No. _____

SUPREME COURT OF THE UNITED STATES

DAMON WILLIAMS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Terrance O. Waite
Counsel of Record
Waite & McWha
116 N. Dewey St; PO Box 38
North Platte, NE 69103-0038
Tel.: (308) 532-2202
E-mail: twaite@northplattelaw.com

Question Presented

I.

When imposing maximum, consecutive sentences for two convictions for attempted interference with commerce by robbery (18 U.S.C. § 1951)—arising out of two discrete events taking place on two different nights—did the District Court abuse its discretion by implicitly premising its sentencing on an erroneous application of the Federal Sentencing Guidelines and a pretextual consideration of 18 U.S.C. § 3553 factors exclusively related to the operative facts underlying one conviction but not the other?

II.

When imposing maximum, consecutive sentences for two convictions for attempted interference with commerce by robbery (18 U.S.C. § 1951)—arising out of two discrete events taking place on two different nights—did the District Court violate Petitioner's Fifth and Sixth Amendment rights by applying the murder cross reference USSG § 2A1.1 based on dismissed charges that previously arose out of the operation of law instead of relevant conduct of Mr. Williams underlying those dismissed charges?

Parties to the Proceedings

Petitioner, Damon Williams, was the appellant below. Respondent, United States of America, was the appellee below. The appeal below was consolidated with the proceedings for co-defendant/appellant, Tawhyne M. Patterson. The underlying District Court action included the following additional defendants: Dante Williams, Ira Morrow, and Willaim Boothe III.

Related Proceedings

United States District Court (Dist. Neb.)
United States v. Williams, et al., No. 4:19-cr-03011
(Dec. 21, 2023)

United States Court of Appeals (8th Cir.)
United States v. Williams, No. 21-2485,
(June 27, 2023).

United States Court of Appeals (8th Cir.)
United States v. Tawhyne Patterson, Sr., No. 21-2469
(May 23, 2023)

United States Court of Appeals (8th Cir.)
United States v. Williams, No. 21-2485
(May 23, 2023)

United States Court of Appeals (8th Cir.)
United States v. Tawhyne Patterson, Sr., 23-3777
(Apr. 1, 2025)

United States Court of Appeals (8th Cir.)
United States v. William, 23-3766
(Apr. 1, 2025)

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Federal Sentencing Guidelines (2018) and Commentary

I. Petition for Writ of Certiorari

Damon Williams, an inmate currently incarcerated in the United States Penitentiary in Florence, Colorado, by and through Terrance O. Waite, counsel of record appointed under the Criminal Justice Act, U.S.C. §3006A, respectfully petitions this Court for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

II. Opinions Below

On December 21, 2023, the United States District Court for the District of Nebraska entered its amended judgment upon resentencing. *United States v. Williams, et al.*, No. 4:19-cr-03011. The decision by the Eighth Circuit Court of Appeals affirming the District Court's resentencing is unreported and can be located at *United States v. Williams*, No. 23-3766, 2025 WL 972973, at *1 (8th Cir. Apr. 1, 2025). The aforementioned orders are attached at the Appendix ("App.").

III. Jurisdiction

The Eighth Circuit Court of Appeals order affirming the resentencing order was entered on April 1, 2025. Mr. Williams invokes this Court's jurisdiction under 28 USC. § 1254, having timely filed this petition under U.S. Sup.Ct. Rule 13.

IV. Statutory Provisions Involved

18 USC. § 1951

18 USC § 3553

USSG § 2A1.1

USSG 2B3.1

USSG §3D1.2(b)

Pertinent text is attached in the Appendices.

V. Constitutional Provisions Involved

United States Constitution, Amendment V:

> 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.

United States Constitution, Amendment VI:

> 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 the compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

VI. Statement of the Case

This case involves an attempted robbery of a drug dealer at his home in Lincoln, Nebraska in July 2018, during which an individual was tragically killed. Damon Williams was convicted of four separate counts and sentenced to life in prison for commission of murder with a firearm during a crime of violence (18 U.S.C. §§ 924(j)(1) (attempted Hobbs Act robbery)), in addition to maximum sentences imposed for the remaining three counts, to be served concurrently.

On July 30, 2018, "four individuals enter[ed] a side gate to the backyard and one trie[d] to open a side door to the residence, but it appears from the video that the side door was locked.," "[o]ne appears to be in possession of a firearm, and another is carrying a baseball bat," and they "walked around the outside of the home for a short amount of time and then left." See App., A – 000018.

On July 31, 2018, three individuals approached the same residence, one of whom "approached the front door, turned away from it, and then placed several back kicks into the bottom center of the interior front door. Once the second individual got the door fully open, all three rushed into the home together, yelling, 'LPD! LPD! LPD!,' according to victims in the home who were later interviewed by investigators. Seconds later, eight gunshots are heard being fired in the video in rapid succession." See App., A – 000019.

After a few minutes and five more shots, the home invaders fled. *Id.* One inhabitant of the residence "sustained a single gunshot wound during the home invasion" and died. *Id.* "In addition to MJR and the deceased victim JB, there were four females sixteen years of age and younger, and a 61-year-old female, MJR's mother, inside the residence during the home invasion robbery. Several individuals on the main floor were bound by the suspects with zip ties and duct tape." *Id.*

On June 26, 2021, following a jury trial, the Court sentenced Damon Williams to life imprisonment on Count I (Commission of Murder with a Firearm During a Crime of Violence), consecutive to any other sentence imposed. On Counts II (Attempted Interference with Commerce by Robbery), III (Attempted Interference with

Commerce by Robbery), and V (Firearms Conspiracy), Mr. Williams was sentenced to a term of two hundred forty (240) months on each count—the maximum sentence—with each count to be served concurrently to one another. See App., A – 000001.

Damon Williams appealed both his convictions and sentences, largely based on evidentiary issues, and at that time the Eighth Circuit Court of Appeals, in reviewing the case for plain error, directed the parties to prepare supplemental briefs to address the impact of *United States v. Taylor*, 142 S. Ct. 2015 (2022)—issued after Damon Williams' conviction—with respect to the Supreme Court's determination that an attempted Hobbs Act robbery is not a "crime of violence" as defined in 18 U.S.C. § 924(c). *United States v. Patterson*, 68 F.4th 402, 420 (8th Cir. 2023).

Thereafter, the Government conceded, and Eight Circuit Court ruled accordingly, that the holding in *United States v. Taylor* rendered unfirm Damon William's conviction for commission of murder with a firearm during a crime of violence under 18 U.S.C. §§ 924(j)(1) and 2 (attempted Hobbs Act robbery), dismissed Count I, and remanded the case for resentencing on the remaining counts under the sentencing package doctrine. *Id*. at 423.

Mr. Williams subsequently filed a petition for rehearing *en banc*, which was denied. *United States v. Williams*, No. 21-2485, 2023 WL 4219407, at *1 (8th Cir. June 27, 2023).

On remand for resentencing, the U.S. Probation and Pretrial Services Officer submitted his Second Revised Presentence Investigation Report ("PSR") on October 26, 2023. See App., A – 000009. On November 11, 2023, Damon Williams filed his

Motion/Brief for Departure and Deviation from Guidelines and Written Statement Regarding Unresolved Objections to The Presentence Report, largely based on the grouping of Counts II and III.

In its Tentative Findings, the District Court overruled Damon William's objections to the PSR, and reserved its ruling on his motion for variance until sentencing. See App., A – 000038.

At the December 20, 2023, resentencing hearing, the District Court adopted the PSR, overruled objections to Tentative Findings, and sustained in part Damon William's motion for variance. See App., A – 000053. The District Court sentenced Damon Williams to the custody of the Bureau of Prisons on Counts II and III to a term of 240 months each, and on Count V to a term of 180 months, with each count—II, III, and V—to be served consecutively to the other. See App., A – 000045.

Appeal to Eight Circuit

Damon Williams timely filed his appeal with the United States Court of Appeals for the Eighth Circuit, pursuant to 28 U.S.C. §1291, which provides for jurisdiction over a final order subject to appeal, and 18 U.S.C. §3742, which provides for review of a federal sentence.

Mr. Williams based his appeal on improper grouping of counts II and III under the federal sentencing guidelines to effect maximum, consecutive sentence for his convictions, and violations of his constitutional rights. In affirming the sentencing below, the Eighth Circuit reasoned that:

(i) The District Court's improper grouping, if any, was harmless error because the Court "indicated it would have imposed the same sentence under the lower guideline range," using 18 U.S.C. § 3553(a) factors;

(ii) The use of USSG § 2A1.1 cross reference for murder to effect and increase to both counts was not unconstitutional because Mr. Williams was "found guilty beyond a reasonable doubt of murder;" and,

(iii) There was no abuse of discretion.

See App., A – 000081.

The Eighth Circuit's holding was wrong.

VII. Reasons for Granting the Writ

A. The District Court Relied on an Improper Grouping Mechanism within the Sentencing Guidelines

Although the Eighth Circuit did not reach the merits of Mr. Williams' arguments with respect to improper grouping, it should have, because a careful consideration of the flawed application of the guidelines brings into relief the District Court's implicit reliance on the same during sentencing.

Mr. Williams' Counts II and III are identical convictions for Attempted Interference with Commerce by Robbery under 18 U.S.C. § 1951, each premised on events taking place on the nights of July 30, 2018 and July 31, 2018, respectively. The grouping of Counts II and III and the subsequent application of the cross reference to the highest offense level, First Degree Murder (2A1.1), results in a base level offense of 43 and the recommended maximum of 240 months (20 years) for *both* counts. This is an improper application of the guidelines and requires completely disregarding the circumstances of each count.

> USSG §3D1.2(b) provides, in part, as follows:
>
> All counts involving *substantially the same harm* shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

> (b) When counts involve the same victim *and* two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

The comments on this section state further:

> Subsection (b) provides that counts that are part of a single course of conduct with a single criminal objective *and represent essentially one composite harm to the same victim* are to be grouped together, even if they constitute legally distinct offense occurring at different times. *This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (e.g., robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm)*

(emphasis added)

"The Sentencing Commission intended the grouping rules to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct." *United States v. Green*, 225 F.3d 955, 959 (8th Cir. 2000). "The Guidelines do not require grouping in all situations. . . as here, the offenses involved *different victims, were separated in time*, and involved *dissimilar conduct*, grouping is not appropriate and the court retains the discretion to sentence either consecutively or concurrently." *United States v. Waugh*, 207 F.3d 1098, 1102 (8th Cir. 2000). (emphasis added) "In *United States v. Rugh*, 968 F.2d 750, 755 (8th Cir.1992) this Court stated 'The primary focus in determining whether counts *involve substantially the same harm*, and therefore should be grouped, is whether the counts *involve the same victim* and same act or transaction.'" *Id.* (emphasis added). *See also*, *United States v. O'Kane*, 155 F.3d 969, 972 (8th Cir. 1998) (where the court reasoned

that grouping entails "different kinds of proscribed conduct, punishable on different scales, which harm distinct and different victims.")

i. Disparity of Harms

Counts II and III should not have been grouped together for sentencing purposes due to the disparate and distinct harms arising from the acts attributed to Damon Williams on July 30, 2018, and July 31, 2018.

The grouping criteria in USSG. § 3D1.2(b) are incongruous with Counts II and III. "[S]eparate acts should not be grouped if each act caused a separate harm to a single victim, rather than simply contributing to one overall harm." *Decision to Group*, 2002 WL 32508831. When a "defendant's criminal conduct constitutes single episodes of criminal behavior, each satisfying an individual-albeit identical-goal, then the district court does not group the offenses." *United States v. Pitts*, 176 F.3d 239, 245 (4th Cir. 1999).

On July 30, 2018, the would-be robbers showed up but left without entering the home or interacting with anyone. The attempt to commit robbery and interfere with commerce commenced upon their arrival and concluded when they left. As the District Court noted in its Tentative Findings, "[t]he July 30 attempt was relatively uneventful, as the defendant and his associates weren't able to enter the dwelling" while "[t]he July 31 attempt was calamitous, as detailed in the trial record and presentence report." See App., A – 000040.

The events of July 30, 2018, constitute a single event, and should be distinguished, both factually and for sentencing purposes, from the events of July 31, 2018. Grouping the events of each night as one composite harm is disingenuous.

The attempt on July 31, 2018, was a separate event, at a separate time, with different victims, different fears, and different harms. One cannot in good faith punish Damon Williams equally for each night using a tortured reading of the sentencing guidelines.

ii. Different Victims and Potential Ambiguity

In addition to the requirement that each count have *substantially the same harm,* USSG §3D1.2(b) also requires that each count involve the *same victim*. But here, there are two conceivable interpretations of USSG §3D1.2(b)'s victim requirement as applied to this case: (1) the victims were not the same each night, and USSG §3D1.2(b) is inapplicable, or (2) given the nature and circumstances of the underlying inchoate offenses, USSG §3D1.2(b) is rendered ambiguous.

The "[s]entencing Guidelines do not define the term [victim], leaving the federal courts to sketch out the contours of its meaning." *Andrew Nash, Victims by Definition*, 85 Wash. U.L. Rev. 1419, 1419–20 (2008). The Crime Victims' Rights Act broadly defines "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C.A. § 3771.

The Hobbs Act also explicitly contemplates multiple victims in its definition of robbery, which includes "the unlawful taking . . . by means of actual or threatened

force, or violence, or fear of injury, immediate or future, to his person or property . . . or the person or property of a relative or member of his family *or of anyone in his company at the time of the taking or obtaining*." 18 USC § 1951(emphasis added).

Although the Sentencing Guidelines do not contain a universal definition of victim, they do devote a substantial section to adjustments for different types of victims, e.g., hate crime victims, multiple victims, official victim, and vulnerable victims. USSG §3A1.1, *et seq*. Suffice it to say, the Guidelines contemplate an expansive understanding of victimhood, which accommodates those definitions found in Crime Victims' Rights Act and the Hobbs Act.

However, and significantly, the comments USSG §3D1.2(b) explicitly state that the "term 'victim' is not intended to include indirect or secondary victims" and "[g]enerally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim." USSG §3D1.2 (comment 2).

iii. Interpreting the Sentencing Guidelines

"We interpret the Sentencing Guidelines using the ordinary tools of statutory interpretation. Our inquiry will most often begin and end with the text and structure of the Guidelines. The language of the Sentencing Guidelines, like the language of a statute, must be given its plain and ordinary meaning." *United States v. Clayborn*, 951 F.3d 937, 939 (8th Cir. 2020) (Cleaned up)

§ 3D1.2(b) of the Sentencing Guidelines requires each count have the same "victim" in order to group the counts. This is a necessary prerequisite. However, given that the term "victim" is in the singular as written, one must naturally read the term

in the plural, i.e., as "victims," to resolve the inconsistency between the guidelines as written and the underlying facts of the crimes and resulting convictions.

This interpretation is appropriate under the Dictionary Act, which states that "words importing the singular include and apply to several persons, parties, or things." 1 U.S.C.A. § 1. [T]his rule is not one to be applied except where it is necessary to carry out the evident intent of the statute." *First Nat. Bank in St. Louis v. State of Missouri at inf. Barrett*, 263 U.S. 640, 657, 44 S. Ct. 213, 215, 68 L. Ed. 486 (1924). "When reading the U.S. Code, that Act tells us to assume 'words importing the singular include and apply to several persons, parties, or things,' unless statutory context indicates otherwise." *Niz-Chavez v. Garland*, 593 U.S. 155, 164, 141 S. Ct. 1474, 1482, 209 L. Ed. 2d 433 (2021).

Therefore, for the purposes of Counts II and III, § 3D1.2(b) as appropriately modified reads in relevant part as follows: "Counts involve substantially the same harm within the meaning of this rule (b) [w]hen counts involve the same ***victims*** and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan."

iv. Application: July 30, 2018 - No Victim or Societal Interest as Victim

In this case at issue, there were two formal charges for inchoate offenses with drastically different victims, varying in both number and degree. As the Court noted in its Tentative Findings, the night of July 30, 2018, was "relatively uneventful," and "there's not much to suggest that the July 30 attempt was an 'instance of fear' for the

intended victims—there's little to no evidence in the record showing that." See App., A – 000041.

Indeed, on the first night, there were, quite literally, no identifiable victims. The sentencing guidelines do provide a default when there is no victim, but that default offers little guidance here: "By its terms, § 3D1.2(b) applies only to counts involving the same victim. U.S.S.G. § 3D1.2(b). According to the guideline commentary, '[f]or offenses in which there are no identifiable victims ..., the 'victim' for purposes of subsections (a) and (b) is the *societal interest that is harmed*.'" U.S.S.G. § 3D1.2, appl. note 2." *United States v. Rudolph*, 137 F.3d 173, 181 (3d Cir. 1998).

Under this interpretive framework, the victims were different each separate night.

v. Application: Intended Victim or Potential Victims

One might consider the intended victim or potential identifiable victims, i.e., the owner of the home and the inhabitants, respectively. Based on the formal conviction, there would only be one intended victim, Michael Robertson, the owner of the home. Based on the inhabitants of the house on July 30, 2018, there would be six victims: Michael Robertson, Jessica Brandon, Kyana, Ava, Hailey, and Pat. See App., A – 000085.

Significantly, in addition to the six inhabitants on the first night, there was an additional victim who was present on the second night who, at that time, was bound with zip ties by the would-be robbers: visitor, L. S., *Id*. On the second night, one person was killed, and several others were bound—clearly all of these individuals

were the identifiable victims "directly and most seriously affected by the offense," yet they differ from the identifiable victims on the first night.

If "victim" is read properly as "victims," USSG §3D1.2(b) cannot be used to group counts in this case. "[W]hen there are multiple victims who are "directly and seriously affected by the offense," grouping is not appropriate. U.S.S.G. § 3D1.2, application note 2; *see also id.* § 2A6.1, application note 2 (stating that "multiple counts involving making a threatening or harassing communication to the same victim are grouped together [but] [m]ultiple counts involving different victims are not to be grouped")." *United States v. Parker*, 551 F.3d 1167, 1173–74 (10th Cir. 2008).

Under this interpretive framework, the potential and actual victims differ each night.

vi. Relevant Conduct and the Hobbs Act

The Hobbs Act provision for robbery encompasses and explicitly identifies "victims" as those persons suffering "actual or threatened force, or violence, or fear of injury . . . in his [intended victim's] company at the time of the taking or obtaining." 18 U.S.C.A. § 1951(emphasis added). Under §1B1.3 of the guidelines, "relevant conduct" is made up of "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction." The seven victims on July 31, 2018, were not merely secondary "relevant conduct victims," they were direct victims contemplated by the Hobbs Act and are therefore subsumed under the commission of the attempted robbery and conviction.

Under this interpretive framework, the victims differ each night.

vii. District Court Reasoning

The District Court adopted USSG §3D1.2(b) to sentence Damon Williams using the narrow and incompatible "intended victim" framework. In its Tentative Findings, concluding that the "presentence report is correct in all respects," the District Court reasoned that "both were attempts to steal the same property from the same victim" and "[w]hat the defendant and his associates really did was attempt the same robbery twice," See, App., A – 000041. This completely disregards the fact that there were different victims, *per se*, each night.

At sentencing the District Court stated that it would "**stand on the rationale and the findings**" related to, *inter alia*, the grouping of Counts II and III under USSG §3D1.2(b). (Resentence Trans. 5: 1-6). Further, the District Court adds, "to be clear, my sentencing today is based on the Section 3553(a) factors, and my particular rulings on the guideline objections or other objections, whether they're right or wrong, will have no effect on your ultimate sentence."

viii. Ambiguity

The only other alternative interpretative framework is to posit that what USSG §3D1.2(b)'s "same victim" provision actually means is that grouping is appropriate when counts involve *at least one same victim where there are multiple victims*. But this is a re-writing of the texts. Assuming *arguendo*, that this reading is correct, then it stands to reason that there are conflicting reasonable interpretations of USSG §3D1.2(b).

"The rule of lenity applies when an ambiguous section of the Sentencing Guidelines may be given either of two plausible readings." *United States v. Rodriguez-Arreola*, 313 F.3d 1064, 1067 (8th Cir. 2002). "[T]he rule of lenity dictates that the ambiguity be resolved in favor of the defendant." *United States v. Pharis*, 176 F.3d 434, 436 (8th Cir. 1999).

Based on the foregoing, §3D1.2(b) is inapplicable for the purposes of grouping Counts 2 and 3. Accordingly, an upward departure in the base level offense premised on the cross reference within §2B3.1 to §2A1.1 (First Degree Murder) of the Guidelines, if any, at the sentencing of Mr. Williams, may only be appropriately applied to one of the two convictions for Attempted Interference with Commerce by Robbery, i.e., the one in which a murder occurred.

B. The District Court's Pretextual Reference to 18 USC § 3553 Factors at Resentencing is not the *carte blanche* that the Eighth Circuit believes, because the District Court Implicitly Adhered to a Flawed Reading of the Guidelines and Emphasized Factors that were Substantively Unreasonable

Within its opinion, the Eighth Circuit opted to forgo reaching the merits of the improper grouping because the District Court "provided an alternative explanation under the 18 U.S.C. § 3553(a) factors." However, those alternative factors are precisely the factors of consideration when making a determination under USSG §3D1.2(b), and, within that framework, do not warrant grouping the respective increases to each count. The Eighth Circuit failed to acknowledge that the § 3553(a) factors considered by the District Court to secure the maximum sentence for conviction of one crime—the actions and circumstances of the July 31, 2018—were

simultaneously used to secure the maximum sentence for the conviction of the other crime on July 30, 2018.

This amounts to giving "significant weight to an improper or irrelevant factor" and is "a clear error of judgment." *See, United States v. Salazar-Aleman*, 741 F.3d 878, 881 (8th Cir. 2013). "A sentence is substantively unreasonable if the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor. *United States v. Mahbub*, 818 F.3d 213, 232 (6th Cir. 2016).

> As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. . . After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.

Gall v. United States, 552 U.S. 38, 49–50, 128 S. Ct. 586, 596, 169 L. Ed. 2d 445 (2007).

At resentencing, and in its discussion of the 3553(a) factors, the District Court oscillated between treating the events of July 30, 2018, and July 31, 2018, as one uninterrupted episode or, alternatively, two discrete offenses insofar as it supported its rationale for the ultimate sentences.

"The § 3553(a) factors are used to set both the length of separate prison terms and an aggregate prison term comprising separate sentences for multiple counts of conviction." *Dean v. United States*, 581 U.S. 62, 67, 137 S. Ct. 1170, 1175, 197 L. Ed.

2d 490 (2017). Although in form the district court was setting the length of separate prison terms for each discrete conviction, in substance the district court was using operative facts used to secure one conviction to effect an increase to another conviction based on drastically different circumstances.

When maintaining the distinction between each count and conviction for the purposes of sentencing, and to avoid the impression of cumulative punishment, the District Court emphasized that the robbery attempts occurred on two separate nights. "Double-jeopardy protection limits the judicial branch by assuring that the sentencing court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Dodge v. Robinson*, 625 F.3d 1014, 1017 (8th Cir. 2010) (cleaned up). When wedding each count and conviction for the purposes of sentencing, the District Court emphasized only the heinous acts and victims of the night of July 31, 2018.

Implicit in the district courts consideration of the 3553(a) factors is a strong adherence to the grouping logic of the guidelines for the purposes of effecting an increase for Count 2 with the murder cross-reference.

> First, as to the nature and circumstances of the offense and the need to have the sentence reflect the seriousness of the offense and to promote respect for the law and to provide just punishment for these acts . . . home invasions are at the top of the ladder of the most heinous crimes. Home invasions always involve violence. The crime involves weapons, and invariably there are victims that are either seriously injured or, in a case like this, murdered.

See App., A – 000071.

Here, the District Court references the "offense" (singular) committed on July 31, 2018, for which Appellant was charged with Count 3 and given the maximum

sentence using a murder enhancement. The consideration of any sentencing increase for the nature and circumstances of the "home invasion" and "murder" are fully attributable to and satisfied by the maximum sentencing for Count 3 alone.

"You carried out your function of tying up a nine-year-old child as well as tying up and duct taping an older woman." See App., A – 000072. Again, the district court references the events of July 31, 2018, for which Mr. Williams was charged with Count 3 and given the maximum sentence. The consideration of any sentencing increase for the nature and circumstances regarding the "tying up" of victims are fully attributable to and satisfied by the sentencing for Count 3 alone.

"This is a classic case, if you were in state court, of felony murder, and the punishment will be for the acts that you committed on Counts II and III." See App., A – 000072. Here, the district court references the event of July 31, 2018, for which Appellant was charged with Count 3 and given the maximum sentence. No felony murder conviction could have arisen out of Count 2 in isolation.

> And I also took into account the lasting effects on the other victims in this case, the children that were tied up, restrained, with a gun shoved in both their backs. Patti Oaks was also tied up and held hostage. They're all naturally suffering from that, and I've considered the victim statements.

See App., A – 000073.

Here, the District Court references the event of July 31, 2018, for which Mr. Williams was charged with Count 3 and given the maximum sentence. There are no lasting effects on the "other victims" that are attributable to the night of July 30, 2018, and the corresponding Count 2.

> Finally, I have considered the need to avoid unwarranted sentencing disparities among codefendants . . . You were part of the plan. You were armed. You carried out the plan, and for good measure you discharged your gun on the way out of the house and nearly killed or injured another innocent victim.

See App., A – 000073.

Here again the district court references the event of July 31, 2018, for which Appellant was charged with Count 3 and given the maximum sentence, then concludes with the following:

> So it's for all of those reasons that you will be sentenced, and you'll receive a maximum sentence of 240 months on Counts II and III. Even though it was part of a common scheme, it was different nights, and those sentences will be served consecutive to one another.

See App., A – 000073.

Finally the District Court, after primarily relying on the events of July 31, 2018, during its explanation of its consideration of 3553(a) factors, tacks on this final logic that can be summarized as follows: Mr. Williams' formal convictions for Counts 2 and 3 were premised on actions that took place on two separate nights, but since they were part of common scheme, all the underlying facts and corresponding 3553(a) factors premised on a consideration of the second night will be equally attributed to the first night. This is essentially an attempt to apply the flawed grouping mechanism in USSG §3D1.2(b) and the murder cross-reference in the guise of 3553(a) factors.

A "[d]istrict court abuses its discretion when it (1) fails to consider a relevant factor that should have received significant weight; (2) gives significant weight to an improper or irrelevant factor; or (3) considers only the appropriate factors but in

weighing those factors commits a clear error of judgment. *United States v. Salazar-Aleman*, 741 F.3d 878, 881 (8th Cir. 2013) (emphasis added).

The district court was not simply considering 3553(a) factors, nor was it simply considering uncharged relevant conduct. At re-sentencing, the district court implicitly imported the improper grouping mechanism of the guidelines by considering the operative facts used to secure and enhance a separate conviction for which Mr. Williams already received the maximum sentence. This increase for what was essentially a cotemporaneous and identical conviction was improper.

C. The District Court's Consideration of the Dismissed Murder Charge to Affect an Increase was Unconstitutional, because the Court should only look to Relevant Conduct, not Potential Charges arising out of the Operation of Law

Within its opinion, the Eighth Circuit held that Mr. Williams' constitutional rights were not violated because a "jury found Williams guilty beyond a reasonable doubt of murder." However, this was not the conviction or standard used, and the District Court was essentially focusing on *potential charges resulting from the operation of law*.

The use of USSG §2A1.1 to affect any increase or enhancement at sentencing violates Damon Williams' Sixth Amendment right to a jury trial and his Fifth Amendment due process rights. Damon Williams' prior conviction for Count I, Commission of Murder with a Firearm During a Crime of Violence, in violation of 18 U.S.C. § 924(j), was vacated and dismissed. *United States v. Patterson*, 68 F.4th 402, 408 (8th Cir. 2023).

Accordingly, the dismissal of Count I as akin to a formal acquittal of murder for sentencing purposes. And whether acquitted conduct may be considered during sentencing under the broad framework provided by *United States v. Watts* presently rests on precarious constitutional grounds. 519 U.S. 148, 149, 117 S. Ct. 633, 634, 136 L. Ed. 2d 554 (1997).

As recently as June 2023, the Supreme Court discussed the use of acquitted conduct at length in denying a writ of certiorari from a Defendant who argued that the consideration of his acquitted murder charge, i.e., the fact that a killing occurred, should not be used under the Sentencing Guidelines to affect an increase in his sentence. At that time, Justice Sotomayor, with whom Justice Kavanaugh, Justice Gorsuch, and Justice Barrett joined, and for whom Justice Alito wrote a concurring opinion, noted the following:

> 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)

"The Due Process Clause of the Fifth Amendment is implicated when a sentencing court considers evidence that the defendant had no meaningful opportunity to rebut, and only then when that consideration results in a sentence based on material misinformation…. [while the] [c]onfrontation Clause of the Sixth Amendment is implicated when consideration by the sentencing court of evidence that the defendant was not given an opportunity to rebut results in a defendant being sentenced on the

basis of misinformation of constitutional magnitude. *United States v. Godat*, 688 F.3d 399, 401 (8th Cir. 2012) (cleaned up).

After the dismissal of the murder charge, the underlying facts and the dismissed charge became *relevant conduct* for the purposes of sentencing, and as relevant conduct, was used by the District Court to endorse a murder cross reference for both Counts II and III.

"It is now well established that in the sentencing context neither Booker nor the Fifth or Sixth Amendment is violated by the application of a cross reference on the basis of judge found facts so long as those facts are proven by a preponderance of the evidence and the guidelines are used in an advisory manner." *United States v. Howell*, 606 F.3d 960, 963 (8th Cir. 2010).

Here, based on the facts adduced at trial, Damon Williams was convicted of "using or carrying a firearm during and in relation to a crime of violence" to secure his murder conviction. This is a far cry from proving he was the cause in fact of the killing. His carrying of the firearm during the crime of violence was a formal requirement of a conviction which is now dismissed. Unlike his previous sentencing, the resentencing may not punish Damon Williams for a conviction of murder that was proved beyond a reasonable doubt, because now Mr. Williams' relevant conduct must be considered, not his conduct relevant to a dismissed conviction that initially arose out of the operation of law.

Mr. Williams' sentence for attempted robbery may only be enhanced by the consideration of relevant conduct using a preponderance of the evidence standard.

During the trial there was never a preponderance of the evidence that Damon Williams pulled the trigger that fired the fatal shot. As the Court acknowledged on December 20, 2023, it was Tawhyne Patterson who "started blazing away with a gun seconds after entering the house." See App., A – 000072.

Given the differing standards of proof, the dismissal of Damon Williams' murder charge is akin to an acquittal of that charge for sentencing purposes, and Damon Williams' relevant conduct at sentencing does not include a finding that he killed anyone.

The district court inordinately focused on *potential charges resulting from the operation of law*—i.e., felony murder constructively imputed to Mr. Williams as a participant in the robbery—not his underlying relevant conduct, which is purely a factual consideration, and thereby deprived Mr. Williams of his Fifth and Sixth Amendment rights to a jury.

"The Sixth Amendment provides that those accused of a crime have the right to a trial by an impartial jury. This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 104, 133 S. Ct. 2151, 2156, 186 L. Ed. 2d 314 (2013) (internal citations omitted). "The Fifth and Sixth Amendments' jury trial rights provide a defendant with entirely complementary protections at a different stage of the proceedings by ensuring that, once a jury is lawfully empaneled, the government must prove beyond a reasonable doubt to a unanimous jury the facts

necessary to sustain the punishment it seeks." *Erlinger v. United States*, 144 S. Ct. 1840, 1857–58 (2024) (cleaned up) (emphasis added).

At sentencing, "[j]udge-found facts need be established only by a preponderance of the evidence. The district court may consider charged, uncharged, dismissed, and acquitted conduct as relevant conduct." *United States v. Thomas*, 760 F.3d 879, 889 (8th Cir. 2014). Mr. Williams readily concedes the district court's broad grant of discretion at sentencing, but the foregoing proposition does not mean the district court may consider *charges, uncharged charges*, *dismissed charges, or acquitted charges* when they are purely the result of the operation of law, as in this case, where a felony murder charge imputed to Mr. Williams is a construct of law. The key consideration here is "conduct," which is a finding of fact, not the hypothetical possibility of a formal charge of felony murder. This distinction is important.

"Very roughly speaking, relevant conduct corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment." *United States v. Watts*, 519 U.S. 148, 152, 117 S. Ct. 633, 635, 136 L. Ed. 2d 554 (1997). (cleaned up). "[T]he focus is on the ***specific acts and omissions for which the defendant is to be held accountable*** in determining the applicable guideline range, rather than on ***whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator***."§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range), Fed. Sent. L. & Prac. § 1B1.3 (2024 ed.) (emphasis added).

During resentencing the District Court stated "[t]his is a classic case, if you were in state court, of felony murder, and the punishment will be for the acts that you committed on Counts II and III." App (Resent. Trans. p. 20:18-20). Despite the District Court's affirmation that Mr. Williams is being punished for his acts that he "committed on Counts II and III," given the murder enhancement, he is being punished twice for Count III, which, in any event, was enhanced not by Mr. Williams' acts, but by the criminal liability as a result of the operation of law with respect to felony murder, a constructive charge for which he was not convicted.

The District Court's focus is on the severity of a formal charge that would constructively impute murder to Mr. Williams, not his actual relevant conduct. The Court is considering a hypothetical charge that Mr. Williams could have been charged with in another court for events, acts, and omission wholly attributable to July 31, 2018, and resulting Count III, and in any event, those events, acts, and omissions did not constitute murder under 18 U.S.C. § 1111 (a).

Federal Sentencing Guidelines state that "(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. §1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder)." (USSG §2B3.1(c)(1)). The cross reference to USSG §2A1.1 requires a base level offense of 43, making the maximum sentence an inevitability for Damon Williams on at least one count.

> Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson,

> escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

18 U.S.C. § 1111 (a),

The guidelines permit grouping when a murder has occurred under 18 U.S.C. § 1111 (a). First, with respect to the prior dismissal of Count I, as a matter of law, no one was "killed under circumstances that would constitute murder under 18 U.S.C. §1111." Thus grouping is inappropriate under the guidelines. Second, with respect to a charge of felony murder under state court, this is not a murder under 18 U.S.C. §1111.

The district court is focusing on the *charge* of felony murder and the constructive imputation of the killing to other participants in the underlying felony, not the actual conduct of Mr. Williams. "[F]elony murder does not require that the defendant commit the killing or even intend to kill, so long as the defendant is involved in the underlying felony." *Schad v. Arizona*, 501 U.S. 624, 654, 111 S. Ct. 2491, 2508, 115 L. Ed. 2d 555 (1991). Under Nebraska law, "felony murder is a form of first-degree murder and is defined as murder committed in the perpetration of or attempt to perpetrate certain enumerated felonies, including sexual assault or attempt to commit sexual assault in the first degree." *Hopkins v. Reeves*, 524 U.S. 88, 91, 118 S. Ct. 1895, 1897, 141 L. Ed. 2d 76 (1998) (internal citations omitted).

Accordingly, in considering relevant conduct, the District Court must limit the factual inquiry into Mr. Williams' "acts and omissions." "Relevant conduct under the

guidelines need not be charged to be considered in sentencing, and it includes all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." *United States v. Jokhoo*, 806 F.3d 1137, 1141 (8th Cir. 2015). "Whether an act or omission constitutes relevant conduct is a factual determination." *United States v. Regenwether*, 300 F.3d 967, 968 (8th Cir. 2002).

At trial, the preponderance of the evidence did not support that *Mr. Williams' acts and omissions* resulted in the killing—any murder charge considered at sentencing could have only arisen from the operation of law, i.e., a legal conclusion unreached at Mr. William's conviction. By focusing on *charges, uncharged charges*, *dismissed charges, or acquitted charges*, instead of Mr. Williams' actual conduct underlying those charged, uncharged, or dismissed charges, the District Court was essentially acting as both judge and jury for a trial that never occurred.

VIII. Conclusion

For the foregoing reasons, Mr. Williams respectfully requests that this Court issue a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

Respectfully submitted,

Damon Williams, Petitioner,

/s/ Terrance O. Waite

Terrance O. Waite
Counsel of Record
Waite & McWha
116 N. Dewey St; PO Box 38
North Platte, NE 69103-0038
Tel.: (308) 532-2202
E-mail: twaite@northplattelaw.com