No. 24-5339

IN THE SUPREME COURT OF THE UNITED STATES

SETH ELRED PERRICONE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioner's Fifth and Sixth Amendment rights by considering conduct that it found by a preponderance of the evidence, but that a jury in a prior state case had not found beyond a reasonable doubt, in determining his sentence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is available at 2024 WL 2237965.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2024. The petition for a writ of certiorari was filed on August 14, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on six

counts of distributing child pornography and one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2) and (b)(1) (2012). Judgment 1. The district court sentenced petitioner to 360 months of imprisonment and a life term of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-17a.

1. In 2012, petitioner began downloading and distributing files that depicted the sexual abuse and exploitation of children through a peer-to-peer file sharing system. C.A. ROA 1362; Presentence Investigation Report (PSR) ¶ 9. In 2017, law enforcement detected that distribution and downloaded from petitioner's IP address more than 100,000 files depicting prepubescent children engaged in sexually explicit conduct. PSR ¶¶ 7-8.

Agents searched petitioner's home and seized his electronic devices, which contained more than 30,000 images of child sex abuse. See PSR ¶¶ 10-11. During that search, agents also discovered a polygraph report from 2009 that documented petitioner's admission to sexually abusing his wife's sister. See Pet. App. 2a; PSR ¶¶ 10-11.

A grand jury in the Western District of Texas charged petitioner in a superseding indictment with six counts of distributing child pornography and one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2) and (b). Pet. App. 3a. Following a three-day trial, the jury found petitioner guilty on all counts. Ibid.

2. In preparation for sentencing, the Probation Office recommended a five-level enhancement to the offense level under the advisory Sentencing Guidelines because petitioner had "engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." Sentencing Guidelines § 2G2.2(b)(5) (2021); see PSR ¶ 33. The Guidelines commentary explains that a qualifying "[p]attern" means "any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant" regardless of whether the abuse "resulted in a conviction." Sentencing Guidelines § 2G2.2, comment. (n.1) (2021).

The proposed enhancement relied on both the polygraph report from 2009 and state-court proceedings in which the polygraph was never introduced into evidence. See Pet. App. 14a. In 2011, petitioner was charged in a state court with one count of sexual assault of a child, in violation of Texas Penal Code Ann. § 22.011(a)(1)(A) (2004), and one count of aggravated sexual assault of a child, in violation of Texas Penal Code Ann. § 22.021(a)(1)(A)(i) and (2)(B) (1998). See PSR ¶¶ 47-48. Those charges alleged abuse of the child whom he had admitted to abusing during the polygraph examination -- namely, his minor sister-in-law. Pet. App. 14a, 17a; PSR ¶ 10; C.A. ROA 1315-1316, 1323-1324. In the absence of the polygraph -- which was prepared at the request of the defense and was not made known to the jury -- a state jury acquitted petitioner on both counts. Ibid.

The district court overruled petitioner's objection to the consideration of acquitted conduct to support the pattern enhancement; adopted the presentence report's recommended guidelines range; and imposed a 360-month term of imprisonment. Pet. App. 3a-4a; see id. at 14a. Its finding by a preponderance of the evidence that petitioner had sexually abused a minor on multiple occasions rested solely on petitioner's 2009 admission during his polygraph exam that he had sexually abused his minor sister-in-law and the presentence report; the court declined to rely directly on the trial proceedings that had resulted in his acquittal. Id. at 15a.

3. The court of appeals affirmed. Pet. App. 1a-17a. Petitioner argued, as relevant here, that application of the offense-level enhancement violated the Fifth and Sixth Amendments because it was based on conduct underlying state charges on which he had been acquitted. Id. at 12a-13a. The court rejected that argument, consistent with circuit precedent permitting a district "court to consider acquitted conduct 'as long as it finds that the conduct occurred by a preponderance of the evidence.'" Id. at 13a (quoting United States v. Landreneau, 967 F.3d 443, 454 (5th Cir. 2020), cert denied, 141 S. Ct. 1443 (2021)).

ARGUMENT

Petitioner contends (Pet. 15-25) that the district court violated his Fifth Amendment right to due process and his Sixth Amendment right to trial by jury by relying for sentencing purposes

on conduct that a state jury did not find proven beyond a reasonable doubt. This Court, however, has upheld a district court's authority to consider such conduct in fashioning an appropriate sentence. And as petitioner correctly acknowledges, every federal court of appeals with criminal jurisdiction has recognized a sentencing court's ability to rely on conduct that the court finds by a preponderance of the evidence, but that a jury did not find beyond a reasonable doubt. This Court has recently and repeatedly denied petitions for writs of certiorari in similar cases,[1] and it should follow the same course here.

1. When selecting an appropriate sentence, a district court may, consistent with the Fifth and Sixth Amendments, consider conduct that was not intrinsic to the underlying conviction. Although the Sixth Amendment requires that, other than the fact of a prior conviction, "any fact that increase[s] the prescribed statutory maximum sentence" or the statutory "minimum sentence" for an offense "must be submitted to the jury and found beyond a

[1] See, e.g., O'Bannon v. United States, 144 S. Ct. 572 (2024) (No. 23-554); Merry v. United States, 143 S. Ct. 2692 (2023) (No. 22-6815); Martin v. United States, 143 S. Ct. 2692 (2023) (No. 22-6736); Karr v. United States, 143 S. Ct. 2691 (2023) (No. 22-5345); Cain v. United States, 143 S. Ct. 2691 (2023) (No. 22-6212); Bullock v. United States, 143 S. Ct. 2691 (2023) (No. 22-5828); Sanchez v. United States, 143 S. Ct. 2691 (2023) (No. 22-6386); Luczak v. United States, 143 S. Ct. 2690 (2023) (No. 21-8190); Shaw v. United States, 143 S. Ct. 2689 (2023) (No. 22-118); McClinton v. United States, 143 S. Ct. 2400 (2023) (No. 21-1557); see also Br. in Opp. at 14-15, McClinton, supra (No. 21-1557) (listing cases).

reasonable doubt," Alleyne v. United States, 570 U.S. 99, 106, 108 (2013) (plurality opinion), judges have broad discretion to engage in factfinding to determine an appropriate sentence within a statutorily authorized range, see, e.g., id. at 116 (majority opinion) ("[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."); United States v. Booker, 543 U.S. 220, 233 (2005) ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."); see also 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.").

Contrary to petitioner's contention (Pet. 19-25), neither the Fifth Amendment nor the Sixth Amendment precludes sentencing courts from finding facts about relevant conduct under this framework when the defendant is acquitted of that conduct under a higher standard of proof at trial. As this Court explained in United States v. Watts, 519 U.S. 148 (1997) (per curiam), in addressing judicial factfinding under the then-mandatory federal Sentencing Guidelines, "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." Id. at 157. The Court observed

that under the pre-Guidelines sentencing regime, it was "'well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted,'" and that "[t]he Guidelines did not alter this aspect of the sentencing court's discretion." Id. at 152 (citation omitted). And the Court explained that a jury's determination that the government failed to prove a fact beyond a reasonable doubt does not have preclusive effect in contexts in which a lower standard of proof applies. Id. at 156 ("[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.") (citation omitted).

Petitioner's effort (Pet. 11-12, 15-18) to characterize Watts as an inapposite double-jeopardy case lacks merit. Although Watts specifically addressed a challenge to acquitted conduct based on double-jeopardy principles, its clear import is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution. See 519 U.S. at 157; see also, e.g., Alabama v. Shelton, 535 U.S. 654, 665 (2002); United States v. Grubbs, 585 F.3d 793, 798-799 (4th Cir. 2009) (describing Watts as "clear Supreme Court * * * precedent holding that a sentencing court may consider uncharged and acquitted conduct in determining a sentence, as long as that conduct is proven by a preponderance of the evidence"), cert. denied, 559 U.S. 1022 (2010). Indeed, Watts is incompatible with petitioner's core premise: that

consideration of acquitted conduct as part of sentencing contravenes the jury's verdict or punishes the defendant for a crime for which he was not convicted. If consideration of such conduct at sentencing were in fact a re-prosecution of the prior charges, it is difficult to see how Watts could have found it compatible with the Double Jeopardy Clause.

This Court's decision in United States v. Booker confirms that a judge may constitutionally base a defendant's sentence on conduct that was not found by the jury, so long as the sentence is at or below the statutory maximum. In discussing the type of information that a sentencing court could consider under the advisory guidelines, Booker made no distinction between acquitted conduct and other relevant conduct. See, e.g., 543 U.S. at 252 (emphasizing the need to consider all relevant conduct to achieve "the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways"). To the contrary, after emphasizing the judge's "broad discretion in imposing a sentence within a statutory range," id. at 233, Booker cited Watts for the proposition that "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found unproved (beyond a reasonable doubt)," id. at 251 (emphasis omitted). And after Booker, the majority opinion in Alleyne v. United States expressly distinguished "facts that increase either the statutory maximum or minimum" from those "used to guide judicial discretion in selecting a punishment 'within limits fixed

by law.'" 570 U.S. at 113 n.2 (citation omitted). The Court made clear that although the latter "may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing." Ibid.; contra Pet. 20-21.

Petitioner's Fifth Amendment argument (Pet. 22-25) is likewise unsound. Notwithstanding that judges have historically enjoyed discretion to impose sentences based on additional facts found by a preponderance of the evidence at sentencing, petitioner essentially proposes (Pet. 23) to create an exception for factual findings that assertedly conflict with a jury's acquittal. That exception is logically unsound because factual findings that satisfy the preponderance standard do not conflict with a jury's verdict of acquittal under the more demanding beyond-a-reasonable-doubt standard. See Watts, 519 U.S. at 156; cf. 18 Charles Alan Wright et al., Federal Practice and Procedure § 4422, at 634 (2016) (explaining that an acquittal is not issue preclusive in civil cases when the standard of proof is lower, and that the same rule "applies also when further criminal proceedings do not require proof beyond a reasonable doubt").

2. Every federal court of appeals with criminal jurisdiction has recognized that a district court may consider acquitted conduct for sentencing purposes. See, e.g., United States v. Gobbi, 471 F.3d 302, 313-314 (1st Cir. 2006); United States v. Vaughn, 430 F.3d 518, 526-527 (2d Cir. 2005)

(Sotomayor, J.), cert. denied, 547 U.S. 1060 (2006); United States v. Ciavarella, 716 F.3d 705, 735-736 (3d Cir. 2013), cert. denied, 571 U.S. 1239 (2014); Grubbs, 585 F.3d at 798-799 (4th Cir.); United States v. Farias, 469 F.3d 393, 399-400 & n.17 (5th Cir. 2006), cert. denied, 549 U.S. 1272 (2007); United States v. White, 551 F.3d 381, 386 (6th Cir. 2008) (en banc), cert. denied, 556 U.S. 1215 (2009); United States v. Waltower, 643 F.3d 572, 574-578 (7th Cir.), cert. denied, 565 U.S. 1019 (2011); United States v. High Elk, 442 F.3d 622, 626 (8th Cir. 2006); United States v. Mercado, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 552 U.S. 1297 (2008); United States v. Magallanez, 408 F.3d 672, 683-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); United States v. Siegelman, 786 F.3d 1322, 1332-1333 & n.12 (11th Cir. 2015), cert. denied, 577 U.S. 1092 (2016); United States v. Settles, 530 F.3d 920, 923-924 (D.C. Cir. 2008), cert. denied, 555 U.S. 1140 (2009). Contrary to petitioner's suggestion (Pet. 16, 26-27), the uniformity among the federal courts of appeals on the question presented is a reason to deny review, not to grant it. See Sup. Ct. R. 10.

Petitioner's reliance on state-court decisions is misplaced. Petitioner cites (Pet. 14-15, 23) decisions from the Supreme Courts of Georgia, New Hampshire, North Carolina, and New Jersey. Two of those decisions predate Watts and are therefore of minimal relevance. See State v. Cote, 530 A.2d 775 (N.H. 1987); State v. Marley, 364 S.E.2d 133 (N.C. 1988). Two others did not cite this

Court's decision in Watts, let alone attempt to distinguish it. See Bishop v. State, 486 S.E.2d 887 (Ga. 1997), cert. denied, 522 U.S. 1119 (1998); State v. Cobb, 732 A.2d 425 (N.H. 1999). Indeed, the Supreme Court of New Hampshire has since clarified that its earlier decision in "Cote provides greater protection than that provided to a defendant in * * * Watts" -- a statement best read as clarifying that its decisions are rooted in state law and thus do not create a conflict on the federal constitutional question presented here. State v. Gibbs, 953 A.2d 439, 442 (2008). The same is true of State v. Melvin, 258 A.3d 1075 (N.J. 2021), which expressly relied on state, not federal, law. Id. at 1094 (explaining that the "State Constitution offers greater protection against the consideration of acquitted conduct in sentencing than does the Federal Constitution").

Petitioner also cites (Pet. 15, 23) the Supreme Court of Michigan's decision in People v. Beck, 939 N.W.2d 213 (2019), cert. denied, 140 S. Ct. 1243 (2020), which took the view that "due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted." Id. at 227. Beck not only is an outlier decision, but it appears to be the first of its kind. Beck concluded that the sentencing court erred in relying on conduct underlying a murder charge directly before the jury in the same case. Id. at 225. To the extent that Beck could be read to further preclude Michigan state courts from considering acts included as additional

support for a racketeering charge in a prior case, any disagreement it has created remains too shallow to warrant this Court's review.

Moreover, Beck's reasoning is tenuous. In that court's view, "when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent," and reliance on acquitted conduct at sentencing "'is fundamentally inconsistent with the presumption of innocence itself.'" Beck, 939 N.W.2d at 225 (citation omitted). But an individual is equally "presumed innocent" when he is never charged with a crime in the first place. Ibid. The logical implication of the Beck majority's reasoning would therefore preclude a sentencing court from relying on any conduct not directly underlying the elements of the offense on which the defendant is being sentenced. Yet Beck itself acknowledged that "[w]hen a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard." Ibid. The majority did not attempt to explain that logical inconsistency in its reasoning.

3. This Court's intervention is particularly unwarranted now that the U.S. Sentencing Commission has amended the Sentencing Guidelines to instruct courts not to consider conduct "charged and acquitted in federal court" when calculating a defendant's guidelines range. Sentencing Guidelines § 1B1.3(c) (2024); see

McClinton v. United States, 143 S. Ct. 2400, 2403 (2023) (Sotomayor, J., statement respecting the denial of certiorari) (citing Commission's efforts to "resolve questions around acquitted-conduct sentencing"); McClinton, 143 S. Ct. at 2403 (Kavanaugh, J., respecting the denial of certiorari) (similar). In particular, the Commission added Sentencing Guidelines § 1B1.3(c), which provides that the "relevant conduct" that courts may consider to calculate the guidelines range "does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction." Ibid. That amendment took effect on November 1, 2024, and the Commission has not yet decided whether to apply the amendment retroactively. See 89 Fed. Reg. 36,853, 36,867-36,868 (May 3, 2024); see also Calton W. Reeves, Chair, Remarks at Public Meeting of the U.S. Sentencing Comm'n 5 (Aug. 8, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20240808/remarks.pdf.

To the extent that petitioner seeks this Court's guidance on how acquitted conduct should be treated by state courts, this is not an appropriate case in which to do so. And contrary to petitioner's contention (Pet. 12-15), this Court's review is not warranted to address the limited instances in which the Sentencing Commission has allowed district courts to consider acquitted conduct under Section 1B1.3. In particular, while Section 1B1.3

permits district courts to consider conduct underlying a charge on which a defendant was acquitted in state (rather than federal) court, the Commission explained that it "limit[ed] the scope" of Section 1B1.3(c) to capture "only those charges of which the defendant has been acquitted in federal court" to respect "the principles of the dual-sovereignty doctrine" and to respond to "administrability" concerns. Sentencing Guidelines App. C Supp., Amend. 826 (Nov. 1, 2024).[2] That approach recognizes that -- even aside from the principles set forth in Watts -- an acquittal by "'the people of a State'" is not one by "'the people of all the States'" and that "the States and the Nation" have "different 'interests' and 'rights'" in their criminal systems. Gamble v. United States, 587 U.S. 678, 689 (2019) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421, 428, 435-436 (1819))a (brackets omitted).

[2] This case does not implicate the other limited circumstance in which Section 1B1.3 permits courts to consider "acquitted conduct," i.e., where "such conduct also establishes, in whole or in part, the instant offense of conviction." Sentencing Guidelines § 1B1.3(c) (2024) (capitalization altered). That exception reflects that conduct may "underlie[] both an acquitted charge and the instant offense of conviction." *Id.* § 1B1.3, comment. (n.10). For example, a federal jury may return a split verdict on overlapping counts or find a defendant guilty only of a lesser-included offense. See *id.* App. C Supp., Amend. 826 (Nov. 1, 2024). The Commission, however, estimated that cases involving charges acquitted in federal court would be "rare." Ibid. (noting that in fiscal year 2022, only "0.4% of all [federally] sentenced individuals" were "acquitted of at least one offense or found guilty of only a lesser included offense").

Moreover, as a practical matter, the Commission's approach avoids complicated inquiries into state law and records to determine the conduct underlying a count on which a state jury, at a previous proceeding, acquitted the defendant. See Sentencing Guidelines App. C Supp., Amend. 826 (Nov. 1, 2024). Indeed, such inquiries can be difficult even when the proceedings are federal, and the Commission is best positioned to address practical problems as they may arise. Constitutionalizing a theory that would extend even further than the Guidelines, however, could constrain courts' ability to find workable solutions.

Furthermore, in all events, even in the limited circumstances where the Sentencing Guidelines still permit courts to consider conduct underlying an acquitted count, the Guidelines do not require it. Sentencing courts always retain discretion to consider whether such conduct should carry weight in their assessment of each defendant's "background, character, and conduct" for the purpose of imposing a sentence in a case. 18 U.S.C. 3661; see 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).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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