

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KAMAR LAQUAN COX, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

*ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth and Sixth Amendments prohibit a federal court from basing 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):

1. *United States v. Cox*, No. 2:20-cr-00166-SDM (July 5, 2021), United States District Court (S.D. Ohio); and
2. *United States v. Cox*, No. 22-3593 (June 12, 2023), United States Court of Appeals (6th Cir.).

TABLE OF CONTENTS

	Page
Table Of Authorities.....	1
Opinions Below	1
Jurisdiction.....	1
Constitutional Provisions Involved.....	1, 2
Statement of the Case.....	2-5
Reasons For Granting the Petition	5
Conclusion	6

INDEX TO APPENDIX

	Page
Appendix A: Court of Appeals Opinion (June 12, 2023)	1a
Appendix B: Judgment in a Criminal Case (July 5, 2022).....	10a
Appendix C: Indictment (October 1, 2020)	19a
Appendix D: District Court Jury Verdict Sheets (March 9, 2022).....	21a

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>Jones v. United States</i> , 574 U.S. 948, 949–50 (2014).....	6
Constitution and Statutes:	
U.S. Const. amend. V.....	1
U.S. Const. amend. VI	1, 2
28 U.S.C. § 1254(1)	1

OPINIONS BELOW

The June 12, 2023 opinion of the Court of Appeals for the Sixth Circuit appears at Appendix A to the Petition and is unpublished.

The July 25, 2022 Judgment and Conviction of the District Court for the Southern District of Ohio appears at Appendix B to the Petition and is unpublished.

JURISDICTION

The Court of Appeals decided this case on June 12, 2023, and no petition for rehearing was filed in the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States 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 to the Constitution of the United States 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.

STATEMENT OF THE CASE

Petitioner was sentenced to a term of imprisonment of 102 months, nearly twice what he would have received if his sentence had not been enhanced by the use of acquitted conduct. The crux of Petitioner's application for a writ is concisely summarized in the words of Circuit Judge Readler, who authored the Sixth Circuit's opinion affirming Petitioner's sentence:

Cox argues that the district court erred in applying this enhancement for brandishing because the jury acquitted him of such conduct. This is so, Cox says, because relying on acquitted conduct in sentencing violates the Fifth and Sixth Amendment. *See Jones v. United States*, 574 U.S. 948, 948 (2014) (mem.) (Scalia, J., dissenting from denial of certiorari) ("We should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment[.]"). **There may be something to his argument.** *See, e.g., United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (per curiam) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (questioning whether the Constitution allows a district judge to increase a defendant's sentence "based on facts the judge finds without the aid of a jury or the defendant's consent"). But, as Cox recognizes, Supreme Court and circuit precedent foreclose his argument.

United States v. Cox, No. 22-3593 (June 12, 2023), United States Court of Appeals (6th Cir.) (emphasis added)

As the Sixth Circuit noted, when Petitioner was briefing the issue before the Court of Appeals, he acknowledged that precedent from the Sixth Circuit and this Court likely foreclosed his argument. Nonetheless, Petitioner held out hope that while his appeal was pending before the Sixth Circuit, the United States Sentencing Commission would adopt the amendment it proposed in January of 2023, which would severely limit the use of acquitted

conduct in sentencing. Petitioner also held out hope that this Court would grant *certiorari* in the case *McClinton v. United States*, Supreme Court Case No. 21-1557, where the questioned propriety of using acquitted conduct to enhance sentences was squarely presented to this Court. Finally, Petitioner was hopeful that Congress would act on the bi-partisan bills introduced in the House¹ and Senate, which would amend 18 U.S.C. 3661 to prohibit federal courts from considering acquitted conduct for sentencing except as a mitigating factor. Unfortunately, none of these events occurred.

Here is what happened – the congressional process stalled in the Senate, which is likely waiting for this Court or the Sentencing Commission to take action which would make new legislation unnecessary. Indeed, the Solicitor General sent a letter to this Court’s Clerk on January 18, 2023 (a copy of which was filed in the *McClinton* case) indicating that the Sentencing Commission had proposed an amendment on January 12, 2023 regarding acquitted conduct. The Sentencing Commission solicited and received public comment on the proposed acquitted conduct amendment with March 14, 2023 being the closing date for public comment. If adopted, the proposed amendment would become effective on November 1, 2023.

Despite the propelling force behind the proposed acquitted conduct amendment, something happened to derail the process. On April 27, 2023, the Sentencing Commission published the adopted amendments that would become effective on November 1, 2023. Conspicuously absent from the adopted amendments was an amendment relating to acquitted conduct. Inquiries to the Sentencing Commission have provided no official record as to why the proposed amendment was withdrawn, rather than adopted, but the unofficial

¹ The House bill passed on March 28, 2022 by a vote of 405 to 12.

word is that the Sentencing Commission believed this Court was going to grant *certiorari* in *McClinton* and take up the constitutional issues presented by the use of acquitted conduct in sentencing.

However, on June 30, 2023, this Court issued its opinion in *McClinton* and denied *certiorari* because “[t]he Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted-conduct sentencing in the coming year.” It is assumed that this Court’s reference to an announcement from the Sentencing Commission stems from the Sentencing Commission’s April 5, 2023 press release wherein the Sentencing Commission announced the adoption of proposed amendments – with the exception of the acquitted conduct amendment – and stated that “... there is more work to do. In the year to come, **the Commissioners will continue to study** a number of proposed policies, including those regarding how the guidelines treat acquitted conduct....” *News Release*, April 5, 2023, www.ussc.gov/about/news/press-releases/april-5-2023. (emphasis added).

The next statement on the issue occurred on August 24, 2023, when the Sentencing Commission issued a news release announcing that “[t]he Commission will also review and **potentially** amend how the guidelines treat acquitted conduct for purposes of sentencing.” *News Release*, August 24, 2023, www.ussc.gov/about/news/press-releases/august-24-2023 (emphasis added).

At this point, the Sentencing Commission is moving backwards: from a definite, proposed amendment in January of 2023, to the withdrawal of that proposed amendment in April of 2023 to now “potentially” amending how the Guidelines treat acquitted conduct. This does not provide the Petitioner with much confidence. Meanwhile, the other entities

that could have resolved the issue (this Court and Congress) have chosen to not address the issue, likely on the assumption that the Sentencing Commission would do something, and now are left in the unfortunate position of having misplaced faith in the Sentencing Commission to make hard decisions in a timely fashion. Unfortunately, only this Court or Congress can effectively, and with finality, end the use of acquitted conduct at sentencing. As a practical matter, even if the Sentencing Commission would act to prohibit the use of acquitted conduct in sentencing, the proper forum for the promulgation of a broad, constitutional rule is this Court (or maybe Congress), particularly since the Guidelines are only advisory rather than mandatory. As such, Petitioner's case is ripe for this Court to allow the writ.

REASONS FOR GRANTING THE PETITION

The foregoing Statement of the Case reads like an argument and, as such, the need to restate it here would be a redundancy. Likewise, as reflected in the June 30, 2023 denial of McClinton's petition for a writ of *certiorari*, this Court is well aware of the arguments against the use of acquitted conduct at sentencing, and there is no need to repeat the same here.

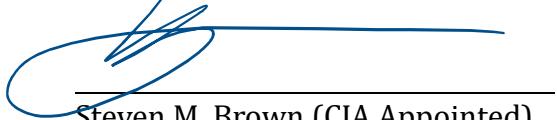
So what has changed between the Court's denial of McClinton's petition and now? First, it is now clear that the prior strategy of "waiting on the other guy" to fix the issue is not going to work. Secondly, the "other guy" is moving in the wrong direction – from a definitive (though still lacking) proposed amendment that restructured the Guideline's use of acquitted conduct in sentencing – to now an equivocating promise to "continue to study" the issue and "potentially" propose a new amendment. At best, this feels like a "definite maybe". Meanwhile, people like Petitioner can only plead the thought expressed by Justice Scalia a

decade ago...“this has gone on long enough.” *Jones v. United States*, 574 U.S. 948, 949–50 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of cert.).

CONCLUSION

This unsettled important question of federal law has not been, but should be, settled by this Court. As such, Petitioner respectfully requests that this Court grant his Petition and allow the issuance of a writ of *certiorari*.

Respectfully submitted,



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