

NO:

**In the
Supreme Court of the United States**

TIANNA BARBER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

**Benton C. Martin
Assistant Federal Public Defender**

Counsel for Petitioner

**613 Abbott St., Suite 500
Detroit, Michigan 48226
Telephone No. (313) 967-5832
Email: benton_martin@fd.org**

QUESTION PRESENTED FOR REVIEW

Whether the jury's rejection of drug quantities on special interrogatories meets the definition of "acquitted conduct" for purposes of the federal sentencing guidelines?

PARTIES TO THE PROCEEDINGS

The parties to this petition are:

- (1) Tianna Barber (the defendant), and
- (2) the United States of America.

Neither party has any stock ticker symbol.

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PETITION FOR WRIT OF CERTIORARI

Tianna Barber respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is included in Westlaw's database at 2026 WL 2364330. It is also reprinted in the appendix at APP 1. There is no district court order.

STATEMENT OF JURISDICTION

Jurisdiction is invoked under 28 U.S.C. § 1254(1). The decision of the court of appeals affirming the judgment issued August 14, 2026. This petition is timely filed.

SENTENCING GUIDELINE PROVISION INVOLVED

Section 1B1.3(c) of the United States Sentencing Guidelines states as follows:

(c) **Acquitted Conduct.**—Relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.

Commentary Note 10 to § 1B1.3(c) further states:

10. Acquitted Conduct.—Subsection (c) provides that relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct establishes, in whole or in part, the instant offense of conviction. There may be cases in which certain conduct underlies both an acquitted charge and the instant offense of conviction. In those cases, the court is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the instant offense of conviction and therefore qualifies as relevant conduct.

STATEMENT OF THE CASE

This case presents an important question about the definition of an “acquittal” and the scope of a new provision of the federal sentencing guidelines prohibiting reliance on acquitted conduct at sentencing.

1. In 2022, federal authorities charged Barber with drug trafficking and conspiracy charges tied to her relationship with Derrick Murphy. Much of the

government's trial evidence related to Darnell Triplett—an alleged distributor for Murphy—who was arrested after roughly three kilograms of cocaine was found in a vehicle he was driving. The government's case against Barber focused on recorded jails between her and Murphy, including jail calls that the government argued showed that Barber acted as a “fixer” for Murphy.

2. The jury found Barber guilty of conspiracy, but it acquitted her of the elevated quantities of drugs the government had charged. In particular, in regard to a conspiracy charge (Count One), the jury found Barber guilty of “less than 100 grams” of a mixture or substance containing a detectable amount of heroin, “less than 500 grams” a mixture or substance containing a detectable amount of cocaine, “less than 40 grams” a mixture or substance containing a detectable amount of fentanyl, and “less than 50 grams but more than 5 grams” of a mixture or substance containing a detectable amount of methamphetamine. There was no choice given for the jury to select “zero” or “not guilty” as a quantity.

3. The jury also found Barber guilty of substantive counts of distribution of methamphetamine and heroin. Consistent with its findings in regard to the conspiracy charge, the jury found Barber accountable for “less than 50 grams but more than 5 grams” of a mixture or substance containing a detectable amount of methamphetamine. The standalone heroin charge did not ask for a quantity determination. The jury also found Barber guilty of one count of use of a telephone to

facilitate a drug felony. The jury acquitted Barber of a second count of use of a communication facility to facilitate a drug felony.

4. In advance of sentencing, a probation officer prepared a presentence report calculating a total converted drug weight of 5,696.73 kilograms. This amount included 1,360 grams of methamphetamine, 27.1 grams of actual methamphetamine, 7,002.18 grams of cocaine, and 1,034.29 grams of heroin. These quantities led to an offense level of 32. Barber objected to the drug weight calculation, explaining that the jury had rejected the government's request to find her responsible for higher quantities. The district court denied the objection, finding that the government established the acquitted drug quantities calculated by the probation officer by a preponderance of the evidence. The district court ultimately adopted a guideline range of 262 to 327 months but varied below that range and imposed a total prison term of 150 months.

5. On appeal, Barber argued that the district court had run afoul of USSG § 1B1.3 by calculating her sentencing guidelines using acquitted drug quantities. App.8. The Sixth Circuit affirmed. App.9. It cited the commentary to the guidelines and reasoned that, "even if the jury acquitted her of the aggravated charges involving the higher drug quantities, the same drugs underlying those greater offenses 'establish[], in whole or in part,' the lesser included offenses of conviction." *Id.*

REASON FOR GRANTING THE WRIT

This Court’s intervention is needed to clarify the scope of the relevant-conduct guideline prohibiting reliance on charged but acquitted conduct.

For jointly undertaken criminal activity, as charged in this case, the relevant conduct rule requires the court to determine an individual’s advisory sentencing guidelines range based on his own conduct and on “all acts and omissions of others that were (i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity.” USSG § 1B1.3(a)(1)(B).

In 2024, the Sentencing Commission promulgated an amendment to § 1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), prohibiting the use of most acquitted conduct in calculating a person’s sentencing guidelines range. The amendment added a new subsection (c) to § 1B1.3, entitled “Acquitted Conduct,” that states: “Relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.” USSG § 1B1.3(c). This amendment went into effect before Barber’s sentencing.

The Commission explained that it promulgated this amendment in response to concerns raised by many courts and commentators, particularly this Court, about using acquitted conduct at sentencing. *See* Reason for Amendment, 89 FR at 36855 (citing *e.g.*, *McClinton v. United States*, 143 S. Ct. 2400, 2401 & n.2 (2023))

(Sotomayor, J., statement respecting the denial of certiorari) (collecting cases and statements opposing acquitted-conduct sentencing)).¹ The Commission observed that “[i]n denying certiorari last year in *McClinton*, multiple Justices suggested that it would be appropriate for the Commission to resolve the question of how acquitted conduct is considered under the guidelines.” *Id.*

The district court’s drug quantity finding in this case defied this new rule and this Court’s recent admonition that “[t]he Fifth and Sixth Amendments placed the jury at the heart of our criminal justice system” so that “a judge’s power to punish would ‘derive wholly’ from, and remain always ‘controlled’ by, the jury and its verdict.” *Erlinger v. United States*, 602 U.S. 821, 822 (2024) (quoting *Blakely v. Washington*, 542 U.S. 296, 306 (2004)).

Special verdict findings on drug quantity are “acquitted conduct” for purposes of the new rule. This Court has long defined an “acquittal” as “any ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense.” *Evans v. Michigan*, 568 U.S. 313, 318 (2013). Likewise, the Court has consistently understood using “acquitted conduct” at sentencing as synonymous with relying on fact allegations that a jury or court found were not proven beyond a reasonable doubt

¹ See Fed. Pub. & Comm. Def. Cmt. to U.S. Sent. Comm’n. on Acquitted Conduct (Fed. 22, 2024), <https://perma.cc/48BS-EEFE> (discussing commentary from academics and federal and state jurists from around the country- including Justices of the United States Supreme Court-who have, for decades, expressed grave misgivings about the use of acquitted conduct at sentencing).

to sentence the accused individual. *See Jones v. United States*, 574 U.S. 948, 948 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari) (calling upon the Court to resolve constitutional questions related to acquitted-conduct sentencing and explaining that “[t]he Sixth Amendment, together with the Fifth Amendment’s Due Process Clause, requires that each element of a crime be either admitted by the defendant or proved to the jury beyond a reasonable doubt.”).

Consider *McClinton*, which the Commission cited as a basis for addressing acquitted-conduct sentencing. *See* Reason for Amendment, 89 FR at 36855. There, the prosecution argued that McClinton shot and killed his friend while robbing a pharmacy. *See McClinton*, 143 S. Ct. at 2401. A jury, however, unanimously acquitted McClinton of killing his friend and convicted him only of the robbery. *See id.* Even so, the sentencing court cross-referenced the first-degree murder guideline and set McClinton’s base offense level at 43, rather than level 20, for his robbery conviction. *See id.*; *see also* Petition for Writ of Certiorari at 5–7, *McClinton v. United States*, No. 21-1557 (June 10, 2022), <https://perma.cc/ZC2Z-MD5X>.

In her statement respecting the denial of certiorari, Justice Sotomayor described the case as involving “acquitted conduct,” and further described “acquitted conduct” as a finding that the government failed to prove an essential element of an offense beyond a reasonable doubt. *See id.* at 2402. She added that “acquittals have

long been accorded special weight, distinguishing them from conduct that was never charged and passed upon by a jury.” *Id.* (cleaned up).

Justice Sotomayor’s understanding of an acquittal aligns with *United States v. Watts*, which also described “acquitted conduct” as an “acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt.” 519 U.S. 148, 155 (1997) (per curiam) (cleaned up); *see also, e.g., McElrath v. Georgia*, 601 U.S. 87, 94 (2024) (defining “acquittal” as “any ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense” (quoting *Evans*, 568 U.S. at 318)); *United States v. Bell*, 808 F.3d 926, 930 (D.C. Cir. 2015) (Millet, J., concurring in denial of rehearing en banc) (stating that “allowing judges to materially increase the length of imprisonment based on facts that were *submitted directly to and rejected by* the jury in the same criminal case is too deep of an incursion into the jury’s constitutional role.” (emphasis in original)).

Here, the amendment directly responds to the use of acquitted conduct at sentencing as that practice has been understood by the Supreme Court and other courts and commentators for decades. *See* Reason for Amendment, 89 Fed. Reg. at 36855 (discussing *McClinton*). So, when the Commission uses terms like “acquitted” or “acquitted conduct” in §1Bl.3(c) that “the Supreme Court has given . . . specific meaning,” it is logical to “assume that [the Commission] intends the meaning to carry over to the ‘same wording in related [guidelines].’” *Davis v. Echo Valley Condo. Ass’n*, 945 F.3d 483, 491 (6th Cir. 2019) (quoting Antonin Scalia & Bryan A. Garner,

Reading Law: The Interpretation of Legal Texts § 54, at 322 (2012) (discussing the prior-meaning canon)).

Therefore, § 1Bl.3(c)'s title "Acquitted Conduct" and its reference to "conduct for which the defendant was criminally charged and acquitted in federal court" must be interpreted consistently with the Supreme Court's understanding of acquitted conduct and acquittal—which is any fact allegation that the prosecution failed to prove beyond a reasonable doubt. This includes a jury's special finding about the quantities and types of drugs the government proved were involved in the offense.

Turning back to the new amendment with *Watts*'s understanding of an acquittal in mind, determining which fact allegations are excluded from the new relevant conduct rule under §1Bl.3(c) requires two steps: (1) identifying the underlying conduct charged in federal court (i.e., the facts comprising an element of an offense); and (2) excluding conduct that the jury or court found unproven beyond a reasonable doubt (i.e., an acquittal).

As to the first step, *Alleyne* and *Apprendi* require that the prosecution must charge, and a jury must find beyond a reasonable doubt, any fact that increases the statutory maximum or minimum penalty. See *Apprendi v. New Jersey*, 530 U.S. 466, 483, n. 10, 490 (2000); *Alleyne v. United States*, 570 U.S. 99, 103 (2013). These fact allegations are "elements" of an aggravated offense, rather than just "sentencing factors" that can be determined by the court using the preponderance standard,

because they expose the sentenced individual to greater statutory punishment. *See Apprendi*, 503 U.S. at 492–95.

In the context of a federal drug case, this means the government must charge and prove a threshold drug quantity to trigger aggravated penalties under 21 U.S.C. § 841(b). *See United States v. Dado*, 759 F.3d 550, 570 (6th Cir. 2014) (holding that under *Alleyne*, “drug quantity is an element of the offense”). “The core crime”—the drug offense—and “the fact triggering the mandatory minimum sentence”—i.e., drug quantity—“together constitute a new, aggravated crime, each element of which must be submitted to the jury.” *Alleyne*, 570 U.S. at 113; *see also United States v. Gonzales*, 420 F.3d 111, 120–31 (2d Cir. 2005) (addressing the operation of *Apprendi* on aggravated § 841 charges and holding that drug quantity is an element of an aggravated drug offense because it increases the authorized sentencing range above what it would have been had the individual been convicted of an unquantified drug crime).

The above makes sense: “The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant’s liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment.” *Apprendi*, 530 U.S. at 495.

And the above logic flows directly into §1Bl.3(c)’s second step: where a jury affirmatively finds that the government has not proven a drug quantity that would

trigger a higher statutory sentencing range, that is an acquittal of an aggravated offense. Special verdict forms or interrogatories asking the jury to unanimously find the drug quantity involved in the offense beyond-a-reasonable doubt have become standard *post-Alleyne* and *Apprendi*. See Wayne R. LaFave, et al., 6 Crim. Proc. § 24.10(a) (4th ed. 2023) (discussing special interrogatories in federal drug cases involving mandatory minimums). And a jury’s specific finding on a lesser quantity constitutes an acquittal on the greater quantity because it necessarily resolves whether the prosecution proved, beyond a reasonable doubt, a threshold drug quantity—the element separating the base offense from the aggravated offense. See *Green v. United States*, 355 U.S. 184, 191 (1957) (discussing the concept of an implied acquittal where the jury “was given a full opportunity to return a verdict” on a greater charge but returned a verdict on a lesser offense).

Consider *United States v. Randolph*, 794 F.3d 602, 612 (6th Cir. 2015). There, a jury found Randolph guilty of a drug trafficking conspiracy but then answered “none” in response to a special interrogatory about the quantity of drugs involved in the offense. *Id.* The Sixth Circuit explained, “[w]here a jury’s special verdict finding negates an essential element of the offense, the defendant must be acquitted and cannot be retried on that offense.” *Id.* Because the “jury’s special verdict found that the drugs ‘involved in’ the conspiracy were ‘none,’” the Sixth Circuit concluded that “[t]his unanimous finding negate[d] an essential element of the charged drug

conspiracy and is only susceptible to one interpretation: the government failed to prove Randolph guilty of the charged drug conspiracy beyond a reasonable doubt.” *Id.*

Mere “labels” of special verdict or special interrogatory “do not control” whether an acquittal occurs. *McElrath*, 601 U.S. at 96 (quoting *Evans*, 586 U.S. at 322). “Thus, it is not dispositive whether a factfinder incanted the word acquit; instead, an acquittal has occurred if the factfinder acted on its view that the prosecution had failed to prove its case.” *Id.* (cleaned up).

This Court’s precedent thus supports that a jury’s special finding constitutes an acquittal as long as the special finding either explicitly or implicitly shows that the prosecution has failed to prove a fact beyond a reasonable doubt. So, because the jury’s answers to the special interrogatories posed in Count One establish the government failed to prove that the offenses involved certain drug quantities beyond a reasonable doubt, the jury’s special findings fall within this meaning of “acquitted conduct” under §1B1.3(c).

By asking the jury to find drug quantities, the government was essentially charging two offenses: an unaggravated drug conspiracy and an aggravated drug crime with a mandatory minimum. Correspondingly, the pattern special verdict forms ask the jury to unanimously determine the drug quantity that triggers an aggravated statutory penalty ranges.

The Sixth Circuit concluded that, even if the higher drug quantities are acquitted conduct under § 1B1.3(c), the district court could rely on those higher

quantities under commentary to § 1B1.3(c) permitting reliance on acquitted conduct when there is “overlapping conduct,” i.e., “certain conduct underlies both an acquitted charge and the instant offense of conviction.” USSG § 1B1.13(c), cmt. n.10.

There are two problems with this reasoning.

First, the district court did not make any findings about whether Barber’s conduct of conviction “overlapped” with the offense of conviction. The same commentary cited by the Sixth Circuit as justifying affirmance of Barber’s sentence makes clear that the sentencing court “is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the instant offense of conviction and therefore qualifies as relevant conduct.” USSG § 1B1.13(c), cmt. n.10. The government appeared to agree, noting in appellate briefing that the Sentencing Commission “prudently left” the determination of overlapping conduct “in the hands of sentencing courts.”

Second, the jury refused to find Barber criminally liable on multiple fronts: in regard to the conspiracy charge, the jury found Barber guilty of “less than 100 grams” of a mixture or substance containing a detectable amount of heroin, “less than 500 grams” a mixture or substance containing a detectable amount of cocaine, “less than 40 grams” a mixture or substance containing a detectable amount of fentanyl, and “less than 50 grams but more than 5 grams” of a mixture or substance containing a detectable amount of methamphetamine. Yet the district court decided Barber was

responsible for 1,360 grams of methamphetamine, 27.1 grams of actual methamphetamine, 7,002.18 grams of cocaine, and 1,034.29 grams of heroin.

This conduct did not amount to “relevant conduct” underlying the offense of conviction. For the methamphetamine count, the jury convicted Barber of an offense under 21 U.S.C. § 841(b)(1)(B), for distributing methamphetamine in a quantity between 5 and 50 grams—and it *rejected* finding her guilty of the more serious offense under 21 U.S.C. § 841(b)(1)(A), for distributing 50 grams or more of methamphetamine. The same is true for the conspiracy charge: When the government seeks a mandatory minimum sentence for a drug conspiracy, then it is charging a separate crime under 21 U.S.C. § 846 and § 841(b)(1)(A) or (B), as opposed to § 846 and § 841(b)(1)(C). In other words, the jury was asked, but refused, to find Barber guilty of multiple aggravated drug crimes. By relying on acquitted conduct, the district court did not sentence Barber for overlapping relevant conduct—it sentenced her based on conduct that would have underlaid separate *offenses* for which the jury acquitted her.

CONCLUSION

Petitioner Tianna Barber asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,
FEDERAL PUBLIC DEFENDER

By:

/s/ Benton C. Martin

Benton C. Martin

Deputy Defender

Counsel for Petitioner Tianna Barber

Detroit, Michigan
September 21, 2026