No. 22-118

In the Supreme Court of the United States

MARQUIS SHAW, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioner's Fifth and Sixth Amendment rights, or principles of collateral estoppel, in considering conduct at issue in a charge that the jury did not find beyond a reasonable doubt, but that the court found by a preponderance of the evidence, in determining his sentence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is available at 2022 WL 636639.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 2022. On May 20, 2022, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 1, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of distributing a controlled substance, in violation of 21 U.S.C. 841(a) and 21 U.S.C. 841(b)(1)(B) (2006 & Supp. IV 2010); and two counts of

distributing and possessing with intent to distribute a controlled substance within 1000 feet of a public school or public park, in violation of 21 U.S.C. 860. Judgment 1. He was sentenced to 420 months of imprisonment, to be followed by 16 years of supervised release. *Ibid.* The court of appeals affirmed. Pet. App. 1a-4a.

1. Petitioner "is a long-time and violent Broadway Crips member." C.A. E.R. 138. On at least five occasions in 2011 and 2012, petitioner sold crack cocaine in the Los Angeles area to confidential informants in gang territory and from his house, including within 1000 feet of Main Street Elementary School and Pocket Park. Revised Presentence Investigation Report (PSR) ¶¶ 11-15. Petitioner also was involved in several acts of violence in the course of his gang participation, including several killings. C.A. E.R. 138-147. For example, on one occasion in March 2003, petitioner and other gang members shot into a vehicle containing several people, killing L.R., the person in the driver's seat. PSR ¶ 52. Petitioner then fled the scene, leading the police on a high-speed chase before being taken into custody. *Ibid.* Petitioner was convicted after a guilty plea in state court of voluntary manslaughter. *Ibid.*

In November 2017, a federal grand jury in the Central District of California returned an indictment charging petitioner on one count of conspiring to participate in a racketeering enterprise, in violation of 18 U.S.C. 1962(d); one count of murdering L.R. in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) and (2); one count of conspiring to distribute and possess with intent to distribute crack cocaine, cocaine, phencyclidine (PCP), methamphetamine, 3-4 methylenedioxymethamphetamine (MDMA or ecstasy), codeine, and marijuana, in violation of 21 U.S.C. 846; one count of distributing a

controlled substance, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(B)(iii) (2006 & Supp. IV 2010); two counts of distributing and possessing with intent to distribute a controlled substance within 1000 feet of a public school or public park, in violation of 21 U.S.C. 860; and one count of using a firearm causing L.R.'s death during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (2000) and 18 U.S.C. 924(j) and 2. See C.A. E.R. 319-320, 332-336, 339-341 (Second Superseding Indictment).

The jury found petitioner guilty on the three drug-distribution counts, but found him not guilty on the other four counts, including the charges of murder in aid of racketeering and using a firearm during and in relation to a crime of violence, both of which were related to the 2003 killing of L.R. C.A. E.R. 271-277.

2. Before sentencing, the Probation Office prepared a presentence report in which it determined that petitioner's Sentencing Guidelines calculation should include application of the career-offender guideline, Sentencing Guidelines § 4B1.1 (2016), because he had at least two prior felony convictions for a crime of violence or a controlled-substance offense. PSR ¶¶ 33-34; see PSR ¶¶ 46, 52 (describing two predicate convictions). The career-offender designation resulted in a total offense level of 37 and a resulting advisory guidelines range of 360 months to life imprisonment. PSR ¶¶ 34, 103.

The government urged the district court to take into account petitioner's role in the murder of L.R., along with other gang activity in which he participated, when considering the sentencing factors set forth in 18 U.S.C. 3553(a). See C.A. E.R. 138-147. That activity included an occasion in May 2012 when petitioner acted as a driver in connection with the fatal shooting of W.S., a

member of a rival gang, PSR ¶ 61; see C.A. E.R. 141-145, as well as his orchestration of assaults on and personal threats against rival gang members while he was incarcerated on the manslaughter conviction, C.A. E.R. 130-31, 146, 158-161. Petitioner objected to the court's consideration of the L.R. and W.S. murders on the ground that neither of those killings qualified as relevant conduct with respect to the convictions in this case. Sentencing Tr. 31; see Sentencing Guidelines § 1B1.3 (2016). Petitioner did not assert that the court's consideration of those murders at sentencing would violate the Fifth or Sixth Amendments.

The district court agreed with the government and imposed a sentence that "takes into consideration * * * the murder of L.R., his involvement in the murder of W.S., [and petitioner's] violent criminal conduct while he was in custody." Sentencing Tr. 59-60. The court found L.R.'s murder "especially egregious," observing that trial testimony showed that "the persons in the other vehicle were essentially gunned down for simply committing an act of insulting [petitioner] and his companions." *Id.* at 60. The court imposed a within-guidelines sentence of 420 months of imprisonment. *Id.* at 57. The court explained that it "respect[ed] the conclusions of the jury in reference to the counts that [petitioner] was acquitted on," but that "separate and apart from whether [petitioner] qualifies as a career offender, * * * the Court would sentence [petitioner] under the [Section] 3553 factors to the same sentence." *Id.* at 60-61.

3. The court of appeals affirmed. Pet. App. 1a-4a. On appeal, petitioner argued for the first time that the district court's consideration of the murders of L.R. and W.S., and petitioner's role in the gang more generally, violated the Fifth and Sixth Amendments on the ground

that the jury had acquitted petitioner on charges based on that conduct. Pet. C.A. Br. 31-40. Reviewing that forfeited claim for plain error, see Fed. R. Crim. P. 52(b), the court of appeals rejected those constitutional arguments, explaining that petitioner's claims were foreclosed by both circuit precedent and this Court's decision in *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam). Pet. App. 3a.

ARGUMENT

Petitioner renews his contention (Pet. 24-32) that the district court's reliance on acquitted conduct at sentencing violated his Fifth Amendment right to due process and his Sixth Amendment right to trial by jury. This Court, however, has upheld a district court's authority to consider such conduct at sentencing. And as petitioner correctly acknowledges, every federal court of appeals with criminal jurisdiction has recognized sentencing courts' authority to rely on conduct that the judge finds by a preponderance of the evidence but that the jury does not find beyond a reasonable doubt. This Court has repeatedly denied petitions for writs of certiorari in cases raising the issue and should follow the same course here.* In any event, this case would be an unsuitable vehicle in which to address the question presented because the record does not clearly establish that the district court actually relied on acquitted conduct in sentencing petitioner.

1. For the reasons set forth in the government's brief in opposition to the petition for a writ of certiorari

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* Several pending petitions for writs of certiorari also seek review of the question presented. See, *e.g.*, *Luczak* v. *United States*, No. 21-8190 (filed May 12, 2022); *McClinton* v. *United States*, No. 21-1557 (filed June 10, 2022); *Karr* v. *United States*, No. 22-5345 (filed Aug. 10, 2022).

in *McClinton* v. *United States*, No. 21-1557, a copy of which is being served on petitioner's counsel, petitioner's constitutional challenges do not warrant this Court's review. See Br. in Opp. at 7-16, *McClinton*, *supra* (No. 21-1557) (filed Oct. 28, 2022).

As this Court explained in *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), in addressing judicial factfinding under the then-mandatory federal Sentencing Guidelines, "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence," *id.* at 157. See Br. in Opp. at 7-11, *McClinton*, *supra* (No. 21-1557). Petitioner's attempt (Pet. 12-14, 21-22) to characterize *Watts* as an inapposite double-jeopardy case lacks merit; the clear import of *Watts* is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution, see 519 U.S. at 157, and its reasoning is incompatible with petitioner's premise that consideration of acquitted conduct as part of sentencing contravenes the jury's verdict or punishes the defendant for a crime for which he was not convicted. See Br. in Opp. at 9-10, *McClinton*, *supra* (No. 21-1557).

Petitioner acknowledges (Pet. 15) that no federal court of appeals has concluded otherwise. Instead, every federal court of appeals with criminal jurisdiction has recognized that a district court may consider acquitted conduct for sentencing purposes. See Br. in Opp. at 11-12, *McClinton*, *supra* (No. 21-1557) (listing cases). Petitioner's reliance (Pet. 15-16) on state-court decisions, including the Supreme Court of Michigan's decision in *People* v. *Beck*, 939 N.W.2d 213 (2019), cert. denied, 140 S. Ct. 1243 (2020) (No. 19-564), is misplaced.

Beck is an outlier and its reasoning is tenuous, see Br. in Opp. at 13-14, *McClinton*, *supra* (No. 21-1557), and the other state decisions that petitioner cites either predate *Watts*, do not cite *Watts*, or rely on state law, see *id.* at 12-13. Nor do petitioner's policy considerations (Pet. 17-20) counsel in favor of further review. See Br. in Opp. at 15-16, *McClinton*, *supra* (No. 21-1557).

This Court has repeatedly and recently denied petitions for writs of certiorari challenging reliance on acquitted conduct at sentencing, and the same result is warranted here. See *id.* at 14-15 (listing cases); see also Br. in Opp. at 14, *Asaro* v. *United States*, 140 S. Ct. 1104 (2020) (No. 19-107) (listing additional cases).

2. Petitioner additionally contends that the use of acquitted conduct at sentencing violates "traditional notions of issue preclusion." Pet. 36; see Pet. 32-36. As an initial matter, petitioner did not press that issue before either the district court or the court of appeals, and this Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted); see *EEOC* v. *Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) (per curiam).

In any event, the contention that issue preclusion or collateral estoppel forbids a sentencing court's use of acquitted conduct lacks merit. Application of issue preclusion requires, among other things, that the fact at issue have been conclusively determined by a final judgment on the merits in another proceeding. See *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970). Even if an acquittal signifies a finding that a reasonable doubt exists as to a certain fact for purposes of a conviction, such a finding does not conclusively determine the nonexistence of

that fact for purposes of sentencing. That is because of "the different standards of proof that govern at trial and sentencing": a jury's finding that the government failed to prove an element of the charged offense beyond a reasonable doubt does not preclude a judge from finding facts underlying that element under the lower preponderance-of-the-evidence standard that applies at sentencing. *Watts*, 519 U.S. at 155; cf. 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4422, at 631 (3d ed. 2016) ("Issue preclusion * * * may be defeated by * * * changes in the degree of persuasion required."). Accordingly, "[t]he jury verdict in [a] criminal action d[oes] not negate the possibility that a preponderance of the evidence could show that the defendant was engaged in" the charged criminal conduct. *Dowling* v. *United States*, 493 U.S. 342, 349 (1990) (quoting *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 360 (1984)) (brackets omitted).

Petitioner's reliance (Pet. 34) on *Sealfon* v. *United States*, 332 U.S. 575 (1948), and *United States* v. *Adams*, 281 U.S. 202 (1930), is misplaced. In each case, the defendant was acquitted and then raised a claim of issue preclusion to bar a second criminal prosecution, where the same beyond-a-reasonable-doubt standard would apply. See *Sealfon*, 332 U.S. at 578; *Adams*, 281 U.S. 204. Here, in contrast, petitioner seeks to raise issue preclusion in a sentencing proceeding that requires facts to be proved under a lower standard of proof. See *Dowling*, 493 U.S. at 348 ("[W]e decline to extend [issue-preclusion principles] to exclude in all circumstances * * * relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.").

3. At all events, this case would be an unsuitable vehicle in which to review the questions presented because the record does not clearly establish that the district court actually relied on acquitted conduct in sentencing petitioner.

Even setting aside standards of proof, the district court's consideration at sentencing of petitioner's role in L.R.'s killing, see Sentencing Tr. 59-60, was compatible with the jury's verdict of not guilty on the charges of murder in aid of racketeering and using a firearm during and in relation to a crime of violence. The jury's acquittal on the first count could have reflected only a finding of reasonable doubt as to whether the murder was committed *in aid of racketeering*—not whether petitioner participated in the killing of L.R. in the first place. Similarly, the acquittal on the second count could have reflected a finding only with respect to whether the firearm was used during and in relation to a crime of violence, which the operative indictment specified was the "conspiracy to engage in racketeering activity" and "murder in aid of racketeering activity," C.A. E.R. 341. Neither is inconsistent with a finding that petitioner was responsible for killing L.R.

Moreover, the district court calculated petitioner's advisory guidelines range without considering the murder of L.R. as relevant conduct. See PSR ¶¶ 19-41; Sentencing Tr. 56-60; Pet. App. 3a ("[T]he record * * * shows that the court expressly stated that it considered that conduct as part of the § 3553(a) sentencing factor analysis, not as relevant conduct under § 1B1.3(a)(2)."). Instead, the court considered L.R.'s murder only when analyzing the Section 3553(a) factors, and in that analysis, the court also considered petitioner's "involvement in the murder of W.S." and his "violent criminal conduct

while he was in custody." Sentencing Tr. 60. The record thus does not clearly indicate whether or to what extent petitioner's sentence was influenced by the murder of L.R., as opposed to the other conduct that the court considered when determining the within-guidelines sentence.

Petitioner also briefly contends (Pet. 37)—for the first time in this Court—that the district court relied on acquitted conduct in calculating the drug quantity for which it held petitioner responsible. But that contention, even if correct, would not entitle him to relief. The court found "clear and convincing evidence" that petitioner was responsible for distributing at least 2.8 kilograms of crack cocaine, Sentencing Tr. 53, which would have resulted in an offense level of 34, see C.A. E.R. 134 (citing Sentencing Guidelines § 3D1.1(c)(3) (2016)). But the court ultimately sentenced petitioner as a career offender, which set his offense level at 37, and petitioner does not challenge the career-offender designation. See Sentencing Tr. 56; PSR ¶ 34; Sentencing Guidelines § 4B1.1(b) (2016). Petitioner thus cannot show that the drug-quantity calculation had any effect on his ultimate sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2022