

No. 19-_____

IN THE SUPREME COURT OF THE UNITED STATES

HAGI BAGCHO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether pursuant to the Jury Selection and Service Act a criminal defendant who observes a racially skewed venire can be denied time to inspect jury records where the jury office's policy prohibited any earlier opportunity to observe the venire or venire list?
- II. Whether the Fifth and Sixth Amendments to the United States Constitution prohibit imposing punishment based on crimes for which a jury acquitted the defendant and for uncharged conduct?

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PETITION FOR WRIT OF CERTIORARI

Haji Bagcho respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The decision of the United States Court of Appeals for the D.C. Circuit is reported at *United States v. Haji Bagcho*, 923 F.3d 1131 (D.C. Cir. 2019).

JURISDICTION

The D.C. Circuit issued its opinion on May 14, 2019. Petitioner's petition for rehearing and rehearing en banc was denied on September 25, 2019. Pet. App. 14. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Jury Selection and Service Act establishes "the right to grand and petit juries selected at random from a fair cross section of the community[.]" 28 U.S.C. § 1861. It states that "[t]he parties in a case *shall* be allowed to inspect, reproduce, and copy [jury] records or papers at all reasonable times *during the preparation and pendency* of such a motion [challenging the fair cross section of the jury pool]." 28 U.S.C. § 1867(f) (emphasis added).

The Fifth Amendment to the United States Constitution provides in relevant part:

No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law[.]

The Sixth Amendment to the United States Constitution provides in relevant part:

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

STATEMENT OF THE CASE

The trial of Haji Bagcho commenced on February 21, 2012. At the start of voir dire, defense counsel, who had not previously been permitted to see the venire list pursuant to the jury office's policy, observed an absence of African Americans on the venire and

raised her concern with the district court. Specifically, out of the 40 prospective jurors, 26 were white, 12 were black, and 2 were unknown. This appeared abnormal because African Americans represented over 50 percent of the population in D.C. at that time. After receiving a list containing juror information, defense counsel also learned that 29 of the 40 prospective jurors came from Northwest, D.C. (which was overwhelmingly white), but only three came from Southeast, D.C. (which was overwhelmingly black). As a result of defense counsel's concerns, the court scheduled an administrator from the jury office to testify the following day.

The jury administrator testified that approximately 1,200 individuals were summoned to jury duty, but most of them did not appear in court because they were either excused, deferred, or disqualified by the jury office staff, or did not receive the summons because it was not delivered to them in the mail ("undeliverables"). The administrator did not know how many undeliverables came from Southeast, D.C., but stated that the answer could be found by analyzing the records stored in the jury office. She also explained that jury office records would reflect which potential jurors that jury office staff had excused before trial.

At the close of the hearing, defense counsel moved to access the jury records in the jury office to support a potential challenge under the Jury Selection and Service Act (JSSA). The court denied the request, ruling that the defendant needed to establish a prima facie violation of the JSSA, and had not done so. The district court's ruling foreclosed any further litigation of his claims on this issue, and his trial began.

The trial concluded on March 13, 2012 with guilty verdicts on three of the four counts charged. On June 12, 2012, the district court sentenced petitioner to concurrent terms of life imprisonment on each of the counts. Following a motion for new trial, on September 6, 2017, the district court dismissed count four of the indictment and resentenced petitioner to concurrent terms of 300 months' imprisonment on both of the remaining counts. At the 2017 sentencing hearing, the court held petitioner responsible for 1.998 kilograms of heroin sold on September 26, 2006 (count two), 3.71 kilograms of heroin sold on May 21, 2008 (count three, for which petitioner had been acquitted), and 10 kilograms of heroin (discussed on the telephone but never distributed and not charged in the indictment).

Petitioner appealed his conviction and sentence to the United States Court of Appeals for the District of Columbia Circuit. The

Court of Appeals affirmed petitioner's conviction and affirmed the use of acquitted and uncharged conduct in imposing sentence.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION REGARDING ACCESS TO RECORDS UNDER THE JURY SELECTION AND SERVICE ACT.

The D.C. Circuit erred when it affirmed the district court's denial of petitioner's motion to inspect records pertaining to the jury selection process that yielded a seemingly unrepresentative jury venire for his trial. The Sixth Amendment and JSSA guarantee criminal defendants "the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community." *Berghuis v. Smith*, 559 U.S. 314, 319 (2010); 28 U.S.C. §§ 1861-78. In order to ensure compliance with the fair cross section requirement, the JSSA entitles defendants to access jury selection records and the right to challenge "any jury on the ground that such jury was not selected in conformity with the provisions of the [JSSA]." 28 U.S.C. §§ 1867(e)-(f). The JSSA explicitly provides for access to jury records in advance of making a cross section challenge in two ways: First, the JSSA states that "[t]he parties in a case shall be allowed to inspect, reproduce, and copy [jury] records or papers at all reasonable times during the preparation and pendency of such a motion." *Id.* § 1867(f) (emphasis added). Second, the JSSA makes a limited

exception to the general rule of non-disclosure for the preparation or presentation of a motion. *Id.* Thus, this Court has held that the JSSA's plain language "makes clear that a litigant has essentially an unqualified right to inspect jury lists." *Test v. United States*, 420 U.S. 28, 30, n.4 (1975) (emphasis added). In reaching this conclusion, the Court explained that "without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge." *Id.* at 30.

In this case, petitioner's request to access records regarding jury selection, which he had an "unqualified right" to obtain, was unlawfully denied. The morning of the trial was the first time petitioner and his counsel could have suspected a cross section violation because the jury office for the United States District Court for the District of Columbia withholds prospective juror information "until the members of the jury venire are brought into the courtroom." *United States v. Defries*, 129 F.3d 1293, 1300 (D.C. Cir. 1997) (explaining the court's jury procedures). Because of this, defense counsel asked the court for access to the jury records to determine whether petitioner had a potentially meritorious jury challenge -- i.e., whether the disparity was a byproduct of systematic problem or just a fluke:

DEFENSE: Your Honor, what we would request is that the Court give us a continuance to go to the jury office to go through the statistics to determine whether or not the process of excluding undeliverables and the disqualifications excusals and deferrals are causing -- causing the disparity that exists. . . .

COURT: You are assuming that people who don't show or that people who are nondeliverable, that that equals some kind of systemic action?

DEFENSE: *I'm not assuming it at this point. I'm asking for the opportunity to determine whether it does.*

COURT: But how could it? That implies that there's some act that's being done by a human being to make sure there's an underrepresentation. I don't understand the argument. . . .

DEFENSE: If we could show that the undeliverables, and the way the jury office is doing this has a [systematic] effect on a particular population, then that would be sufficient to be a violation of the cross section requirement. I don't think it has to be an intentional act by a person. It has to be a fundamental flaw in the process works. *The only way we can ever do that is to take a look at the statistics.*

But the district court denied petitioner's discovery request on grounds that he failed to meet his burden to demonstrate a prima facie cross section violation. As it stated:

So when all is said and done . . . the defendant here has not sustained their burden. [T]o succeed, they must meet their burden, as the moving party, and demonstrate that there was a substantial failure to comply with the act. There's been no demonstration there's any failure to comply with the act. [...]

The Court cannot continue to provide discovery about an issue . . . which has really no relevance to the analysis. [...]

In any case, there are many, many cases that would indicate here that there has been insufficient showing that would justify any further discovery.

As shown above, the district court required petitioner to make a prima facie case in order to access the records that would allow him to make a prima facie case. This put the cart before the horse and closed off any further litigation of this claim.

The district court erred, and the D.C. Circuit erred when it affirmed petitioner's conviction, holding that:

The issue before the district court was not whether to let Bagcho (or his counsel) have access to the jury records, but whether to further delay the trial proceedings while he examined the jury office records.

Bagcho, 923 F.3d at 1136 (emphasis in original). The record did not evince whether the purported request for continuance was for one hour, one day, or one week, or how a continuance would impact the trial or court. All the district court knew was that the defense wished to exercise its right to inspect jury records and had not had that opportunity before jury selection. There is no indication that the district court balanced the reasons for the purported continuance against the defendant's right to inspect jury records, or any other countervailing factor. The district court did not engage in this balancing because it did not perceive petitioner's request to be a motion for continuance. The district court, therefore, did not provide a reason for denying a continuance. As a consequence, the D.C. Circuit decision does not

rely upon a specific reason as a basis for upholding the denial of the purported continuance. Instead, the court recognized the right to inspect the jury records but ruled that the denial of a "continuance" to do so is not an abuse of discretion. *Bagcho*, 923 F.3d at 1137.

The D.C. Circuit recognized the practical difficulty for defendants "to exercise their statutory rights to investigate the jury pool while simultaneously participating in the trial," *id.*, and acknowledged that this difficulty arises because of the jury office's practice of waiting until the day of trial to provide the parties the list of D.C. residents to be present for voir dire. Where such a practice is in effect, such as here, the only mechanism for counsel to get the materials is to request time to do so -- as counsel did here. The Circuit opinion ignores this practical dilemma, and avoids the justiciable issue in this case, claiming that "Bagcho does not challenge that aspect of the district court's practice, so its consistency with the Jury Selection Service Act is not before us." *Id.* The Circuit's ruling signals that where a district court denies a request for time to inspect juror records without weighing the interests at stake there is no remedy.

THIS CASE PRESENTS AN IMPORTANT QUESTION REGARDING THE USE
OF ACQUITTED AND UNCHARGED CONDUCT IN SENTENCING.

Punishing a defendant for acquitted crimes or uncharged crimes violates due process principles because it allows the government to deprive a person of his or her liberty in contravention of the verdict reached by a jury beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363-64 (1970) ("'[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.' ... 'Due process commands that no man shall lose his liberty unless the Government has borne the burden of ... convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable.") (citations omitted)).

The use of acquitted crimes and uncharged crimes to calculate the sentencing range pursuant to the United States Sentencing Guidelines also deprives a defendant of his Sixth Amendment right to a sentence wholly authorized by the jury's verdict, from which a judge's authority to sentence derives. See *Blakely v. Washington*, 542 U.S. 296, 306 (2004) ("jury trial is meant to ensure [the people's ultimate] control in the judiciary" and "the judge's authority to sentence derives wholly from the jury's

verdict"). This Court's findings that the jury's verdict of conviction limits the applicable sentence in *Booker v. United States*, 543 U.S. 220 (2005), *Blakely*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Alleyne v. United States*, 570 U.S. 99 (2013), and *United States v. Haymond*, 139 S.Ct. 2369, 2373 (2019), justify similar limits on the extent to which the jury's verdict of acquittal or uncharged conduct control the sentence. "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *Haymond*, at 2373.

The district court held petitioner responsible for the distribution of 3.71 kilograms of heroin for which the jury acquitted him in Count Three and the distribution of 10 kilograms of heroin that were discussed in a telephone call but never carried out and not charged in the indictment. Based solely on the facts found by the jury, Mr. Bagcho could be sentenced for distribution of two kilos of heroin (base level 30) but based on the use of acquitted and uncharged conduct he was sentenced based on 15.71 kilos of heroin (base level 34). Relying on its earlier decision in *United States v. Bell*, 795 F.3d 88 (D.C. Cir. 2015), which relied on this Court's decision in *United States v. Watts*, 519 U.S. 148 (1997), the D.C. Circuit held that because the sentence imposed "did not exceed the statutory maximum of life imprisonment

for Counts I and II, nor was the statutory mandatory minimum increased by consideration of the uncharged or acquitted conduct," the "court must affirm the district court's consideration of uncharged and acquitted conduct in calculating Bagcho's sentence." *Bagcho*, 923 F.3d at 1140.

Many jurists have questioned the use of acquitted and uncharged conduct to increase a defendant's sentence, and have questioned whether the Court's decision in *Watts*, which considered whether the practice offended the double jeopardy clause, decided the issue. See e.g., *United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part); *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing en banc); *United States v. Jones*, 135 S.Ct. 8 (2014) (Scalia, J., dissenting from denial of certiorari); *United States v. Sabillon-Umana*, 772 F.3d 1328 (10th Cir. 2014) (citing Justice Scalia's dissent in *Jones*); *United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008); *United States v. White*, 551 F.3d 381, 392 n.2 (6th Cir. 2008) (en banc (Merritt, J., dissenting), including in this case, *Bagcho*, 923 F.3d at 1141 (Millett, J., concurring)). As the petitioner in *Vincent Asaro v. United States*, whose petition for certiorari is now pending before the Court has explained, "[w]ithout the Court's intervention to clarify or overrule *Watts*,

the use of acquitted conduct at sentencing will continue unabated." Petition for Certiorari at *11.¹

The same reasoning applies to uncharged conduct, which here, along with the use of acquitted conduct increased Bagcho's base offense level from 30 to 34. Appellant urges the Court to clarify that the Fifth and Sixth Amendments do not permit the use of acquitted conduct or uncharged conduct to increase a defendant's sentencing Guidelines range.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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¹ If certiorari is granted in *Asaro*, petitioner Bagcho requests that this case be held pending resolution of that case.