

No. _____

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

**CHIMA EDOZIE ALIGWEKWE,
*Petitioner,***

v.

**UNITED STATES OF AMERICA,
*Respondent.***

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the right to a jury trial as guaranteed by the Sixth Amendment is violated when a district court increases the defendant's prison sentence and restitution liability based on conduct which the jury acquitted the defendant of, or which was never presented to the jury.

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Chima Edozie Aligwekwe, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit Court of Appeals unpublished opinion affirming Petitioner's sentence was rendered on November 28, 2018. (Pet. App. A). Subsequently, a Petition for Rehearing and Rehearing En Banc was filed, which the Eleventh Circuit Court of Appeals denied on February 7, 2019. (Pet. App. C).

JURISDICTION

The Eleventh Circuit issued its order denying the Petition for Rehearing and Rehearing En Banc on February 7, 2019. (Pet. App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS INVOLVED

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 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 the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The Trial

The facts established at trial were as follows. In August of 2010, Authnel McPhie created a scheme to defraud timeshare owners and established a business called Timeshare Title Services, LLC (TTS). The business was formed as a Florida Limited Liability Company, and Charles Sutton was the company's registered agent. The scheme that Authnel McPhie employed was to target owners of timeshares who wanted to sell them and thereby be released from the financial obligations of ownership.

Authnel McPhie would acquire lead-lists also known as lead-sheets which were lists of timeshare owners who recently purchased their timeshares. The lead-lists contained the owner's contact information, including phone numbers, and the location of the timeshares. Authnel McPhie would hand out the lead-lists to his employees at a call center that he operated at the HARBCO Building in Orlando, Florida. As was demonstrated at trial, Authnel McPhie would assign the call center employees to cold-call the timeshare owners and inquire whether they wanted to sell the rights to their timeshares. If Authnel McPhie's employees found an owner that was interested in selling their timeshare, they would give the information to Authnel McPhie, who would call the owners and privately make the fraudulent deals with the timeshare owners while alone in his office.

Authnel McPhie routinely took fees, generally checks and money orders, that were mailed to him from the timeshare owners, in exchange for the promise to assist them in finding a buyer for their timeshares. He also would regularly use the false name of

"George Mason". However, Authnel McPhie never provided any of the services promised to the owners, nor did he refund the money they paid him. In fact, it was never Authnel McPhie's intention to actually assist the owners in selling their timeshares. His only intent was to collect the money from the owners and if they complained he made up lulling excuses or refused to speak with them.

Eventually, complaints from time share owners made their way to United States Postal Inspector David Keith, who began his investigation into the scheme, and the bank accounts of TTS were frozen. At that point, Authnel McPhie instructed his sister, Leicent McPhie to open another Florida company named United Clearing Solutions, LLC. Leicent McPhie was listed as the registered agent of the new company. In addition, Eugene Brewington, who worked for Authnel McPhie, hired an attorney to attempt to have the TTS bank account unfrozen, but that never transpired. Shortly thereafter, Authnel McPhie left town, and was not available for trial with the other co-defendants.

During the operation of TTS, Eugene Brewington was acting as a sales manager along with Ricardo Bell. Charles Sutton acted as the registered agent, and as an assistant and sometimes chauffeur for Eugene Brewington. Mr. Aligwekwe owned and operated a separate business, CEA Management Services, LLC, which sold lead-lists to TTS on various occasions. At trial the government argued that Mr. Aligwekwe was also a phone sales manager for TTS, but they had no direct or credible evidence that he managed anyone. The government could not provide the jury with any names or information regarding the identity of the people he allegedly managed. Nor could they provide the trial court with any names of the alleged employees at the time of Mr.

Aligwekwe's sentencing hearing. (Pet. App. F, Pg. 52).

At trial Eugene Brewington, Charles Sutton, and Mr. Aligwekwe argued that they were unaware that Authnel McPhie was taking money and not providing any services. They also argued that for all intents and purposes, Authnel McPhie appeared to be operating a legitimate business.

The Verdicts

Mr. Aligwekwe was found guilty of only Counts One and Count Twelve of the verdict form. (Pet. App. D). Mr. Aigwekwe was acquitted by the jury of all other charges. *Id.* Eugene Brewington was found guilty of all 16 counts in the indictment. *Id.* Charles Sutton was acquitted of all charges. *Id.*

On appeal, Mr. Aligwekwe renewed his contention that the District Court erred by finding facts not found by the jury and using those facts to enhance his sentencing range and restitution liability beyond the the range authorized by the jury's verdict alone.

Specifically, the jury's verdict held Mr. Aligwekwe responsible a total of two victims, and a total amount of loss of \$794.00. However, at his sentencing hearing, the District Court found Mr. Aligwekwe responsible for a total of "10 or more victims" and a total loss amount of \$600,000.00 or more. (Pet. App. F).

Based on the jury's verdict alone, Mr. Aligwekwe's sentencing range would have been 9 - 14 months in prison. However, the District Court's findings subjected Mr. Aligwekwe to a sentence of 108 months in prison. But for the additinal victims and loss amounts found by the District Court, Mr. Aligwekwe would have been released from

prison prior to the drafting of this petition, and his restitution would have been limited to the jury's finding of \$794.00.

The 11th Circuit Court of Appeals rejected Mr. Aligwekwe's argument and affirmed his sentence stating only that his argument lacked merit. In addition, Mr. Aligwekwe filed a Petitioner for Rehearing and Rehearing En Banc which was denied on February 2, 2019.

Mr. Aligekwe currently remains in federal prison.

REASONS FOR GRANTING THE WRIT

- I. **This Honorable Court should grant review to determine whether a judge, rather than a Jury, can find facts that increase the prescribed range of penalties to which a criminal defendant is exposed, when the facts are not admitted to by the defendant, nor found by a jury beyond a reasonable doubt.**

To begin with, Mr. Aligwekwe's principle objections to his Presentence Report were based on the inclusion of acquitted and uncharged conduct in determining Mr. Aligwekwe's sentencing guideline range and amount of restitution. Mr. Aligwekwe asserts that the inclusion of such facts in the calculation of his guideline range violated his Sixth Amendment rights found in the United States Constitution. The crux of his objection was that the court's inclusion of acquitted and uncharged conduct in determining his sentencing range violated his Sixth Amendment right to have a jury determine all the relevant facts of his case that determined his sentencing range.

Specifically, the verdict form contained Sixteen Counts. Count one was a generalized count of Mail and Wire Fraud. (Pet. App. D). Counts Two through Sixteen

contained verdicts for fifteen specific occurrences of mail or wire fraud which included specific victims and loss amounts. *Id.* Mr. Aligwekwe was named in Count One, and Counts Twelve through Sixteen of the verdict form.

Of the all the counts against him, the jury only found Mr. Aligwekwe guilty of Count One, which was a general fraud count, and a single instance of mail fraud which named two victims and a single loss amount of \$797.44. (Pet. App. D, Pg 6). The total number of victims listed in the verdict form was 18, and the total amount of loss in the verdict form was \$24,419.22.

Regarding Mr. Aligwekwe, there were six possible victims and a total of loss amount of \$7256.73 presented to the jury. As stated above the jury acquitted Mr. Aligwekwe of all but two counts, for a total of two victims and a total loss of \$797.44.

Significantly, each of the co-defendants who were tried together received very different verdicts. Eugene Brewington was found guilty of all 16 counts by the jury. The total number of victims the jury attributed to Eugene Brewington was 18, and the total loss amount was \$24,419.22. However, Charles Sutton was acquitted of all charges, and Mr. Aligwekwe was found guilty of two counts which involved only two victims and a total loss of \$797.44.

In addition, the specific amount of loss in Count Twelve that the jury attributed to Mr. Aligwekwe was the least amount available for the jury to find him guilty of. The amounts in Counts Thirteen through Sixteen were all larger amounts of loss, which the jury could have convicted him of, but chose to specifically acquit him of. (Pet. App. D, Pgs. 6-8).

The jury's verdict clearly demonstrates that they made decisions regarding the

relative culpability of the co-defendants. In that sense, the verdict speaks for itself. The jury found that Eugene Brewington was guilty of all charges, that Charles Sutton was not guilty of any charges, and that Mr. Aligwekwe was guilty of a *de minimis* number of victims and loss amount. The jury's verdict stands as prime example of the "relative culpability" determinations that take place in joint trials.

It is apparent that the jury found Eugene Brewington to be the most culpable and that they found that Charles Sutton was not culpable at all. In addition, even though the jury found Mr. Aligwekwe to be culpable, they found him to be much less culpable than Eugene Brewington.

It is also clear that the jury did not believe there was proof beyond a reasonable doubt that Mr. Aligwekwe was responsible for *any more than* two victims and a total loss of \$797.44. Therefore, to use any greater number of victims or any higher amount of loss to punish or sanction Mr. Aligwekwe invades the fact finding function of the jury and violates his Sixth Amendment rights.

Indeed, if the members of the jury had been told that their determination of relative culpability would be disregarded by the trial court, they would likely wonder what their function truly was. Are they as some have called "low-level gatekeepers" or are they the true finders of fact? Mr. Aligwekwe asserts that a jury is the only constitutionally authorized finder of facts regarding criminal liability and that their findings should be respected.

In addition, if the jury's determination regarding the number of victims and amounts of loss attributable to the defendants was not binding, why include them in the verdict forms? Instead, the jury verdict could have contained general charges of wire

and mail fraud conspiracy, and left all of specific number of victims and amounts of loss to be determined by the District Court at a sentencing hearing, if and only if, the defendants were convicted of the general conspiracy counts. That way, if they were acquitted of the general conspiracy charges, then they would have truly been acquitted.

Including the specific number of victims and loss amounts in the verdict forms only deceived the jury into believing they were determining relative culpability, and limiting their verdicts to the amounts of loss they thought the government proved beyond a reasonable doubt. However, in reality, they merely opened the floodgates to judicial fact finding at Mr. Aligwekwe's sentencing hearing beyond anything presented to or imagined by the jury, in violation of Mr. Aligwekwe's Sixth Amendment rights.

II. The Eleventh Circuit Court of Appeals Decision is Wrong

The right to a jury trial as guaranteed by the Sixth Amendment is violated when the District Court increases the defendant's prison sentence and restitution liability based on conduct which the jury acquitted the defendant of, or which was never presented to the jury.

Sentencing and Restitution Based on Acquitted and Uncharged Conduct

The 11th Circuit went astray by failing to acknowledge the controlling authorities of *Alleyne v. United States*, 133 S. Ct. 2151 (2013), *Cunningham v. California*, 549 U.S. 270, (2007), *Blakely v. Washington*, 542 U.S. 296, (2004), and *Apprendi v. New Jersey*, 120 S.Ct. 2348, (2000), which have collectively and repeatedly held that any “facts that increase the prescribed range of penalties to which a criminal defendant is exposed” are elements of the crime and the Sixth Amendment provides defendants with the right to have a jury, not a judge, find those facts, and find them beyond a reasonable doubt.

Regarding the specific legal challenge to the inclusion of acquitted and uncharged conduct in his advisory guideline calculations, Mr. Aligwekwe pointed to the recent case of *Cunningham v. California*, 549 U.S. 270, (2007), where this Honorable Court stated:

"This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence."

Cunningham v. California, 549 U.S. 270, at 281 (2007).

In addition, the this Honorable Court stated:

"Our precedents make clear ... that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' ... and the judge exceeds his proper authority." *Id.*, at 303–304, 124 S.Ct. 2531 (quoting 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872); emphasis in original).

Cunningham v. California, 549 U.S. 270, at 284, Citing *Blakely v. Washington*, 542 U.S. 296, (2004).

Counsel acknowledges that the Eleventh Circuit Court of Appeals has in the past declined to concur with this proposition. *United States v. Parker*, No. 07-11312, Page 18, (11th Cir. 5152008) (11th Cir., 2008) *Affirmed*. In addition, in *United States v. Chau*, 426 F.3d 1318, (2005), the Eleventh Circuit Court of Appeals also held that "use of extra-verdict enhancements in an advisory guideline system is not unconstitutional." *Id.* at 1323.

However, in a more recent case this Honorable Court has reiterated the Court's position in *Apprendi*. Specifically, this Honorable Court held that only facts found by a jury beyond a reasonable doubt should be used to calculate a defendant's sentence. *Alleyne v. United States*, 133 S. Ct. 2151 (2013). In *Alleyne*, the Court stated the following:

Consistent with common-law and early American practice, *Apprendi* concluded that any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are elements of the crime. *Id.*, at 490, 120 S.Ct. 2348 (internal quotation marks omitted); *id.*, at 483, n. 10, 120 S.Ct. 2348. We held that the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt. *Alleyne v. United States*, 133 S.Ct. 2151 at 2160 (2013).

However, in the Appellee's brief, the United States argued that a recent decision by the 11th Circuit indicated that sentencing courts can rely on acquitted conduct in determining a defendant's sentence, as long as the government proves the conduct by a preponderance of the evidence. *Appellee's Brief Page 52*, citing *U.S. Tejas, No. 16-16336*.

The *Tejas* opinion was filed on August 23, 2017, which was four months after Mr. Aligwekwe filed his Initial Brief. However, it relies for authority on the 2005 case, *United States v. Duncan*, 400 F.3d 1297, 1304 (11th Cir. 2005). Mr. Aligwekwe asserts that *Duncan* was decided prior to the decisions of the U.S. Supreme Court in *Cunningham v. California*, 549 U.S. 270, (2007), and *Alleyne v. United States*, 133 S.Ct. 2151 at 2160 (2013).

Both *Cunningham* and *Alleyne* held that conduct not found by the jury should not be included in the calculation of a defendant's sentence range, as argued in Appellant's

Initial Brief. *Appellant's Initial Brief, Pages 11-19*. Thus, as demonstrated above, despite the previous decisions of the Eleventh Circuit Court of Appeals, this Honorable Court has held repeatedly that facts should not be included in the assessment of a defendant's sentencing range unless a defendant admits to the facts, or they are found by a jury beyond a reasonable doubt.

Furthermore, Mr. Aligwekwe acknowledges that while the United States Sentencing guidelines are now advisory, he is also aware that they are still of great importance since the first step in determining a reasonable sentence is to calculate a defendant's advisory guideline range. *United States v. Talley*, 431 F.3d 784, 786 (11th Cir. 2005). Reviewing the records of Mr. Aligwekwe's sentencing hearing reveals that the trial court believed the advisory sentencing guidelines were "a valid" place to start, and did in fact start its calculations there. (Pet. App. F, Pg 71, Ln. 14).

In addition, at his sentencing hearing Mr. Aligwekwe requested that the trial court sustain his objections to the Presentence Report, and limit its calculation of his sentencing range to the facts found by the jury. However, the trial court overruled Mr. Aligwekwe's objections and included both acquitted and uncharged conduct in its calculation of Mr. Aligwekwe's advisory guideline range. (Pet. App. F, Pg 53).

Specifically, the trial court adopted the Presentence Report calculations and found that Mr. Aligwekwe's sentencing guideline range calculation included ten or more victims and at least \$600,000.00 of loss. The trial court then found that Mr. Aligwekwe's total offense level was total offense level was 27, and his criminal history category was V. This calculation indicated a guideline sentence range of 120 - 150 months. (Pet. App. F, Pg 54). The court then sentenced Mr. Aligwekwe to 108 months in prison, followed by 36

months supervised release and ordered him to pay \$372,346.21 in restitution. (Pet. App. B); (Pet. App. E). The sentencing court did grant a slight downward departure to Mr. Aligwekwe by accepting his argument that he was less culpable than Eugene Brewington.

Nevertheless, the trial court relied upon acquitted and uncharged conduct in determining Mr. Aligwekwe's sentencing range and restitution amount. The acquitted conduct used by the trial court was the total number of victims and loss amounts included in the verdict form, that was explicitly rejected by the jury.

The uncharged conduct the court relied upon was the total number of victims and amounts of loss that were not included in the superceding indictment or the verdict form. In accepting the calculations in the Presentence Report, the court found that the total amount of loss to all victims was at least "\$600,000 or more". This amount is at least \$575,580.78 more than the \$24,419.22 total amount of loss included in the jury verdict form.

Regarding Mr. Aligwekwe, the total loss amount of \$600,000.00 is at least \$599,202.56 more than the \$797.44 found by the jury. In addition, the trial court's finding that there were "10 or more" victims included eight more victims than the jury found regarding Mr. Aligwekwe. Given all the other sentencing factors of his case, a sentence based solely on the facts found by the jury would not have exceeded 9-15 months imprisonment.

In addition, at Mr. Aligwekwe's restitution hearing, the court found Mr. Aligwekwe to be accountable for \$372,346.21 in restitution. In ordering the restitution, the trial court held that Mr. Aligwekwe would be jointly and severally accountable for the amount of restitution, along with Eugene Brewington. (Pet. App. E).

However, at the restitution hearing Mr. Aligwekwe objected to the trial court's calculation of the restitution amount. Mr. Aligwekwe's principal objection was that the restitution amount, which is an additional sanction upon Mr. Aligwekwe, was calculated using conduct that was never presented to the jury, and went beyond the information found in the indictments or verdict form. (Pet. App. G, Pg 16). The trial court's calculations included conduct that was specifically rejected by the jury when they acquitted Mr. Aligwekwe on all but two counts. (Pet. App. G, Pgs. 23-26). In addition, Regarding restitution based acquitted conduct, a recent decision of this this Honorable Court indicated that acquitted conduct should not be the basis for restitution. *Nelson v. Colorado*, 137 S.Ct. 1249, (2017).

III. This Case Presents a Particularly Good Vehicle For Deciding These Issues

As discussed above, based on the jury's verdict alone, Mr. Aligwekwe's sentencing range would have been 9 - 14 months in prison. However, the District Court's findings subjected Mr. Aligwekwe to a sentence of 108 months in prison. But for the additinal victims and loss amounts found by the District Court, Mr. Aligwekwe would have been released from prison prior to the drafting of this petition, and his restitution would have been limited to the jury's finding of \$794.00.

In summation, the trial court's sentencing range and restitution amount based on the facts the court found by a preponderance of evidence was profoundly and substantially more punitive than a sentencing range and restitution amount based on the facts found by the jury beyond a reasonable doubt.

Therefore, Mr. Aligwekwe argues that his sentencing range based on acquitted and uncharged conduct was unreasonable and should be overturned and remanded for a reasonable sentence based solely on the facts that the jury found beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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