v. United States*, No. 22-118; *Karr v. United States*, No. 22-5345; *Bullock v. United States*, No. 22-5828; *Cain v. United States*, No. 22-6212; and *Sanchez v. United States,* No. 22-6386, referenced *infra*, as the "core cases" all are "DISTRIBUTED for Conference of May 11, 2023."

McClinton involved charges of pharmacy robbery and murder; *Luczak* involved RICO and first degree murder; *Shaw* involved RICO, narcotics, and firearms; *Bullock* and *Cain* both involved drugs and firearms; and *Sanchez* involved charges of aggravated sexual misconduct and abusive sexual conduct against two minor child victims. Five of the cases involve an acquittal by the jury

of one or more charges at **trial in the case at bar**. *Bullock*, however, involved an acquittal of state charges.

In the present case, David Merry was charged in the Northern District of Florida in 2019 and was sentenced in 2021. He pleaded guilty in 2021 to two counts of receipt and attempt to receive material containing child pornography in interstate or foreign commerce. The two counts were for identical, duplicate materials on two cell telephones.

The acquitted conduct that resulted in Merry's increased sentence in 2021, was alleged to have occurred in Connecticut in the very early 2000's. The record shows that the Connecticut jury acquitted Mr. Merry of all charges alleged, specifically child sexual molestation, at a state jury trial in in 2004; and that Mr. Merry languished in pretrial custody for seventeen months in Connecticut before his trial began. When the case finally went to trial, the jury acquitted him as to all charges. This jury heard and saw the witnesses including the alleged child victim, her mother, state child protective services officials, and medical personnel.

Nonetheless, in 2021, the federal prosecutor transported a 28-year old woman from Connecticut to North Florida to testify at Mr. Merry's federal sentencing hearing. This woman was the alleged child victim in the 2004 trial in

the Connecticut state court. After hearing the woman's testimony and then holding the sentencing hearing in abeyance for several months to study and review the entire transcript of the 2004 Connecticut jury trial; and despite the jury's verdict of acquittal, the United States District Judge found by a preponderance of the evidence that Mr. Merry committed the offenses charged by the State of Connecticut in the early 2000's. Thereupon the judge approved a five-level guidelines sentencing enhancement and imposed the resultant greater sentence.

From a close review of the response in opposition filed by the government in the present case, and having reviewed documents filed on this Court's docket by the respective parties in the six pending "core" cases that are set for Conference of May 11th, it appears that the arguments made are similar to those raised and argued in the earlier cases. As a result, our response may be similar to those already before this Court in the "core" cases.

We note that there is no vehicle problem raised in the present case as there were in the core cases. Also, there is a footnote in the response in opposition to Merry's petition, about recent developments at the Sentencing Commission. On information and belief, the government responded to the Commission's invitation for comments by telling the Commission that it lacks the authority to promulgate

amendments addressing acquitted-conduct sentencing. Hence, there is no reason for this Court to defer to the Commission. Not even the government believes that the Commission is authorized to act to resolve this issue.

In the statement of the case portion of its response, the government writes on page 4, that the Probation Officer recommended in the presentence report, a five-level enhancement to the offense level under Sentencing Guidelines Section 2G2.2(b)(5) (2018) for "enga[ging] in a **pattern of activity** involving the sexual abuse or exploitation of a minor." (emphasis added); and that 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 Section 2G2.2 comment. (n.1) (2018).

As set forth in great detail on page 4 of the government response, the now-28 year old woman testified at sentencing in 2021. In her testimony she referenced more than one incident of sexual abuse or exploitation by Mr. Merry. But, again, as a child, she testified at the 2004 trial, and the prosecution for the State of Connecticut also presented the testimony of her mother, a nurse, child protective services officials, and other witnesses. And even with all of that testimony having been presented on the record, the jury acquitted Mr. Merry of all charged offenses.

Guidelines commentary may say that certain facts or events may be considered when the court is determining an appropriate sentence. But if the commentary, or a guidelines section itself is in violation of the United States Constitution and its amendments, the Constitution will prevail. The Sentencing Guidelines operate within constitutional parameters and requirements. The response is correct in stating on page 5 that the district court overruled the defense objection at sentencing to use of prior acquitted conduct in calculating the range.

The district judge cited, among other authorities, *United States v. Watts*. 519 U.S. 148 (1997) (*per curiam),* and opined that there is long-standing precedent in this Court and in the Eleventh Circuit that a sentencing court may consider uncharged, dismissed, and/or acquitted conduct in calculating an appropriate sentence, so long as that conduct is proved by a preponderance of the evidence and the sentence does not exceed the statutory maximum. The court believed the alleged child victim's testimony in transcripts of the 2004 Connecticut trial and live testimony as an adult in N Florida in 2021 by a preponderance of evidence.

The advisory guidelines range with the pattern of activity enhancement was 188 to 235 months. Mr. Merry was sentenced to 120 months in prison followed by lifetime supervised release. And as the government wrote on page 6 of its reply, "The court stated that it would impose a 90-month sentence … if the five-

level enhancement were later deemed inapplicable."

In the argument section of its reply, on pages 7 and 8, the government relies on the reasons and arguments in its brief in opposition to the petition in *McClinton v. United States*, No. 21-1557. Just as the government has relied on its pleadings in a related cases on the identical issue, David E. Merry also will rely on documents filed on behalf of McClinton and the other core cases set to be addressed during the Conference of May 11, 2023.

The government argues that *Watts* does not prevent a sentencing court from considering acquitted conduct and that the petitioners including McClinton and the other five are mistaken. Au contrarire, for years, current and former Justices of this Court and other federal judges have articulated concerns about the due process and Sixth Amendment violations created by factoring acquitted conduct into sentencing decisions.

This Court has never addressed the full range of constitutional concerns raised by this practice. There is a substantial split of authority between the federal courts of appeals, which have rejected constitutional challenges to the use of acquitted conduct at sentencing, and the highest courts of several states which have held that the use of acquitted conduct at sentencing violates the defendant's constitutional rights.

This case presents the ideal opportunity for this Court to resolve the issue of the constitutionality *vel non*, of using acquitted conduct at sentencing.

In the interest of brevity and judicial economy, to avoid unnecessary repetition, and in keeping with that awful saying about beating the proverbial dead horse to death (especially just days before the running of the 149th Kentucky Derby). And keeping with the government's reliance on its response in *McClinton*, Petitioner David Merry would adopt and incorporate by reference as though set forth in their entirety herein, certain pleadings that have been filed and docketed on behalf of Dayonta McClinton in Case No. 21-1557. Those arguments and authorities are well-written, thorough, and supported by numerous brilliantly executed amicus briefs, all of which are equally applicable to Petitioner Merry.

The documents that Mr. Merry would specifically adopt include, but are not limited to: McClinton's Reply Brief, November 2022; McClinton's Supplemental Brief, January, 2023; and McClinton's Supplemental Brief, March, 2023. Copies of these three documents are attached and included in the Appendix at the end of this Reply Brief.

Petitioner David E. Merry respectfully states that his petition should be granted, as should the core six scheduled for Conference on May 11, 2023, for all of the reasons, and based on the authorities and arguments presented herein and in

in those six petitions.

This case presents an ideal opportunity for this Court to address the growing concerns about this 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,

Sheryl J. Lowenthal

Sheryl J. Lowenthal, Atty at Law
CJA Counsel of Record on Appeal for
Petitioner David E. Merry
221 East Government Street
Pensacola, Florida 32502-6018
Phone: 850-912-6710
E-mail: sjlowenthal@appeals.net

South Florida Office:
9130 S Dadeland Blvd. Suite 1511
Miami, Florida 33156-7851
Phone: 305-670-3360
Florida Bar No. 163475

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APPENDIX

Dayonta McClinton v. United States
Case No. 21-1557

1
Reply Brief
November 2022

2
Supplemental Brief
January 2023

3
Supplemental Brief
March 2023

Appendix 1

McClinton v. United States,
Case No. 21-1557

Reply Brief

November 2022

No. 21-1557

In the Supreme Court of the United States

DAYONTA MCCLINTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

JOHN P. ELWOOD
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000

AARON BOWLING
ARNOLD & PORTER KAYE SCHOLER LLP
70 West Madison Street
Suite 4200
Chicago, IL 60602
(312) 583-2300

ELIE SALAMON
Counsel of Record
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000
elie.salamon@arnoldporter.com

KAREN OAKLEY
LAW OFFICE OF KAREN OAKLEY, LLC
P.O. Box 54111
Cincinnati, OH 45254
(513) 436-1618

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: **Page(s)**

Statutes:

Other Authorities:

Other Authorities—Continued: **Page(s)**

In the Supreme Court of the United States

No. 21-1557

DAYONTA MCCLINTON, PETITIONER

v.

UNITED STATES

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

REPLY BRIEF FOR THE PETITIONER

The government does not dispute that the question presented—whether the Fifth and Sixth Amendments prohibit courts from basing a criminal defendant's sentence on conduct underlying a charge for which he has been acquitted—is a critically important and recurring one in both state and federal criminal systems. The government concedes that there is a split between federal appellate courts and state courts of last resort. Br. in Opp. (Opp.) 12-14. And the government does not dispute that the Seventh Circuit upheld petitioner's sentence on the grounds that petitioner committed a murder of which the jury acquitted him, more than tripling his sentence. Opp. 6; Pet. App. 6a.

At bottom, the government can only repeat its shopworn claim that the Fifth and Sixth Amendment issues were resolved by this Court's summary disposition in *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam)—although *Watts* does not even mention either amendment, and this Court has since said that case "presented a very narrow question regarding the interaction of the Sentencing Guidelines with the Double

Jeopardy Clause, and did not even have the benefit of full briefing and argument." *United States* v. *Booker*, 543 U.S. 220, 240 n.4 (2005).

While the government urges this Court to wait for the split to deepen, it has identified no benefit from further delay. More than a dozen federal cases raising the issue have been decided just since the petition was filed. And more petitions will continue to be filed until this Court resolves the split. As the Seventh Circuit observed below, Pet. App. 1a-3a, and *amici* Former Federal Judges note, see Br. of 17 Former Federal Judges as Amici Curiae 1-4, there is "increasing support among many circuit court judges and Supreme Court Justices * * * question[ing] the fairness and constitutionality of allowing courts to factor acquitted conduct into sentencing calculations." Pet. App. 3a-4a. The practice of acquitted-conduct sentencing "has gone on long enough." *Jones* v. *United States*, 574 U.S. 948, 950 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of cert.). The Court should "grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment" jury-trial right and Fifth Amendment protection of Due Process. *Ibid.*

A. The Split Is Real

The government concedes that there is a "split among state courts," *People* v. *Rose*, 776 N.W.2d 888, 891 (Mich. 2010) (Kelly, C.J., dissenting), and that the supreme courts of four states—Georgia, Michigan, New Hampshire, and North Carolina—have as a matter of federal constitutional law "disallowed the use of acquitted conduct at sentencing" in conflict with their corresponding regional federal courts of appeals. Opp. 12; Pet. 15-18.

The government attempts to downplay the split, saying that "[t]wo of those decisions predate *Watts* and are therefore of minimal relevance" and "two others did

not cite * * * *Watts*." Opp. 12. But that overstates the relevance of *Watts*, which *never addressed* the Due Process ramifications of acquitted-conduct sentencing, nor, as this Court has noted, did it consider whether a judge's "sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment," *Booker*, 543 U.S. at 240 & n.4. The irrelevance of the government's proposed distinction is confirmed by the fact that both *People* v. *Beck*, 939 N.W.2d 213, 224 (Mich. 2019), and *State* v. *Melvin*, 258 A.3d 1075, 1089-1090 (N.J. 2021), discussed *Watts* at length and squarely concluded that its holding was limited to double jeopardy and did not resolve the jury-trial and due process issues.[1] The government contends that *Beck*'s reasoning is "tenuous." Opp. 13. Even if it were, that counsels review to discharge this Court's "principal responsibility" of "ensur[ing] the integrity and uniformity of federal law." *Kansas* v. *Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring).

Even if the split *were* limited to *Beck*, that would not be "too shallow to warrant this Court's review." Opp. 13.

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[1] Although *Melvin*'s holding barring acquitted-conduct sentencing was based on the New Jersey constitution, Pet. 17; Opp. 13, the New Jersey Supreme Court concluded as a matter of *federal* law that "*Watts* is not dispositive of the due process" question, nor does it "control" the Sixth Amendment analysis, 258 A.3d at 1089-1090.

The government argues that the New Hampshire Supreme Court's statement in *State* v. *Gibbs*, 953 A.2d 439, 442 (N.H. 2008), that "[*State* v.] *Cote* provides greater protection than" *Watts*, indicates "its decisions are rooted in state law." Opp. 12-13. But *Gibbs*'s briefing centered on whether later *federal* decisions like *Booker* had undercut *Watts*. See Def. Br. at 22-23, *State* v. *Gibbs*, 2008 WL 4186514 (N.H. Mar. 27, 2008) (courts "have questioned the continuing validity of *Watts*" and "recent decisions of the United States Supreme Court have restored the jury to its historic central role in our justice system"); State's Br. at 18-19, *Gibbs*, 2008 WL 4186515 (N.H. May 2008) ("*Watts* is still good law").

Indeed, the government often successfully petitions for review based on shallower splits.[2] That is especially warranted because this conflict divides state courts of last resort from their corresponding federal appellate courts, which this Court has deemed intolerable because the scope of constitutional protections depends on the choice of state or federal forum. See *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994) (granting review to resolve 1-1 split).

The issues have been thoroughly discussed and the split will not resolve itself absent this Court's intervention. Nothing is to be gained by waiting.

B. The Government's Merits Arguments Provide No Basis To Deny Review

The government's central submission is that the Seventh Circuit's decision was correct. Opp. 7-11. The government principally relies on *Watts*, but does not acknowledge that decision's limits. The government concedes that *Watts* "specifically addressed a challenge to acquitted conduct based on double-jeopardy principles," Opp. 9, but asserts with scant analysis that the "clear import" of that summary decision was to foreclose Fifth and Sixth Amendment arguments it never mentioned, *ibid.* Previously, the government acknowledged *Watts*'s limits. See U.S. Br. at 7, *United States* v. *Booker*, 543 U.S. 220 (2005) (No. 04-104), 2004 WL 1967056 (stating that *Watts* held "the Double Jeopardy Clause does not prevent the district court from increasing the offense level on the

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[2] See, *e.g.*, Pet. at 11, *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, No. 15-290 (Sept. 8, 2015), 2015 WL 5265284 (urging review of "square but shallow" 1-1 circuit split); U.S. Pet. at 25, *United States* v. *Sanchez-Gomez*, No. 17-312 (Aug. 29, 2017), 2017 WL 3809745 (2-1 circuit split); U.S. Pet. at 13, *United States* v. *Ressam*, No. 07-455 (Oct. 4, 2007), 2007 WL 2898699 ("2-1 conflict * * * merits this Court's review").

basis of the conduct underlying the acquitted charge"); *id.* at 35 (same).

The government fails to address the "increasing support among circuit court judges and Supreme Court Justices" (Pet. App. 4a), to say nothing of state Supreme Court justices, see *Beck*, 939 N.W.2d at 224-225; *Melvin*, 258 A.3d at 1090, concluding that the brief, summary *Watts* opinion did not conclusively resolve the constitutionality of acquitted-conduct sentencing. See Pet. 12-15. Seventeen more distinguished jurists have added their voices to the growing chorus of those questioning the constitutionality of the practice. See Br. of 17 Former Federal Judges as *Amici Curiae* 1. The idea that those larger issues were conclusively resolved without full briefing and argument is impossible to square with Justice Kennedy's comment that the *Watts per curiam* failed to "confront[]" the lawfulness of acquitted conduct sentencing with "a reasoned course of argument" instead of "shrugging it off." 519 U.S. at 170 (Kennedy, J., dissenting).

In response to petitioner's Sixth Amendment argument, the government contends that this Court's precedents permit consideration of "conduct that was not found by the jury." Opp. 9-10. But enhancing a sentence based on a distinct crime that "the jury expressly disapproved" as a basis for punishment, *United States* v. *Bell*, 808 F.3d 926, 929-930 (D.C. Cir. 2015) (Millett., J., concurring in the denial of rehearing en banc), implicates a *completely distinct* common-law tradition than enhancing a sentence based on information the jury never considered, see generally *Hester* v. *United States*, 139 S. Ct. 509, 511 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of cert.) ("It's hard to see why the right to a jury trial should mean less to the people today than it did to those at the time of the Sixth and Seventh Amendments' adoption."). The government

never acknowledges that historical tradition, much less does it address petitioner's argument that this Court's more recent Sixth Amendment cases—that honor that original understanding—"provide[] a compelling reason to at least limit *Watts* to the Double Jeopardy context, if not overrule it entirely." Pet. 22.

The government's response to petitioner's Fifth Amendment Due Process arguments likewise turns on the general permissibility of imposing sentencing enhancements based on facts a judge finds by a preponderance of the evidence. The government asserts that judicial findings by a preponderance of the evidence "do not conflict with a jury's verdict of acquittal," citing only *Watts* (which never mentioned the Fifth Amendment) and a treatise that cites *Watts*. Opp. 10-11. But that double jeopardy *per curiam* provides no basis for concluding that the Nation's due process traditions permit judges to consider conduct the jury rejected as a basis for punishment, particularly where drastic increases in punishment (here, more than tripling the sentence) pose the risk of "unusual and serious procedural unfairness" that warrant "invocation of the Due Process Clause." *Apprendi* v. *New Jersey*, 530 U.S. 466, 562-563 (2000) (Breyer, J., dissenting).

C. Only This Court Can Resolve The Split

The government argues that the Court's intervention is unnecessary because "Congress *could* pass a statute or the Sentencing Commission *could* promulgate guidelines to preclude such reliance" on acquitted conduct, or individual "sentencing courts" *could* fix this problem by exercising their "discretion" to ignore acquitted conduct "for purposes of imposing a sentence in a given case." Opp. 15-16 (emphases added). But as petitioner has explained, Pet. 18-19, none of those actors can resolve the issue.

To begin, Congress and the Sentencing Commission would affect only *federal* sentencing and could do nothing to address acquitted-conduct sentencing in state courts, which impose the vast majority of criminal sentences. Although the Sentencing Commission finally has a quorum following a three-year hiatus, Opp. 15, it has failed to act on Justice Breyer's suggestion a quarter-century ago that "the Commission could decide to revisit this matter in the future." *Watts*, 519 U.S. at 159 (Breyer, J., concurring). The government fails even to acknowledge Justice Scalia's concerns that the Commission actually *lacks* "authority to decree that information which would otherwise justify enhancement of sentence * * * may not be considered * * * if it pertains to acquitted conduct." *Id.* at 158 (Scalia, J., concurring).

It is of no moment that "Congress currently is considering legislation * * * to prohibit consideration of acquitted conduct at sentencing." Opp. 15. As the government has repeatedly advised this Court, "[t]he speculative possibility that Congress might ultimately enact one of the bills that are still pending in committee should not deter the Court from considering the important questions presented by this case." U.S. Cert. Reply Br. at 8, *United States* v. *Eurodif S.A.*, No. 07-1059 (Apr. 2, 2008), 2008 WL 905193 (citation omitted); U.S. Cert. Reply Br. at 10 n.8, *Gonzales* v. *Duenas-Alvarez*, No. 05-1629 (Sept. 6, 2006), 2006 WL 2581844 (same). Moreover, a "[s]imilar bill[] w[as] introduced in the previous Congress but w[as] not enacted, and there is no evident reason to expect a different result now." U.S. Pet. at 26 n.7, *United States* v. *Clintwood Elkhorn Mining Co.*, No. 07-308 (Sept. 7, 2007), 2007 WL 2608817. This Court routinely grants review despite pending legislation. See, *e.g.*, *United States* v. *Windsor*, 570 U.S. 744 (2013); *TC Heartland LLC* v. *Kraft Foods Grp. Brands LLC*, 137 S.

Ct. 1514 (2017); *Henderson* v. *Shinseki*, 562 U.S. 428 (2011).

As to the lower courts, precedent prohibits judges in many circuits from "excluding acquitted conduct from the information that [they] could consider in the sentencing process." *United States* v. *Ibanga*, 271 F. App'x 298 (4th Cir. 2008) (per curiam); *United States* v. *Vaughn* 430 F.3d 518, 527 (2nd Cir. 2005) (vacating sentence and ordering district court "to consider all facts relevant to sentencing * * * even those relating to acquitted conduct"). Even district judges willing to disclaim consideration of acquitted conduct at sentencing will continue to risk reversal in the other circuits that have yet to wade into the debate. As Judge Millett recently observed, it thus "falls upon the Supreme Court to hold that sentencing defendants based on conduct for which they have been acquitted contravenes the Constitution and to firmly put an end to the practice." *United States* v. *Khatallah*, 41 F.4th 608, 653 (D.C. Cir. 2022) (Millett, J., concurring).

In any event, relying on individual "district court judges * * * willing to risk reversal [and] not disturbed by appellate reversals" would make criminal sentencing "turn on a spin of the judicial assignment wheel"; such a practice is incompatible with a "criminal justice system that touts its procedural fairness." Br. of the Nat'l Ass'n of Federal Defenders & FAMM as Amici Curiae Supporting Pet'r 18, 23.

D. No Vehicle Problem Would Prevent The Court From Resolving This Issue

Finally, the government contends that this case is "an unsuitable vehicle in which to review the question presented because the record does not clearly establish that the district court actually relied on conduct underlying petitioner's acquittal in sentencing him," and thus, "petitioner's sentence would therefore be lawful

even if the question presented were resolved in his favor." Opp. 16-17. That argument does not withstand even momentary scrutiny.

To begin, the government does not dispute that the judgment under review squarely affirmed petitioner's sentence *based on acquitted-conduct sentencing*: "McClinton * * * settle[d] the dispute" over robbery proceeds "by shooting Perry," and "under *Watts* * * * that could be used to calculate McClinton's sentence." Pet. App. 6a. The government is essentially attempting to portray a potential alternative ground for affirmance as a vehicle problem preventing the Court from reaching the question presented. But this Court regularly reviews cases although the petitioner may lose on another ground after an erroneous ruling is corrected. See, *e.g.*, *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201-202 (2012). The government has repeatedly persuaded this Court that "[t]he possibility that [petitioner] might ultimately be denied benefits on another ground would not prevent the Court from addressing the [question presented]. Indeed, the Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues to be decided on remand, if necessary." Cert. Reply Br. at 11, *Astrue* v. *Capato ex rel. B.N.C.*, 566 U.S. 541 (2012) (No. 11-159), 2011 WL 5098759; accord Cert. Reply Br. at 10, *Salazar* v. *Patchak*, 567 U.S. 209 (2012) (No. 11-247), 2011 WL 5856209 (similar).

In any event, the government's theory that petitioner could validly be sentenced based on the "acts and omissions of the *others*," Opp. 16, overlooks the fact that *the jury also acquitted petitioner of that theory of liability*. The government charged petitioner with aiding and abetting the others in robbing and shooting Perry, Pet. App. 23a (charging violation of 18 U.S.C. § 2); the government argued that petitioner was "responsible for everything [his] codefendants are doing, as well," Tr. 399;

and the district court instructed the jury that it should convict petitioner if one of the others robbed and shot Perry "if [petitioner] knowingly participated in the criminal activity and tried to make it succeed," Tr. 456. But the jury acquitted petitioner on *that* theory of liability for Perry's death too. Pet. App. 27a-28a.

The government's alternative theory that petitioner shot Perry in a dispute over proceeds but then did not bother to take the proceeds (Opp. 16) is nonsensical. The government did not raise this argument in the Seventh Circuit, Gov't C.A. Br. 11-14, which therefore did not address it. It is therefore forfeited. See *United States* v. *Jones*, 565 U.S. 400, 413 (2012). The government's *only* theory at trial was that petitioner alone robbed and killed Perry; no one else was charged for the offense. It was undisputed that the drugs had been taken from Perry's body, Tr. 201, 401, and that the shooter took them. Petitioner's sole defense, which the jury plainly accepted, was that cooperating witness Yates "framed" petitioner of the murder and robbery of petitioner's best friend, which Yates had himself committed. Tr. 37, 43. The government's eleventh-hour alternative ground for affirmance provides no basis to insulate the Seventh Circuit's legal error from review.

Lastly, the government notes that this Court has denied petitions presenting this question in the past. Opp. 14. But nearly all of those cases arose before *Beck* and *Melvin* squarely rejected the idea that *Watts* controls the Fifth and Sixth Amendment analysis. Many of those cases, moreover, suffered from genuine vehicle problems that would prevent the Court from reaching the question. *E.g., Ludwikowski* v. *United States*, 141 S. Ct. 872 (2020) (No. 19-1293) (procedural default); *Price* v. *United States*, 140 S. Ct. 2743 (2020) (No. 19-7479) (same); *Bagcho* v. *United States*, 140 S. Ct. 2677 (2020) (No. 19-7001) (statutory mandatory minimum sentence not increased by

consideration of uncharged or acquitted conduct). Many raised only a Sixth Amendment challenge. *E.g.*, *Baxter* v. *United States*, 140 S. Ct. 2676 (2020) (No. 19-6647); *Prezioso* v. *United States*, 140 S. Ct. 2645 (2020) (No. 19-7086).

This case not only raises *both* Fifth and Sixth Amendment challenges; it does so in the context of an enhancement that this Court has recognized is "absurd"—"sentenc[ing] a man for committing murder even if the jury convicted him only of" a lesser offense. *Blakely* v. *Washington*, 542 U.S. 296, 306 (2004); *Apprendi*, 530 U.S. at 562 (Breyer, J., dissenting); *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting). This case thus squarely and cleanly presents an issue that is long overdue for this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN P. ELWOOD
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000

AARON BOWLING
ARNOLD & PORTER
KAYE SCHOLER LLP
70 West Madison Street
Suite 4200
Chicago, IL 60602
(312) 583-2300

ELIE SALAMON
Counsel of Record
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000
elie.salamon@arnoldporter.com

KAREN OAKLEY
LAW OFFICE OF KAREN
OAKLEY, LLC
P.O. Box 54111
Cincinnati, OH 45254
(513) 436-1618

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Appendix 2

McClinton v. United States,
Case No. 21-1557

Supplemental Reply

January 2023

No. 21-1557

In the Supreme Court of the United States

DAYONTA MCCLINTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

SUPPLEMENTAL BRIEF FOR PETITIONER

JOHN P. ELWOOD
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000

AARON BOWLING
ARNOLD & PORTER KAYE SCHOLER LLP
70 West Madison Street
Suite 4200
Chicago, IL 60602
(312) 583-2300

ELIE SALAMON
Counsel of Record
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000
elie.salamon@arnoldporter.com

KAREN OAKLEY
LAW OFFICE OF KAREN OAKLEY, LLC
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Cincinnati, OH 45254
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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court's Rule 15.8, petitioner submits this supplemental brief to address the Government's letter filed on January 18, 2023 concerning the recent proposal by the United States Sentencing Commission.

1. On January 12, 2023, the Sentencing Commission published Preliminary Proposed Amendments to the Sentencing Guidelines. See U.S. Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines (Preliminary), Proposed Amendment: Acquitted Conduct* 13-14 (Jan. 12, 2023), https://bit.ly/3QOA35o (Preliminary Proposed Amendments).

The proposal, which is explicitly denominated "Preliminary," includes twelve categories of amendment proposals, one of which relates to acquitted conduct. By their own terms, the proposals will be subject to public comment, hearings, debate, and revision before eventually being put to a vote at some point, typically after at least a year-long process. See U.S. Sentencing Commission, *Amendment Process*, http://bit.ly/3weG2Y4 (last visited Jan. 19, 2023).

The Preliminary Proposed Amendments would provide that acquitted conduct "*generally* shall not be considered relevant conduct for purposes of determining the guideline range." Preliminary Proposed Amendments 13-14 (emphasis added). But as the government concedes, the proposed amendments would continue to allow judges to increase a defendant's punishment by considering acquitted conduct when "determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted." *Id.* at 14.

2. The Preliminary Proposed Amendments only highlight the Sentencing Commission's inability to effectively address the unfair and unconstitutional

practice of acquitted-conduct sentencing. They present no reason for this Court to deny review.

To begin with, the government has not even acknowledged, much less refuted, Justice Scalia's concern that the Commission lacks "authority to decree that information which would otherwise justify enhancement of sentence * * * may not be considered * * * if it pertains to acquitted conduct." *United States* v. *Watts*, 519 U.S. 148, 158 (1997) (Scalia, J., concurring). Attempting to address acquitted-conduct sentencing through a guidelines amendment does nothing to resolve the fundamental constitutional questions that have divided the courts, but instead creates *additional* legal uncertainty about the Commission's statutory authority to act.

Second, the Preliminary Proposed Amendments are toothless. Even if the Sentencing Commission eventually votes to adopt the Amendments, they would *still permit* judges to rely on acquitted conduct to increase a defendant's sentence so long as they use the simple expedient of relying on an upward departure instead of a guidelines adjustment to increase the sentence. The proposal represents little more than a semantic speed-bump that does nothing to prevent a judge from "gut[ting] 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. 2018) (Millett, J., concurring). And the current proposals are framed to have prospective effect only, offering no relief whatsoever to the hundreds or thousands of criminal defendants like petitioner whose cases are now pending or who will be sentenced before the Sentencing Commission finally acts.

Third, and most fundamentally, the Preliminary Proposed Amendments would have no effect whatsoever on the vast majority of criminal sentences imposed in the

United States: those imposed by *state courts*. The Sentencing Commission's authority only reaches the sentencing policies and practices of federal courts. See 28 U.S.C. § 994(a). Even if the Sentencing Commission categorically prohibited judges from considering acquitted conduct at sentencing, it would hardly scratch the surface of constitutional violations. After all, "the vast majority of criminal cases in the U.S."—over 94 percent—"are prosecuted in state courts." Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue*, 50 Wm. & Mary L. Rev. 211, 243 & n.158 (2011). The Proposed Amendments will have no effect whatever on most unconstitutional sentences.

3. In short, the Sentencing Commission's disputed authority to eventually impose minor, prospective restrictions as a matter of policy on under six percent of criminal sentences presents no reason for this Court to deny review of fundamental constitutional questions that are ripe for this Court's review. "This has gone on long enough. * * * [This Court] should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment" and the Fifth Amendment Due Process Clause. *Jones* v. *United States*, 574 U.S. 948, 950 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of cert.).

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari and reply brief, the petition should be granted.

Respectfully submitted.

JOHN P. ELWOOD
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000

AARON BOWLING
ARNOLD & PORTER
KAYE SCHOLER LLP
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Appendix 3

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Supplemental Reply

March 2023

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court's Rule 15.8, petitioner submits this supplemental brief to further address the government's letter filed on January 18, 2023 concerning the recent proposal by the United States Sentencing Commission.

1. In its brief in opposition, the government argued that "[t]his Court's intervention" was not "necessary to address" the widespread problem of acquitted-conduct sentencing because "the Sentencing Commission could promulgate guidelines to preclude such reliance." Br. in Opp. 15. In January 2023, the Sentencing Commission introduced preliminary proposed amendments that would, if adopted, place modest limitations on federal courts' consideration of acquitted conduct in sentencing. Several days later, the government submitted a letter to this Court to notify it of that proposal. See Letter from Elizabeth B. Prelogar, Solicitor General, U.S. Dep't of Just., to the Hon. Scott S. Harris, Clerk, Supreme Court of the United States, Re: *McClinton* v. *United States*, No. 21-1557 (Jan. 18, 2023). The Sentencing Commission invited public comment on the proposal through March 14, 2023. See U.S. Sentencing Comm'n, *Proposed Amendments to the Sentencing Guidelines (Preliminary), Proposed Amendment: Acquitted Conduct* 1 (Jan. 12, 2023), https://bit.ly/3QOA35o. As Sentencing Commission Vice Chair Laura Mate has since explained, the pending proposal does not provide "that acquitted conduct be entirely banned from a court's considerations at sentencing," but is "just a more narrow proposal" to place modest restrictions on its use. *Proposed Amendments to the Federal Sentencing Guidelines Before the U.S. Sentencing Comm'n*, at 2:08:05 (Feb. 24, 2023) (remarks of Laura Mate, Vice

Chair, U.S. Sentencing Comm'n), *available at* http://bit.ly/3KN96OH.

2. On February 15, 2023, the U.S. Department of Justice submitted written testimony to the Commission, urging it to reject even those modest proposed changes. Letter from Jonathan J. Wroblewski, Dir., Off. of Pol'y and Legis., Crim. Div., U.S. Dep't of Just., *ex officio* Member, to Hon. Carlton W. Reeves, Chair, U.S. Sentencing Comm'n 12 (Feb. 15, 2023), https://bit.ly/3Zg5skY (Gov't Views).

In urging the Sentencing Commission to reject the proposed amendments, the government began its argument with a broad reading of *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam). The government argued that the Commission's proposal to "[c]urtail[] the consideration of acquitted conduct at sentencing would be a significant departure from long-standing sentencing practice" because this "Court has continued to affirm that there are no limitations on the information concerning a defendant's background, character, and conduct that courts may consider in determining an appropriate sentence." Gov't Views at 12-13.

That expansive reading of *Watts* is deeply at odds with the far more limited understanding the government has presented to this Court. In *United States* v. *Booker*, the government described *Watts* as holding only that "*the Double Jeopardy Clause* does not prevent the district court from increasing the offense level on the basis of the conduct underlying the acquitted charge." U.S. Br. at 7, *United States* v. *Booker*, 543 U.S. 220 (2005) (No. 04-104), 2004 WL 1967056 (emphasis added). The Court ultimately adopted that view, writing that *Watts* "presented a very narrow question regarding the interaction of the [U.S. Sentencing] Guidelines with the Double Jeopardy Clause, and did not even have the

benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 n.4. As noted in petitioner's reply brief, Reply Br. 2-4, the federal courts of appeals and state courts of last resort remain divided on whether *Watts* broadly held that acquitted conduct sentencing is constitutional, or whether it merely rejected a double jeopardy challenge to the practice. See *People* v. *Beck*, 939 N.W.2d 213, 224 (Mich. 2019) (holding that *Watts* concerned only a double jeopardy challenge); *State* v. *Melvin*, 258 A.3d 1075, 1089-1090 (N.J. 2021) (same).

3. The government also appears to have reversed its position on whether "the Sentencing Commission could promulgate guidelines to preclude such reliance." Br. in Opp. 15. In oral testimony to the Commission in February, the government argued that "[t]he Commission's proposal is unfortunately inconsistent with [18 U.S.C. § 3661]," a statute governing sentencing law. *Proposed Amendments to the Federal Sentencing Guidelines Before the U.S. Sentencing Comm'n*, at 1:58:21 (Feb. 24, 2023) (statement of Jessica D. Aber, U.S. Att'y, E.D. Va.), *available at* https://bit.ly/3IAUe3j (Aber Test.). As petitioner noted, Reply Br. 7, Justice Scalia relied on this same statute when he rejected the suggestion that the Sentencing Commission could alone address the practice of acquitted-conduct sentencing. He wrote that an amendment passed by the Commission would be improper under § 3661, which provides that "[n]o limitations shall be placed on the information concerning the background, character, and conduct of [a defendant] which a court * * * may receive and consider for the purpose of imposing an appropriate sentence." *Watts*, 519 U.S. at 158 (Scalia, J., concurring) (quoting 18 U.S.C. § 3661). The government's adoption of this argument is difficult to square with its assurances to this Court that "this Court's intervention" is not "necessary to

address" the problem of acquitted-conduct sentencing. Br. in Opp. 15.

4. By statute, the U.S. Department of Justice is designated an *ex officio* Member of the Sentencing Commission, and its member represents it in all Commission meetings, even nonpublic ones. See 28 U.S.C. § 991(a). Though formally a "nonvoting member," *ibid.*, very little gets passed without the Department of Justice Member's support. Indeed, the last time the Sentencing Commission proposed amendments to limit the use of acquitted conduct under the Guidelines' relevant conduct provisions in 1993, the U.S. Department of Justice's *ex officio* Member "strenuously oppose[d]" the proposal, and the Commission accordingly rejected it. See *Witness Testimony, Public Hearing on Proposed Guidelines Amendments, Vol. II Before the U.S. Sentencing Comm'n* 3-7 (Mar. 22, 1993) (statement of Roger A. Pauley, *ex officio* Member, U.S. Sentencing Comm'n, U.S. Dep't of Just.), https://bit.ly/3mgyoKG; Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. Rev. 153, 191 (1996). Here, too, the government's vigorous opposition likely condemns the current proposal to the same fate as the 1993 proposed amendments and dooms any chance of even modest Commission action on the issue of acquitted-conduct sentencing. Even if it were to succeed, the government would certainly maintain that courts are not bound by guidelines provisions that are "unfortunately inconsistent with [18 U.S.C. § 3661]." Aber Test., *supra* at 1:58:21.

* * * * *

Even as the government urges this Court that other mechanisms exist to address a controversial sentencing practice that a host of distinguished jurists have criticized, see Pet. 11-15; Br. of 17 Former Federal Judges as *Amici*

Curiae 1, the government simultaneously invokes a disputed reading of the quarter-century-old *per curiam* opinion in *Watts* to defeat even the most modest efforts at reform. And contrary to its assurances to this Court, it now contends that the Sentencing Commission *lacks* authority to promulgate amendments addressing the practice.

Absent further guidance from this Court, there is no reasonable prospect of ending acquitted-conduct sentencing, even at the federal level. And absent this Court's review, there is *no* prospect of the practice ending at the state level, which comprises "the vast majority of criminal cases in the U.S." Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 Wm. & Mary L. Rev. 211, 242-243 & n.158 (2011). Only this Court can "put an end to the unbroken string of cases disregarding the Sixth Amendment" and the Fifth Amendment Due Process Clause. *Jones* v. *United States*, 574 U.S. 948, 950 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of cert.). "This has gone on long enough." *Ibid.*

CONCLUSION

For the foregoing reasons, and those stated in our previous filings, the petition should be granted.

Respectfully submitted.

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