

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

**SHAWN LAMONT McCLAIN,  
a/k/a Gucci,**

*Petitioner,*

v.

**UNITED STATES OF AMERICA,**

*Respondent.*

**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit**

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI**  
\_\_\_\_\_

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## QUESTION PRESENTED

### I.

Certiorari should be granted to determine whether the Court of Appeals erred in affirming the underlying sentencing where:

- A. The February 4, 2015 drug distribution conviction as charged in Count 6 of *U.S. v. McClain*, Case No. 5:16CR16, was relevant conduct used by a prior sentencing court to enhance and vary from Appellant's recommended guideline sentence of 15-21 months to a 120-month sentence in *U.S. v. McClain*, Case No. 5:14CR22.
- B. Whether Title 18, United States Code, Section 3553 and 3584 as well as U.S.S.G Sentencing Guideline 1B1.3 and 5G1.3 mandate the imposition of concurrent sentences in *U.S. v. McClain*, Case No. 5:16CR16 and *U.S. v. McClain*, Case No. 5:14CR22 where the February 4, 2015 conduct was considered relevant to enhance McClain's sentence in 5:14CR22 then again charged in 5:16CR16 as a substantive count of distribution.

## **PARTIES TO THE PROCEEDING**

Petitioner, Shawn Lamont McClain was the Defendant in criminal proceedings before the United States District Court for the Northern District of West Virginia, in the cases of *U.S. v. Shawn Lamont McClain*, Criminal Action No. 5:16R16 and Criminal Action No. 5:14:CR22 and the Appellant before the United States Court of Appeals for the Fourth Circuit in *U.S v. Shawn Lamont McClain*, No. 16-4688.

Respondent, the United States of America was the Plaintiff in criminal proceedings before the United States District Court for the Northern District of West Virginia, in the cases of *U.S. v. Shawn Lamont McClain*, Criminal Action No. 5:16R16 and Criminal Action No. 5:14:CR22 and the Appellee before the United States Court of Appeals for the Fourth Circuit in *U.S. v. Shawn Lamont McClain*, No. 16-4688.

There are no other parties to this action.

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### **OPINION BELOW**

On August 31, 2017, the United States Court of Appeals for the Fourth Circuit issued its mandate, affirming the conviction and sentencing in the United States District Court for the Northern District of West Virginia. The opinion was a percuriam unpublished opinion. (App. A)

## **STATEMENT OF JURISDICTION**

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 19, 2016. Appx. A; Fed. R. App. P. 36. This petition is filed within 90 days after that date. Rules 13.1, 13.3. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The 5<sup>th</sup> Amendment to the United States Constitution protects individuals from double jeopardy. It specifically states:

### *Amendment V*

*No person shall .... be subject for the same offense to be twice put in jeopardy of life or limb*

## **ISSUES PRESENTED FOR REVIEW**

- I. Whether the February 4, 2015 drug distribution conviction as charged in Count 6 of *U.S. v. McClain*, Case No. 5:16CR16, was relevant conduct used by a prior sentencing court to enhance and vary from Defendant's recommended guideline sentence of 15-21 months to a 120-month sentence in *U.S. v. McClain*, Case No. 5:14CR22.
- II. Whether Title 18, United States Code, Section 3553 and 3584 as well as U.S.S.G. Sentencing Guidelines 1B1.3 and 5G1.3 mandate the imposition of concurrent sentences in *U.S. v. McClain*, Case No. 5:16CR16 and *U.S. v. McClain*, Case No. 5:14CR22 where the February 4, 2015 conduct was considered relevant to enhance McClain's sentence in 5:14CR22 then again charged in 5:16CR16 as a substantive count of distribution.

## **STATEMENT OF THE CASE**

Petitioner, Shawn McClain challenges the Fourth Circuit's August 31, 2017, affirmance of the convictions and sentences imposed upon him as reflected in orders filed and entered October 19, 2016 in the United States District Court for the Northern District of West Virginia.

While this appeal only concerns the imposition of a ninety-five (95) month consecutive sentence in *U.S. McClain*, 5:16CR16, (hereinafter Case 2), a comprehensive *de novo* review mandates consideration of facts used to impose a one hundred twenty (120) month sentence in *U.S. McClain*, 5:14CR22. (hereinafter Case 1.)

### **A. The Course of Proceedings**

#### **CASE 1: *U.S. McClain*, 5:14CR22**

On April 1, 2014 a Federal Grand Jury for the Northern District of West Virginia returned a one count indictment charging, Appellant, Shawn McClain (hereinafter "Mr. McClain") with Possession with Intent to Distribute Heroin on or about January 20, 2013

On September 8, 2014, Mr. McClain signed a plea agreement and plead guilty to the January 20, 2013 possession with intent to distribute heroin charge presentence investigation report was disclosed on October 18, 2014 which "guideline provision" provides as follows:

"Based upon a total offense level of 12 and a criminal history category of III, the guideline imprisonment range is 15 to 21 months."

Prior to his sentencing, the government filed a Petition for Action on Conditions of Pretrial Release on February 10, 2015 alleging the following:

On **February 4, 2015**, a confidential informant made a controlled purchase of heroin from the defendant. . . .

On February 10, 2015, the Honorable Judge John Preston Bailey ordered the issuance of an arrest warrant for the defendant.

On March 3, 2015 the Honorable Judge John Preston Bailey sentenced the Defendant to a one hundred (120) month term of imprisonment varying upward from the 21 to 27 month advisory guideline range citing as his reasons, inter alia,

“First, the defendant is from Cleveland, Ohio and it is abundantly clear that he came to the Ohio Valley in order to spread his poison on it citizens.”

“Second, the defendant reports no addiction to heroin, he is not even a heroin user, he is here as part of a business enterprise to make money by selling misery.”

“Third, the defendant continued to sell heroin after being arrested and released on bond and ***made an additional sale to a confidential informant on February 4, 2015***. It is obvious the only way to stop his drug trafficking is by keeping him in prison.” (Emphasis supplied)

#### **CASE 2: U.S. McClain, 5:16CR16**

Approximately a year after receiving a 120 month sentence for possession with intent to distribute heroin, a Federal Grand Jury for the Northern District of West Virginia returned a seven count indictment charging Appellant, Shawn McClain in three counts of the seven count Indictment. The seven count Indictment charged Mr. McClain as follows:

**Count 1:** Conspiracy to Distribute Heroin and Fentanyl from on or about November 2014 and continuing until February 17, 2015.

**Count 6:** Distribution of Heroin and Fentanyl within 1,000 feet of a school on or about ***February 4, 2015*** (emphasis supplied).

**Count 7:** Distribution of Heroin and Fentanyl on or about February 6, 2015.

On July 19, 2016, Mr. McClain filed his Notice of Intent to change his plea recognizing his consideration of the government's plea offer<sup>1</sup> and instead making knowing and intelligent choice to plead to the entire Indictment. On July 21, 2016 Mr. McClain plead guilty to all counts of the Indictment. A presentence investigation report was disclosed on August 29, 2016 "guideline provision" stated as follows:

"Based upon a total offense level of 25 and a criminal history category of IV, the guideline imprisonment range is 84 to 105 months."

Mr. McClain filed numerous objections to the presentence report, which can be categorized as follows:

- 1) Objection to the Government's Intent to apply the Death Enhancement
- 2) Relevant conduct calculations
- 3) Argument in support of a concurrent sentence

On October 7, 2016 Mr. McClain filed his presentence memorandum in support of his position which 1) opposed the Government's attempts to seek enhancement due to alleged drug related deaths and 2) argued the drug distribution charged in Case 2

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<sup>1</sup> Despite the Indictment failing to charge death related to drug distribution, the government's offer consisted of a plea to the Conspiracy Count with a corresponding 20 year consecutive sentence based upon the government's theory that individuals allegedly died from the heroin which Defendant distributed.

was considered as relevant conduct in Case 1 and thus any sentence imposed as to Case 2 should run concurrently to Case 1.

On October 8, 2016, the Government filed its Presentence Memorandum in support of its position that an 84-105 month sentence in Case 2 should be imposed consecutive to the 120 month sentence in Case 1 while acknowledging that *“It is unsupported by the record for defendant to claim that any conduct referenced in the current Indictment (other than the February 4, 2015 or any historical evidence by the witnesses in this case was used by the Court in the prior sentencing.”*

On October 24, 2015, the district court sentenced Mr. McClain to a term of “95 months incarceration as to each of Counts One, Six and Seven to be served concurrently with each other and consecutively with Case No. 5:14CR22.”) In so doing, the sentencing Court in Case No. 2 explained his rationale at the hearing by stating the following:

Mr. McClain, if you'll stand for a moment, I'm ready to impose sentence upon you. Pursuant to the Sentencing Reform Act of 1984, it's the judgment of this Court that you be committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 95 months as to each of Counts 1, 6, and 7, to be served concurrently with one another and ***consecutively with the case in Docket 5:14-CR-22.***

Let me explain. First of all, while I have heard the testimony of the witnesses, the three witnesses that testified here at the sentencing hearing, I have not considered their testimony with regard to overdoses resulting in death because that issue has been withdrawn by the government to the extent that it was ever an issue, and was not part of the indictment.

And I have not considered that testimony of the other witnesses except as it relates and could be determined to relate to relevant conduct as it appears in the presentence report. And as I said, I think the relevant

conduct was accurately calculated by the probation officer and I have sustained any objection relating to relevant conduct.

I think I can consider the admissions that the -- one of the witnesses was Jako, commented on, upon the -- being told that the heroin was strong as relating to his attitude as to the sale of drugs and how he wished to treat them. But even in considering that, I think you can consider that independently of that testimony.

***The concern that I have here is that unlike a number of cases we see in this court where heroin distributors are addicts and are selling in order to obtain enough money to take care of their own habits, it doesn't appear that Mr. McClain was an addict, and so while the reasons that addicts commit the crime is not justification, it is some explanation of why those defendants do that. That doesn't mean they're entitled to a lesser or greater sentence. It's just that here it appears to me that Mr. McClain's dealings simply show that he was in the drug-trafficking business solely or substantially because of the money that he could raise.***

I think the sentence that I am imposing, which is not at the highest end of the guidelines and not certainly at the low end of the guidelines, but in the middle range, is still considering the *United States v. Booker* and *United States v. Kimbrough*, sufficient but not greater than that necessary to meet the sentencing factors under 18, United States Code, Section 3553(a). I think it'll reflect the seriousness of the offense, and it certainly is a serious offense. I think it'll promote respect for the law, and I think it'll provide just punishment for the offense.

In rendering these sentences consecutive to the earlier case before another sentencing judge, 5:14-CR-22, I'm exercising my discretion to treat these matters in the manner that I think they have to be considered here. While at the same time I don't believe that it's a sentence that is necessary to be at the highest end of the guideline range, I think that 95 months is sufficient.

Assuming without deciding that a concurrent sentence would be imposed, it seems to me that it could only reasonably be considered as to Count 6, and I think as to Count 6 I don't know that it would make a difference. Nevertheless, ***I make this decision solely on my feelings that the sentences should be consecutive.***

Mr. McClain timely filed a Notice of Appeal on October 21, 2016. Mr. McClain filed an appeal seeking a remand for the imposition of a sentence which runs concurrent to his prior sentence imposed for *U.S. v. McClain*, Case No. 5:14CR22; the Fourth Circuit Court of Appeals affirmed the District Court; Mr. McClain presently seeks a Writ of Certiorari to review the Appellate Court's decision.

The conduct charged in Mr. McClain's current indictment (Case 2) may either have been part of the conduct which resulted in Defendant's bond violation in the prior sentence (Case 1) or alternatively was conduct used to enhance Defendant's prior sentence in Case 1. If so, any sentence imposed in Case 2 must be concurrent to that sentence imposed in Case 1.

The government's ardent approach to this case and goal to incarcerate Defendant McClain for an additional 20 years consecutive to his current 10 year sentence cannot be sustained in fact or law. Mr. McClain plead to the Indictment with no promises in return. Shawn McClain only seeks the correct application of the law to his case.

## STATEMENT OF FACTS

A de novo review in this appeal requires an examination of the sentencing record in *U.S. v. McClain*, Case No. 5:14CR22 (Case 1), and the sentencing record in *U.S. v. McClain*, Case No. 5:16CR-16-01 (Case 2) to determine if conduct considered relevant in Case 1 was likewise considered relevant in Case 2.

Without doubt, the factual circumstances in Case 1 as to the drug distribution on February 4, 2015 was not only sufficiently similar, it was ***identical*** the factual circumstances in Case 2 as to the drug distribution on February 4, 2015.

Without doubt, the factual circumstances surrounding drug distribution in Case 1 were both sufficiently regular and sufficiently close in time to the factual circumstances surrounding drug distribution in Case 2 between the dates of November, 2014 and February 17, 2015.

Case 1 convicted Mr. McClain for possession with intent to distribute cocaine which occurred on January 20, 2013. While on bond and prior to sentencing in Case 1, the government sought to revoke Mr. McClain's bond for distribution of heroin on February 4, 2015. On January 9, 2015 and February 4, 2015, well in advance of Mr. McClain's sentencing, the government interviewed Angel Klein (co-conspirator in Case 2) related to her knowledge regarding heroin distribution in the Ohio Valley. On February 4, 2015 and again on February 6, 2015, the government made controlled buys from Mr. McClain. Knowing both the information gathered in the co-conspirator's interview and the controlled buys from Mr. McClain, the government participated in Mr. McClain's sentencing in Case 1 and acquiesced in the imposition

of a 120 month period of incarceration. On March 2, 2015, Mr. McClain received a sentence based upon an upward variance related to the February 4, 2015 distribution of heroin.

Knowing both the information gathered in the co-conspirator's interview and the controlled buys from Mr. McClain, and further armed with knowledge that Mr. McClain had already received a 120 month sentence for distribution of heroin on or about February 4, 2015, the government presented to, and a federal grand jury returned an Indictment on April 6, 2016, charging Mr. McClain in Count 1 with Conspiracy to Distribute Heroin and Fentanyl *from in or about November, 2014 and continuing until February 17, 2015*; in Count 6 with Distribution of Heroin and Fentanyl within 1,000 feet of a school on or about *February 4, 2015*; in Count 7 with Distribution of Heroin and Fentanyl on or about *February 6, 2015*.

The Conspiracy charged in Case 2 began in November 2014 and ended on or about February 17, 2015. The Conspiracy charged in Case 2 clearly falls within the time frame of the conduct considered at sentencing for the conviction in Case 1:

Case 1            January 20, 2013 -----March 2, 2015

Case 2            -----November, 2014 to February 17, 2015

While the government seeks to claim that *"It is unsupported by the record for defendant to claim that any conduct referenced in the current Indictment (other than the February 4, 2015 buy) or any historical evidence by the witnesses in this case was used by the Court in the prior sentencing,"* the record is replete with evidence that **the conduct charged, considered, and sentenced in Case 2 was known to the**

government as per the dates contained in their “version of the offense” submitted to the Probation Officer in Case 2. Likewise the conduct charged, considered, and sentenced in Case 2 was likewise known to the sentencing court in Case 1.

## I.

### SUMMARY OF ARGUMENT

The February 4, 2015 drug distribution conviction as charged in Count 6 of *U.S. v. McClain*, Case No. 5:16CR16, was relevant conduct used by a prior sentencing court to enhance and vary from Defendant's recommended guideline sentence of 15-21 months to a 120 month sentence in *U.S. v. McClain*, Case No. 5:14CR22.

Title 18, United States Code, Section 3553 and 3584 as well as U.S.S.G. Sentencing Guidelines 1B1.3 and 5G1.3 mandate the imposition of concurrent sentences in *U.S. v. McClain*, Case No. 5:16CR16 and *U.S. v. McClain*, Case No. 5:14CR22 where the February 4, 2015 conduct was considered relevant to impose an upward variance of Mr. McClain's sentence in 5:14CR22 and then again charged and sentenced in 5:16CR16 as a substantive count of distribution.

## ARGUMENT

### I.

**The February 4, 2015 drug distribution conviction as charged in Count 6 of *U.S. v. McClain*, Case No. 5:16CR16, was relevant conduct used by a prior sentencing court to enhance and vary from Defendant’s recommended guideline sentence of 15-21 months to a 120-month sentence in *U.S. V. McClain*, Case No. 5:14CR22.**

A factual review of the district court’s imposition of a consecutive sentence in Case 2 demonstrates clear error and, a de novo review of the district court’s rationale demonstrates an abuse of discretion mandating a reversal and remand for resentencing.

When a district court interprets the meaning and legal components of the term “relevant conduct,” it makes a legal determination that we review de novo. See, e.g., *United States v. Fullilove*, 388 F.3d 104, 106 (4th Cir. 2004). But the application of the relevant conduct standard typically involves consideration of factual circumstances, such as whether acts or omissions are sufficiently similar; whether they are sufficiently regular; whether they are sufficiently close in time; and whether, when one factor is particularly weak or even lacking, another factor compensates to satisfy the factual requirements of relevant conduct. Such analysis constitutes fact finding that we review for clear error. *United States v. McVey*, No. 13–4285, 4<sup>th</sup> Cir. April 23, 2014.

Sentencing under the Sentencing Guidelines involves consideration of the actual conduct in which a defendant engaged, “regardless of the charges for which he was indicted or convicted.” U.S.S.G. § 1B1.3(a). Despite the limited scope of

conduct for which the defendant was convicted, he may nonetheless be sentenced more broadly for relevant conduct—i.e., the conduct of other offenses insofar as they were “part of the same course of conduct as the offense of conviction.” *Id.* § 1B1.3(a)(2). Further, Application Note 2 to § 1B1.3 instructs that “*In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. If Defendant’s accountability for particular conduct is established under one provision of this guideline, it is not necessarily to review alternative provisions under which such accountability might be established.*” *Id.* § 1B1.3, n.2.

Without doubt, the factual circumstances in Case 1 as to the drug distribution on February 4, 2015 were not only sufficiently similar to the factual circumstances in Case 2 as to the drug distribution on February 4, 2015 ~ ***they were identical!***

Case 1 convicted Mr. McClain for possession with intent to distribute cocaine which occurred on January 20, 2013. While on bond and prior to sentencing in Case 1, the government sought to revoke Mr. McClain’s bond for distribution of heroin on February 4, 2015. On January 9, 2015 and February 4, 2015, prior to Mr. McClain’s sentencing, the government interviewed Angel Klein (co-conspirator in Case 2) related to her knowledge regarding heroin distribution in the Ohio Valley. On February 4, 2015 and again on February 6, 2015, the government made controlled buys from Mr. McClain. At Mr. McClain’s sentencing in Case 1, the government already knew of both the information gathered in the co-conspirator’s interview and the controlled buys from Mr. McClain. For the government to now argue in Case 2

that the district court did not know of “all the relevant conduct” is disingenuous. The government cannot rely on the District Court’s “lack of knowledge” when such knowledge was in fact known to the government and presumably withheld. On March 2, 2015, Mr. McClain received a sentence based upon an upward variance related to the February 4, 2015 distribution of heroin. 240. Apparently not satisfied with the 120-month sentence, the government went on to Indict Mr. McClain in Case 2 for the identical conduct.

Knowing both the information gathered in the co-conspirator’s interview and the controlled buys from Mr. McClain and further armed with knowledge that Mr. McClain had already received a 120 month sentence for distribution of heroin on or about February 4, 2015, the government presented to and a federal grand jury returned an Indictment on April 6, 2016, charging Mr. McClain in Count 1 with Conspiracy to Distribute Heroin and Fentanyl ***from in or about November, 2014 and continuing until February 17, 2015***; in Count 6 with Distribution of Heroin and Fentanyl within 1,000 feet of a school on or about ***February 4, 2015***; in Count 7 with Distribution of Heroin and Fentanyl on or about ***February 6, 2015***.

The Double Jeopardy Clause of the Fifth Amendment provides “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. ***The Double Jeopardy Clause***, among other things, ***protects individuals against suffering multiple punishments for the same offense***. See *United States v. Dixon*, 509 U.S. 688, 696 (1993). If ever a case existed which demonstrates that a person has received multiple punishments for the same offense,

the facts of Mr. McClain's case demonstrates a prima facie violation of the double jeopardy provisions of the United States Constitution.

The Fourth Circuit has adopted a multi-pronged "totality of the circumstances" test to determine whether two successive conspiracy counts charge the "same offense" within the meaning of the Double Jeopardy Clause. See *United States v. MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986). Under this test, the Court considers five factors: (1) the time periods covered by the alleged conspiracies; (2) the places where the conspiracies are alleged to have occurred; (3) the persons charged as co-conspirators; (4) the overt acts alleged to have been committed in furtherance of the conspiracies, or any other descriptions of the offenses charged which indicate the nature and scope of the activities being prosecuted; and (5) the substantive statutes alleged to have been violated. *United States v. Ragins*, 840 F.2d 1184, 1189 (4th Cir. 1988).

A review of the record below clearly demonstrates that the conduct charged in Mr. McClain's Case 1 and Mr. McClain's Case 2 fell (1) within the same time period (2) occurred in the same place (3) involved the same individuals and (4) the very overt acts committed in furtherance of the conspiracy in Case 2 was the identical act in Case 1 which was used as relevant to vary upward in Case 1. While charging the same conduct in Case 2 was permissible because it contained additional elements not charged in Case 1, double jeopardy violations can and did occur in that Mr. McClain received duplicative punishments for the same offense.<sup>2</sup>

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<sup>2</sup> *U.S. v. Dixon* 509 U.S. 688 (1993)

There are three separate guarantees contained in the Double Jeopardy Clause. It protects against a second prosecution for the same offense after acquittal; against a second prosecution for the same offense after conviction; and against multiple punishments for the same offense. *U.S. v. Dixon* 509 U.S. 688 (1993), see also *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984). Mr. McClain submits error for having received multiple punishments for the same offense.

Without doubt, the factual circumstances as to the drug distribution in Case 1 were both sufficiently regular and sufficiently close in time as to the factual circumstances as to the drug distribution in Case 2 between the dates of November, 2014 and February 17, 2015.

The Conspiracy charged in Case 2 began in November, 2014 and ended on or about February 17, 2015. The Conspiracy charged in Case 2 falls within the time frame of the conduct considered at sentencing for the conviction in Case 1:

|        |                                          |
|--------|------------------------------------------|
| Case 1 | January 20, 2013 -----March 2, 2015      |
| Case 2 | -----November, 2014 to February 17, 2015 |

While the government seeks to claim that “*It is unsupported by the record for defendant to claim that any conduct referenced in the current Indictment (other than the February 4, 2015 buy) or any historical evidence by the witnesses in this case was used by the Court in the prior sentencing,*” the record is replete with evidence that **the conduct charged, considered, and sentenced in Case 2 was known to the government as per the dates listed within its own statements contained in**

**their “version of the offense” submitted to the Probation Officer in Case 2.** (JA Vol. II at 171-174, specifically, paragraphs 19-28 of the Presentence Report). Likewise the **conduct charged, considered, and sentenced in Case 2 was likewise known to the sentencing court in Case 1.**

Any interpretation of the facts between Case 1 and Case 2 leads to the same result. The facts in Case 1 are relevant to Case 2. The facts in Case 2 are relevant to Case 1.

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. See *U.S. v. Watts*, 519 U.S. 148 (1997); *U.S. v. Jones*, 31 F.3d 1304 (4th Cir. 1994). *Booker* did not change the sentencing court’s ability to consider uncharged or even acquitted conduct during sentencing. The panel also held that the district court was not required to apply a heightened standard of proof as to the uncharged conduct used as the basis for enhancing defendant’s sentence. Preponderance of the evidence is the appropriate standard of proof for sentencing purposes. *U.S. v. Grubbs*, 585 F.3d 793 (4th Cir. 2009).

Section 1B1.4 says a court may consider, without limitation, any information concerning the background, character, and conduct of the defendant. This language is broad enough to include dismissed, uncharged or acquitted conduct. Using dismissed conduct as grounds for a departure would not undermine the plea bargaining process any more than using it as relevant conduct. *U.S. v. Barber*, 119 F.3d 276 (4th Cir. 1997), *replacing on rehearing en banc U.S. v. Barber*, 93 F.3d 1200 (4th Cir. 1996).

Based upon the above, no factual question exists that Defendant McClain received a sentence on October 17, 2016 in Case 2 for the substantive count of drug distribution which occurred on February 4, 2015, and which conduct had already been considered “relevant” in Case 1 because the sentencing court referred to it as a reason for varying from the guidelines and imposing the maximum 120 month sentence where both the plea and the presentence report called for a sentence of approximately 15-21 months.

## II.

**Title 18, United States Code, Section 3553 and 3584 as well as U.S.S.G. Sentencing Guidelines 1B1.3 and 5G1.3 mandate the imposition of concurrent sentences in *U.S. v. McClain*, Case No. 5:16CR16 and *U.S. V. McClain*, Case No. 5:14CR22 where the February 4, 2015 conduct was considered relevant to impose an upward variance of Mr. McClain’s sentence in 5:14CR22 and then again charged and sentenced in 5:16CR16 as a substantive count of distribution.**

The determination of whether to run sentences concurrently with one another is subject to a de novo review of the trial court’s application of 18 U.S.C. § 3584 (2005) regarding the imposition of concurrent or consecutive sentences. *Holland v. Pardee Coal Co.*, 269 F.3d 424, 430 (4th Cir.2001). In this case, the Government’s attempt to solicit an additional 105 months **consecutive** to Defendant McClain’s current sentence was clearly an overreach not based in fact or law. Likewise, no law supports the district court’s ultimate imposition of a 95-month consecutive sentence.

### A. Applicable Law for Concurrent Sentencing

Mr. McClain submits that the district court erred in running his sentences consecutive to one another. Several statutes, Sentencing Guidelines, as well as the

United States Constitution clearly outline the law governing concurrent and consecutive sentences. They state in pertinent part as follows:

**Title 18 U.S.C. § 3584 (2005) states:**

(a) **Imposition of concurrent or consecutive terms.**- If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) **Factors to be considered in imposing concurrent or consecutive terms.**-The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

**Title 18, United States Code, Section 3553(a) states:**

(a) **Factors To Be Considered in Imposing a Sentence.**— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
  - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
    - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
    - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or ...
- (5) any pertinent policy statement—
  - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
  - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

**U.S.S.G. Section 5G1.3 states:**

**§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment**

- (a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

**(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:**

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

A district court's discretion in imposing consecutive or concurrent sentences is bounded only by the relevant factors that the current version of § 5G1.3(c) directs the court to consider. *United States v. Mosley*, 200 F.3d 218, 224-25 (4th Cir. 1999). Those factors include the concerns enumerated in 18 U.S.C. § 3553(a); the type and length of the prior undischarged sentence; the time likely to be served before release on the undischarged sentence; and the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court. See USSG § 5G1.3(c), cmt. n.3(A)

The facts enumerated within the Statement of the Case demonstrate that both the District Court in Case 1 and the District Court in Case 2 considered the same concerns when discussing Title 18 U.S.C. § 3553. That is:

## **CASE 1**

On March 3, 2015, the Honorable Judge John Preston Bailey sentenced Mr. McClain to a one hundred twenty (120) month term of imprisonment varying upward from the 21 to 27 month advisory guideline range citing as his reasons, *inter alia*,

“First, the defendant is from Cleveland, Ohio and it is abundantly clear that he came to the Ohio Valley in order to spread his poison on its citizens.”

***“Second, the defendant reports no addiction to heroin, he is not even a heroin user, he is here as part of a business enterprise to make money by selling misery.”***

***“Third, the defendant continued to sell heroin after being arrested and released on bond and made an additional sale to a confidential informant on February 4, 2015. It is obvious the only way to stop his drug trafficking is by keeping him in prison.”*** (Emphasis supplied)

## **CASE 2**

On October 24, 2015, the Honorable Frederick P. Stamp, Jr. sentenced Mr. McClain to a term of “95 months incarceration as to each of Counts One, Six and Seven to be served concurrently with each other and consecutively with Case No. 5:14CR22.” In so doing, the sentencing Court in Case No. 2 explained his rationale at the hearing by stating the following:

***“Let me explain. First of all, while I have heard the testimony of the witnesses, the three witnesses that testified here at the sentencing hearing, I have not considered their testimony with regard to overdoses resulting in death because that issue has been withdrawn by the government to the extent that it was ever an issue, and was not part of the indictment.***

***The concern that I have here is that unlike a number of cases we see in this court where heroin distributors are addicts and are selling in order to obtain enough money to take care of their own habits, it doesn't appear that Mr. McClain was an addict, and so while the reasons that addicts commit the crime is not justification, it is some explanation of why those defendants do that. That doesn't mean they're entitled to a lesser or greater sentence. It's just that here it appears to me that Mr. McClain's dealings simply show that he was in the drug-trafficking business solely or substantially because of the money that he could raise.***

In rendering these sentences consecutive to the earlier case before another sentencing judge, 5:14-CR-22, I'm exercising my discretion to treat these matters in the manner that I think they have to be considered here. While at the same time I don't believe that it's a

sentence that is necessary to be at the highest end of the guideline range, I think that 95 months is sufficient.

Assuming without deciding that a concurrent sentence would be imposed, it seems to me that it could only reasonably be considered as to Count 6, **[February 4, 2015 charge]** and I think as to Count 6 **[February 4, 2015 charge]** I don't know that it would make a difference. Nevertheless, I make this decision solely on my feelings that the sentences should be consecutive.

The sentencing courts in Case 1 and Case 2 used the same factors to impose a variance sentence of 120 months and a 95 month consecutive sentence thereto; both sentences related in some way to the February 4, 2015 conduct. As such U.S.S.G. Section 5G1.3(b)(2) mandates the imposition of a concurrent sentence where the term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction. Failure of the sentencing court in Case 2 to impose a concurrent sentence was clear error, an abuse of discretion and violated the provisions of the double jeopardy provisions of the United States Constitution.

## CONCLUSION

Defendant respectfully requests that Certiorari be granted to determine if Appellant's consecutive sentences must be remanded with a new sentence imposed to run concurrently to the Appellant's statutory maximum sentence.

Respectfully Submitted,

s/ Elgine Heceta McArdle  
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## **INDEX TO APPENDIX**

- A. Unpublished opinion of the Fourth Circuit, August 25, 2017

# APPENDIX

**UNPUBLISHED****UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**No. 16-4688**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHAWN LAMONT MCCLAIN, a/k/a Gucci,

Defendant - Appellant.

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Appeal from the United States District Court for the Northern District of West Virginia,  
at Wheeling. Frederick P. Stamp, Jr., Senior District Judge. (5:16-cr-00016-FPS-JES-1)

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Submitted: August 25, 2017

Decided: August 31, 2017

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Before WILKINSON, SHEDD, and THACKER, Circuit Judges.

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Affirmed by unpublished per curiam opinion.

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Elgine Heceta McArdle, McARDLE LAW OFFICES, Wheeling, West Virginia, for  
Appellant. Betsy Steinfeld Jividen, Acting United States Attorney, Randolph J. Bernard,  
David J. Perri, Assistant United States Attorneys, Wheeling, West Virginia, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

**APPENDIX A**

## PER CURIAM:

Shawn Lamont McClain pled guilty, without the benefit of a plea agreement, to conspiracy to distribute heroin and fentanyl (Count 1), in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), 846 (2012), distribution of heroin and fentanyl within 1000 feet of a protected location (Count 6), in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), and distribution of heroin and fentanyl (Count 7), in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (collectively, “2016 Convictions”). The district court imposed concurrent sentences of 95 months’ imprisonment and ordered that such sentence run consecutively to the sentence imposed on a 2014 federal drug conviction (“2014 Conviction”). On appeal, McClain argues that: (1) the imposition of a consecutive sentence violated the Double Jeopardy Clause, as the sentencing court, when crafting the sentence for the 2014 Conviction, took into account some of the conduct at issue in Count 6 of the 2016 Convictions; and (2) the district court erred in failing to account for 18 U.S.C. § 3584 (2012), and U.S. Sentencing Guidelines Manual § 5G1.3 (2015), when imposing the sentence on the 2016 Convictions to be consecutive to the sentence imposed on the 2014 Conviction. We affirm.

McClain’s first argument—that consideration of the conduct in Count 6 during sentencing for the 2014 Conviction and a subsequent conviction in 2016 based on that same conduct constitutes a double jeopardy violation—is squarely foreclosed by Supreme Court precedent. *See Witte v. United States*, 515 U.S. 389, 399 (1995) (holding “that use of evidence of related criminal conduct to enhance a defendant’s sentence for a separate crime within the authorized statutory limits does not constitute punishment for that

conduct within the meaning of the Double Jeopardy Clause”). McClain has not offered any reasoned distinction between his case and *Witte*, and, consequently, his convictions and sentence do not implicate the Double Jeopardy Clause.

As to McClain’s second argument on appeal, “we review a district court’s decision to order consecutive or concurrent sentences for abuse of discretion . . . [but] review *de novo* whether the district court properly applied the relevant sentencing guideline to the defendant.” *United States v. Puckett*, 61 F.3d 1092, 1097 (4th Cir. 1995). Multiple sentences “may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt.” 18 U.S.C. § 3584(a). The statute mandates that “[t]he [district] court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in [18 U.S.C. §] 3553(a).” 18 U.S.C. § 3584(b).

The Guidelines provide that:

If . . . a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:

- (1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
- (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

USSG § 5G1.3(b). The Guidelines also state that, “[i]n any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.” USSG § 5G1.3(d), p.s.; *See United States v. Rouse*, 362 F.3d 256, 262 (4th Cir. 2004) (discussing § 5G1.3(b)’s purpose and stating that “the provision applies—*i.e.*, that a prior offense has been fully taken into account in the determination of the offense level for the instant offense—at least when conduct underlying a prior conviction is considered as relevant conduct” (internal quotation marks omitted)).

Here, the 2014 Conviction stemmed from McClain’s conduct on January 20, 2013, when officers arrested McClain for possession of heroin, which he admitted he intended to sell. At the sentencing on the 2014 Conviction, the district court noted, among other factors, that McClain had continued to traffic in heroin, cited his subsequent arrest on Count 6 (of the 2016 charges) as evidence for that assertion, and concluded that confining him would end his drug activities. Thus, the district court considered the conduct at the center of Count 6 of McClain’s 2016 Convictions when imposing the sentence for the 2014 Conviction.

However, as counsel conceded during sentencing for the 2016 Convictions, the conduct underlying Count 6 was not “relevant conduct” for the 2014 Conviction. *See* USSG §§ 1B1.3, 3D1.2(d). Furthermore, the court in the 2014 Conviction did not treat the Count 6 conduct as if it had been a part of the offense of the 2014 Conviction. The

district court merely considered the conduct in Count 6 as to a relevant § 3553(a) factor, namely, the need to protect the public.

Similarly, McClain's conduct underlying the 2014 Conviction did not qualify as relevant conduct for his 2016 Convictions. The earlier conduct did not occur during the course of the criminal conspiracy charged in Count 1, and the district court did not account for the earlier conduct when determining the amount of heroin attributable to McClain at the 2016 sentencing. Nor are the crimes sufficiently connected in other ways to qualify as closely related conduct. *See United States v. McVey*, 752 F.3d 606, 610 (4th Cir. 2014) (setting forth factors courts should consider); *see also United States v. Wall*, 180 F.3d 641, 646 (5th Cir. 1999). ("In short, the two sets of offenses do not share many similarities other than that they both involved [heroin]."). We therefore conclude the conduct relating to McClain's 2014 Conviction does not qualify as "relevant conduct" for the 2016 Convictions and that § 5G1.3(b)(2) does not apply. *See Rouse*, 362 F.3d at 263.

Because USSG § 5G1.3(b) does not apply, the Guidelines provide that the district court may impose consecutive sentences "to achieve a reasonable punishment for the instant offense." USSG § 5G1.3(d), p.s.; *see* USSG § 5G1.3, cmt. n.4(A) (outlining factors courts examine in fashioning sentence). Here, the district court considered several § 3553(a) factors with regard to the 2016 Convictions and considered all of the circumstances of McClain's federal sentence for his 2014 conviction. Thus, we conclude that the court adequately complied with the requirements of USSG § 5G1.3(d).

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED*