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 further address the government's letter filed on January 18, 2023 concerning the recent proposal by the United States Sentencing Commission.

1. In its brief in opposition, the government argued that "[t]his Court's intervention" was not "necessary to address" the widespread problem of acquitted-conduct sentencing because "the Sentencing Commission could promulgate guidelines to preclude such reliance." Br. in Opp. 15. In January 2023, the Sentencing Commission introduced preliminary proposed amendments that would, if adopted, place modest limitations on federal courts' consideration of acquitted conduct in sentencing. Several days later, the government submitted a letter to this Court to notify it of that proposal. See Letter from Elizabeth B. Prelogar, Solicitor General, U.S. Dep't of Just., to the Hon. Scott S. Harris, Clerk, Supreme Court of the United States, Re: *McClinton* v. *United States*, No. 21-1557 (Jan. 18, 2023). The Sentencing Commission invited public comment on the proposal through March 14, 2023. See U.S. Sentencing Comm'n, *Proposed Amendments to the Sentencing Guidelines (Preliminary), Proposed Amendment: Acquitted Conduct* 1 (Jan. 12, 2023), https://bit.ly/3QOA35o. As Sentencing Commission Vice Chair Laura Mate has since explained, the pending proposal does not provide "that acquitted conduct be entirely banned from a court's considerations at sentencing," but is "just a more narrow proposal" to place modest restrictions on its use. *Proposed Amendments to the Federal Sentencing Guidelines Before the U.S. Sentencing Comm'n*, at 2:08:05 (Feb. 24, 2023) (remarks of Laura Mate, Vice

Chair, U.S. Sentencing Comm'n), *available at* http://bit.ly/3KN96OH.

2. On February 15, 2023, the U.S. Department of Justice submitted written testimony to the Commission, urging it to reject even those modest proposed changes. Letter from Jonathan J. Wroblewski, Dir., Off. of Pol'y and Legis., Crim. Div., U.S. Dep't of Just., *ex officio* Member, to Hon. Carlton W. Reeves, Chair, U.S. Sentencing Comm'n 12 (Feb. 15, 2023), https://bit.ly/3Zg5skY (Gov't Views).

In urging the Sentencing Commission to reject the proposed amendments, the government began its argument with a broad reading of *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam). The government argued that the Commission's proposal to "[c]urtail[] the consideration of acquitted conduct at sentencing would be a significant departure from long-standing sentencing practice" because this "Court has continued to affirm that there are no limitations on the information concerning a defendant's background, character, and conduct that courts may consider in determining an appropriate sentence." Gov't Views at 12-13.

That expansive reading of *Watts* is deeply at odds with the far more limited understanding the government has presented to this Court. In *United States* v. *Booker*, the government described *Watts* as holding only that "*the Double Jeopardy Clause* does not prevent the district court from increasing the offense level on the basis of the conduct underlying the acquitted charge." U.S. Br. at 7, *United States* v. *Booker*, 543 U.S. 220 (2005) (No. 04-104), 2004 WL 1967056 (emphasis added). The Court ultimately adopted that view, writing that *Watts* "presented a very narrow question regarding the interaction of the [U.S. Sentencing] Guidelines with the Double Jeopardy Clause, and did not even have the

benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 n.4. As noted in petitioner's reply brief, Reply Br. 2-4, the federal courts of appeals and state courts of last resort remain divided on whether *Watts* broadly held that acquitted conduct sentencing is constitutional, or whether it merely rejected a double jeopardy challenge to the practice. See *People* v. *Beck*, 939 N.W.2d 213, 224 (Mich. 2019) (holding that *Watts* concerned only a double jeopardy challenge); *State* v. *Melvin*, 258 A.3d 1075, 1089-1090 (N.J. 2021) (same).

3. The government also appears to have reversed its position on whether "the Sentencing Commission could promulgate guidelines to preclude such reliance." Br. in Opp. 15. In oral testimony to the Commission in February, the government argued that "[t]he Commission's proposal is unfortunately inconsistent with [18 U.S.C. § 3661]," a statute governing sentencing law. *Proposed Amendments to the Federal Sentencing Guidelines Before the U.S. Sentencing Comm'n*, at 1:58:21 (Feb. 24, 2023) (statement of Jessica D. Aber, U.S. Att'y, E.D. Va.), *available at* https://bit.ly/3IAUe3j (Aber Test.). As petitioner noted, Reply Br. 7, Justice Scalia relied on this same statute when he rejected the suggestion that the Sentencing Commission could alone address the practice of acquitted-conduct sentencing. He wrote that an amendment passed by the Commission would be improper under § 3661, which provides that "[n]o limitations shall be placed on the information concerning the background, character, and conduct of [a defendant] which a court * * * may receive and consider for the purpose of imposing an appropriate sentence." *Watts*, 519 U.S. at 158 (Scalia, J., concurring) (quoting 18 U.S.C. § 3661). The government's adoption of this argument is difficult to square with its assurances to this Court that "this Court's intervention" is not "necessary to

address" the problem of acquitted-conduct sentencing. Br. in Opp. 15.

4. By statute, the U.S. Department of Justice is designated an *ex officio* Member of the Sentencing Commission, and its member represents it in all Commission meetings, even nonpublic ones. See 28 U.S.C. § 991(a). Though formally a "nonvoting member," *ibid.*, very little gets passed without the Department of Justice Member's support. Indeed, the last time the Sentencing Commission proposed amendments to limit the use of acquitted conduct under the Guidelines' relevant conduct provisions in 1993, the U.S. Department of Justice's *ex officio* Member "strenuously oppose[d]" the proposal, and the Commission accordingly rejected it. See *Witness Testimony, Public Hearing on Proposed Guidelines Amendments, Vol. II Before the U.S. Sentencing Comm'n* 3-7 (Mar. 22, 1993) (statement of Roger A. Pauley, *ex officio* Member, U.S. Sentencing Comm'n, U.S. Dep't of Just.), https://bit.ly/3mgyoKG; Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. Rev. 153, 191 (1996). Here, too, the government's vigorous opposition likely condemns the current proposal to the same fate as the 1993 proposed amendments and dooms any chance of even modest Commission action on the issue of acquitted-conduct sentencing. Even if it were to succeed, the government would certainly maintain that courts are not bound by guidelines provisions that are "unfortunately inconsistent with [18 U.S.C. § 3661]." Aber Test., *supra* at 1:58:21.

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Even as the government urges this Court that other mechanisms exist to address a controversial sentencing practice that a host of distinguished jurists have criticized, see Pet. 11-15; Br. of 17 Former Federal Judges as *Amici*

Curiae 1, the government simultaneously invokes a disputed reading of the quarter-century-old *per curiam* opinion in *Watts* to defeat even the most modest efforts at reform. And contrary to its assurances to this Court, it now contends that the Sentencing Commission *lacks* authority to promulgate amendments addressing the practice.

Absent further guidance from this Court, there is no reasonable prospect of ending acquitted-conduct sentencing, even at the federal level. And absent this Court's review, there is *no* prospect of the practice ending at the state level, which comprises "the vast majority of criminal cases in the U.S." Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 Wm. & Mary L. Rev. 211, 242-243 & n.158 (2011). Only this Court can "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.). "This has gone on long enough." *Ibid.*

CONCLUSION

For the foregoing reasons, and those stated in our previous filings, the petition should be granted.

Respectfully submitted.

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