

No. 22-5345

---

---

IN THE SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
GARY PAUL KARR, PETITIONER

v.

UNITED STATES OF AMERICA

\_\_\_\_\_

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

\_\_\_\_\_

BRIEF FOR THE UNITED STATES IN OPPOSITION

\_\_\_\_\_

ELIZABETH B. PRELOGAR  
Solicitor General  
Counsel of Record

KENNETH A. POLITE, JR.  
Assistant Attorney General

JAVIER A. SINHA  
Attorney

Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217

---

---

## QUESTIONS PRESENTED

1. Whether the district court violated petitioner's Fifth and Sixth Amendment rights 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.

2. Whether the district court violated due process by relying on hearsay to support one of two alternative bases for applying a murder cross-reference when determining petitioner's advisory range under the Sentencing Guidelines.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

Karr v. United States, No. 03-cv-89 (Apr. 22, 2003)

Karr v. United States, No. 14-cv-447 (May 16, 2014)

Karr v. United States, No. 16-cv-854 (July 11, 2016)

Karr v. United States, No. 20-cv-105 (July 28, 2020)

United States Court of Appeals (5th Cir.):

United States v. Karr, No. 00-50785 (Aug. 13, 2001)

United States v. Karr, No. 03-50701 (Oct. 28, 2003)

United States Supreme Court:

Karr v. United States, No. 01-7549 (Feb. 19, 2002)

IN THE SUPREME COURT OF THE UNITED STATES

---

No. 22-5345

GARY PAUL KARR, PETITIONER

v.

UNITED STATES OF AMERICA

---

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

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is available at 2022 WL 1499288.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2022. The petition for a writ of certiorari was filed on August 10, 2022. 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 Western District of Texas, petitioner was convicted of conspiring to interfere with commerce by robbery and extortion, in violation of 18 U.S.C. 1951 and 2; traveling in interstate commerce to commit a crime of violence, in violation of 18 U.S.C. 1952(a)(2) and 2; conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h), 1957, and 2; and transporting stolen goods in interstate commerce, in violation of 18 U.S.C. 2314 and 2. 8/21/00 Judgment 1. He was sentenced to life imprisonment. Id. at 2. The court of appeals affirmed, 273 F.3d 1098, and this Court denied certiorari, 534 U.S. 1150. After a subsequent grant of collateral relief, petitioner was resentenced to 595 months of imprisonment, to be followed by three years of supervised release. 3/16/21 Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A3.

1. In April 1995, petitioner was discharged from the Illinois Department of Corrections after serving approximately 20 years of imprisonment for aggravated kidnapping and armed robbery. 3/2/21 Revised Presentence Investigation Report (PSR) ¶ 10; see PSR ¶¶ 71-74. Upon his release, petitioner traveled to Austin, Texas, to join David Waters, a man he had met in prison. PSR ¶¶ 10, 12. Petitioner and Waters developed a plan to kidnap and extort money from the O'Hair family, who ran a business for which Waters had previously worked. PSR ¶¶ 11, 34. Petitioner and Waters recruited another accomplice to help. PSR ¶ 42.

Disguised as delivery drivers, petitioner and the accomplice entered the business and abducted three members of the family at gunpoint. PSR ¶ 42. Petitioner sexually assaulted one of them. Ibid. After moving the family to a hotel room, petitioner and the others robbed and extorted them, forcing them to cash checks and withdraw cash, and selling off one of their cars. PSR ¶¶ 34, 42. Petitioner and the others also forced the O'Hairs to transfer \$600,000 to a bank account controlled by petitioner and his accomplices. PSR ¶¶ 19, 23, 34, 39.

Petitioner and the others then killed the three O'Hairs. PSR ¶ 44. Petitioner, Waters, and the accomplice together strangled one with a belt, while also placing a plastic bag over his head to suffocate him. Ibid.; 3/12/21 Resentencing Tr. 36. Waters and the accomplice then strangled another with the same belt while petitioner strangled the third (the one he had sexually assaulted) with his bare hands. PSR ¶ 44; 3/12/21 Resentencing Tr. 37-38. They wrapped the bodies in blankets and transported them to a storage unit, where petitioner dismembered the bodies and stored them in large containers. PSR ¶ 44.

The following day, under the pretext of finding a place to bury the bodies, petitioner and Waters lured the accomplice to a rural area, where they shot him in the back of the head. PSR ¶ 44; see 5/23/00 Trial Tr. 292 (testimony that petitioner claimed credit for shooting the accomplice); 3/12/21 Resentencing Tr. 44-45 (testimony that Waters claimed credit). Petitioner then

decapitated the accomplice and cut off his hands. PSR ¶ 44. Petitioner and Waters buried the three O'Hairs, along with the accomplice's head and hands, at a ranch in Camp Wood, Texas. PSR ¶ 45.

2. A federal grand jury in the Western District of Texas charged petitioner with conspiring to commit kidnapping, in violation of 18 U.S.C. 1201(c) and 2; conspiring to obstruct commerce by robbery and extortion, in violation of the Hobbs Act, 18 U.S.C. 1951 and 2; traveling in interstate commerce to commit a crime of violence, in violation of 18 U.S.C. 1952; conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h), 1957, and 2; and transporting stolen goods in interstate commerce, in violation of 18 U.S.C. 2314 and 2. Indictment 1-6. The indictment charged that the crime of violence in the interstate-traveling count was "kidnaping and robbery resulting in the death of another person." Indictment 4.

The jury acquitted petitioner on the kidnapping-conspiracy count, but found him guilty on the other four counts in the indictment. Verdict 1-2. As to the interstate-traveling count, the jury made a special finding that it had not "f[ou]nd beyond a reasonable doubt that the offense \* \* \* resulted in the death of another person," thereby acquitting petitioner of an aggravated version of the offense. Verdict 1; see 18 U.S.C. 1952(a)(2)(B) (increasing statutory maximum term of imprisonment from 20 years to life "if death results").

The district court imposed mandatory life sentences on the federal robbery and interstate-travel counts, pursuant to 18 U.S.C. 3559(c)(2)(F)(ii), and concurrent sentences of 115 months of imprisonment on the other two counts. 8/17/00 Sentencing Tr. 30; 8/21/00 Judgment 2. The court of appeals affirmed, 273 F.3d 1098, and this Court denied certiorari, 534 U.S. 1150. Petitioner unsuccessfully sought postconviction relief in 2003, 2014, and 2016. See D. Ct. Docs. 119 (Apr. 22, 2003), 162 (Aug. 25, 2014), and 166 (July 21, 2016).<sup>1</sup>

3. In 2020, the district court granted petitioner's motion under 28 U.S.C. 2255 to vacate his two mandatory life sentences, agreeing with the parties that Section 3559(c)(2)(F)(ii) contained the same constitutional vagueness infirmity that this Court had identified in a similarly worded provision in United States v. Davis, 139 S. Ct. 2319 (2019). D. Ct. Doc. 177 (July 28, 2020); see D. Ct. Doc. 176, at 1 (June 25, 2020). The court accordingly ordered resentencing on those two counts. See D. Ct. Doc. 177, at 1. Before resentencing, the Probation Office calculated petitioner's base offense level under the advisory Sentencing Guidelines as 43, which resulted in a guideline range of life imprisonment. PSR ¶ 57. The advisory range was truncated to 480 months, however, because that was the statutory maximum for the

---

<sup>1</sup> All citations of district court documents are to those in Case No. 99-cr-274.



relevant offenses in the absence of Section 3559(c)(2)(F)(ii).  
PSR ¶ 57, 105.

The offenses were "grouped for guideline calculation purposes," with the robbery count "used to determine the guideline calculations." PSR ¶¶ 55-56. The robbery guideline provides that the base offense level for a conviction under 18 U.S.C. 1951 is 20, Sentencing Guidelines § 2B3.1(a), but also contains a "Cross Reference" specifying an offense level of 43, which is the base offense level for first-degree murder, "[i]f 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," § 2B3.1(c); see § 2A1.1. The Guidelines instruct that whether to apply such "cross references in Chapter Two \* \* \* shall be determined" by considering "relevant conduct." § 1B1.3(a); see § 1B1.2(b).

The Guidelines define "[r]elevant [c]onduct" to include "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, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." Sentencing Guidelines § 1B1.3(a)(1) and (A). For "a jointly undertaken criminal activity," the definition also includes "all acts and omissions of others that were \* \* \* within the scope of, \* \* \* in furtherance of" and "reasonably foreseeable in

connection with" the jointly undertaken criminal activity "that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." § 1B1.3(a)(1) and (B).

The Probation Office determined that the murders of the accomplice and the three O'Hairs each would have qualified as murder under 18 U.S.C. 1111 and relevant conduct with respect to the robbery and interstate-travel counts, thereby triggering the cross-reference and the accompanying calculation of a base offense level of 43. PSR ¶ 57; PSR Addendum 2A. The Probation Office observed that the district court "may consider relevant information without regard to its admissibility under rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability." PSR Addendum 2A. It therefore relied both on the evidence presented at petitioner's trial, PSR ¶¶ 10-40, as well as on petitioner's statements to fellow inmates in which he admitted taking part in the murders, PSR ¶¶ 48-49, and on statements made by Waters to law enforcement after petitioner's initial sentencing, PSR ¶¶ 41-47.

Waters, who died in prison in 2003, PSR ¶ 7, had been interviewed by law enforcement in connection with an eventual guilty plea, and had described his and petitioner's involvement in the murders and other crimes and led federal agents to the ranch where he and petitioner had buried the bodies. PSR ¶¶ 41-47; see

3/12/21 Resentencing Tr. 52, 56-59. At the resentencing hearing, the district court heard testimony from one of the original case agents who had interviewed Waters and found both the agent and Waters's underlying testimony "to be credible and consistent." 3/12/21 Resentencing Tr. 114; see id. at 113 ("I find that what Mr. Waters told Special Agent Martin to be credible because it all fits and comes together to me with regard to the facts that were known and were produced at trial.").

The district court found "based on the evidence that I have heard here today and on what is contained in the presentence investigation report" that the government had proved by a preponderance of the evidence that the murders were relevant conduct and that the murder cross-reference was therefore appropriate. 3/12/21 Resentencing Tr. 99; see id. at 98-102. The court additionally found that even "if I were not to consider any of the post-trial or post-first sentencing information," and instead to rely "just on the evidence that was previously known," the evidence "is more than enough \* \* \* to justify the cross-reference." Id. at 99-100. The court explained that the murders were a reasonably foreseeable result of the conspiracy because keeping the O'Hairs hostage made it increasingly probable that they would have to be murdered to cover up the extortion. Id. at 100; see Sentencing Guidelines § 1B1.3(a)(1)(B).

The district court confirmed that it had taken into account the jury's special finding as to the interstate-travel count, but

explained that it “d[id] not affect my reasoning.” 3/12/21 Resentencing Tr. 101. And the court rejected petitioner’s argument that the special finding constitutionally foreclosed reliance on the murders as relevant conduct, citing this Court’s decision in United States v. Watts, 519 U.S. 148 (1997) (per curiam). 3/12/21 Resentencing Tr. 98. The court determined that a within-guidelines sentence was appropriate and sentenced petitioner to 480 months of imprisonment on the robbery and interstate-travel counts, to be served consecutive to the undisturbed 115-month sentence on the money-laundering and transportation counts, resulting in a total sentence of 595 months of imprisonment. 3/12/21 Resentencing Tr. 115-116.

4. The court of appeals affirmed. Pet. App. A1-A3.

On appeal, petitioner argued that application of the murder cross-reference violated the Fifth and Sixth Amendments on the theory that “the jury acquitted [petitioner] of conspiracy to kidnap and found that the O’Hairs’ deaths were not the result of his conduct.” Pet. C.A. Br. 40. Petitioner acknowledged, however, that his argument was “foreclosed” by Watts, id. at 4 n.2, and the court of appeals agreed, Pet. App. A2.

The court of appeals also rejected petitioner’s argument that the district court erred in relying on Waters’s statements at sentencing, observing that “[t]he district court concluded that even disregarding Waters’s statement, other evidence in the record supported application of” the cross-reference. Pet. App. A3. The

court of appeals also explained that because petitioner had “failed to challenge the sufficiency of the other information the district court relied on,” he had “abandoned any objection to the district court’s alternative bases for applying” the cross-reference and thus “would not be entitled to the relief he seeks even if he is right that Waters’s statement was unreliable.” Ibid.

#### ARGUMENT

Petitioner renews his contention (Pet. 16-21) that the district court’s reliance on the murders 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 conduct that the court finds by a preponderance of the evidence, but that the jury did not find beyond a reasonable doubt, in fashioning an appropriate sentence. And as petitioner correctly acknowledges, every federal court of appeals with criminal jurisdiction has recognized that authority. 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. This Court has repeatedly denied petitions for writs of certiorari in cases raising the issue, and it should follow the same course here.<sup>2</sup>

---

<sup>2</sup> 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); Shaw v. United States, No. 22-118 (filed Aug. 1, 2022).

Petitioner separately contends (Pet. 21-27) that the district court violated due process by relying on hearsay evidence to support application of the murder cross-reference in computing petitioner's advisory sentencing range. The court of appeals correctly rejected that factbound contention, and its decision does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. For the reasons set forth in the government's brief in opposition to the petition for a writ of certiorari in McClinton v. United States, No. 21-1557, a copy of which is being served on petitioner's counsel, petitioner's constitutional challenges to the use of acquitted conduct at sentencing do not warrant this Court's review. See Br. in Opp. at 7-16, McClinton, supra (No. 21-1557) (filed Oct. 28, 2022).

a. 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 effort (Pet. 16-17) 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. 17) 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. 19) on 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, its reasoning is tenuous, and any conflict it may have created remains too shallow to warrant this Court's review. See Br. in Opp. at 13-14, McClinton, supra (No. 21-1557). Nor do petitioner's policy considerations (Pet. 19-20) 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. See Br. in Opp. at 14-15, McClinton, supra (No. 21-1557) (listing cases); see also Br. in Opp. at 14, Asaro v. United States, 140 S. Ct. 1104 (2020) (No. 19-107) (listing additional cases). The same result is warranted here.

b. In any event, 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.

The jury found beyond a reasonable doubt that petitioner traveled in interstate commerce to commit a crime of violence (namely, kidnapping and robbery), but did not find beyond a reasonable doubt that the interstate travel itself resulted in the death of another person. In contrast, the district court found by a preponderance that petitioner was responsible for killing the O'Hairs and the accomplice. Even setting aside the different standards of proof, those findings are not incompatible or inconsistent, because petitioner could be responsible for the deaths even if the deaths did not result from interstate travel. The jury could, for example, have harbored reasonable doubt as to whether the hostage-taking and murders might have occurred even without petitioner's involvement in the scheme. See 18 U.S.C. 1952(a)(2)(B) ("if death results"); Burrage v. United States, 571 U.S. 204, 210-214 (2014) (describing common meaning of "results" language to include requirement of but-for causation).

Moreover, even if one were to (incorrectly) view the jury's special finding as an affirmative finding that petitioner did not personally commit any of the murders, it still would not be inconsistent with application of the cross reference. Relevant conduct includes the reasonably foreseeable acts of others if



within the scope and in furtherance of jointly undertaken criminal activity. Sentencing Guidelines § 1B1.3(a)(1)(B). Accordingly, even if Waters were solely responsible for committing the four murders, those murders could qualify as relevant conduct with respect to petitioner's robbery conviction without any reliance on acquitted conduct.

2. Petitioner additionally contends (Pet. 21-27) that the district court violated due process by relying on allegedly unreliable hearsay to find that petitioner was accountable for the murders of the O'Hairs and the accomplice. The court of appeals correctly rejected that factbound contention, which does not warrant further review.

a. Due process requires that someone convicted of a crime not be sentenced based on "materially false" information that the offender did not have an effective "opportunity to correct." Townsend v. Burke, 334 U.S. 736, 741 (1948). Otherwise, a sentencing judge is "largely unlimited either as to the kind of information he may consider, or the source from which it may come." United States v. Tucker, 404 U.S. 443, 446 (1972); see also Williams v. New York, 337 U.S. 241, 246 (1949) (citing reliance on reports prepared by federal probation officers as "[a] recent manifestation of the historical latitude allowed sentencing judges"); 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States

may receive and consider for the purpose of imposing an appropriate sentence.”).

Sentencing proceedings under the advisory Guidelines are not governed by the Federal Rules of Evidence. Fed. R. Evid. 1101(d)(3). Nor are they limited by the Confrontation Clause. See Williams, 337 U.S. at 245 (rejecting constitutional challenge to state procedure allowing sentencing judge to consider information “obtained outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine”); see also Williams v. Oklahoma, 358 U.S. 576, 584 (1959). The advisory Guidelines, however, address due process concerns by requiring that whenever a “factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor,” and the court will rely on information only if it determines that “information has sufficient indicia of reliability to support its probable accuracy.” Sentencing Guidelines § 6A1.3(a).

The court of appeals in this case has long recognized the requirement for reliability in the use of hearsay statements at sentencing. See, e.g., United States v. Gaytan, 74 F.3d 545, 558 (5th Cir. 1996) (“For purposes of sentencing, ‘the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its

probable accuracy.'") (citation omitted); see also, e.g., United States v. Nava, 624 F.3d 226, 231 (5th Cir. 2010), cert. denied, 563 U.S. 1027 (2011); United States v. Rodriguez, 62 F.3d 723, 725 n.9 (5th Cir. 1995).

b. Petitioner's principal challenge is to the district court's application of that accepted framework to the facts of his case. E.g., Pet. 21-22. The application of established legal principles to the facts does not warrant this Court's review. Sup. Ct. R. 10. And petitioner's factbound challenge lacks merit in any event.

The presentence report recounted that Waters told law enforcement that "he, [petitioner], and [the accomplice] all participated in the murders of the O'Hairs," which included petitioner's "strangl[ing] [one of the O'Hairs] with his hands" and "dismember[ing] the bodies and placed the body parts in the 55-gallon containers." PSR ¶ 44. It also recounted Waters's admission that he and petitioner "lured [the accomplice] to rural area in north Texas where Waters shot [him] in the back of the head at point-blank range" after which petitioner "decapitated [him] and cut off his hands." Ibid. And the original case agent testified at the resentencing hearing and corroborated the account set forth in the presentence report. 3/12/21 Resentencing Tr. 6-69, 103-104.

The district court could reasonably determine that those statements had the requisite "indicia of reliability." United

States v. Solis, 299 F.3d 420, 455 (5th Cir. 2002) (citation omitted). For example, the court assessed Waters's credibility after personally questioning the experienced case agent who had elicited and observed Waters's confession, 3/12/21 Resentencing Tr. 103-104, and agreed with the agent's assessment that, notwithstanding some inaccuracies, see id. at 113, Waters's ultimate description of the murders was credible and consistent with the evidence at trial, id. at 112-113. Waters's account of the murders was corroborated by and consistent with available business records, forensic evidence, and trial testimony, see Gov't C.A. Br. 2-14, as well as petitioner's own statements admitting to having participated in efforts to ensure that the murders remained unsolved, see id. at 15-16. And Waters had good reason not to overstate petitioner's involvement in the murders because his plea agreement stated that providing materially false information to investigators would have resulted in the government's ability to vitiate his plea agreement and use his confession against him. Plea Agreement at 3, United States v. Waters, No. 00-cr-211 (W.D. Tex. Jan. 24, 2001).

c. At all events, this case would be an unsuitable vehicle in which to review the second question presented. As the court of appeals observed, "[t]he district court concluded that even disregarding Waters's statement, other evidence in the record supported application of" the murder cross-reference. Pet. App. A3; see 3/12/21 Resentencing Tr. 100. And the court of appeals

further observed that petitioner had forfeited any objection to that independently sufficient evidence. Pet. App. A3. The court thus correctly determined that the “district court’s alternative bases for applying [the murder cross-reference]” meant that petitioner “would not be entitled to the relief he seeks even if he is right that Waters’s statement was unreliable.” Ibid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR  
Solicitor General

KENNETH A. POLITE, JR.  
Assistant Attorney General

JAVIER A. SINHA  
Attorney

NOVEMBER 2022