No. 19-6284

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE L. CABRERA-COSME — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FIRST CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOSE L. CABRERA-COSME #30094-069
(Your Name)

FCI COLEMAN, PO. BOX. 1032
(Address)

COLEMAN, FLORIDA 33521 - 1032
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whetehr a reasonable jurist could find debatable Petitioner's Sixth Amendment was violated when the district court sentenced him to life without any ... possibility of parole based on - § 2A1.1 cross refere nce, (First Degree Murder), that was not charged in the indictment ?

2. Should certiorari issue to confirm that the Sixth Amendment right to a jury trial prohibits judges from basing sentences on uncharged or acquitted conduct; and overturn United States v. Watts / McMillin v. Penn sylvania ?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix **A** to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 10, 2019.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 6

Rights of the accused.

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

In a second superseding indictment Petitioner was - charged with one count of conspiracy to distribute, and possess within intent to distribute, both marijuana and over 50 grams of crack cocaine within 1000 feet of a .. public Housing facility and a public school, in violati on of 21 U.S.C. § 841 and § 860; and one count of consp iracy to possess, use, carry, brandish, and discharge of a firearm in furtherance or, or during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924 (c)(1)(A) and (o). Prior to trial, Petitioner moved to - sever his trial from that of his codefendants, claiming that the evidence regarding several of the murders was "spillover" evidence as to him and that he would be .. prejudice by its introduction. The district court appl ied the "murder - cross reference" of U.S.S.G. § 2D1.1(d) (1) to reach an advisory Guidelines calculation of life imprisonment for Count 1, under § 2A1.1 (First Degree - Murder), which was not charged in the indictment.

Petitioner sought COA arguing that the jury did not find the facts rendering petitioner to a maximum sentence of life. The First Circuit denied the COA, this writ of certiorari is timely filed within the 90 day requirement.

REASONS FOR GRANTING THE PETITION

Petitioner was sentences to a .... **l i f e** sentence without the possibility of parole solely on the basis of the cross reference § 2A1.1 for first degree murder that was not charged in the indictment. Petitioner argues that this case is now ripe for review by the Supreme Court as reflected in the New Acquitted Conduct Act, which states in relevant part:

The Prohibiting Punishment of Acquitted Conduct Act would end this practice by:

> Amending 18 U.S.C. § 3661 to preclude a court of the United States from considering, except for purposes of mitigating a sentence, acquitted conduct at sente ncing, and Defining "acquitted conduct" to include - acts for which a person was criminally charged and .. adjudicated not guilty after trial in a Federal, Sta te, Tribunal, or Juvenile court, or acts underlying a criminal charge or juvenile information dismissed upon a motion for acquittal.

(Sponsors U.S. Senators Dick Durbin (D-Ill.) and Chuck Grassley (R-Iowa)(Sep. 2019). Petitioner equates the .. acquitted conduct regime to the uncharged conduct regime as opined by Justice Kavanaugh, in United States v. Bell, 808 F.3d 926 (D.C. Cir. 2015):

Here's the issue: Based on a defendant's conduct apart from the conduct encompassed by the offense of conviction - in other words, based on a defendant's - uncharged or acquitted conduct - a judge may impose a sentence higher than the sentence the judge would have imposed absent consideration of the uncharged or acqui tted conduct. The judge may do so as long as the factu al finding regarding that conduct does not increase the statutory sentencing range for the offense of convicti on alone. The Sixth Amendment Jury Trial Clause is ... deemed satisfied because the judge's factual finding does not increase the statutory sentencing range establ ished by the jury's finding of guilt on the offense of conviction. See Booker v. United States, 543 U.S. at 267 (remedial opinion). And the Fifth Amendment Due .. Process Clause is deemed satisfied because a judge — finds the relevant conduct in a traditional advesarial procedure. See McMillan v. Pennsylvania, 477 U.S. 79, 91-93, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986). Judge Millett cogently expresses her concern about sentencing judges' reliance on acquitted conduct at sentencing. Even though the Sentencing Guidelines are now advisory, rather than mandatory, she advocates barring consideration of

acquitted conduct in calculating the advisory guide lines offense level. Justice Kavanaugh opined. "I share Judge Millett;s overarching concern about the use of .. acquitted conduct ast sentencing, as I have written before. See, e.g., United States v. Settles, 530 F.3d 920, 923-24, 382 U.S. App. D.C. 7 (D.C. Cur. 2008); see also United Sta tes v. Henry, 472 F.3d 910, 918-22, 374 U.S. App. D.C. 149 (D.C. Cir. 2007)(Kavanaugh, J., concurring). Of course, re solving that concern as a constitutional matter would like ly require a significant revamp of criminal sentencing ... jurisprudence - a revamp that the Supreme Court lurched - toward in cases such as Blakely v. Washington, 542 U.S. 296 124 S. Ct. 2531, 159 L. Ed 2d 403 (2004), but backed away from its remedial opinion in Booker." (2015 U.S. App. LEXIS 4). Justice Kavanaugh went on to opine "A judge likewise could not rely on uncharged conduct to increase a sentence, even if the judge found the conduct by the preponderance of the evidence. At least as a matter of policy, if not also as a matter of constitutional law, I would have little pro blem with a new federal sentencing regime along those lines. Allowing judges to rely on acquitted or **uncharged conduct** to impose higher sentences than they otherwise would impose seems a dubious infringment of the rights to due process and to a jury trial." 808 F.3d at 928.

A R G U M E N T

Allowing a judge to dramatically increase a defendan t's sentnece based on jury-acquitted or uncharged conduct is at war with the fundemantal purspose of the Sixth Amend ment's jury-trial guarantee. The Constitution affords defe ndants the "right to a speedy and public trial, by an impa rtial jury." U.S. CONST. Amend. VI. That right is "designed to guard against a spirit of oppression any tyranny on the part of rulers[.]" United States v. Gaudin, 515 U.S. 506, 510-511, S. Ct. 2310, 132 L. ED 2d 444 (1995); see also .. Duncan v. Louisiana, 391 U.S. 145, 155, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)("A right to a jury trial is granted to criminal defendants in order to prevent oppression by the Government."). Accordingly, before depriving a .... defendant of liberty, the government must obtain permission from the defendant's fellow citizens, who must be pursuaded themselves that the defendant committed each element of the crime charged beyond a reasonable doubt. That jury trial right is "no mere procedural formality," but rather a .. "fundamental reservation of power in our constitutional structure." Blakely v. Washington, 542 U.S. 269, 306, 124 S. Ct. 2531, 159 L. Ed 2d 403 (2004). Yet as the law now stands, prosecutors can brush off the jury's judgment by

persuading judges to use the very same facts the jury rejected at trial, or was uncharged to multiply - the duration of a defendant's loss of liberty threefold. In that same regime, the jury is largely "relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the fact of the crime the State **actua lly** seeks to punish" at sentencing. Blakely 542 U.S. at 307.

To be sure, the Supreme Court has generally permitt ed judicial fact-finding by a preponderance of the evid wence at sentencing that goes beyond what the jury's verdict encompasses, including facts about character, criminal history, cooperation, and even some unadjudic ated conduct. See UNited States v. O'Brien, 560 U.S. - 218, 224, 130 S. Ct. 2169, 176 L. Ed 2d 979 (2010)(... "Sentencing factors *** can be proved to a judge at - sentencing by a preponderance of the evidence."). But allowing judges to materially increase the length of imprisonment based on uncharged conduct or 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. "[W]hen a court consid ers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize; it

considers facts facts of which the jury expressly disapproved." United States v. Pimental, 367 F. Supp. 2d 143, 152 (D. Mass. 2005); see also United States v. DiFrancesco, 449 U.S. 117, 129, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980)("An acquittal is accorded special .. weight."); United States v. Scott, 437 U.S. 82, 91, 98 S. Ct. 2187, 57 L. Ed 2d 65 (1978)("[T]he law attaches particular significance to an acquittal."). The oft-vo iced response, or course, is that the different treatm ent arises because the jury must find that the defenda nt committed charged conduct beyond a reasonable doubt, while a judge is permitted to find even uncarged conduct relevant to sentencing under the leaase preponderance-of -the-evidence standard. The problem with relying on that distinction in this setting is that the whole reason the Constitution imposes that strict beyond-a-reasonable .. doubt standard is that it would be constitutionally in tolerable, amounting "to a lack of fundamental fairness," for an individual to be convicted and then "imprisoned for years on the strength of the same evidence as would suffice in a civil case." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In other words, proof beyond a reasonable doubt is what we demand

from the government as an indespensible preconditi on to **depriving an individual of liberty for the alleg ed conduct.** Construing a regime in which the judge dep rives the defendant of liberty on the basis of the very same factual allegations that the jury specifically .. found did not meet our constitutional standard for - a depravation of liberty puts the guilt and sentencing - halves of a criminal case at war with each other. The other explanation commonly profferd is that, as long as the final sentence does not exceed the statutorily auth orized maximum length of incarceration for the offense of conviction, the defendant is only being sentenced for the crime he committed. That blinks reality when, as here, the sentence imposed so far exceeds the Guide lines range warranted for the crime of conviction itself that the sentence would likely be substantively unreaso nable unless the acquitted conduct/uncharged conduct is punished too. After all, "it is not the abstract dignity of the statutory maximum that is at stake in the Supreme Court Sixth Amendment jurisprudence, but the integrity of the jury right itself, the cornerstone of our crimin al justice system." United States v. Faust, 456 F.3d 13 42, 1350 (11th Cir. 2006)(Barkett, J., concurring speci ally).

in Alleyne v. United States, 133 S. Ct. 2152 (2013), the Court held that the Sixth Amendment does not allow a judge, absent a jury, to fins any fact that "alter[s] the prescribed range of sentences to which the defendant is exposed and do[es] so in a manner that aggravates the punishment." Id. at 2158. In so holding, the Court reje cted therule in Harris v. UNited States, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed 2d 524 (2002), that allowed judges to find facts which increased a defendant's man datory minimum sentence, but not the maximum sentence. Id at 2158.

While Alleyne's requirement that the jury, not a .. judge, find facts fixing the permissible sentencing ran ge applies to statutory limitations, it is hard to under stand why the same principle would not apply to dramatic departures from the Sentencing Guidlines range based on uncharged ar acquitted conduct. After all, the Supreme Court held that, as a matter of law, a sentence within the Guidelines rabge is presumptivelt reasonable and .. lawful, and any "major departure" from that range requi res "significant justification." Gall v. United States, 552 U.S. 38 (2007); see also Id. at 49. ("[A] district court should begin all sentencing proceedings by corre ctly calculating the applicable Guidelines range ," and

if a sentence falls within the Guidelines range, " "the appellate court may *** apply a presumption of reasonableness."). Because the Sententencing Guidelines has "force as the framework for sentencing," .. Peugh v. United States, 133 S. Ct. 2072, 2083, 186 L. Ed. 2d 84 (2013), and because, in the ususl case "the judge will use the Guidelines range as the starting - point in the analysis and impose a sentence within the range," Freeman v. United States, 564 U.S. 522 (2011). the Guideliens demarkthe de facto bounderies of a lega lly authorized sentence in the mine run of cases. Given that reality, the Sixth Amendment should not tolerate the use of acquitted conduct or **uncharged conduct** for tripling a defendant's sentence. See Jones, 135 S. Ct. at 8-9 (Scalia, J., Joined by Thomas and Ginsburg, JJ., dissenting from the denial of certiorari)("It unavoidab ly follows that any fact necessary to prevent a sentence form being substantively unreasonable-thereby exposing the defenadnt to the longer sentence-is an element that must be either admitted by the defendant or found by the jury. It **may not be found by a judge,**" especially when "a jury acquitted them of that offense." The Sixth Amend ment jury trial right is one of the critical pillars of our criminal justice system. In the 1980's and 1990's

however, state legislature and Congress thretened the primacy of this right by passing a series of laws permitting judges to engage in expansive fact finding at sentencing that went well beyond any facts found by a jury in this case. The time has come for the Court to set precedent by overturning United States v. Watts / McMillian v. Pennsylvania.

"A judge likewise could not rely on uncharged conduct to increase a sentence, even if the judge found the .... conduct proved by the preponderance of the evidence." Bell 808 F.3d at 928. (Kavanaugh J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 10-14-19