No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2024

LEONARD WILLIAMSON,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED

Whether the Fifth and Sixth Amendments prohibit the district court from considering conduct of which Mr. Williamson was acquitted by the jury when calculating the sentencing guidelines and imposing sentence?

TABLE OF CONTENTS

PAGE

INDEX TO APPENDIX

TABLE OF AUTHORITIES CITED

PAGE

CASES

STATUTES

OTHER AUTHORITIES

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Petitioner, LEONARD WILLIAMSON, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit, issued on March 18, 2024, affirming the Petitioner's conviction and sentence.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit dated March 18, 2024, appears in Appendix A to this Petition at page 1 and is reported at *United States v. Williamson*, 2024 U.S. App. LEXIS 6413 (7th Cir. Mar. 18, 2024). The oral ruling of the United States District Court for the Southern District of Indiana appears in Appendix A to this Petition at page 3.

JURISDICTION

1. The Southern District of Indiana originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction of offenses against the United States.

2. Thereafter, Petitioner timely appealed his conviction and sentence to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

3. Petitioner seeks review in this Court of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming his sentence pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time

of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the United States Constitution

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 3661

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

STATEMENT OF THE CASE

I. Factual Background and Indictment.

On February 7, 2021, a detective with the Indianapolis Metropolitan Police Department saw Petitioner Leonard Williamson, Jr. driving a black pick-up truck in Indianapolis. (T. Tr. at 135.)[1] Two other officers followed the black truck into an alley and parked behind the truck. (T. Tr. at 147.) Mr. Williamson got out of the driver's side of the truck and ran. (T. Tr. at 148.) Cory Aldridge got out of the passenger side of the truck and dropped a gun on his way out. (T. Tr. at 150.) One of the officers handcuffed Aldridge and the other officer chased Mr. Williamson. (T. Tr. at 151, 185.) The officer who chased Mr. Williamson saw him throw something into a nearby yard as he was running. (T. Tr. at 186.) Shortly thereafter, Mr. Williamson was arrested and had $4,952 and approximately 30 grams of "spice," also called synthetic marijuana, on him. (T. Tr. at 194; R. at 84.)

The officers looked for the object Mr. Williamson threw for some time but were unable to find it because the ground was covered in snow. (T. Tr. at 188.) They eventually called a drug-sniffing dog to search the area. (T. Tr. at 188.) The dog alerted and found a baggie containing 14.2439 grams of crack cocaine in a yard near where Mr. Williamson was arrested. (T. Tr. at 189; R. at 84.) Prior to

[1] The following abbreviations are used herein: Record on appeal: "R. at __;" Appendix: "Appendix A at __;" and Trial Transcript: "T. Tr. at __."

February 7, 2021, Mr. Williamson had been convicted of a crime punishable by a term of imprisonment of more than one year and had knowledge of that conviction. (R. at 81.) The firearm that fell out of the truck with Aldridge had previously travelled in interstate commerce. (R. at 82.)

On April 20, 2021, the grand jury issued an indictment charging Mr. Williamson with possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Count 1); carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c) (Count 2); and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (Count 3). (R. at 5.) Aldridge was not charged with any crimes, despite the fact that the truck was registered to him, he had previously been convicted of a felony, and he had marijuana on his person. (T. Tr. at 172-75, 235, 244.)

II. Jury Trial and Verdict.

Mr. Williamson proceeded to jury trial on November 30, 2021. (R. at 98.) The government called Sara Didandeh, one of the officers who pulled up behind the black truck in the alley on February 7, 2021. (T. Tr. at 143.) Didandeh testified that she and Officer Jonathon Willey parked behind the truck and Mr. Williamson got out of the driver's side and ran. (T. Tr. at 148.) Aldridge got out of the passenger side and Didandeh heard him say he dropped a gun. (T. Tr. at 150.) Didandeh patted Aldridge down, put him in handcuffs, and found a black

firearm lying in the snow under the open passenger's door of the truck. (T. Tr. at 141-52.) She found four cell phones in the truck in the middle console. (T. Tr. at 152.) On cross-examination, Didandeh said she also found a cell phone belonging to Aldridge next to the gun on the ground but could not remember if it was one of the phones listed as found in the truck or not. (T. Tr. at 169-70.) She found marijuana on Aldridge and the truck was registered to Aldridge. (T. Tr. at 173, 175.)

Officer Willey chased Mr. Williamson as he fled from the truck. (T. Tr. at 185.) Willey testified Mr. Williamson was digging in his pockets and made a "baseball-type throw holding a white substance" while running. (T. Tr. at 186.) Mr. Williamson continued to run for a short time but was arrested nearby. (T. Tr. at 186.) Just before he was arrested, he threw a cell phone and a digital scale on the ground. (T. Tr. at 187.) Mr. Williamson also had spice and cash on his person. (T. Tr. at 193.) Willey looked for the object thrown by Mr. Williamson but could not find it. (T. Tr. at 188.) The drug-sniffing dog found a small baggie containing 14.2439 grams of crack cocaine nearby. (T. Tr. at 189.)

Officer Bradley Sollars arrived at the truck to take custody of the firearm that fell out when Eldridge got out of the vehicle. (T. Tr. at 295-96.) Sollars also swabbed the firearm, magazine, and the top bullet in the magazine for DNA. (T. Tr. at 298, 306.) He did not swab any of the other bullets in the magazine. (T. Tr.

at 306.) Forensic scientist Amanda Wilson testified that the DNA swabs of the firearm slide and stop trigger had a mixture of the DNA of three individuals. (T. Tr. at 317.) The swab of the front sight and front barrel of the firearm had a mixture of the DNA of two individuals. (T. Tr. at 318.) Wilson did not match any of these swabs to Mr. Williamson's DNA. (T. Tr. at 321.) The top bullet in the magazine had DNA from two individuals and Mr. Williamson was the major contributor to that DNA. (T. Tr. at 318.) Wilson did not test any other individual's DNA when analyzing the swabs from the firearm. (T. Tr. at 320.)

The government's final witness was DEA Agent Michael Cline who testified as an expert in narcotics distribution and interpretation of slang relating to drugs and firearms. (T. Tr. at 326.) Cline testified that 14 grams of crack cocaine is consistent with a distribution amount. (T. Tr. at 327.) He also testified that when a person possesses a firearm and narcotics, the firearm is being used for protection while engaged in the distribution of narcotics. (T. Tr. at 328-29.) Cline also testified that it was his opinion that the "firearm was being carried during and in relation to the drug trafficking crime of the possession with the intent to distribute cocaine." (T. Tr. at 329.)

Cline also interpreted a short series of text messages between Mr. Williamson and an individual identified only as "Ju Wopp" which occurred on February 5, 2021. (T. Tr. at 331-33.) The text messages were as follows:

Leonard Williamson: What it do
Ju Wopp: Wht it do bro
Leonard Williamson: You got a heat
Ju Wopp: Yea
Leonard Williamson: Can I buy need
Ju Wopp: No for sale
Leonard Williamson: Please
Ju Wopp: I find u one

(Gov't Ex. 28.) Cline testified that this conversation meant that Mr. Williamson wanted to buy a firearm ("a heat") from Ju Wopp. (T. Tr. at 333.) Ju Wopp did not have a firearm that he could sell at that time but he would get one for Mr. Williamson. (T. Tr. at 333.)

Both parties rested, gave closing arguments, and the jury began deliberating. (T. Tr. at 353, 365, 387.) The jury found Mr. Williamson guilty of Count 1, possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). (R. at 92.) The jury found Mr. Williamson not guilty of carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c) (Count 2); and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (Count 3). (R. at 92.)

III. Presentence Investigation Report and Objections.

The United States Probation Office prepared the Presentence Investigation Report ("PSR") on January 28, 2022. (R. at 100.) Using the November of 2021 version of the sentencing guidelines, the officer determined Mr. Williamson's base offense level was 12 pursuant to §§ 2D1.1(a)(5) and (c)(15). (R. at 100, p. 6.)

This base offense level was calculated using the 14.2 grams of crack cocaine and the 32 grams of spice. (R. at 100, p. 6.) The officer assessed a two level enhancement under § 2D1.1(b)(1) because a firearm was possessed during the offense, based specifically on the firearm that fell out of the truck with Aldridge. (R. at 100, p. 6.) Mr. Williamson's total offense level was 14, his criminal history category was V, and the applicable guidelines range was 33 to 41 months. (R. at 100, p. 6, 12, 22.)

Defense counsel filed an objection to the probation officer's assessment of a two level enhancement for possession of a firearm during the offense, arguing this enhancement was based on conduct the jury acquitted Mr. Williamson of at trial. (R. at 105, p. 28.) Counsel acknowledged Supreme Court precedent, *United States v. Watts,* 519 U.S. 148 (1997), allowed acquitted conduct to be considered at sentencing. (R. at 105, p. 28.) However, counsel also noted the disagreement by judges and justices regarding this precedent and the disagreement among the circuits on the issue where the sentence would be dramatically increased by the use of acquitted conduct. (R. at 105, p. 28.) Counsel asserted the district court should not find Mr. Williamson was responsible for the firearm because the evidence was based on unreliable hearsay and DNA evidence that the jury rejected. (R. at 105, p. 28-29.) Counsel questioned the DNA evidence, which was found exclusively on the top bullet in the magazine and not on the firearm itself.

(R. at 105, p. 29.) Counsel pointed out the DNA could have been the result of transfer rather than actual conduct with the bullet. (R. at 105, p. 29.)

The government filed a sentencing memorandum on June 15, 2022, requesting an upward variance from the applicable guidelines range. (R. at 114, p. 1.) The government argued the assessment of the gun enhancement was proper because the district court was present at the trial and heard the evidence about the firearm found on February 7, 2021. (R. at 114, p. 4.) The government relied on Mr. Williamson's DNA evidence on the top bullet in the magazine, the text messages sent on February 5, 2021, to "Ju Wopp" asking to buy a firearm, and the Aldridge's statements that the firearm belonged to Mr. Williamson. (R. at 114, p. 4-5.) The government also noted that, during a police pursuit on January 31, 2021, Mr. Williamson had alleged tossed a firearm, although this evidence was not presented at trial. (R. at 114, p. 5.)

IV. Sentencing Hearing and Judgment in a Criminal Case.

The district court held a sentencing hearing on June 22, 2022. (R. at 117.) The court first considered the use of acquitted conduct at sentencing. After the parties argued their respective positions, the court found:

> I think we do have a common understanding as to the applicable law in terms of the Court's ability to rely on acquitted conduct and I think [defense counsel] has set forth an accurate understanding of that law and of course that is - most recently was set forth by the Seventh Circuit, [*United States v. McClinton,* 23 F.4th 732 (7th Cir. 2022)] where the Seventh Circuit did re-affirm the

principle that a jury's verdict of acquitted does not prevent the sentencing court from considering conduct underlying the charge so long as that conduct has been proved by a preponderance of the evidence.

Here I certainly appreciate the argument made by the defense. Ultimately, however, we don't know exactly why the jury acquitted Mr. Williamson on the two gun counts, Counts 2 and 3, and so the not guilty verdict means only that the jury found that the Government had not proven the essential elements of the offenses charged in Counts 2 and 3 beyond a reasonable doubt.

And as the parties, I think, have alluded to and agree upon, I consider the evidence from the trial in evaluating this issue. I hone in on several pieces of important evidence that I think do support the conclusion that the enhancement does apply and that the firearm was possessed applying the preponderance of the evidence standard. Several pieces of evidence. First, we have the Government's DNA expert who testified that the DNA sample recovered from the top round of the bullet in the magazine fit Mr. Williamson's DNA, so that evidence is set forth in greater detail in the trial transcript. That in and of itself is strong evidence of possession.

But secondly, we also have the fact that we know that the firearm was in the vehicle that Mr. Williamson was driving and that's based on the facts introduced at the trial, that the gun fell out of the passenger's side as the passenger exited the vehicle and the passenger, of course, yelled at the time that the gun was Mr. Williamson's.

Next, there was also evidence introduced at the trial in the form of text messages showing that Mr. Williamson was attempting to get a gun just days before his arrest. There is nothing in those messages that specifically identifies the specific firearm that was recovered here, that is true, but they still show that Mr. Williamson had the intent and purpose to possess a gun around that time.

And I last would note that of course the facts at the trial established Mr. Williamson had on his person at the time of his arrest digital scales and approximately $5,000 of United States currency. Guns are known as tools of the trade of drug trafficking and the jury did find Mr. Williamson guilty of possession with intent to distribute and I think it's reasonable to infer from all of the facts and circumstances that he did possess the firearm. Again, I do

> acknowledge the reasons for the objections. I would note that even if the passenger's statement is hearsay, that it is reliable in the context in which the statement was made here, as shown in the trial transcript, as the passenger made the statement immediately after being removed from the vehicle and that does indicate and connect Mr. Williamson to the gun.
>
> And of course the DNA evidence and the text messages also support the inference that Mr. Williamson did in fact possess the gun. I do recognize that the argument, which was made very well by [defense counsel], that the magazine did not lock perfectly into the firearm and that the magazine fell out later when the examiner took the gun out of the evidence envelope, but the magazine was in the firearm and it did fit, even if it didn't lock in properly, and there is also no other plausible explanation for why the magazine was there if not for the recovered handgun. I also don't find the theory of the DNA being transferred from somebody else to be a plausible theory based on these facts.
>
> So when I combine all of the facts and all of the circumstances, I do find by a preponderance of the evidence that the firearm was possessed by Mr. Williamson here and it is not clearly improbable that it was connected to the offense, so the objection is overruled. The enhancement applies.

(Appendix A at 4-7.)

The court made findings regarding the appropriate sentence, starting with the guidelines range of 33 to 41 months. (R. at 129, p. 40.) The court found Mr. Williamson engaged in serious conduct regarding possessing drugs and a firearm, recklessly discarded the drugs and firearm, had sparse employment history, and a significant criminal history. (R. at 129, p. 41-42.) The court specifically stated it would not consider the instances of conduct alleged by the government that were not part of the charged offenses but would consider the acquitted conduct. (R. at 129, p. 44-45.) However, the court then found Mr.

Williamson had a pattern of unlawful possession of drugs and guns and compared him to other repeat drug and gun offenders. (R. at 129, p. 44-45.) The court imposed an above-guidelines sentence of 57 months in prison. (R. at 129, p. 47.)

V. Proceedings in the Seventh Circuit.

Mr. Williamson filed a brief in the Seventh Circuit arguing that the district court erred by using acquitted conduct to sentence him. (Appendix A at 1.) The Court of Appeals held:

> Williamson's appeal raises a single issue: he argues that the judge's reliance on acquitted conduct to calculate the Guidelines range violated his rights to due process and trial by jury under the Fifth and Sixth Amendments. This argument is foreclosed by *United States v. Watts*, 519 U.S. 148, 157 (1997), as we have repeatedly held, *see, e.g., United States v. Robinson*, 62 F.4th 318, 320–21 (7th Cir. 2023) (collecting cases). Williamson acknowledges as much and explains that he raises the issue here to preserve it for Supreme Court review. He has properly done so. *Robinson*, 62 F.4th at 321 (rejecting the same argument based on *Watts* and noting that the defendant properly preserved the issue for further review).

(Appendix A at 2.)

REASONS FOR GRANTING THE WRIT

I. The Fifth and Sixth Amendments prohibit the district court from considering conduct of which Mr. Williamson was acquitted by the jury when calculating the sentencing guidelines and imposing sentence.

There is "increasing support among many circuit court judges and Supreme Court Justices, who in dissenting and concurring opinions, have questioned the fairness and constitutionality of allowing courts to factor acquitted conduct into sentencing calculations." *United States v. McClinton,* 23 F.4th 732, 735 (7th Cir. 2022), *citing Jones v. United States,* 574 U.S. 948, 948 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of *certiorari*), *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing *en banc*), *United States v. Canania,* 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring). However, the Seventh Circuit has indicated that the Supreme Court "endorsed" the practice of using acquitted conduct as long as the conduct has been proven by a preponderance of the evidence. *United States v. Robinson,* 62 F.4th 318, 320 (7th Cir. 2023), *citing United States v. Watts,* 519 U.S. 148 (1997).

The Seventh Circuit and all other circuit courts to consider the issue have improperly expanded the holding of *Watts*, which was a case involving a challenge under the Double Jeopardy Clause and was intended to be limited to that holding. *Watts* did not address whether using acquitted conduct at

sentencing violated the Due Process Clause of the Fifth Amendment or the right to a jury trial under the Sixth Amendment. Despite this, *Watts* still stands in all circuit courts, including the Seventh Circuit. *See McClinton,* 23 F.4th at 735. As such, this issue is properly before this Court for review.

A. The impact of acquitted conduct at Mr. Williamson's sentencing.

Mr. Williamson exercised his right to jury trial. The jury convicted him of possession with intent to distribute cocaine. The jury acquitted him of both charges relating to possession of the firearm: being a felon in possession of a firearm and carrying a firearm during and in relation to a drug trafficking crime. In many situations, it is difficult to know exactly why a jury acquits a defendant on some counts. In Mr. Williamson's case, however, the logical explanation is that it did not believe Mr. Williamson possessed or carried the firearm because it was more closely associated with Aldridge. The gun fell out of the truck with Aldridge, the truck belonged to Aldridge, and Aldridge also had a felony record and drugs on his person.

In any event, the district court used the firearm conduct against Mr. Williamson in two ways. First, it enhanced his offense level by two levels under § 2D1.1(b)(1) because a firearm was present during a drug crime. This resulted in a total offense level of 14 rather than 12 and a guidelines range of 33 to 41 months, rather than 27 to 33 months. Second, the court imposed an above-

guidelines sentence of 57 months, 16 months higher than the high end of the district court's guideline range and 24 months higher than the non-enhanced range. This violated Mr. Williamson's Fifth Amendment right to Due Process Clause and Sixth Amendment right to trial by jury.

B. District courts should not use acquitted conduct at sentencing.

In *Watts*, a divided Court held that use of acquitted conduct at sentencing does not violate the Double Jeopardy Clause of the Fifth Amendment. *Watts*, 519 U.S. at 156. Lower courts have misinterpreted *Watts* to apply to all constitutional challenges to the use of acquitted conduct at sentencing, including arguments under the Fifth Amendment's Due Process Clause and the Sixth Amendment's right to trial by jury. *Canania,* 532 F.3d at 776 (Bright, J. concurring). This Court later emphasized 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." *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005). The Court did not consider whether the Due Process Clause of the Fifth Amendment or the Sixth Amendment's jury trial guarantee forbid the use of acquitted conduct at sentencing.

However, the lower courts have consistently applied *Watts* to far broader questions, including the Seventh Circuit in *McClinton* and Mr. Williamson's case. *See McClinton,* 23 F.4th at 735; *see also United States v. White*, 551 F.3d 381, 392 n.2

(6th Cir. 2008) (*en banc*) (Merritt, J., dissenting, joined by five others) (noting numerous courts of appeals have simply assumed that *Watts* controls the outcome of both the Fifth and Sixth Amendment challenges to the use of acquitted conduct). Judge Bright of the Eighth Circuit argued "that the consideration of 'acquitted conduct' to enhance a defendant's sentence is unconstitutional" under both the Due Process Clause of the Fifth Amendment and the Sixth Amendment. *Canania*, 532 F.3d at 776 (Bright, J., concurring). In his "strongly held view," acquitted-conduct sentencing "violates the Due Process Clause of the Fifth Amendment" because it "undermines the notice requirement that is at the heart of any criminal proceeding." *Id*. at 776-777. And it violates the Sixth Amendment jury trial guarantee because it creates a "sentencing regime that allows the Government to try its case not once but twice. The first time before a jury; the second before a judge." *Id*. at 776.

Judge Fletcher of the Ninth Circuit has called acquitted-conduct sentencing clearly violates the Fifth and Sixth Amendments because it "allows the jury's role to be circumvented by the prosecutor and usurped by the judge." *United States v. Mercado*, 474 F.3d 654, 658, 664 (9th Cir. 2007) (Fletcher, J., dissenting). Numerous other federal judges have reached the same conclusion. *See White*, 551 F.3d at 392 (Merritt, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring) ("sentence enhancements based on acquitted conduct are

unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment").

Watts was questioned even at the time it was decided. Justice Stevens believed the idea "that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved" was "repugnant" to the Constitution. *Watts*, 519 U.S. at 170 (Stevens, J., dissenting). Justice Kennedy also questioned the decision because it did not confront the distinction between uncharged conduct and acquitted conduct, calling these issues "question[s] of recurrent importance in hundreds of sentencing proceedings in the federal criminal system" and which "ought to be confronted by a reasoned course of argument, not by shrugging it off." *Id.* at 170 (Kennedy, J., dissenting). "At the least it ought to be said that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal." *Id.*

In the years after *Watts,* there is increasing support among many circuit court judges and Supreme Court Justices for "question[ing] the fairness and constitutionality of allowing courts to factor acquitted conduct into sentencing calculations." *McClinton,* 23 F.4th at 755. For example, in *Jones*, defendants who were convicted at trial of distributing small amounts of crack cocaine, but acquitted of conspiring to distribute drugs, challenged the constitutionality of the

district court imposing sentencing enhancements based on the conduct comprising the conspiracy. *Jones,* 574 U.S. at 949-50. Justice Scalia, joined by Justices Thomas and Ginsburg, dissented from the Court's denial of *certiorari*, explaining that "[t]he 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." *Id.* at 948 (Scalia, J., dissenting from denial of *certiorari*.) Scalia noted the long-held principle that "[a]ny 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.* at 949. The dissent also observed that the Supreme Court's silence on the matter suggested the Court believed the Constitution permits sentences supported by judicial factual finding, as long as the sentences are in the statutory range. *Id.* That situation "has gone on long enough," and the dissent urged the Court to "grant *certiorari* to put an end to the unbroken string of cases disregarding the Sixth Amendment." *Id.* at 950.

Last year, the Court finally seemed to have a case in which to remedy this situation in *McClinton*. However, it denied the petition of writ of *certiorari*, reasoning the Sentencing Commission could fix the problem:

> The Court's denial of certiorari today should not be misinterpreted. The Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted-conduct sentencing in the coming year.

> If the Commission does not act expeditiously or chooses not to act, however, this Court may need to take up the constitutional issues presented.

McClinton v. United States, 143 S. Ct. 2400, 2403 (2023). Justice Sotomayor wrote the main opinion concurring in the denial of *certiorari* and was joined by Kavanaugh, Alito, Gorsuch, and Barrett.

Although the Court's reluctance to address an issue that could be partially rectified by the Sentencing Commission is understandable, the Sentencing Commission's limited function hinders it from determining a real solution to the problem. The use and consideration of acquitted conduct at sentencing is not only an issue in the sentencing guidelines, it is also a statutory and constitutional issue which should be resolved by the Supreme Court. *See* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.") Most circuit courts, have concluded that the use of acquitted conduct is permissible because of *Watts* but also because of § 3661. *See United States v. Hogue,* 66 F.4th 756, 764-65 (8th Cir. 2023); *United States v. Legins,* 34 F.4th 304, 326 (4th Cir. 2022); *United States v. Lignelli,* 660 Fed. Appx. 118, 125 (3d Cir. 2016); *United States v. Broxmeyer,* 699 F.3d 265, 285 (2d Cir. 2012); *United States v. Waltower,* 643 F.3d 572, 578-79 (7th Cir. 2011); *United States v. Todd,* 515

F.3d 1128, 1137 (10th Cir. 2008); *United States v. Brika,* 487 F.3d 450, 459-60 (6th Cir. 2007); *United States v. Mercado,* 474 F.3d 654, 657 (9th Cir. 2007); *United States v. Dorcely,* 454 F.3d 366, 375 (D.C. Cir. 2006); *Faust*, 456 F.3d at 1347; *United States v. Amirault,* 224 F.3d 9, fn 3 (1st Cir. 2000). This Court also specifically held that provisions of the Sentencing Reform Act, which promulgates and gives effect to the sentencing guidelines, cannot repeal this statutory provision. *Id.* at 579.

The criticisms from the circuit courts demonstrate why the Sentencing Commission is unlikely to fix the issues with consideration of acquitted conduct at sentencing. Following *Jones*, then-Judge Gorsuch questioned the lawfulness of imposing sentences based on judge-found facts, writing that "[i]t is far from certain 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." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014). Judge Gorsuch's analysis focuses on the constitutionality of increasing sentences based on facts found by the judge - a question that also necessarily implicates § 3661.

Despite the statutory language putting no limits on the information the court can consider when sentencing, then-Judge Kavanaugh has also criticized acquitted-conduct sentencing. In *Bell*, where the sentencing judge increased the defendant's sentence by more than 300% based on acquitted conduct, Judge Kavanaugh wrote that "[a]llowing 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." *Bell,* 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing *en banc*). He observed that "resolving that concern as a constitutional matter would likely require" Supreme Court review. *Id.* at 927. In *Brown*, where the defendant was acquitted on most counts but "then sentenced in essence as if he had been convicted on all of the counts," then-Judge Kavanaugh called acquitted-conduct sentencing "unsound," and noted "good reasons to be concerned about [it]." *United States v. Brown,* 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part); *United States v. Henry*, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring) (noting "the oddity" that courts are still using acquitted conduct to increase sentences after *Booker* held that "the Constitution requires that facts used to increase a sentence beyond what the defendant otherwise could have received be proved to a jury beyond a reasonable doubt").

Of course, both Justices Gorsuch and Kavanaugh are now on the Supreme Court and weighed in its recent denial of the petition for writ of *certiorari* in *McClinton*. *McClinton,* 2023 U.S. LEXIS 2796 at *6. They, joined by Justice Barrett and like Justice Sotomayor, focused on the Sentencing Commission's potential consideration of the issue, stating, "It is 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.*

Despite this, most circuit judges to have addressed this issue place the responsibility squarely in the Supreme Court's hands, not the Sentencing Commission's. Judge Millett of the District of Columbia Circuit has observed that "only the Supreme Court can resolve the contradictions in the current state of the law," and urged the Court "to take up this important, frequently recurring, and troubling contradiction in sentencing law." *Bell*, 808 F.3d at 932 (Millett, J., concurring in the denial of rehearing *en banc*). Judge Bright has implored the Supreme Court to reexamine the "continued use forthwith" of "'acquitted conduct' to fashion a sentence." *Canania,* 532 F.3d. at 777.

The Sentencing Commission's history with the issue of acquitted conduct is fraught, to say the least. After ignoring the issue for decades, not having a quorum since 2018, and delaying consideration of acquitted conduct in the 2023 amendment cycle, the Commission finally formally announced it would "review and *potentially* amend how the guidelines treat acquitted conduct for purposes of sentencing" on August 24, 2023. *See* U.S. Sentencing Commission Votes to Allow Retroactive Sentence Reductions and Announces its Next Set of Policy Priorities (Aug. 24, 2023)[2] (emphasis added). The Commission did, in fact, propose

[2] https://www.ussc.gov/about/news/press-releases/august-24-2023 (last visited June 11, 2024)

changes to the use of acquitted conduct in the Sentencing guidelines on April 30, 2024. *See* Amendments to the Sentencing Guidelines, Policy Statements, Official Commentary, and Statutory Index (Apr. 30, 2024).[3]

The proposed amendments including changes to the definition of relevant conduct, indicating that relevant conduct does not include acquitted conduct. *See* Amendments to the Sentencing Guidelines, p. 2 (Apr. 30, 2024).[4] Those changes might have some effect in the calculation of guidelines ranges; however, the amendments still allow the court to consider acquitted conduct:

> Second, the amendment adds new Application Note 10 to §1B1.3(c), which instructs that in "cases in which certain conduct underlies both an acquitted charge and the instant offense of conviction . . . , the court is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the instant offense of conviction and therefore qualifies as relevant conduct." The amendment thus clarifies that while "acquitted conduct" cannot be considered in determining the guideline range, any conduct that establishes – in whole or in part – the instant offense of conviction is properly considered, even as relevant conduct and even if that same conduct also underlies a charge of which the defendant has been acquitted. . . .
>
> To ensure that courts may continue to appropriately sentence defendants for conduct that establishes counts of conviction, rather than define the specific boundaries of "acquitted conduct" and "convicted conduct" in such cases, the Commission determined that the court that presided over the proceeding will be best positioned to determine which conduct can properly be considered as part of

[3] https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202405_Amendments.pdf (last visited June 10, 2024).

[4] https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202405_RF.pdf (last visited June 11, 2024).

relevant conduct based on the individual facts in those cases. *Id.* While the amendment addresses the issue, it still allows district courts to make a discretionary decision regarding whether to include acquitted conduct.

In addition, the amendment only goes so far. It does not address the conflicts with § 3661 and does not address offenders already sentenced using acquitted conduct, like Mr. Williamson. The Commission merely noted sentencing courts can consider a broad range of conduct under § 3661. *See* Amendments to the Sentencing Guidelines, p. 2, 5 (Apr. 30, 2024). The Sentencing Commission cannot change or invalidate § 3661 which has the potential to make any change the guidelines pointless. The Supreme Court, however, can invalidate § 3661 and should consider it.

The Commission also repeatedly noted that nothing in the guidelines abrogates a court's authority under § 3661. *Id.* In addition, no decision has been made as to whether the acquitted conduct amendment would be made retroactive. *See* Memorandum: Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024).[5] This is hardly comfort to the estimated 1,971 defendants who are in prison and will be imprisoned for longer because of the use of acquitted conduct in sentencing. *Id.* at 21 (noting 1,971 persons are

[5] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2024-amendments/2024_Amdts-Retro.pdf (last visited June 11, 2024).

currently eligible to receive a reduction if the amendment to the acquitted conduct rules were made retroactive). Therefore, Mr. Williamson respectfully requests this Court grant his petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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