No. 22-5828

IN THE SUPREME COURT OF THE UNITED STATES

DESHAUN BULLOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH 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 in considering conduct that a 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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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is published at 35 F.4th 666.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2022. A petition for rehearing was denied on July 13, 2022. The petition for a writ of certiorari was filed on October 11, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Iowa, petitioner was convicted of

possessing a firearm as an unlawful user or addict of a controlled substance, in violation of 18 U.S.C. 922(g)(3) and 924(a)(2). Pet. App. 9a. He was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. Id. at 10a-11a. The court of appeals affirmed. Id. at 1a-8a.

1. On March 15, 2019, officers in Waterloo, Iowa, stopped petitioner after they saw him drive away from what appeared to be an illegal drug transaction in the parking lot of a liquor store. Presentence Investigation Report (PSR) ¶ 5. Petitioner had a loaded firearm, and a search of the car revealed two baggies of marijuana, ammunition, and a marijuana pipe. PSR ¶ 6. After receiving Miranda warnings, petitioner admitted that "he had smoked marijuana every day consistently since he was 13 years old" and "stipulated and agreed that he was, and knew he was, an unlawful user of marijuana on and prior to March 15, 2019." PSR ¶ 7.

On April 12, 2019, petitioner purchased a Taurus TH9c 9x19mm caliber pistol from a federally licensed dealer, but answered "no" to the question on ATF Form 4473 asking whether he was "an unlawful user of, or addicted to, marijuana." PSR ¶ 8. Petitioner later "stipulated and agreed that he was, and knew he was, an unlawful user of marijuana on and prior to April 12, 2019." Ibid.

On July 11, 2019, a search of petitioner's residence pursuant to a warrant revealed both marijuana and the loaded Taurus pistol, along with additional ammunition and drug paraphernalia. PSR

¶ 12. Petitioner once again "stipulated and agreed that he was, and knew he was, an unlawful user of marijuana on and prior to July 11, 2019." Ibid.

A federal grand jury in the Northern District of Iowa charged petitioner with two counts of possessing a firearm as an unlawful user of marijuana, in violation of 18 U.S.C. 922(g)(3) and 924(a)(2), and one count of causing a firearms dealer to maintain false records, in violation of 18 U.S.C. 924(a)(1)(A). Indictment 1-3. Petitioner pleaded guilty to one count of possessing a firearm as an unlawful user of marijuana, related to the events of July 11, 2019. Pet. App. 9a.

2. Applying the advisory Sentencing Guidelines, the Probation Office calculated a total offense level of 21, PSR ¶ 27, and a criminal history category of III, which was based on three prior state convictions for possession of marijuana, PSR ¶ 33; see PSR ¶¶ 29-31. That yielded an advisory guidelines range of 46 to 57 months of imprisonment. PSR ¶ 67.

Before sentencing, the government moved for an upward departure or variance. D. Ct. Doc. 52 (Apr. 9, 2021). The government requested an upward departure under Sentencing Guidelines § 4A1.3(a)(1) because "reliable information indicates that [petitioner's] criminal history category substantially under-represents the seriousness of [his] criminal history and the likelihood that [he] will commit other crimes." D. Ct. Doc. 52, at 1 (citation omitted); see D. Ct. Doc. 52-1, at 10-12 (Apr. 9,

2021). In the alternative, the government sought an upward variance under 18 U.S.C. 3553(a) "based on [petitioner's] criminal history as well as the other § 3553(a) factors." D. Ct. Doc. 52, at 1; see D. Ct. Doc. 52-1, at 12-15. Both requests were based on petitioner's March 2017 shooting of a man named R.J., which was not included in his criminal history, and his repeated commission of drug and firearms offenses. See D. Ct. Doc. 52-1, at 1-10.

The government introduced testimony and evidence related to the March 2017 shooting. Sent. Tr. 10-27; D. Ct. Docs. 52-2, 52-3, and 52-4 (Apr. 9, 2021); see D. Ct. Doc. 52-1, at 1-6. That evidence showed that on March 27, 2017, petitioner drove to a local hospital to drop off R.J., who had suffered a gunshot wound to his face, and then drove home and called 911 to report the shooting. See D. Ct. Doc. 52-1, at 1. Officers who responded to the call found "a large amount of blood on the kitchen floor, teeth and teeth fragments in the living room, and blood spatter throughout." Id. at 2. Petitioner initially denied shooting R.J., but officers soon believed that petitioner "was withholding information" because of inconsistent answers to their questions. Id. at 4; see id. at 2-4.

After he was given Miranda warnings, petitioner admitted that he had lied in his initial statements. D. Ct. Doc. 52-1, at 4. And at the hospital, R.J. told police that petitioner had shot him. Id. at 5. Petitioner was charged in state court with reckless use of a firearm causing serious injury, in violation of Iowa Code

§ 724.30(1). Id. at 5-6. In April 2018, a jury acquitted petitioner of that charge. Id. at 6.

Two weeks after the acquittal, however, petitioner sent a text message stating: "I just beat a case last Friday. My best friend tried to rob me so I shot him in the face. Due to my moms prayers and my self research on my case I just got acquitted of all charges Friday." D. Ct. Doc. 52-3, at 1. Later in the conversation, petitioner said that R.J. "should have known better" than to testify at petitioner's trial because R.J. "knows how I used to get down back in the day" and "I'm still that same [person] so he played himself." Ibid.

In March 2019, petitioner sent another text message claiming to have had a "reputation out here for hustling and having a bad temper and shooting [people]." D. Ct. Doc. 52-4, at 1. He also texted: "I beat my last attempted murder in 2017 my best friend tried to rob my so I shot his bitch ass in the head he made it tho." Id. at 2.

3. The district court granted the government's motion for an upward departure or variance, determining that the assigned category under the advisory Guidelines understated the seriousness of petitioner's criminal history. Sent. Tr. 67. The court applied an upward departure to increase petitioner's criminal-history category under the advisory Guidelines from III to IV, resulting in an advisory sentencing range of 57 to 71 months of imprisonment. Id. at 67.

With respect to the 2017 shooting of R.J., the court found "based on the evidence presented by the government that [petitioner] at the very least recklessly discharged this firearm. He either intentionally shot his friend or he recklessly did so." Sent. Tr. 65. The court acknowledged that petitioner "was acquitted of that conduct in state court," but explained that it was "assessing evidence by a preponderance of the evidence," whereas "[a]t a criminal trial, the jury has to find the evidence beyond a reasonable doubt." Ibid. The court also explained that the "state court did not have the benefit of the text messages," which the district court found to demonstrate that petitioner "most clearly shot [R.J.]." Ibid. .

The district court made clear, however, that it "would vary upward to that [same] range" even without the departure, "based not only on the 2017 criminal conduct of which [petitioner] was acquitted but also" the "lack of deterrence" and "high degree of recidivism" that petitioner had demonstrated. Sent. Tr. 67. The court observed that two of petitioner's three prior marijuana offenses "occurred while he was on probation from a prior one," showing "a degree of recidivism and failure to be deterred by contact with law enforcement or even criminal sentences." Id. at 64. The court also recounted the events in March and April 2019 (the subject of the two counts in the indictment that the government had dismissed in exchange for the guilty plea), and

explained that petitioner's behavior "show[ed] a complete disrespect for the law." Id. at 62.

The district court sentenced petitioner to 63 months of imprisonment, "roughly the middle of th[e] new advisory guideline range." Sent. Tr. 68. The court then stated that "if I am in error in my upward departure, I would impose the same sentence under the [Section] 3553(a) factors independent of the guidelines." Id. at 68-69.

4. The court of appeals affirmed. Pet. App. 1a-8a. Petitioner argued on appeal that "[i]t violated [his] Fifth and Sixth Amendment[] rights to a jury trial and to due process of law to utilize the acquitted conduct as a basis for departing upward." Pet. C.A. Br. 27 (boldface omitted); see id. at 27-32. The court of appeals observed that circuit precedent foreclosed that argument. Pet. App. 5a.

ARGUMENT

Petitioner renews his argument (Pet. 8-18) that the district court's reliance on the 2017 shooting in determining his sentence 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 a 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 and any such error would be harmless. This Court has repeatedly denied petitions for writs of certiorari in cases raising the issue, and it should follow the same course here.*

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).

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-

* Several pending petitions for writs of certiorari seek review of similar issues. 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); Karr v. United States, No. 22-5345 (filed Aug. 10, 2022).

1557). Petitioner's attempt (Pet. 8, 15-17) 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's suggestion (Pet. 12-13) that Watts is inconsistent with decisions of this Court concerning the constitutional requirements necessary for applying a higher statutory sentencing range -- Apprendi v. New Jersey, 530 U.S. 466 (2000), United States v. Booker, 543 U.S. 220 (2005), and Alleyne v. United States, 570 U.S. 99 (2013) -- likewise lacks merit. See Br. in Opp. at 9-10, McClinton, supra (No. 21-1557). Petitioner's 63-month sentence lies within the default sentencing range for his offense and thus does not violate Apprendi, Booker, Alleyne, or any other decision of this Court.

Petitioner errs in contending that "the evidentiary rules attendant at a sentencing hearing" are inconsistent with "the presumption of innocence." Pet. 18; see Pet. 17-18. The sentencing court's consideration of evidence that would be inadmissible or irrelevant at a jury trial does not discard the

presumption of innocence or relieve the prosecution of its burden of proving guilt beyond a reasonable doubt, because a court considers such evidence only after a defendant has been duly convicted of the crime for which he is to be punished.

Petitioner was sentenced solely for his conviction of possessing a firearm as an unlawful marijuana user, see Pet. App. 9a, to a term of imprisonment far below the 10-year statutory maximum Congress authorized for that conviction, see 18 U.S.C. 924(a)(2) (2021); PSR ¶ 66. And the facts relevant to petitioner's sentencing were used not to create a separate offense or affix a separate penalty, but only to "guide judicial discretion in selecting a punishment 'within limits fixed by law,'" Alleyne, 570 U.S. at 113 n.2 (citation omitted). In any event, petitioner did not raise any challenge in the courts below to the evidentiary rules applicable to sentencing proceedings, and the court of appeals thus did not address that issue. Further review is unwarranted for that reason as well. See Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

2. Petitioner acknowledges (Pet. 11) that no federal court of appeals has agreed with his position. 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. 14-15) 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.

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.

Petitioner's suggestion that a different result is warranted because the 2017 shooting was tried "in a different jurisdiction before a different judge" is unsound. Pet. 4; see Pet. 15-17. Section 3661 of Title 18 explains that "[n]o 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." 18 U.S.C. 3661. Thus, as this Court has explained, judges have "broad discretion" to engage in factfinding to determine an appropriate sentence within a statutorily authorized range. Alleyne, 570 U.S. at 116 (majority opinion); see Booker, 543 U.S. at 233 (similar). Petitioner

identifies no authority for the proposition that courts may not in the exercise of that broad discretion consider conduct extrinsic to the underlying conviction.

3. At all events, this case would be an unsuitable vehicle in which to review the question presented because the record does not clearly establish that the district court actually relied on acquitted conduct in sentencing petitioner. Although the court considered "the 2017 criminal conduct of which [petitioner] was acquitted" (among other conduct) in imposing the upward departure, Sent. Tr. 67, the court also made clear that "if I am in error in my upward departure, I would impose the same sentence under the [Section] 3553(a) factors independent of the guidelines," id. at 68-69.

In reviewing those factors, the district court emphasized petitioner's "complete disrespect for the law" as demonstrated by the March and April 2019 events, Sent. Tr. 62, as well as "a degree of recidivism and failure to be deterred by contact with law enforcement or even criminal sentences" (despite "prior attempts by courts to be lenient"), as demonstrated by his repeated marijuana convictions, id. at 64-65. The court also stated that even if the 2017 shooting were "accidental" -- which would not be inconsistent with the jury's acquittal, even setting aside the different standards of proof -- petitioner "shot a man in the face" and "could have killed him," which the court viewed as "completely

inconsistent with the idea that [petitioner is] not a dangerous man." Id. at 61.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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