

No. 22-6212

IN THE SUPREME COURT OF THE UNITED STATES

ERIC CAIN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

REPLY BRIEF FOR THE PETITIONER

Kenneth P. Tableman P27890
Kenneth P. Tableman, P.C.
Attorney for Petitioner
71 Maryland Avenue, SE
Grand Rapids, MI 49506-1819
(616) 233-0455
tablemank@sbcglobal.net

REPLY BRIEF FOR THE PETITIONER

The government's brief in opposition asks the Court to adopt a broad reading of Watts v. United States, 519 U.S. 148 (1997). But Watts did not consider the Fifth and Sixth Amendment issues Cain's petition presents. Watts was a per curiam opinion and "presented a very narrow question regarding the interaction of the Sentencing Guidelines and the Double Jeopardy Clause." United States v. Booker, 543 U.S. 220, 240 n.4 (2005).

Since Watts the Court has decided several cases that emphasize the primacy of the right to have a jury decide facts that affect the penalty in a criminal case, starting with Apprendi v. New Jersey, 530 U.S. 466 (2000). The Court struck down the mandatory federal sentencing guidelines because they violated the jury trial right. United States v. Booker, 543 U.S. at 244.

Watts is outmoded and does not bear the weight the government wants to give it.

The government's brief notes the unanimity of the federal circuit courts in permitting judges to base sentences on acquitted conduct, but ignores the split among the state courts. At least four states say that using acquitted conduct at sentencing violates federal due process. State v. Melvin, 258 A.2d 1075 (N.J. 2021), People v. Beck, 939 N.W. 2d 213, 225–26 (Mich 2019), State v. Marley, 364 S.C.2d 133 (N.C. 1988) and State v. Cote, 530 A.2d 775 (N.H.

1987). That means in those states the choice of forum will determine the reach of a jury verdict. The Court should grant the petition to settle the conflict.

The government asks the Court to rely on the government's arguments in opposition in McClinton v. United States, No. 21-1557. (Brief in Opposition at 7). The Petitioner's Reply in McClinton rebuts those arguments, and Cain adopts them here.

CONCLUSION

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

March 2023

Respectfully submitted,

Kenneth P. Tableman
Kenneth P. Tableman, P.C.
Attorney for Petitioner
71 Maryland Avenue, SE
Grand Rapids, MI 49506-1819
(616) 233-0455
tablemank@sbcglobal.net