No. 23-A248

In the Supreme Court of the United States

MICHAEL O'BANNON,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Constitution permits a criminal defendant to be sentenced based on conduct for which he or she was acquitted.

RELATED PROCEEDINGS

United States v. Pierre Riley, et al., Case No. 1:18-cr-00116-JRS-MJD, United States District Court for the Southern District of Indiana

United States v. Thomas Jones, et al., Case No. 20-1405, United States Court of Appeals for the Seventh Circuit (consolidated appeal that included Petitioner's appeal, originally docketed at 20-2498)

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PETITION FOR WRIT OF CERTIORARI

The government charged Michael O'Bannon with possession of methamphetamine with intent to distribute and conspiracy to possess and distribute methamphetamine. The jury convicted him on possession and acquitted him on the conspiracy charge. But when the district court sentenced O'Bannon, it found—contrary to the verdict—that he participated in the charged conspiracy. This finding dramatically increased O'Bannon's sentence.

The Court should grant certiorari to decide a question that four sitting Justices have described as "important": whether the Constitution permits "the use of acquitted conduct to increase a defendant's Sentencing Guidelines range." *McClinton v. United States*, 143 S. Ct. 2400, 2401 (2023) (Sotomayor, J., respecting the denial of certiorari); *see id.* at 2403 (Kavanaugh, J., joined by Gorsuch and Barrett, J.J., respecting the denial of certiorari). In June 2023, the Court declined to decide this issue shortly after the United States Sentencing Commission had "announced that it [would] resolve questions around acquitted-conduct sentencing in the coming year." *Id.* at 2403 (Sotomayor, J., respecting the denial of certiorari). This petition presents the Court with a clean vehicle for review "[i]f the Commission does not act expeditiously or chooses not to act." *Id.*

The Court should grant the petition. Alternatively, it should hold the petition until the Sentencing Commission acts and, if the Commission changes the rules on acquitted-conduct sentencing, summarily reverse and remand for resentencing.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 56 F.4th 455 and reproduced at pages A2-95 of the appendix.

JURISDICTION

The Seventh Circuit issued its opinion on December 22, 2022. A2-A101. The Seventh Circuit denied O'Bannon's petition for rehearing or rehearing en banc on June 21, 2023. A1. On September 18, 2023, Justice Barrett extended O'Bannon's time to file a petition for writ of certiorari until November 18, 2023. Under Supreme Court Rule 30, the petition for writ of certiorari became due on November 20, 2023, because November 18 was a Saturday. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall be * * * subject for the same offence to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty, or property, without due process of law * * * .

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * * .

STATEMENT OF THE CASE

A. Indictment

In the course of wiretapping phones belonging to Michael O'Bannon's father and uncle, the police overheard conversations with O'Bannon that they believed were connected to a drug conspiracy. A100-02. They also overheard conversations with O'Bannon that led them to believe that he had hired two shooters to kill a government informant; the informant was not killed. A4, 54, 66.

O'Bannon was indicted on five counts in the Southern District of Indiana: (1) conspiracy to possess with intent to distribute controlled substances; (2) conspiracy in the commission of murder for hire; (3) possession with intent to distribute controlled substances; (4) possession of a firearm in furtherance of a drug trafficking crime; and (5) possession of a firearm by a previously convicted felon. A107-16, 117-20, 123-24. The case went to trial with three other defendants in October 2020.

B. Verdict And Sentence

The jury convicted O'Bannon of conspiracy to commit murder for hire, possession of controlled substances with intent to distribute, and possession of a firearm by a previously convicted felon. But the jury acquitted O'Bannon of conspiracy to possess with intent to distribute controlled substances, and possession of a firearm in furtherance of a drug trafficking crime. A121, 126, 128-29.

The district court sentenced O'Bannon to 450 months in prison for possession with intent to distribute controlled substances. A89, 233. In doing so, it imposed a series of enhancements "after finding by a preponderance of the evidence that O'Bannon had actually participated in the conspiracy." A100. O'Bannon objected, arguing that an enhancement based on acquitted conduct is unconstitutional, but recognized that this argument was foreclosed by Seventh Circuit precedent. A100-01, 169-89. The district court also sentenced O'Bannon to 120 months' imprisonment for the murder-for-hire charge, and 120 months' imprisonment for the firearm-possession charge, to be served concurrently with the drug-possession sentence. A89, 233.

C. Seventh Circuit Appeal

O'Bannon appealed to the Seventh Circuit on several grounds, including that "he was unconstitutionally sentenced based on conduct for which he was acquitted." A100-01. The Seventh Circuit affirmed O'Bannon's conviction and sentence. *Id.* It then denied O'Bannon's petition for rehearing or rehearing en banc. A1.

D. The U.S. Sentencing Commission's Preliminary Steps To Address Acquitted-Conduct Sentencing.

In February 2023, the Sentencing Commission proposed a series of amendments to the Sentencing Guidelines that would have limited the use of sentencing based on acquitted conduct. *See* Proposed Amendments to the Sentencing Guidelines § 8 (Feb. 2, 2023) (available online). The proposed amendment to

U.S.S.G § 1B1.3 provides that "[a]cquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range" unless it is admitted by a defendant or proven beyond a reasonable doubt. *Id.*

The Sentencing Commission received a substantial amount of feedback on the proposal, which was mostly supportive of the restriction on acquitted-conduct sentencing. U.S. Sentencing Commission, Public Comment from March 14, 2023 (available online). In April 2023, the Chair of the Sentencing Commission announced that "the Commission need[ed] a little more time * * * before coming to a final decision on such an important matter," and "intend[ed] to resolve these questions involving acquitted conduct next year." Public Meeting. Tr. at 23, U.S. Sentencing Commission (Apr. 5, 2023) (available online).

E. Statements On The Denial Of Certiorari In *McClinton*

In June 2023, this Court denied certiorari in a number of cases raising the issue of acquitted-conduct sentencing. In *McClinton v. United States*, 143 S. Ct. 2400 (2023), Justice Sotomayor and Justice Kavanaugh (joined by Justices Gorsuch and Barrett) wrote statements on the denials of certiorari.

Justice Sotomayor explained that, "[a]s many jurists have noted, the use of acquitted conduct to increase a defendant's Sentencing Guidelines range and sentence raises important questions that go to the fairness and perceived fairness of the criminal justice system." *Id.* at 2401 (Sotomayor, J., respecting the

denial of certiorari). These questions arise from "a tension between acquitted-conduct sentencing and the jury's historical role"; "concerns about procedural fairness and accuracy when the State gets a second bite at the apple with evidence that did not convince the jury"; and the importance of the "public's perception that justice is being done." *Id.* at 2401-02. Justice Sotomayor therefore emphasized that "[t]he Court's denial of certiorari [] should not be misinterpreted": "If the [Sentencing] Commission does not act expeditiously or chooses not to act, * * * this Court may need to take up the constitutional issues presented." *Id.* at 2403.

Justice Kavanaugh likewise wrote that "[t]he use of acquitted conduct to alter a defendant's Sentencing Guidelines range raises important questions." *Id.* (Kavanaugh, J., respecting the denial of certiorari). But because "the Sentencing Commission [was] currently considering the issue," he found it "appropriate for this Court to wait for the Sentencing Commission's determination before the Court decides whether to grant certiorari in a case involving the use of acquitted conduct." *Id.*

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari To Determine Whether Acquitted-Conduct Sentencing Is Unconstitutional.

This Court should grant O'Bannon's petition and hold that acquitted-conduct sentencing is unconstitutional. The Court has never decided whether acquitted-conduct sentencing violates the Fifth Amendment's Due Process Clause or the Sixth

Amendment. And the Court's modern jurisprudence strongly suggests that this practice is impermissible. For these reasons and others, numerous judges have expressed concerns about acquitted-conduct sentencing. The Court should resolve this critical question, particularly if the Sentencing Commission does not act with appropriate speed.

A. This Court Has Not Addressed Whether Sentencing For Acquitted Conduct Violates The Due Process Clause And The Sixth Amendment.

Most federal courts, including the Seventh Circuit, have permitted acquitted-conduct sentencing based on a controversial reading of this Court's decision in *United States v. Watts*, 519 U.S. 148 (1997). As a result, the state of the law is unlikely to change unless this Court (or the Commission) intervenes.

In *Watts*, two defendants' sentences were increased based on "conduct * * * underlying charges of which they had been acquitted." 519 U.S. at 149. The Ninth Circuit vacated the convictions, and this Court reversed. *Id.* at 157. After holding that acquitted-conduct sentencing was permitted by statute and the Sentencing Guidelines, the Court found that the Ninth Circuit's decision was "based on erroneous views of our *double jeopardy jurisprudence*." *Id.* at 154 (emphasis added). The Court reasoned that the Ninth Circuit "misunderstood the preclusive effect of an acquittal" by "fail[ing] to appreciate the significance of the different standards of proof that govern at trial and sentencing." *Id.* at 155. The Court then concluded that "a jury's verdict of acquittal does not prevent the sentencing court

from considering conducting underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 156.

Both the holding and rationale in *Watts* are expressly grounded in the Court's "double jeopardy jurisprudence." *Id.* at 154. But if *Watts* left any ambiguity about the narrow scope of its holding, this Court cleared it up in *United States v. Booker*, 543 U.S. 220 (2005). There, in the course of addressing the constitutionality of the Sentencing Guidelines, the Court explained that "*Watts* * * * presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." 543 U.S. at 240 n.4.

B. The Court's Modern Jurisprudence Is In Serious Tension With Acquitted-Conduct Sentencing.

Federal courts have not heeded *Booker*'s instruction to confine *Watts* to the Double Jeopardy context. And the expansion of *Watts* is difficult to reconcile with this Court's modern jurisprudence.

Since *Watts* was decided, the Court has held that the Sixth Amendment forbids a "sentence enhancement" based on judicial factfinding if it would increase either the statutory maximum (*Apprendi v. New Jersey*, 530 U.S. 466, 476 490 (2000)) or the statutory minimum (*Alleyne v. United States*, 570 U.S. 99, 102 (2013)). Such factfinding is even more suspect when it is based on *acquitted* conduct, even if the findings affect only a defendant's Guidelines range.

More recently, the Court held that a statute violated the Fifth and Sixth Amendments because it "compelled a federal judge to send a man to prison for a minimum of five years" for a parole violation. *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019). The Court emphasized that "one of the Constitution's most vital protections against arbitrary government" is that "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *Id.* This principle, too, is irreconcilable with acquitted-conduct sentencing.

C. Numerous Judges Have Recognized That Acquitted-Conduct Sentencing Has Many Constitutional Problems.

Even before the statements issued in *McClinton*, a host judges had written separately to opine that acquitted-conduct sentencing is "a dubious infringement of the rights to due process and to a jury trial." *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring).

Our "constitutional system [] relies upon the jury as the great bulwark of our civil and political liberties." *United States v. Brown*, 892 F.3d 385, 408 (D.C. Cir. 2018) (Millett, J., concurring). It is therefore "hard to overemphasize * * * the importance of restraining judges, legislators, and sentencing commissioners from punishing people for crimes the jury has rejected." *United States v. White*, 551 F.3d 381, 393 (6th Cir. 2008) (Merritt, J., dissenting). Acquitted-conduct sentencing "guts [the jury's] role" in that respect. *Brown*, 892 F.3d at 408 (Millet, J., concurring). It is "fundamentally inconsistent with the presumption of innocence itself." *People v. Beck*,

504 Mich. 605, 626-27 (2019); *see also Jones v. United States*, 574 U.S. 948, at *9 (2014) (Scalia, J., dissenting from the denial of certiorari) (voting to grant review "because not only did no jury convict the[] defendants of the offense the sentencing judge thought them guilty of, but a jury *acquitted* them of that offense"); *United States v. Lasley*, 832 F.3d 910, 920 (8th Cir. 2016) (Bright, J., dissenting) ("Many federal judges have expressed the view that the use of acquitted conduct to enhance a defendant's sentence should be deemed to violate the Sixth Amendment and the Due Process Clause."); *White*, 551 F.3d at 394 (Merritt, J, dissenting) ("[T]he overwhelming majority of states do not use acquitted conduct at sentencing."); *United States v. Faust*, 456 F.3d 1342, 1350 (11th Cir. 2006) (Barkett, J., specially concurring) ("[I]t perverts our system of justice to allow a defendant to suffer punishment for a criminal charge for which he or she was acquitted." (quotations and alterations omitted)).

Meanwhile, only one rationale has been offered in favor of acquitted-conduct sentencing:

> All an acquittal means is that the trier of fact, whether judge or jury, did not think the government had proved its case beyond a reasonable doubt. * * * You can think it slightly more likely than not that a defendant committed some crime without thinking it *so* much more likely that you would vote to convict him.

United States v. Horne, 474 F.3d 1004, 1006-07 (7th Cir. 2007). Although this rationale has superficial logic, it rests on a false premise.

When a jury acquits a defendant, it does more than simply find that the government has failed to meet its evidentiary burden. *See Jones v. United States*, 526 U.S. 227, 246 (1999) (a jury's "power to control outcomes" is not "confine[d] to findings of fact"). "[T]he right of jury trial * * * is no procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). Juries have the "constitutional authority to set the metes and bounds of judicially administered criminal punishments." *Haymond*, 139 S. Ct. at 2378-79. "[B]efore depriving a defendant of liberty, the government must obtain permission from the defendant's fellow citizens." *Bell*, 808 F.3d at 930 (Millet, J. concurring). When those citizens refuse to grant permission to punish a crime, a judge cannot then "brush off the jury's judgment" by using "the very same facts the jury rejected at trial to multiply the duration of a defendant's loss of liberty"; that is a "deep" "incursion into the jury's constitutional role." *Id*.

D. This Question Is Exceptionally Important.

Unless Congress or the Sentencing Commission steps in, only this Court can likely stop the unlawful punishments resulting from acquitted-conduct sentencing in federal courts. And this procedure has consequences beyond the sentences themselves: "if anyone is to respect and honor the judgments coming out of our criminal justice system," courts "must give exonerative effect to a not guilty verdict." *McNew v. State*, 271 Ind. 214, 222 (1979). The state courts are generally following that principle. *See White*, 551 F.3d

at 394 (Merritt, J, dissenting). But the federal courts are not, resulting in unconstitutional sentences in case after case around the country. That practice "undermines respect for the law and the jury system." *United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (Kavanaugh, J.). The Court should grant O'Bannon's petition.

II. In The Alternative, The Court Should Hold This Petition Until The Sentencing Commission Acts Or Declines To Act On Acquitted-Conduct Sentencing.

As discussed above, four Justices have found it "appropriate for this Court to wait for the Sentencing Commission's determination before the Court decides whether to grant certiorari in a case involving the use of acquitted conduct." *McClinton*, 143 S. Ct. at 2403 (Kavanaugh, J., respecting the denial of certiorari). And the Sentencing Commission has announced an intent to resolve the issue in 2024. Given that timing, this petition provides a good vehicle for the Court to address acquitted-conduct sentencing if the Commission declines to act or "does not act expeditiously." *Id.* at 2403 (Sotomayor, J., respecting the denial of certiorari).

O'Bannon therefore respectfully proposes the following approach if the Court is disinclined to grant certiorari now: The Court should hold this petition until the Sentencing Commission (1) amends the Guidelines on acquitted-conduct sentencing; (2) chooses not to amend the Guidelines; or (3) does not act with appropriate expediency. In the first circumstance, the Court should summarily reverse and remand for resentencing in light of the amended

Guidelines. In the second or third circumstance, the Court should grant this petition.

CONCLUSION

The Court should grant this petition for writ of certiorari. Alternatively, the Court should hold the petition until the Sentencing Commission acts or declines to act on acquitted-conduct sentencing, and summarily reverse and remand if the Commission amends the relevant Sentencing Guidelines.

Respectfully submitted,

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