

In The
Supreme Court of the United States

JERRY JABBARI RHODES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

Joshua S. Kendrick
Counsel of Record
KENDRICK & LEONARD, P.C.
Post Office Box 6938
Greenville, South Carolina 29606
(864) 760-4000
josh@kendricleonard.com

Counsel for Petitioner

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REPLY BRIEF OF PETITIONER

INTRODUCTION

The Government’s response in opposition to Petitioner Jerry Rhodes’ petition for a writ of certiorari is simple: this Court did not grant any of the other “acquitted conduct” petitions, so it should not grant this one.¹ While there is an attractively simple logic to that position, Rhodes’ case is different from those denials and should be reviewed by this Court.

Rhodes’ case presents a heartland issue related to the use of acquitted conduct at sentencing. Unlike other denials, his case involves a set of facts that happens and will continue to happen all around the country daily in federal criminal courts.

Rhodes was faced with a common dilemma in federal criminal prosecutions. He had to admit he was a big drug dealer, which he was not, or go to trial and honestly argue to a jury he was a very small drug dealer with an addiction. The Government had no reason to care which route he chose; it remains in control over his sentence regardless. He could plead and cooperate, allowing the Government to pick his sentence in a downward departure. Or he could go to trial.

A guilty verdict vindicates the Government’s position. So does an acquittal. The Government just presents its failed evidence again to the district court at sentencing and gets its sentence. The Government’s “win-win” will always result in a “lose-lose” for defendants.

¹ See *Memorandum for the United States in Opposition*, citing this Court’s denial of petitions for writ of certiorari in *Asaro v. United States*, No. 19-107, *Knight v. United States*, No. 19-6265, *Martinez v. United States*, No. 19-5346, and *Michigan v. Beck*, No. 19-564.

This case, unlike others, will repeat itself. Its facts will be seen every day in every federal court. Nothing offends due process more than telling a defendant his not guilty verdict is not going to help him. The time to fix this is now, and the vehicle to fix it is this case.

ARGUMENT IN REPLY

The Government points to four cases as support for denying Rhodes' petition. Three of those cases are distinguishable. While Rhodes does not concede any of the three federal cases were correctly decided, there are stark differences which affect their use as an avenue for relief. Rhodes' case does not contain the same hindrances to this Court reviewing acquitted conduct and prohibiting its further use in sentencing.

The denial of the cert petition in *Michigan v. Beck* suggests Rhodes' petition should be granted.

1. Rhodes' case is significantly different from the Asaro case.

In *Asaro v. United States*,² the district court found a long history of violent behavior by overwhelming evidence. *United States v. Gotti*, 767 Fed. Appx. 173, 175 (2d Cir. 2019). The acquitted conduct was used as evidence of character and conduct. That conduct informed the district court of Asaro's danger to the community and the seriousness of his present crime. *Id.*

Asaro is not likely to be repeated. The district court pointed out he was part of a broader organized crime operation which allowed him to commit his crime of

² *Asaro v. United States*, No. 19-107 (petition for writ of certiorari denied February 24, 2020).

conviction. Asaro was a famous, long-time member of a New York mafia family. Though the district court sentenced Asaro to a guidelines sentence based on acquitted conduct, her comments at sentencing suggested the long history of involvement in the mafia, which was well-known and undisputed, was the real reason for the higher sentence. *Asaro v. United States*, No. 19-107, Appendix p. 26a-27a.

The district court in Rhodes' case did not have similar concerns. In fact, it seemed troubled by the outcome, but declined to change it.

13 THE COURT: ALL RIGHT. MR. KENDRICK, I HEAR YOUR
14 ARGUMENT THAT FOR ME TO GIVE THE DEFENDANT ANYTHING MORE THAN
15 A DETECTABLE AMOUNT OF COCAINE AND FIGURE THE GUIDELINES FROM
16 THERE WOULD OSTENSIVELY OVERRIDE THE JURY'S VERDICT IN TERMS
17 OF SENTENCING, BUT THAT IS THE LAW. THAT IS THE
18 WELL-ESTABLISHED LAW THAT ACQUITTED CONDUCT CAN STILL BE
19 CONSIDERED BY THE COURT FOR SENTENCING PURPOSES AS LONG AS
20 THIS COURT MAKES THE DETERMINATION THAT THE PROOF IS THERE BY
21 A PREPONDERANCE OF THE EVIDENCE, NOT BEYOND A REASONABLE
22 DOUBT, WHICH IS A BIG DIFFERENCE.
23 AND I STRUGGLE WITH IT, I STRUGGLE WITH IT, BUT I JUST
24 COULD NOT CONCLUDE THAT MR. JAMISON JUST CAME IN AND JUST
25 SPUN A FAIRY TALE IN FRONT OF US. I KNOW HE HAD A PLEA

1 AGREEMENT AND I KNOW HE HAD SOMETHING TO GAIN AND I KNOW THAT
 2 HE COULDN'T GET A DOWNWARD DEPARTURE UNLESS THE GOVERNMENT
 3 MADE THE MOTION, BUT HIS TESTIMONY WAS PRETTY DETAILED AND
 4 PRETTY PRECISE.

5 SO I'M WITH YOU SO FAR AT LEAST TO GO DOWN TO THREE AND
 6 A HALF KILOGRAMS OF COCAINE POWDER AS OUTLINED BY THE
 7 PROBATION OFFICER DRAWING ON PARAGRAPHS 28 TO 31, PRIMARILY
 8 THE PROFFER INTERVIEW WITH MR. JAMISON.

3

The district court in *Assaro* noted there were numerous credible witnesses and strong evidence of a long, violent association with organized crime. The district court in Rhodes' case, on the other hand, found some of the same questions regarding his prosecution that the jury had.

The verdict in Rhodes' case reflects the jury disregarded the testimony from Mr. Jamison. The district court also questioned that evidence, having his own doubts about it. In Rhodes' case, the heart of the dispute was the exact conduct at issue in his prosecution. In Asaro's case, his character and history were the sentencing drivers. This is a critical difference as to what a district court could, or would, do on remand if the petitioner was successful.

2. Rhodes' case is significantly different from the *Knight* case.

The Government's reliance on the denial of cert in the *Knight* case is not helpful to this Court.⁴ Though Knight received a four-point enhancement for conduct

³ While the sentencing transcript was not included in the Appendix to the petition for writ of certiorari, these comments were included in the record below.

⁴ *Knight v. United States*, No. 19-6265 (petition for writ of certiorari denied February 24, 2020).

he was seemingly acquitted of, he could have been subject to the same sentence regardless of the acquitted conduct.

The Government pointed out in its opposition to Knight's petition that there were two grounds for his sentence that were independent of the acquitted conduct. The specific elements of the guidelines enhancement that drove his higher sentence may have been applicable despite the jury's verdict.

Additionally, there was discussion of the appropriateness of an upward departure from the district court. Under either of these theories, it is likely that a decision from this Court would have had no real effect on Knight's relief.

Rhodes does not have that problem. It was clear the district court had its own doubts about his conduct but tried to stay as close as possible to the guidelines. Those guidelines were directly related to the conduct of which Rhodes was acquitted. Unlike the *Knight* case, Rhodes would receive significant relief from a favorable ruling in this Court. While it may be tempting to call that relief a "benefit" to Rhodes, it would actually just be giving accuracy to the verdict rendered by a jury of Rhodes' peers.

3. Rhodes' case is significantly different from *Martinez*.

Martinez involved a unique and fact-specific argument on acquitted conduct.⁵ The petitioner was sentenced for a drug trafficking crime that involved the murder of a witness. He was found not guilty of tampering with a witness.

As the Government argued, it is not clear whether the elements of those two acts were the same. The Government accurately pointed out someone could be

⁵ *Martinez v. United States*, No. 19-5346 (petition for writ of certiorari denied February 24, 2020).

involved in a murder of a witness that would not meet the specific definition of tampering with a witness.

The Government also relied on the definition of “acquittal” found in *Watts*. That definition essentially leaves an acquittal as a relatively innocuous feature of the jury system. This is completely at odds with numerous other definitions of acquittal, including the more recent analysis of a not guilty verdict found in *Nelson v. Colorado*. 137 S. Ct. 1249 (2017). Without discussing that later definition, which is discussed in more detail below, the Court was not presented with a full picture of the issue.

4. This Court’s denial of a petition for certiorari in *Michigan v. Beck* does not support denial in Rhodes’ case.

Michigan v. Beck supports a prohibition on using acquitted conduct at sentencing.⁶ The Michigan Supreme Court correctly held such a sentencing procedure denies due process. The case is distinguishable from Rhodes’ case because of unique Michigan constitutional issues. In addition, the Government’s arguments in support of granting that writ do not support the denial of Rhodes’ writ.

While the Government pointed out the opinion from the Michigan Supreme Court in *Michigan v. Beck* is at odds with every federal Circuit to consider the issue, that is of little relevance. Those same Circuits all consider themselves bound by *Watts*. *Watts* was a departure from prior precedent on the importance of the presumption of innocence, as described in Rhodes’ petition. At the same time, it is questionable whether *Watts* allows acquitted conduct at sentencing in the limitless way most Circuit have used it.

⁶ *Michigan v. Beck*, No. 19-564 (petition for a writ of certiorari denied February 24, 2020).

In 2017, this Court was clear that a person not found guilty of a crime cannot be punished for that crime. *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 n.8 (2017).

More recently, this Court recognized the role of the jury in the American criminal justice system: “Only a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty...[t]hat promise stands as one of the Constitution’s most vital protections against arbitrary government.” *United States v. Haymond*, 139 S. Ct. 2369, 2372 (2019).

The opinion describes the historical significance of a jury trial. *Id.* at 11-12. Importantly, the opinion is clear that juries limit a judge’s power to punish and that judicial authority to issue a sentence is both derived from and limited by “the jury’s factual findings of criminal conduct.” *Id.* at 2375-2377. Calling something a “sentencing enhancement” to avoid the constitutional limitations on punishment is specifically rejected by *Haymond*. *Id.* at 2379.

Haymond recognizes the danger of the creeping acceptance of lessening a jury’s role in imposing punishment. “This displacement of the jury’s traditional supervisory role, under cover of a welter of new labels, exemplifies the ‘Framer’s fears that the jury right could be lost not only by gross denial, but by erosion.’” *Id.* at 2281 (quoting *Apprendi*, 530 U.S. at 483).

5. Rhodes’ case involves a common situation that will arise repeatedly.

Rhodes’ case presents the perfect opportunity for the Court to correct the misunderstandings of *Watts* and disallow sentences based on acquitted conduct.

Rhodes was presented with a common dilemma in the federal judicial system. Despite being caught with a minuscule amount of drugs, cooperators started piling weight on him. Based on nothing more than uncorroborated hearsay, Rhodes was charged with dealing large amounts of drugs and faced a life without parole sentence. Because those cooperators had exaggerated his role in the conspiracy, Rhodes had no real information to offer the prosecutors in exchange for a reduced sentence.

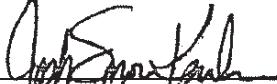
Rhodes had no other option besides going to trial. But his position was vindicated when a jury believed his story, not the Government's. The jury rejected the cooperators' statements and acquitted Rhodes of all but user amounts of drugs. Yet that vindication had little effect on his sentence. It ultimately made no difference that the jury did not believe the Government's evidence.

The same evidence was cited at sentencing. Cited, not presented. There was nothing more presented at sentencing than was rejected by the jury. Though Rhodes marginally benefitted from the district court's doubts about some of the trial testimony, those doubts further highlight the problems with using that conduct in fashioning a sentence. Even in their face, he gained little from an acquittal.

CONCLUSION

Rhodes has presented a compelling case of national concern. His situation will be replayed in courtrooms across the country. This Court should grant the petition to correct the dilemma Rhodes faced and place the jury in its proper position of authority in the criminal justice system.

Respectfully submitted,



Joshua Snow Kendrick
Counsel of Record
KENDRICK & LEONARD, P.C.
P.O. Box 6938
Greenville, South Carolina 29606
(864) 760-4000
Josh@KendrickLeonard.com

Counsel for the Petitioner