No. 21-1557

In the Supreme Court of the United States

DAYONTA MCCLINTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court's Rule 15.8, petitioner submits this supplemental brief to address the Government's letter filed on January 18, 2023 concerning the recent proposal by the United States Sentencing Commission.

1. On January 12, 2023, the Sentencing Commission published Preliminary Proposed Amendments to the Sentencing Guidelines. See U.S. Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines (Preliminary), Proposed Amendment: Acquitted Conduct* 13-14 (Jan. 12, 2023), https://bit.ly/3QOA35o (Preliminary Proposed Amendments).

The proposal, which is explicitly denominated "Preliminary," includes twelve categories of amendment proposals, one of which relates to acquitted conduct. By their own terms, the proposals will be subject to public comment, hearings, debate, and revision before eventually being put to a vote at some point, typically after at least a year-long process. See U.S. Sentencing Commission, *Amendment Process*, http://bit.ly/3weG2Y4 (last visited Jan. 19, 2023).

The Preliminary Proposed Amendments would provide that acquitted conduct "*generally* shall not be considered relevant conduct for purposes of determining the guideline range." Preliminary Proposed Amendments 13-14 (emphasis added). But as the government concedes, the proposed amendments would continue to allow judges to increase a defendant's punishment by considering acquitted conduct when "determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted." *Id.* at 14.

2. The Preliminary Proposed Amendments only highlight the Sentencing Commission's inability to effectively address the unfair and unconstitutional

practice of acquitted-conduct sentencing. They present no reason for this Court to deny review.

To begin with, the government has not even acknowledged, much less refuted, Justice Scalia's concern that the Commission lacks "authority to decree that information which would otherwise justify enhancement of sentence * * * may not be considered * * * if it pertains to acquitted conduct." *United States* v. *Watts*, 519 U.S. 148, 158 (1997) (Scalia, J., concurring). Attempting to address acquitted-conduct sentencing through a guidelines amendment does nothing to resolve the fundamental constitutional questions that have divided the courts, but instead creates *additional* legal uncertainty about the Commission's statutory authority to act.

Second, the Preliminary Proposed Amendments are toothless. Even if the Sentencing Commission eventually votes to adopt the Amendments, they would *still permit* judges to rely on acquitted conduct to increase a defendant's sentence so long as they use the simple expedient of relying on an upward departure instead of a guidelines adjustment to increase the sentence. The proposal represents little more than a semantic speed-bump that does nothing to prevent a judge from "gut[ting] the role of the jury in preserving individual liberty and preventing oppression by the government." *United States* v. *Brown*, 892 F.3d 385, 408 (D.C. Cir. 2018) (Millett, J., concurring). And the current proposals are framed to have prospective effect only, offering no relief whatsoever to the hundreds or thousands of criminal defendants like petitioner whose cases are now pending or who will be sentenced before the Sentencing Commission finally acts.

Third, and most fundamentally, the Preliminary Proposed Amendments would have no effect whatsoever on the vast majority of criminal sentences imposed in the

United States: those imposed by *state courts*. The Sentencing Commission's authority only reaches the sentencing policies and practices of federal courts. See 28 U.S.C. § 994(a). Even if the Sentencing Commission categorically prohibited judges from considering acquitted conduct at sentencing, it would hardly scratch the surface of constitutional violations. After all, "the vast majority of criminal cases in the U.S."—over 94 percent—"are prosecuted in state courts." Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue*, 50 Wm. & Mary L. Rev. 211, 243 & n.158 (2011). The Proposed Amendments will have no effect whatever on most unconstitutional sentences.

3. In short, the Sentencing Commission's disputed authority to eventually impose minor, prospective restrictions as a matter of policy on under six percent of criminal sentences presents no reason for this Court to deny review of fundamental constitutional questions that are ripe for this Court's review. "This has gone on long enough. * * * [This Court] should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment" and the Fifth Amendment Due Process Clause. *Jones* v. *United States*, 574 U.S. 948, 950 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of cert.).

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari and reply brief, the petition should be granted.

Respectfully submitted.

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