No. 07-605

In the Supreme Court of the United States

MARK HURN, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner contends (Pet. 7-18) that his Sixth Amendment rights were violated because the district court, in determining his sentence, relied in part on conduct underlying charges on which the jury had returned a verdict of not guilty. This Court has recently received several other petitions for writs of certiorari raising the same or similar claims. As the government has explained in briefs in opposition to those petitions, the acquitted conduct issue does not warrant this Court's review. See, *e.g.*, Gov't Br. in Opp. at 8-13, *Mercado* v. *United States*, petition for cert. pending, No. 07-5810 (filed Nov. 30, 2007) (available at 2007 WL 4348939); Gov't Br. in Opp. at 7-13, *Ashworth* v. *United States*,

petition for cert. pending, No. 07-8076 (filed Feb. 8, 2008).[1]

In *United States* v. *Watts*, 519 U.S. 148, 157 (1997) (per curiam), this Court held that "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." Although *Watts* specifically addressed a challenge to consideration of acquitted conduct based on double jeopardy principles rather than the Sixth Amendment, the clear import of the Court's decision is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution. See *ibid.* That principle predated the Sentencing Guidelines, see *id.* at 152, and it fully applies to the advisory Guidelines put in place by *United States* v. *Booker*, 543 U.S. 220 (2005).

Since *Booker*, every court of appeals has held that a district court may consider acquitted conduct at sentencing. See *United States* v. *Jimenez*, No. 05-4098, 2008 WL 115206, at *20 (3d Cir. Jan. 14, 2008); *United States* v. *Ashworth*, 247 Fed. Appx. 409 (4th Cir. 2007), petition for cert. pending, No. 07-8076 (filed Dec. 5, 2007); *United States* v. *Mendez*, 498 F.3d 423, 426-427 (6th Cir. 2007); *United States* v. *Hurn*, 496 F.3d 784, 788 (7th Cir.), petition for cert. pending, No. 07-605 (filed Nov. 1, 2007); *United States* v. *Mercado*, 474 F.3d 654, 656-658 (9th Cir.), petition for cert. pending, No. 07-5810 (filed Aug. 8, 2007); *United States* v. *Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States* v. *Farias*, 469 F.3d 393, 399 & n.17 (5th Cir. 2006), cert. denied, 127 S. Ct. 1502

[1] We have served petitioner with a copy of the government's brief in opposition in *Ashworth*.

(2007); *United States* v. *High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States* v. *Dorcely*, 454 F.3d 366, 371 (D.C. Cir.), cert. denied, 127 S. Ct. 691 (2006); *United States* v. *Vaughn*, 430 F.3d 518, 525-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 684-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005).[2]

This Court has repeatedly denied petitions for writs of certiorari raising the issue. See, *e.g.*, *Edwards* v. *United States*, 127 S. Ct. 1815 (2007); *Dorcely* v. *United States*, 127 S. Ct. 691 (2006); *Armstrong* v. *United States*, 127 S. Ct. 109 (2006); *Lynch* v. *United States*, 127 S. Ct. 89 (2006); *Magluta* v. *United States*, 126 S. Ct. 2966 (2006). There is no reason for a different result here. Nevertheless, to the extent that this Court is holding petitions raising this issue for further consideration, it would be appropriate to accord similar treatment to the petition in this case.

2. Petitioner additionally contends (Pet. 18-22) that his sentence was unreasonable under 18 U.S.C. 3553(a) because it was based in part on acquitted conduct and purportedly failed to account properly for petitioner's

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[2] After the Sixth Circuit in *Mendez* upheld a district court's consideration of acquitted conduct at sentencing, a panel of the Sixth Circuit in *United States* v. *White*, 503 F.3d 487 (6th Cir. 2007), issued an opinion adhering to the *Mendez* ruling but suggesting that the defendant file a petition for rehearing en banc on the question whether the continuing use of acquitted conduct as a sentencing enhancement violates *United States* v. *Booker*. On November 30, 2007, the Sixth Circuit withdrew the panel opinion in *White* and granted rehearing en banc. The *Mendez* ruling, however, remains in effect in the Sixth Circuit. Moreover, because the en banc court in *White* may uphold the *Mendez* ruling, this Court's review would be premature at this time.

limited mental capacity. Neither claim merits review. Petitioner did not raise the argument that the district court's consideration of acquitted conduct rendered his sentence unreasonable in either the district court or the court of appeals. See Pet. C.A. Br. 13-17; Pet. C.A. Reply Br. 2-4. Nor did the court of appeals address that argument. For that reason, it is not properly presented here. *United States* v. *Williams*, 504 U.S. 36, 41 (1992). In any event, the courts of appeals have correctly and repeatedly rejected similar contentions. See 18 U.S.C. 3661.[3] There likewise is no need for further review of petitioner's fact-bound claim that his diminished mental capacity rendered his sentence unreasonable. As the court of appeals explained, the district court "reasonably concluded that, despite [petitioner's] low I.Q., he knew that he was engaging in serious criminal activity and that—given the prior conviction for the same offense—a Guidelines range sentence was necessary to deter him from further criminal behavior." Pet. App. A14. The district court did not abuse its discretion in weighing the factors under 18 U.S.C. 3553(a). See *Gall* v. *United States*, 128 S. Ct. 586, 597-598 (2007).

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[3] See, *e.g.*, *United States* v. *Dawkins*, 240 Fed. Appx. 598, 599 (4th Cir.), cert. denied, 128 S. Ct. 632 (2007); *United States* v. *Four Pillars Enter. Co.*, No. 06-3297, 2007 WL 3244034, at *4-*5 (6th Cir. Oct. 30, 2007) (unpublished); *United States* v. *Fazio*, 487 F.3d 646, 659-660 (8th Cir.), cert. denied, 128 S. Ct. 523 (2007); *United States* v. *Demeulenaere*, 205 Fed. Appx. 685, 687 (10th Cir. 2006), cert. denied, 127 S. Ct. 1340 (2007); *United States* v. *Dorcely*, 454 F.3d 366, 375-376 (D.C. Cir.), cert. denied, 127 S. Ct. 691 (2006).

Respectfully submitted.

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