

IN THE
**SUPREME COURT
OF THE UNITED STATES**

WILLIAM SHANNON GRESHAM,
Petitioner,

V.

STATE OF TENNESSEE

Respondent,

**ON PETITION FOR WRIT OF CERTIORARI
IN THE SUPREME COURT
OF THE UNITED STATES
TO THE SUPREME COURT OF TENNESSEE**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sixth Amendment guarantees a defendant the right to a trial by an impartial jury to have his or her guilt proven beyond a reasonable doubt. This Court reaffirmed the principle in *Alleyne v. United States*, 133 S.Ct. 2151 (2013) that any facts that increase either the mandatory minimum or maximum sentence must be submitted to a jury. In spite of this well recognized principle, courts across the country use acquitted conduct to enhance a sentence for a separate or lesser included offense thereby negating the jury's verdict of not guilty which specifically rejected the theory of the State and the evidence associated with that theory. Thus, the questions presented here are:

- (1) Whether a trial court may use acquitted conduct by a jury that rejected the State's proof on a particular issue in order to enhance a defendant's sentence on a separate or lesser-included offense?**
- (2) Whether a trial court may use that same acquitted conduct by a jury to support a conviction for a separate or lesser included offense?**

LIST OF PARTIES TO THE PROCEEDING

State of Tennessee (as represented by the State of Tennessee Attorney General)

William Shannon Gresham (as represented by Mark C. Scruggs)

William Shannon Gresham is not a subsidiary or affiliate of a publicly owned corporation. There is no publicly owned corporation, not a party to the appeal, that has an interest in the outcome of this case.

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Order of Supreme Court of Tennessee Denial of Appeal

Opinion of the Tennessee Court of Criminal Appeals

Trial Court Sentencing Hearing Transcript

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CITATIONS OF OFFICIAL REPORTS

Attached hereto as Exhibit A is the opinion of the Tennessee Court of Criminal Appeals denying relief and affirming the judgment of the trial court.

Attached hereto as Exhibit B is the order of the Tennessee Supreme Court denying permission to appeal. Exhibit C is the transcript of the sentencing hearing before the Trial Court.

JURISDICTION

28 U.S.C. §1257 provides that “Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or *where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.*” (Emphasis added).

The Supreme Court of Tennessee denied the rehearing on December 6, 2018.

STATEMENT OF THE CASE

Respondent William Shannon Gresham seeks to have his conviction for child abuse dismissed, and in the alternative, his sentence of confinement of 2 years be reduced to 1 year and probated. He is currently serving that sentence in the Sumner County Tennessee Jail as an inmate within the Tennessee Department of Corrections.

The Defendant was charged with *especially aggravated sexual exploitation of a minor* (Count 1), *child rape* (Count 2), *aggravated sexual battery* (Count 3), *child rape* (Count 4), and *aggravated sexual battery* (Count 5). After the jury heard the case, it returned a verdict of guilty to the lesser offenses of sexual exploitation of a minor in Count 1 and child abuse through neglect in Count 2. All other counts were dismissed.

Sentencing occurred on August 15, 2015, at which time the Court sentenced the defendant to serve 4 years on Count 1 (sexual exploitation of a minor) and 2 years on Count 2 (child abuse), concurrent.

On March 10, 2017, the Court heard the Defendant's amended motion for judgment of acquittal and/or new trial and found that pursuant to the recent Tennessee Supreme Court opinion in *State v. Whited*, 506 S.W.3d 416 (Tenn. 2016), the media evidence submitted by the State in the trial did not qualify as "lascivious exhibition" of female private parts in accordance with the applicable statutes and granted the Defendant's motion for judgment of

acquittal as to Count 1 (sexual exploitation of a minor). The Court's prior judgment as to Count 2, child abuse, was affirmed. Thus, there was no conviction for any sexual misconduct related charge.

The Trial Court relied on acquitted conduct related to the more serious sexual offenses in all Counts as the reason to impose a sentence of confinement for the lesser offense of conviction; to wit: child abuse. The conviction of child abuse through neglect, T.C.A. 39-15-401(a) requires that the child must have suffered an actual, deleterious effect or harm and that the mere risk of harm is not sufficient. *State v. Mateyko*, 53 S.W.3d 666, 667 (Tenn.2001). The State and the Trial Court could only point to alleged harm suffered by the child related to proof surrounding the sex charges. The defendant appealed to the Tennessee Court of Criminal Appeals challenging the Trial Court's use of acquitted conduct during sentencing as well as the use of that same acquitted conduct to uphold the sufficiency of the evidence as related to the child abuse conviction.

Even though the issues articulated here were raised, neither the Tennessee Court of Criminal appeals nor the Tennessee Supreme Court chose to address them.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS WARRANTED DUE TO THE CONFLICT IN APPELLATE COURTS REGARDING THE USE OF ACQUITTED

CONDUCT DURING SENTENCING POST WATTS.

In *United States v. Watts* (519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554) (1997), this court analyzed the use of acquitted conduct during sentencing, and ruled that the sentencing court may consider conduct of which defendant has been acquitted, so long as that conduct has been proved by preponderance of evidence. In the years since this decision, there have been multiple cases that call the continued validity of Watts into question. Two such cases are *United States v. Booker*, 125 S.Ct. 738 (2005) and *United States v. Pimental*, 367 F.Supp.2d 143 (D.Mass. 2005):

United States v. Booker substantially undermines the continued vitality of *United States v. Watts* both by its logic and words. IT makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury. *Blakely v. Washington*, 542 U.S. 296, 124 S.C.t. 2531, 2538 (2004), and also conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing. (Emphasis in original). Pimental, 367 F.Supp.2d at 150.

Despite the holding in Booker, courts continue to consider acquitted conduct as a basis to increase the applicable sentencing range under the preponderance of evidence standard. In *United*

States v. Vaughn, 430 F.3d 518 2d Cir. (2005), the United States Court of Appeals in the Second Circuit specifically stated that nothing in Booker or its predecessors undermined its prior decisions that a judge's determination of relevant factors by a preponderance of the evidence satisfied due process. (*Id.*) At sentencing defendants are afforded substantially fewer rights as opposed to a jury trial where evidence must be proven beyond a reasonable doubt, yet judges continue to sentence defendants to confinement based on a preponderance of evidence on a charge, which was acquitted by a jury. What is the value of having a trial by jury if the Court ignores the verdict at sentencing? In *Alleyne v. United States*, 133 S.Ct. 2151 (2013), the Court reaffirmed the principle that any facts that increase either the mandatory minimum or maximum sentence must be submitted to a jury. The Defendant in Alleyne was charged with both using or carrying a firearm in relation to a crime of violence (5 year mandatory minimum) and brandishing the firearm (7 year mandatory minimum). The jury found him not guilty of brandishing but the trial court sentenced him to the 7 years anyway. The Supreme Court reversed stating that any fact that increases the mandatory minimum must be submitted to a jury. (*Id.*).

The matter of *State v. Oller*, 85 N.E.3d 1135 (Ohio App. 2017), modified on other grounds, 2017 WL 4005617, is very similar to the case sub judice. In Oller, the Defendant was charged with murder but was convicted of involuntary manslaughter. At sentencing, the trial judge rejected the jury's finding that the Defendant had acted under provocation and

that the Defendant's actions were calculated. (*Id*). The Appellate Court reversed the sentence imposed by the lower court. (*Id*):

This is not a case in which a judge merely considered background facts about defendant or the crime as has traditionally been the role of a sentencing judge. In this case, the trial judge engaged in judicial fact finding about what occurred during the stabbing in direct contravention of the jury's findings on the subjects, proved by the defendant by a preponderance of evidence, in order to justify the trial court's sentence. In a similar circumstance, the Court has held that, "it constitutes an abuse of discretion for a trial court to impose a more severe sentence for a lesser charge of which the defendant was convicted because of the trial court's belief that the jury was mistaken in finding the defendant not guilty of a more serious offense." (Citation omitted). (*Oller*, 85 N.E.3d at 1152).

In the case *sub judice*, Appellate Court stated that the evidence supported "the trial court's finding that the Defendant abused a position of private trust" and that he was "motivated by his desire for sexual pleasure." (Opinion, page 8). Further, the trial court found "that the Defendant lacked candor and attempted to minimize his conduct, as evident in his psychosexual evaluation responses." (Opinion, page 9). However, it is clear that the Appellate Court, as well as the trial court, was referring to the evidence related to the charge that the Defendant had committed a sexual offense. The jury rejected the sex charges found within Counts 2-5 and found the

Defendant guilty of the lesser included offense of child abuse by neglect in Count 2. The trial court found as a matter of law that the material contained in the images on his phone did not constitute child pornography.

The trial court stated its true reasons for his sentencing decision multiple times:

But this whole matter deals with sexual conduct and an eight-year-old child. There are no witnesses. Nobody knows anything about this except two people, and its something that you don't really talk about.

* * * * *

Now, you have to analyze the facts of this case as it is presented to me. I was presented with a pre-sentence report and there's some mention about pornography. I'm not going to make too big a deal, but it helps me understand why you did maybe what you did, something that your friends and family – you don't talk about

* * * * *

Bottom line, your credibility as opposed to the victim's credibility is lacking as it relates to the facts of this case.

* * * * *

Considering the credibility of KB, she was only

eight years old when she made this disclosure. Now, eight year olds don't tell falsehoods to get out of trouble. They tell falsehoods to get into trouble.

* * * * *

There is no doubt in my mind that there was sexual contact and that was clear. I mean, how in the world does an eight-year-old come up with this, I felt something warm and wet on my leg?

* * * * *

And then there are the photographs. I'll never forget that photograph, the one I mentioned to the psychiatrist here. Table, wineglass, focused on her. I mean, it looks like a picture out of some child porn magazine. It's a picture that will affect me, and it's not one of the worst I've ever seen, but it's just a picture, the way it looked and the circumstances.

(Sentencing, Tr.p.112-116).

II. BOTH THE TRIAL AND APPELLATE COURTS USED ACQUITTED CONDUCT TO UPHOLD THE SUFFICIENCY OF THE EVIDENCE RELATED TO THE CONVICTION OF CHILD ABUSE.

The State cited the same acquitted conduct to justify that there was sufficient evidence to uphold the conviction of child abuse by neglect, as set out in the State's brief, page 36, ("In this case, the proof

shows that the defendant knowingly abused the eight year old victim by rubbing her ‘private area,’ and then inserting his finger ‘inside’ her ‘private area.’), in the Appellate Court Opinion, page 10-11, (“Taken in the light most favorable to the State, the proof at trial showed that Defendant knowingly rubbed the victim’s ‘private area’ and inserted his finger ‘inside’ her ‘private area.’”), *it is clear that the State, the Trial Court and the Appellate Court have completely ignored the jury’s verdict which rejected that there was any type of sexual penetration or sexual contact.*

The Sixth Amendment to the United States Constitution states as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury of the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.
(Emphasis added). U.S. Const. amend. VI.

Article I, Section 9 of Tennessee Constitution states as follows:

That in all criminal prosecutions, the accused hath the right to be heard by himself

and his counsel; to demand the nature and cause of the accusations against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in favor, and in prosecutions by indictment or presentment, a speedy public trial, *by an impartial jury of the County in which the crime shall have been committed*, and shall not be compelled to give evidence against himself. (Emphasis added). Tenn. Const. art I,§ 9.

T. C. A. § 40-35-210 states as follows:

- (a) At the conclusion of the sentencing hearing, the court shall first determine the appropriate range of sentence.
- (b) To determine the specific sentence and the appropriate combination of sentencing alternatives that shall be imposed on the defendant, the court shall consider the following:

- (1) *The evidence, if any, received at the trial and the sentencing hearing;*

* * * * *

- (f) *A sentence must be based on evidence in the record of the trial, the sentencing hearing, the presentence report, the validated risk and needs assessment, and the record of prior*

felony convictions filed by the district attorney general with the court, as required by § 40-35-202(a) (Emphasis added).

Thus, there is clear conflict between the statutory sentencing scheme in Tennessee combined with the Tennessee Supreme Court's prior decision in *State v. Winfield*, 23 S.W. 3d 279 (Tenn 2000) verses the decisions in *United States v. Booker*, 125 S. Ct. 738 (2005), *United States v. Pimental*, 367 F.Supp.2d 143 (D. Mass. 2005) and *State v. Oller*, 85 N.E 3d. 1135 (Ohio App. 2017), which cry out against the use of acquitted conduct to enhance a sentence on a lesser-included charge. The sentencing statutes cited above give the sentencing court the discretion to use any evidence in the record, including evidence that has been specifically rejected by the jury, as a reason to increase a sentence and/or use to support a separate or lesser included offense. This judicial authority effectively negates the jury verdict. This issue is prevalent not only in the state of Tennessee, but also across the nation concerning the various misuse of acquitted conduct to enhance a sentence. It is clear that the courts have continuously failed to uphold the ideals set forth in *Booker* and conflicts have yet to cease regarding this issue. Uncharged and acquitted conduct has been recognized as a basis for the enhancement of a sentence within the Federal system. However, with the cases cited above, there is a drastic need for this Court to re-examine this concept as a matter of not only due process but as related to a Defendant's fundamental right to a jury trial.

Furthermore, this case is a good vehicle to, as a matter of public interest, to re-examine and re-affirm the foundation of our criminal justice system; to wit: the **RIGHT TO A JURY TRIAL.**

CONCLUSION

Thus, for the reasons stated above, Petitioner respectfully requests this Court to grant the writ of certiorari.

Respectfully Submitted,

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