NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2018

TYREE MANSELL,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for A Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD COUGHLIN
Federal Public Defender
Richard_Coughlin@fd.org

Counsel of Record for Petitioner
Richard Coughlin
800 Cooper Street, Suite 350
Camden, NJ 08102
Tel: (856) 757-5341
Fax: (856) 757-5273

QUESTION PRESENTED FOR REVIEW

1. Whether the use of acquitted conduct to increase Mr. Mansell's Sentencing guideline range violated his Fifth Amendment right to due process and his Sixth Amendment jury trial right.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Rules

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2018

TYREE MANSELL,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Tyree Mansell respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 21, 2015 in the captioned matter.

OPINION BELOW

The decision of the United States Court of Appeals for the Third Circuit was memorialized in a summary affirmance on February 7, 2019, and appears at Appendix 1-2 ("App.")

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on January 21, 2015. The Third Circuit had jurisdiction under 18 U.S.C. §

3742 and 28 U.S.C. § 1291, and entered judgment on February 7, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to this proceeding, namely, Petitioner, Tyree Mansell, and respondent, the United States.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

No person shall be … deprived of life, liberty, or property, without due process of law ….

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury….

STATEMENT OF THE CASE

This case presents a fundamental question: Whether a sentencing judge may punish an individual for crimes that the jury acquitted him of committing. That is what happened here. The jury was given an opportunity to authorize punishment for specific conduct and explicitly refused to do so. Nonetheless, finding by a preponderance of the evidence that Mr. Mansell had committed the specific conduct for which the jury acquitted him, the District Court increased Mr. Mansell's adjusted offense level, thus raising his sentence by nearly seven years. This same

sentencing practice is countenanced by every Courts of Appeals in mistaken reliance on this Court's decision in *United States v. Watts*, 519 U.S. 148 (1997) (*per curiam*). That decision does not support the enhancement here.

1. Proceedings in the District Court

a. Trial

Mr. Mansell was charged in a nine count superseding indictment that was returned by a federal grand jury sitting in the Eastern District of Pennsylvania on August 4, 2016. The indictment charged Mr. Mansell with Hobbs Act conspiracy (Count 1), Hobbs Act robbery and attempted Hobbs Act robbery (Counts 2, 4, 6,and 8). Each of the Hobbs Act robberies involved home invasion robberies of residences in the Philadelphia area. For each home invasion Hobbs Act count, Mr. Mansell was also charged with four separate counts of using or possessing a firearm in connection with a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) (Counts 3, 5, 7, and 9). The jury trial commenced on July 11, 2017. After three days of testimony, the jury returned verdicts of guilty on the Hobbs Act conspiracy charge, all four Hobbs Act robbery charges, and one § 924(c) charge (Counts 1, 2, 4, 6, 8 and 9). Verdicts of not guilty were returned on the remaining § 924(c) charges (Counts 3, 5 and 7).

b. Sentencing

Mr. Mansell appeared for sentencing on December 1, 2017. He objected to numerous guideline adjustments, *e.g.* App. 5-6, 34-35, 41-42. The Court rejected the objections and adopted the guideline calculations in the Presentence Report. Those

calculations included a 6 level increase for each Hobbs Act conviction associated with an acquitted § 924(c) count. App. 49-50 After grouping the Hobbs Act convictions as required by U.S.S.G. §§ 3D 1.1 – 1.4, the district court imposed consecutive 72-month sentences on each of the Hobbs Act convictions (360 months) and a mandatory consecutive term of 84 months in connection with the lone § 924(c) conviction, for a total sentence of 444 months in prison. Had the 6 level adjustments not been applied, Mr. Mansell's advisory Guideline range would have been 235 to 293 months, plus a mandatory 84 months for the single § 924 (c) count of conviction, for a final advisory sentencing range of 319 to 377 months, well below the 444 month guideline sentence that was imposed. A timely notice of appeal was filed on December 15, 2017. An Order of Summary Affirmance was issued on February 7, 2019.

2. The Opinion of the Third Circuit Court of Appeals

Mr. Mansell appealed his sentence on the grounds that it violated the jury-trial guarantee of the Sixth Amendment for a judge to use acquitted conduct to increase the severity of his sentence. The Third Circuit issued a summary affirmance order on February 7, 2019. (App. 1-2.)

REASONS FOR GRANTING THE PETITION

I. Increasing a defendant's sentencing guidelines range by use of acquitted conduct violates the Sixth Amendment.

The use of acquitted crimes to calculate the sentencing guidelines deprives a defendant of his Sixth Amendment right to a sentence wholly authorized by the

jury's verdict. *See Cunningham v. California*, 549 U.S. 270, 290 (2007) ("If the jury's verdict alone does not authorize the sentence . . . the Sixth Amendment requirement is not satisfied."). Acquitted conduct should be treated differently than other sentencing enhancements because its use at sentencing offends the Sixth Amendment: the jury has been given an opportunity to authorize punishment for the conduct and has explicitly refused to do so. When a judge finds, based on a preponderance of the evidence, that an offense occurred, the judge found facts ignore and circumvent the determination of the jury. It is an explicit rejection of the jury verdict.

Apprendi and its progeny establish that the use of acquitted conduct at sentencing is distinct from other sentencing enhancements. *See Apprendi v. New Jersey,* 530 U.S. 466, 483 n.10 (2000) ("The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury."); *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (*Apprendi* "ensure[es] that the judge's authority to sentence derives wholly from the jury's verdict"); *United States v. Booker*, 543 U.S. 220, 232 (2005) (explaining the Sixth Amendment guarantees a "right to have the jury find the existence of 'any particular fact' that the law makes essential to [the defendant's] punishment" (quoting *Blakely*, 542 U.S. at 301)). Most recently, in *Alleyne v. United States*, this Court held that "[a]ny fact that increases the mandatory minimum [sentence] is an 'element' that must be submitted to the jury." 133 S. Ct. 2151, 2155 (2013). To be sure, this Court reiterated that judges continue to enjoy "broad discretion … to select a sentence within the range

authorized by law," *Alleyne*, 133 S. Ct. at 2163. Nonetheless, just as a sentence that triggers a mandatory minimum, or exceeds a statutory maximum, is not "within the range authorized by law," neither is a guideline range that is increased by acquitted conduct.

Moreover, in the current advisory sentencing regime, the guidelines are the "legally prescribed punishment." *See Alleyne*, 133 S.Ct. at 2162. District Courts are required use the guidelines as the "starting point and the initial benchmark" for sentencing determinations, *Gall v. United States*, 552 U.S. 38, 49 (2007), and a within-guideline sentence may be presumed reasonable on appeal. *See Rita*, 551 U.S. at 347, 356-59. These and other factors "make the imposition of a non-Guidelines sentence less likely." *Peugh v. United States*, 133 S. Ct. 2072, 2083-84 (2013). There is no rational reason to differentiate a statutory and guideline range: "[s]imply calling one 'aggravation' and the other 'discretion' does not do the trick." *Alleyne*, 133 S. Ct. at 2172 (Roberts, J., joined by Scalia and Kennedy, J.J., dissenting). Where a sentence enhancement significantly increases the potential and likely range of punishment, the "judge-found facts" are "not merely facts that the judge finds relevant in exercising his discretion; they are the legally essential predicate for his imposition of the [higher] sentence . . . [without which the sentence] would surely be reversed as unreasonably excessive." *Rita v. United States*, 551 U.S. 338, 371-72 (2007) (Scalia, J., concurring in part and concurring in judgment).

The jury trial guarantees that a defendant is punished based on proof beyond

a reasonable doubt. The reasonable-doubt standard implicates the fundamental fairness and accuracy of criminal proceedings because "a person accused of a crime would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." *In re Winship*, 397 U.S. 358, 363 (1970). "[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.* at 364. This Court has pronounced that the reasonable-doubt requirement is a basic protection "without which a criminal trial cannot reliably serve its function." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). The jury's fact-finding beyond a reasonable doubt thus "plays a vital role in the American scheme of criminal procedure." *Cage v. Louisiana*, 498 U.S. 39, 39-40 (1990).

When a jury rejects that the government has proved an offense beyond a reasonable doubt, it violates the Sixth Amendment to then increase a sentence for the same offense based on a preponderance standard.

A. Circuit precedent extending *Watts* to allow the use of conduct of which the defendant was acquitted at the same trial to calculate a defendant's sentencing guidelines range should be abrogated.

The Court below, bound by Circuit precedent dating back to *United States v. Watts*, 519 U.S. 148 (1997), permitted the use of acquitted conduct in sentencing. *See United States v. Ciavarella*, 716 F.3d 705, 735-36 (3d Cir. 2013). *Watts* should

no longer be used to justify an enhancement based on acquitted conduct. In *Watts*, a summary reversal case, this Court upheld the use of acquitted conduct to calculate a guideline sentence against a double jeopardy challenge. *See Watts*, 519 U.S. at 149. In *United States v. Booker*, this Court clarified that "*Watts* … presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us in these cases." 543 U.S. at 240 n.4; *see also Watts*, 519 U.S. at 171 (Kennedy, J., dissenting). *Watts* did not address whether using acquitted conduct to enhance a sentence was consistent with the Sixth Amendment. Moreover, *Apprendi*, *Blakely*, *Booker*, *Rita*, *Gall*, and now *Alleyne* call into question the continued viability of using *Watts* to justify a sentencing enhancement based on acquitted conduct.

Other circuit are similarly bound by their post-*Watts* acquitted conduct jurisprudence. *See, e.g.*, *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015). The continued validity of those decisions accepting *Watts* to permit sentencing based on acquitted conduct is questionable in light of this Court's developing Sixth Amendment jurisprudence. This Court should use this case to clarify that the Sixth Amendment does not permit use of acquitted conduct to increase a defendant's guideline range.

B. Jurists are sharply divided over this important sentencing issue.

This Court is frequently asked to reconsider whether the Constitution permits acquitted conduct to be used to enhance a sentence. Members of this Court

have signaled that the practice of sentencing based on acquitted conduct is unconstitutional in light of *Alleyne*. *See, e.g., Jones v. United States*, 135 S. Ct. 8 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari where District Court significantly increased guideline sentence based on acquitted conduct). Other members of this Court have at various times expressed similar concern regarding the constitutional validity of such enhancements. *See United States v. Watts,* 519 U.S. 148, 170 (1997) (Kennedy, J., dissenting) (explaining that "increase[ing] a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal"); *see also id.* at 169-70 (Stevens, J., dissenting) ("The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to [our constitutional] jurisprudence.").

Although Courts of Appeals have allowed sentencing judges to enhance sentences based on acquitted conduct, individual jurists have harshly criticized the practice. *See, e.g.*, *United States v. White*, 551 F.3d 381, 387 (6th Cir. 2008) (Merritt, J., dissenting) ("[T]he use of acquitted conduct to punish is wrong as a matter of statutory and constitutional interpretation and violates both our common law heritage and common sense."); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) (finding Fifth and Sixth Amendment violations); *United States v. Mercado*, 474 F.3d 654, 658, 661 (9th Cir. 2007) (B. Fletcher, J., dissenting) ("Reliance on acquitted conduct in sentencing

diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment."); *United States v. Baylor*, 97 F.3d 542, 553 (D.C. Cir. 1996) (Wald, J., specially concurring) ("The result of such a system [in which acquitted conduct yields the same sentence as though the defendant had been convicted] is subtly but surely to eviscerate the right to a jury trial or to proof beyond a reasonable doubt for many defendants."); *United States v. England*, 966 F.2d 403, 410 n.5 (8th Cir. 1992) (deriding enhancements based on acquitted conduct as "unseemly and unworthy of the United States of America").

This Court should grant the petition to resolve an issue over which jurists are sharply divided and rule that judicial consideration of acquitted conduct to enhance a sentence violates the Sixth Amendment.

C. The question presented is important, and this case presents an ideal vehicle to resolve it.

Here, the District Court enhanced Mr. Mansell's guideline range based on conduct which the jury rejected by rendering acquittals on Counts 3, 5, and 7. Relying on acquitted conduct, the District Court calculated a Guideline imprisonment range of 360 months to life for the four Hobbs Act robberies that were charged (Counts 2, 4, 6 and 8) and for a May 19, 2015 uncharged non-Hobbs Act robbery. The sentencing range was further increased by the mandatory consecutive sentence of 84 months compelled by Mr. Mansell's lone § 924(c) conviction on Count 9. Each of the robberies, including the May 19, 2015 uncharged event, was consistent with Sentencing Guideline requirements, treated as a separate "group." U.S.S.G. § 1B.1.2(d) and § 3D1.2(d). As such, the offense level for each robbery was

calculated and assigned a "unit" value of ".5" or "1" depending upon the spread between the "group" with the highest offense level, and each other "group." U.S.S.G. § 3D1.4. By relying on acquitted conduct - the jury had rejected the government's various theories of criminal culpability, *i.e.,* personal, co-conspirator, and accomplice - the sentencing court increased each group by six levels. U.S.S.G. § 2B3.1(b)(27)(B). This resulted in offense levels of 36, 32, 34 and 33 for the three non-924(c) convictions and the one uncharged robbery. An offense level of 31 (plus 84 months) was calculated for the single robbery/924(c) combination returned by the jury.

If the guidelines were calculated without reference to the proofs that were rejected by the jury, each of the non-924(c) groups would be reduced by six levels, and the solitary robbery/924(c) group would become the highest offense level at 31. The remaining groups would be 30, 26, 28 and 27. This would produce 4.5 units, which when added to the highest group score, would yield a total offense level of 35 rather than 40. The Guideline Sentencing range would be reduced from 360 months to life to an advisory range of 235 to 293 months. (Level 35, CH IV). When combined with the mandatory 84-month sentence for Count 9, the final sentencing range would be 319 to 377 month, well below the 444 months sentence that was imposed.

The issue presented by this petition was not explicitly raised before the District Court, but was presented to the Court of Appeals. The sentencing judge should have sentenced Mr. Mansell for the offenses that the jury convicted him of committing, not for conduct that he was acquitted of committing. This Sixth Amendment error goes to the heart of "constitutional protections of surpassing

importance." *Apprendi*, 530 U.S. at 476. These facts present an ideal opportunity for this Court, particularly in the wake of *Alleyne*, to address whether the District Court's sentencing comports with the bedrock protections of the Bill of Rights.

CONCLUSION

On this important issue, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

s/RICHARD COUGHLIN
RICHARD COUGHLIN
Federal Public Defender
Counsel of Record

Office of the Federal Public Defender
District of New Jersey
800-840 Cooper Street, Suite 350
Camden, New Jersey 08102
(856) 757-5341

Counsel for Petitioner
Tyree Mansell

Dated: March 26, 2019