

SUPREME COURT OF THE UNITED STATES

No. 19-6284



JOSE L CABRERA-COSME,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL BRIEF IN LIGHT OF THE CERTIORARI
PETITION PENDING BEFORE THE COURT
IN THE CASE OF ASARO V. UNITED STATES, No. 19-107

PROCEEDING PRO-SE AT ALL TIMES

S. Ct. RULE 15.8

S. Ct. Rule 15.8 states in relevant part:

Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending, calling attention to .. new cases, new legislation, or other intervening matter not available at the time of the party's last filing.

1. Petitioner's case was filed on October 7, 2019 and placed on the docket October 17, 2019 in the case of Cosme v. United States, No. 19-6284.
2. The United States has been given notice under Rule 13.3, that the writ has filed though has not yet either waived or responded to the writ.
3. Petitioner submits supplemental authority of ... a new matter pending before the Court, in conjunction with new legislation that both combined may determine the outcome of this case.
4. Petitioner respectfully submits the following.

Asaro v. United States, No. 19-107

Petitioner raised the question of whether any reasonable jurist could find it dabatable whether his Fifth and Sixth Amendment was violated after receiving a life sentence without the possibility of parole based solely on **uncharged conduct**. Specifically, petitioner was then sentenced under the advisory guideline "cross reference" pursuant to § 2A1.1 (First Degree Murder. Petitioner .. moved for severance from the his co-defendant's based on the spill-over effect the murders woul have in his trial. Petitioner was not charged with (First Degree) murder, however, the district court denied that motion.

The certiorari petition currently pending before the Court in Asaro v. United States, explicitly raises the question of "[w]hether the Fifth and Sixth Amendments prohibit a federal court from basing a criminal defendant's sentence on conduct underlying a charge for - which the defendant was acquitted by a jury." The Gato Institute, Due Process Institute, National Association of Federal Defenders, and FAMM, all filed briefs in support of this petition, and there is good reson that

many of the Justices will be interested. Both Justice Thomas and Ginsburg joined the dissent from the denial of certiorari in the Jones case from 2014, in which Justice Scalia explicitly called upon the Court to clarify that acquitted conduct sentencing violates the Sixth Amendment, and that the Court's history evading that question "has gone on long enough." Justice Kavanaugh, when he was a judge on the D.C. Circuit, repeatedly criticized the practice of not only acquitted conduct, rather **uncharged conduct** as specifically raised by the Petitioner in this case. See United States v. Bell, 808 F.3d 926 (D.C. Cir. 2015) ("A judge likewise could not rely on **uncharged conduct** to increase a sentence, even if the judge found the conduct proven 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 problem with a new federal sentencing regime along those lines"). Bell at 808 F.3d 928. Kavanaugh .. went on to eloquently opine:

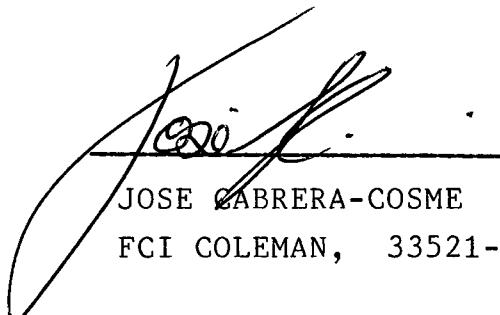
Given the Supreme Court's case law, it likely will take some combination of Congress and the Sentencing - Commission to **systematically** change federal .. sentencing to preclude the use of acquitted conduct or **uncharged conduct**.

Kavanaugh went on to state for the record, "But ... those Guidelines are only advisory, as the Supreme Court has emphasized. So district judges may then vary a sentence downward to avoid basing any part of the ultimate sentence on acquitted or uncharged conduct. In other words, individual district judges possess the authority to address the concern articulated by Judge Millett." (2015 U.S. App. LEXIS 6).

In conjunction with Asaro v. United States, key members of Congress are also moving to eliminate acquitted conduct at sentencing. A bipartisan group of Senators, including Dick Durbin (D-IL), Chuck Grassley (R-IA), Patrick Leahy (D-VT), Thomas Tillis (R-NC), Cory Booker (D-NJ), and Mike Lee (R-UT), introduced the "Prohibiting .. Punishment of Acquitted Conduct Act of 2019." According to the Senate's press release, the bill would "preclude a court of the United States from considering, except .. for purposes of mitigating a sentence, acquitted conduct at sentencing," and it would define "acquitted conduct" as "acts for which a person was criminally charged and adjudicated not guilty after a trial in a Federal, State, Tribal, or juvenile court, or acts underlying a criminal charge or juvenile information dismissed upon a motion of acquittal."

Petitioner's case remains the ideal vehicle for the Court to not only consider the "acquitted conduct" question in conjunction the "uncharged conduct" question that has gone unresolved as well.

10/24/2019


JOSE CABRERA-COSME
FCI COLEMAN, 33521-1032

CERTIFICATE OF SERVICE

I certify under penalty of perjury that I mailed a copy of this Rule 15.8 brief to the U.S. Solicitor General, 950 Pennsylvania Ave, Room 5616, Washington D.C. 20530-0001, pursuant to 28 U.S.C. § 1746, on October 25, 2019.