**No**. ____

October Term, 2022

IN THE
Supreme Court of the United States

LAMAR VICTOR MONCRIEFFE,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

In 1997, this Court held that a sentencing court may rely on acquitted conduct to enhance a sentence and that the conduct need only to be proven by a preponderance of the evidence at sentencing. *United States v. Watts*, 117 S. Ct. 633, 638 (1997). However, this Court later clarified that the holding in *Watts* only "presented a very narrow question regarding the interaction of the [Sentencing] Guidelines with the Double Jeopardy Clause, and it did not even have the benefit of full briefing or oral argument." *United States v. Booker*, 125 S. Ct. 738, 754 n.4 (2005). In the more than a quarter of a century since *Watts*, this Court's jurisprudence has evolved to the point where this Court has made it clear that any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime that must be found by a jury, not a judge. *See Apprendi v. New Jersey*, 530 U.S. 466, 483, 490 (2000); *see also Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013); *Cunningham v. California*, 549 U.S. 270, 281 (2007). This petition thus raises the following question for review which calls into question the continued validity of this Court's *Watts* decision:

**Whether a district court violates a defendant's Fifth Amendment and Sixth Amendment rights by basing a substantial four-level sentencing enhancement on conduct for which a jury has acquitted the defendant?**

## INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

## RELATED CASES

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# PETITION FOR WRIT OF CERTIORARI

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Mr. Lamar Victor Moncrieffe respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 22-10351, in that court on May 5, 2023, *United States v. Moncrieffe,* which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida

## OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District District of Florida, is contained in the Appendix (A-1).

## STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on , 2018. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions:

**U.S. Const., amend. V**:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

**U.S. Const., amend. VI:**

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and pubic trial, by an impartial jury . . . .

## STATEMENT OF THE CASE

### COURSE OF PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT

The Appellant, Mr. Lamar Victor Moncrieffe, is currently incarcerated serving a 41-month term of imprisonment.

A grand jury in the Southern District of Florida charged Mr. Moncrieffe with one count of possession of a firearm and ammunition by a convicted felon (count one); one count of possession with intent to distribute cocaine (count two); and brandishing a firearm in furtherance of a drug trafficking crime (count three). (DE 1). Following a jury trial, the jury convicted Mr. Moncrieffe as to counts one and two, but acquitted him as to count three. At sentencing, the district court sentenced Mr. Moncrieffe to a 41-month term of imprisonment. (DE 107).

## STATEMENT OF FACTS

Mr. Lamar Victor Moncrieffe is a thirty year-old native of Miami, Florida. Presentence Report ("PSR") at ¶ 57. Mr. Moncrieffe was one of eleven children born to drug-addicted parents. *Id*. at ¶ 58. When he was just an infant, Mr. Moncrieffe and two of his siblings were placed up for adoption due to their parents' drug problems, and the three of them were adopted by the Moncrieffe family. *Id*.

Mr. Moncrieffe attended several high schools but never graduated high school. PSR ¶¶ 73-75. Since the age of twenty-one, Mr. Moncrieffe has been convicted three times for unlawful possession of a firearm. PSR ¶¶ 34, 37, 38.

In the instant case, Mr. Moncrieffe and several other individuals were outside of a local convenience store in Miami Gardens at night. Undercover officers from the

Miami Gardens Police Department approached the group. At trial, an officer testified that the police had not been called to the location and that there was no evidence of drug dealing and that no firearms were visible. As the undercover officers approached, Mr. Moncrieffe took off on foot and the officers began to chase Mr. Moncrieffe. (DE 142:82-85). Eventually, a civilian, who was in a nearby vehicle, chased and tackled Mr. Moncrieffe. *Id*. at 89.

At trial, a civilian testified that she and her husband and child were in a nearby car when she saw Mr. Moncrieffe running from the police. (DE 142:34-37). The civilian testified that she saw Mr. Moncrieffe point a firearm at the officers as he ran and she then told her husband to do something. *Id*. at 37. Her husband jumped out of the car and tackled Mr. Moncrieffe. *Id*. at 38-39.

An officer testified that during the chase, Mr. Moncrieffe pulled a firearm out of his waistband and pointed it at the officer. (DE 142:53-58). The officers also testified that when Mr. Moncrieffe was tackled, a firearm fell out of his waistband. *Id*. at 59-60. Mr. Moncrieffe was arrested and paramedics tended to his injuries from the take-down and arrest at scene. An officer testified that it was not until after the paramedics treated Mr. Moncrieffe and the police were again handcuffing Mr. Moncrieffe for transport to the jail that they found baggies containing cocaine in his jacket. (DE 142:166-167).

A grand jury in the Southern District of Florida charged Mr. Moncrieffe with one count of possession of a firearm and ammunition by a convicted felon (count one); one count of possession with intent to distribute cocaine (count two); and brandishing

a firearm in furtherance of a drug trafficking crime (count three). (DE 1). Prior to trial, Mr. Moncrieffe offered to admit guilt as to counts one and two but not as to count three. The government refused to agree to such a plea and Mr. Moncrieffe proceeded to trial. Following a jury trial, the jury convicted Mr. Moncrieffe as to counts one and two, but acquitted him as to count three. He was thus convicted of the two charges to which he was willing to enter a plea a guilty.

Prior to sentencing, counsel for Mr. Moncrieffe objected to the use of acquitted conduct to support a sentencing enhancement. (DE 101). Specifically, Mr. Moncrieffe objected to paragraph 23 of the presentence report which recommended a substantial four-level enhancement for use or possession of a firearm in connection with another felony offense under U.S.S.G. § 2K2.1(b)(6). PSR ¶ 23. At sentencing, the district court rejected the objection and expressly relied on the testimony that Mr. Moncrieffe pointed a firearm at the pursuing officers in support of the enhancement even though the jury acquitted Mr. Moncrieffe on the brandishing charge in count three. (DE 140:15-16). The district court sentenced Mr. Moncrieffe to a 41-month term of imprisonment. (DE 107).

**PROCEEDINGS IN THE COURT OF APPEALS**

On appeal, Mr. Moncrieffe argued that the district court violated his Fifth Amendment and Sixth Amendment rights when it based a substantial four-level enhancement on conduct for which he had been acquitted by a jury. In affirming the sentence imposed, the Eleventh Circuit Court of Appeals held that "even if the district court relied on acquitted conduct – Moncrieffe's acquitted-conduct argument is

foreclosed by binding precedent. *United States v. Faust*, 456 F.3d 1342, 1346 (11th Cir. 2006)." *United States v. Moncrieffe*, No. 22-10351, 2023 WL 3644647 at *4 (May 25, 2023) (unpublished).

## REASONS FOR GRANTING THE WRIT

**Mr. Moncrieffe's constitutional rights under the Fifth and Sixth Amendment were violated when the district court enhanced Mr. Moncrieffe's sentence based on acquitted conduct following a jury trial.**

Mr. Moncrieffe acknowledges that controlling precedent allows a sentencing court to rely on conduct for which a criminal defendant has been acquitted by a jury to be used at sentencing to enhance a sentence based solely on a preponderance of evidence. In 1997, this Court held that a sentencing court may rely on acquitted conduct to enhance a sentence and that the conduct need only to be proven by a preponderance of the evidence at sentencing. *United States v. Watts*, 117 S. Ct. 633, 638 (1997). However, this Court later clarified that the holding in *Watts* only "presented a very narrow question regarding the interaction of the [Sentencing] Guidelines with the Double Jeopardy Clause, and it did not even have the benefit of full briefing or oral argument." *United States v. Booker*, 125 S. Ct. 738, 754 n.4 (2005). Nevertheless, the Eleventh Circuit Court of Appeals, which affirmed Mr. Moncrieffe's conviction and sentence, has consistently followed the holding in *Watts* noting that "a jury cannot be said to have necessarily rejected any particular fact when it returns a general verdict of not guilty." *United States v. Maddox*, 803 F.3d 1215, 1221 (11th Cir. 2015) (citing *Watts*); *see also United States v. Faust*, 456 F.3d 1342, 1347 (11th Cir. 2006) (expressly rejecting a Sixth Amendment challenge to the use of acquitted conduct at sentencing); *United States v. Poyato*, 454 F.3d 1295, 1299 (11th Cir. 2006).

Despite the prior decisions of the Eleventh Circuit, on appeal, Mr. Moncrieffe challenged the reliance of acquitted conduct to enhance his sentence.

The Sixth Amendment guarantees criminal defendants the right to a trial by an impartial jury. U.S. Const., amend. VI. That right grew out of centuries-old common law where a jury trial was seen as an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The Fifth Amendment guarantees criminal defendant the right to Due Process. U.S. Const., amend. V.

This Court's jurisprudence with regard to the punishment that can constitutionally be imposed on a criminal defendant based on whether a fact is found by a jury beyond a reasonable doubt or found by a judge at sentencing by a mere preponderance of evidence has evolved in the past two decades. Specifically, this Court has clarified that "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.'" *Jones v. United States*, 135 S. Ct. 8 (Oct. 14, 2014) (Scalia, J., dissenting from denial of certiorari, joined by Thomas, J. and Ginsburg, J.) (quoting *Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013)). "Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime," and "must be found by a jury, not a judge." *Id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466, 483, 490 (2000); *Cunningham v. California*, 549 U.S. 270, 281 (2007)). Justice Scalia then joined that jurisprudence

with the clear law that "a substantively unreasonable penalty is illegal and must be set aside," (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)), to conclude as follows:

> It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable – thereby exposing the defendant to the longer sentence – is an element that must be either admitted by the defendant or found by the jury. It ***may not*** be found by a judge.

*Id*. at *8 (emphasis in original). Justice Scalia further posited that such a violation of the Fifth and Sixth Amendments would be the most egregious where a sentencing judge relied on acquitted conduct to enhance a sentence by finding the facts underlying the acquitted conduct by a preponderance of evidence. *Id*.

Again, the facts presented at trial were not very complicated. Mr. Moncrieffe fled on foot from police officers arriving at the convenience store. A police officer and a civilian witness testified that they saw Mr. Moncrieffe pull out a firearm and aim it at the officer. The officer further testified that another civilian tackled Mr. Moncrieffe and that a firearm fell out of his waistband when he was tackled. After he was handcuffed, officers found a total of 4 ounces of cocaine in separate baggies on Mr. Moncrieffe. The jury determined that Mr. Moncrieffe was guilty of possession of a firearm by a convicted felon, count one, and guilty of possession of cocaine with intent to distribute, count two. But the jury acquitted Mr. Moncrieffe of count three which charged him with brandishing a firearm in furtherance of a drug trafficking crime.

Because Mr. Moncrieffe was in fact convicted of a drug trafficking crime, possession of cocaine with intent to distribute, it seems clear that the jury simply did

not believe that Mr. Moncrieffe actually brandished a firearm in connection to the offense of conviction, possession of cocaine with intent to distribute. Mr. Moncrieffe's brandishing of the firearm was in fact the least believable part of the testimony from the officer and the civilian witness.

The civilian witness testified that she was making deliveries at night in a dangerous part of town and that she thus brought her husband and young child with her. She testified that she saw Mr. Moncrieffe running away from the police and that while he was running away from the police, she saw Mr. Moncrieffe pull out a firearm and aim it at the officer. She testified that after she saw Mr. Moncrieffe pull out a firearm and aim it at the officer, she encouraged her husband to get out of the car and do something. She then testified that her husband got out of the car and tackled Mr. Moncrieffe even though, from her own testimony, Mr. Moncrieffe was armed and her husband was not. On cross-examination, she could not explain why, after seeing Mr. Moncrieffe aim a firearm at the police officer she encouraged her unarmed husband to get out of the car at night and chase an armed stranger fleeing the police. (DE 142:34-39).

The officer testified that, as he was chasing Mr. Moncrieffe, Mr. Moncrieffe pulled a firearm out of his waistband and pointed it at the officer, without stopping. On cross-examination, the officer could not explain why he didn't pull out his own firearm as a firearm was pointed at him or why he didn't yell out to the other officers that the suspect was aiming a firearm at him. (DE 142:53-58).

As to the connection of the firearm to the drug offense, the government again presented the "expert' testimony of the DEA agent who based his opinion on his memory from other cases and vague training that he could not specifically identify. The jury deliberated for a long time and notified the judge that they were having a difficult time reaching a verdict. (DE 93). Whatever occurred in the jury room, one thing is clear: the jury did not believe that Mr. Moncrieffe had in fact brandished a firearm that night. If the jury had made such a determination, then they would have convicted Mr. Moncrieffe on count three. But they did not.

Yet, in the presentence report, the probation office recommended a substantial four-level sentencing enhancement, under U.S.S.G. § 2K2.1(b)(6), because Mr. Moncrieffe used or possessed the firearm "in connection with another felony offense." PSR ¶ 23. Mr. Moncrieffe had a criminal history category of III. PSR ¶ 40. Without the substantial four-level enhancement, his offense level would have been a level 14, but the enhancement made his final offense level as level 18. PSR ¶¶ 22-30. That means that the four-level enhancement raised his advisory sentencing range from 21-27 months to 33-41 months.

Prior to sentencing, counsel for Mr. Moncrieffe filed objections to the presentence report, and specifically, the four-level enhancement for possession of a firearm in connection with another felony under U.S.S.G. § 2K2.1(b)(6). (DE 101). Counsel for Mr. Moncrieffe argued that application of the enhancement necessitated application of acquitted conduct. The district court, consistent with Eleventh Circuit precedent, held that it could enhance Mr. Moncrieffe's sentence based on acquitted

conduct as long as it found the fact supporting the enhancement by a preponderance of evidence regardless of the jury's acquittal judgment on Count Three.

Here, the fact found by a judge by a preponderance of the evidence, that Mr. Moncrieffe possessed the firearm in connection with a felony offense, directly conflicts the finding of the jury that Mr. Moncrieffe did NOT brandish the firearm in furtherance of a drug trafficking offense. In addition, that judicially-found fact that was clearly based on acquitted conduct resulted in a greater than 50% increase from the high end of what otherwise would have been the advisory sentencing range, 27 months, to the high end of the sentencing range with the enhancement, 41 months. The district court sentenced Mr. Moncrieffe to a 41-month term of imprisonment.

There was no other basis provided by the court to support a 50% sentencing enhancement. Thus, under the logic of Justice Scalia and the other dissenters in *Jones*, that key fact should have been found by a jury beyond a reasonable doubt and not by a judge by a preponderance of evidence. *See Jones*, 135 S. Ct. at *8, *9 (Scalia, J., dissenting from denial of certiorari, joined by Thomas, J. and Ginsburg, J.). Because it was found by a judge by a mere preponderance, the sentence was unreasonable under *Gall* and in violation of Mr. Moncrieffe's constitutional rights under the Fifth and Sixth Amendments. *See id.*

## CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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August 22, 2023