

No. 22-6212

IN THE SUPREME COURT OF THE UNITED STATES

ERIC CAIN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

As provided by this Court's Rule 15.8, petitioner submits this supplemental brief to address the government's letter filed on January 18, 2023, in McClinton v. United States, No. 21-1557, Luczak v. United States, No. 21-8190, Shaw v. United States, No. 22-118, Carr v. United States, No. 22-5345, and Bullock v. United States, No. 22-5828. The letter told the Court about a January 12, 2023, announcement by the United States Sentencing Commission of a proposed amendment to the Sentencing Guidelines about the use of acquitted conduct. See U.S. Sentencing Commission, Proposed Amendments to Sentencing Guidelines (Preliminary), Proposed Amendment: Acquitted Conduct , 13–14 (Jan. 12, 2023), letter of Solicitor General Elizabeth B. Prelogar, dated January 18, 2023, in McClinton v. United States, No. 21-1557.

Petitioner's pending petition, like those in McClinton, et al., concerns the use of acquitted conduct at sentencing.

Since January 12, 2023, the Commission has published proposed amendments on its website and in the Federal Register. <https://www.ussc.gov/topics-proposed-amendments>, retrieved February 17, 2023. The Commission's current proposed amendment about acquitted conduct would still allow courts to consider acquitted conduct at sentencing,

but would bar using acquitted conduct as relevant conduct when determining the guideline sentence range. (Proposed Amendments to the Sentencing Guidelines, February 2, 2023, pp. 213–14, 223–24).

The proposed amendment does not give this Court any reason to deny review in petitioner’s case. It is preliminary, not final. In addition, the proposed amendment does not resolve the basic constitutional questions that petitioner’s petition raises. It still permits judges to rely on acquitted conduct to increase a defendant’s sentence by varying or departing upwards from the sentencing guideline range. (Id., p. 224). Further, the proposal appears to operate prospectively only, so it would offer no relief to those sentenced before the Commission acts.

In all, the proposed amendment sidesteps the fundamental constitutional questions raised in petitioner’s petition and the petitions in McClinton, et al.

CONCLUSION

For these reasons, and those stated in the petition for certiorari, the Court should grant the petition for certiorari.

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Respectfully submitted,
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