No. _____

In the Supreme Court of the United States

BRIAN PRICE, PETITIONER
v.
UNITED STATES OF AMERICA, RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a defendant's constitutional rights are abridged when a district court bases its sentence solely on acquitted conduct.

2. Whether a criminal conspiracy continues for an indefinite period after the objectives of the conspiracy have been achieved.

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Petitioner herein respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The United States Court of Appeals for the First Circuit entered judgment in this case. The opinion ("Judgment," *infra*, 1a) has not been reported.

JURISDICTION

The initial judgment of the First Circuit Court of Appeals was entered on August 30, 2019. Following the timely filing of a petition for rehearing *en banc*, the First Circuit entered an order denying the petition on October 24, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Pursuant to Supreme Court Rules 13.1 and 13.3 and 28 U.S.C. 92101(c), this petition is timely filed if deposited in the United States mail, with first-class postage prepaid, on or before January 22, 2020.

STATEMENT OF THE CASE

Petitioner pleaded guilty to conspiring to distribute cocaine but denied he had any involvement with selling cocaine base ("crack cocaine"). After conducting a bench trial to determine whether crack cocaine was involved in Petitioner's case the district court determined that the government did not

prove the charge beyond a reasonable doubt. However, despite acquitting Petitioner for the charge of conspiring to distribute crack cocaine the district court sentenced him solely on that basis. The First Circuit affirmed the sentence.

This petition seeks relief because the First Circuit decision conflicts with the Fifth and Sixth Amendments to the U.S. Constitution and conflicts with the actions of at least one other sister circuit.

DISCUSSION

The government indicted Petitioner on June 8, 2016, for one count of conspiracy to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 846. Within that count was a specific charge that Petitioner was responsible for 28 grams or more of crack cocaine, which subjected him to a five-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(B)(iii). Eight other defendants were also indicted, including Luis Rivera, the leader of a suspected cocaine trafficking operation.[1]

No drugs were seized in Petitioner's case – not in his possession upon arrest, at his residence during a lawful search, or through controlled purchases by law enforcement. There was electronic surveillance, however, which intercepted text messages and one telephone call between Petitioner and Rivera. Without physical evidence the government built its prosecution solely upon what was gleaned through the surveillance. Most significantly, on March 17, 2016, Rivera and Petitioner exchanged a short series of cryptic texts which ended with Rivera texting the message "I got some heat." Rivera then telephoned Petitioner. A line sheet of the conversation, produced by the government, reads:

> **Petitioner:** What's happening?
>
> **Rivera:** Yeah, the other shit I had, remember that day I was telling you? It was f***ing … my ass to f***ing, to whip it.
>
> **Petitioner:** Right, right, right, right, right.

[1] Petitioner had argued from the outset he was not associated with or involved in jointly-undertaken criminal activity with any of the codefendants save for Rivera. At the bench trial, which produced the judicial decisions to which this petition objects, the district court agreed, ruling that Rivera was running a "hub and spoke" operation in which he was a supplier who sold drugs directly to the other named defendants. *See Kotteakos v. United States*, 328 U.S. 750, 754-55 (1946).

> **Rivera:** Yeah, I … Yeah. I asked you, you said it didn't give you no problem. I'm like, "That's weird, because it f***ing kicked my ass."
>
> **Petitioner**: Nothing gives me a problem, I'm a "all-logist." [Laughs]
>
> **Rivera:** Oh, nah, but I got, I got some. My n***a, I got some, I got some grease!
>
> **Petitioner:** Alright, Um … I'll, I'll grab a 31 now. If it's straight, bro, I'll grab another nine or something later, man. Real shit, if it's what it supposed to be.
>
> **Rivera:** My n***a, I, I, I, yo … My n***a, if you don't like it you bring it right back. I'm telling you, the, it's the shit!
>
> **Petitioner:** Alright, Um … you know where I'm at.

Ultimately, the government held Petitioner responsible for 62 grams of crack cocaine solely on its subjective interpretation of the phone call with Rivera, as well as 62 grams of powder cocaine.[2] Petitioner pled guilty on January 10, 2018, to conspiracy to distribute powder cocaine. He stipulated to purchasing 62 grams of powder cocaine from Rivera in February 2016, as well as purchases of 31 grams each on March 1 and March 17, 2016. However, he denied distributing crack, either directly or as a foreseeable consequence of his involvement with Rivera. The government insisted the 62 grams purchased in March were converted to crack cocaine for distribution and asserted that the term "whip it" in the March 17 conversation was a euphemism for cooking powder cocaine into crack. The district court held a bench trial to determine whether the government could prove that assertion beyond a reasonable doubt. For sentencing purposes, the court stated it would also examine the same issue under the preponderance of the evidence standard.

No evidence was presented at trial that showed Rivera and Petitioner conspiring to make and/or sell crack cocaine. Instead, the government played the recorded conversation, over Petitioner's objection,

[2] It is worth noting that the U.S. Probation Office declined to hold Petitioner responsible for more than 12.5 grams of cocaine or 2.8 grams of crack – a Guidelines base offense level of 12 – due to the government's lack of evidence.

to suggest they had previously made crack, albeit separately.[3] A government law enforcement witness testified that "grease," a term Rivera used during the recorded phone conversation with Petitioner, meant high quality, uncut powder cocaine. There was also testimony that the term "whip it" meant cooking cocaine into crack. The district court agreed, although with the caveat the finding could be erroneous: "I find that 'whip' means cook in this context, but, in any event, even if it doesn't, the word 'cook' was used as well." That uncertainty prompted the court to acquit Petitioner of the crack cocaine charge. However, the court added, "I find under the preponderance of the evidence standard that it was likely 62 grams was **intended** to be cooked into crack. So when I apply the Guidelines, I will be applying the 62 grams." (emphasis added). The court made no mention of relevant conduct.

The district court set Petitioner's base level at 24, which is the U.S. Sentencing Guidelines ("Guidelines") level for an offense involving between 28 and 112 grams of cocaine base. U.S.S.G. § 2D1.1(c)(8). After crediting Petitioner for his guilty plea and applying a variance for his recent work history the district court sentenced him to 36 months incarceration, a full year above the high end of his Guidelines range had he been sentenced for the 124 grams of powder cocaine to which he admitted.

REASONS FOR GRANTING REVIEW

1. By Basing Petitioner's Sentence Entirely Upon Acquitted Conduct, the Appeals Court Has Sanctioned Action That Departs from Federal Law and Judicial Precedent Regarding the Use of Such Conduct at Sentencing.

This Court should grant certiorari in this case because it presents an important issue regarding federal sentencing law which even the First Circuit Court of Appeals has acknowledged does not align comfortably with the constitutional principles of due process and fair trials. *See* Judgment, *infra*, 5a n.3.

Under the First Circuit's own holdings, "[a] sentence must be based upon the crime of conviction." *United States v. Pena*, 742 F.3d 508, 515 (1st Cir. 2014). Yet, the decision to let stand

[3] Although it ultimately had no effect on the outcome, the district court found the recording mostly unintelligible, stating: "I couldn't hear a lot of it. I couldn't understand a lot of it."

Petitioner's conviction and sentence flies in that principle's face because it affirms the district court's reliance on a negated element of the crime as a sentencing basis. Petitioner's sentence was demonstrably not based on the crime of conviction. This Court has stated such a practice raises a Sixth Amendment concern: "It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical." *Alleyne v. United States*, 570 U.S. 99, 114-116 (2013).

The only conviction here comes from Petitioner's guilty plea to conspiring to distribute cocaine. The acquittal negated the essential element of crack cocaine. As this Court has observed, "[a] true acquittal is based upon the insufficiency of the evidence to **prove an element of the offense**." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 579 (1977) (quoting S. REP. NO. 91-1296, at 11 (1970)) (emphasis added). *See also Evans v. Michigan,* 133 S. Ct. 1069, 1075 (2013) (defining "an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense.") (citing *United States v. Scott*, 437 U.S. 82, 98 (1978)). Acquittal is an action that "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Smith v. Massachusetts*, 543 U.S. 462, 468 (2005) (quoting *Martin Linen Supply Co.*, 430 U.S. at 571). *See also Jones v. United States*, 526 U.S. 227, 232 (1999) ("Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.").

Petitioner understands this argument faces an uphill battle in the face of well-established caselaw and statutes and Guidelines which are hostile to his viewpoint. For example, under 18 U.S.C. § 3553(a)(1), "the nature and circumstances of the offense and the history and characteristics of the defendant," are factors a court "shall consider" in determining an appropriate sentence. *Id.* The history and characteristics inevitably include a defendant's entire criminal record, which may include charges which went unproven or unprosecuted. This Court has encouraged and upheld trial courts' efforts to

consider a wide range of information at sentencing, as it "ensures that the punishment will suit not merely the offense but the individual defendant." *Wasman v. United States*, 468 U.S. 559, 564 (1984).

As to caselaw, Petitioner acknowledges that this Court has allowed acquitted conduct to be used as a sentencing enhancement. Under *United States v. Watts*, 519 U.S. 148, 154 (1997), a sentencing court may "consider uncharged or acquitted conduct" in order to "provide additional penalties when defendants are convicted of multiple offenses." Petitioner also concedes that the bright-line rule of *Watts*, *i.e.*, that "a jury's verdict or acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, as long as that conduct has been proven by a preponderance of the evidence," *id.* at 157, is more than problematic to his case. However, the acquitted conduct in Petitioner's case was not "a sentencing enhancement" or an additional penalty but, rather, the sole basis for sentencing, which was imposed to punish a single offense. Also, as explained below, the "conduct" at issue here was not underlying the acquitted charge of **conspiracy** to distribute crack cocaine. *See* section 2, *infra*.

And, finally, in Petitioner's favor is the persistent constitutional concerns which have followed this practice ever since *Williams v. New York*, 37 U.S. 241 (1949) (affirming trial court's sentence enhanced by uncharged offenses and other criminal conduct not presented to the jury). That concern has been voiced by any number of legal commentators, *see, e.g.*, Claire M. Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 ST. JOHN'S L. REV. 1415,[4] to the First Circuit itself in the very judgment Petitioner asks this Court to overturn.[5]

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[4] As just one example of the need for reform or, at least, judicial restraint in this area the author notes, "[w]hile sentencing hearings are not afforded the full due process protections required at trials, there is nonetheless a strong argument to be made that in an era when more than ninety percent of criminal cases end in plea bargains and when a defendant's primary day in court, as well as the day that determines his fate, is his sentencing hearing, due process values should at least guide those hearings." *Id.* at 1462

[5] In a footnote, the panel states its "continuing constitutional concerns on the state of the law, which…allows for judicially found facts being used to enhance a defendant's sentence based on conduct that the defendant was either not charged with or -- as in Price's case -- was acquitted of." Judgment,

Further, at least one circuit (relatively recently) ruled contrary to the practice of using acquitted conduct at sentencing, although under circumstances where a jury rendered the verdict regarding drug quantity attributable to a defendant. In *United States v. Pimentel-Lopez,* 828 F.3d 1173, 1176-77 (9th Cir. 2016), the appellate court held that if a jury verdict finds, beyond a reasonable doubt, that the defendant distributed a drug amount that falls within one range of the Guidelines, the court may not find by a preponderance of the evidence an amount within a higher range. *Id.* The judge in that case relied on *Watts* to sentence the defendant to a much higher Guidelines range, based on what had been presented at trial, but the appellate court vacated that sentence and remanded for resentencing based on the jury's findings. The Ninth Circuit distinguished *Watts*, as well as the decisions of other circuits, by noting the case had "an affirmative finding that the amount in question is less than a particular amount." *Id.* at 1177. Still, the decision represents a significant departure from *Watts* regarding the use of uncharged or unproved conduct. As evidence of this, six Ninth Circuit judges dissented from the decision to deny the government's petition for an *en banc* rehearing. *See United States v. Pimentel-Lopez,* 859 F.3d 1134, 1136 (9th Cir. 2016) (Graber, J. dissenting) (panel's ruling that a sentencing court cannot find by a preponderance of the evidence a higher drug amount than the jury found "is wrong both as a matter of logic and as a matter of Supreme Court law, it has far-reaching consequences for the prosecution of drug crimes in our circuit, and it conflicts with holdings in other circuits.").

While there was no affirmative finding that Petitioner did not conspire to distribute crack cocaine, the trial court's action in his case still represents a logic twist that resulted in an excessive sentence: The judge had a reasonable doubt Petitioner was distributing crack cocaine but decided to sentence him for it anyway.

Petitioner is aware that one of the justifications for allowing acquitted conduct to enhance a sentence, aside from the need for judges to have complete information regarding a defendant's history and characteristics, is that the acquittal may have been the result of a trial error, or insufficient

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infra, 5a n.3.

evidence, or an evidentiary ruling which disfavored the government, and not because of actual innocence. *See Scott*, 437 U.S. at 106 ("[T]he judgment does not necessarily establish the criminal defendant's lack of criminal culpability."). Certainly, the government would argue that was the case with Petitioner.

But these 'not guilty' verdicts do not come with an asterisk attached. A number of this Court's decisions imply that an acquittal is final and that finality must be respected. *See, e.g., Burks v. United States*, 437 U.S. 1, 16 (1978) ("[W]e necessarily afford absolute finality to a jury's verdict of acquittal — no matter how erroneous its decision."). For a court to turn around and then sentence a defendant on the very charge for which he was acquitted is a stark rebuke to those holdings. "The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence." *Watts*, 519 U.S. at 170 (Stevens, J., dissenting).

As noted above the First Circuit, or to be more precise at least one member of the First Circuit, has also expressed concern and disagreement with this aspect of sentencing. In a footnote to the *Price* opinion, *infra*, 5a, as well as in two previous cases, Judge Juan R. Torruella has discussed eloquently why the use of uncharged or unproven conduct at sentencing is so disturbing to constitutional principles. In his concurring opinion in *United States v. St. Hill,* 768 F.3d 33, 39 (1st Cir. 2014), Judge Torruella noted how this practice conflicts with the due process and fair trial guarantees of the Fifth and Sixth Amendments: "[H]igher sentences based on uncharged and untried 'relevant conduct' for, at best, tangentially related narcotics transactions seems like an end-run around these basic constitutional guarantees afforded to all criminal defendants." *Id.* at 41. He restated his concern in *United States v. Alejandro-Montañez*, 778 F.3d 352 (1st Cir. 2015), writing, "I believe it is inappropriate and constitutionally suspect to enhance a defendant's sentence based on conduct that the defendant was … acquitted of. *Id.* at 362-63 (Torruella, J., concurring).

Calling this practice "an injustice," *St. Hill,* 768 F.3d at 41, Judge Torruella questioned whether the courts should revisit this issue. *Id.* 42. Petitioner believes his case would provide the perfect opportunity for that review because of how his sentence was fashioned. As this Court has noted:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual **should not condemn a man for commission of a crime when there is reasonable doubt about his guilt**.

In re Winship, 397 U.S. 358, 363-64 (1970) (emphasis added).

This is a question of fundamental fairness, which is why constitutional concerns have continued to follow *Watts* and the Guidelines. Granting certiorari in this case would give this Court a chance to rectify this injustice and restore the most basic sentencing principle: let the punishment fit the crime.

2. The First Circuit Decision Renders Criminal Conspiracies Permanent, a Significant Change to Criminal Law and the Decisions of This Court.

Although "conspiracy is a continuing offense," *United States v. Payne*, 591 F.3d 46, 69 (2d Cir. 2010) (citing *United States v. Kissel,* 218 U.S. 601, 607 (1910)), it is not an offense that continues *ad infinitum*. It may have "a prolonged course of conduct," but that conduct eventually "run[s] its course" and the conspiracy ends. *Payne*, 591 F.3d at 69 (citing *Toussie v. United States*, 397 U.S. 112, 115 (1970)).

The First Circuit's decision, however, directly contradicts that assumption. The government's evidence proved Petitioner and Luis Rivera conspired to distribute cocaine between themselves. Rivera was Petitioner's source and their "conspiracy" was an agreement by Rivera to sell powder cocaine (when he had some to sell) to Petitioner, if Petitioner agreed to buy it. However, Petitioner was punished for conspiring to distribute crack cocaine, an alleged offense which belied the evidence.

The district court's main objective in the bench trial was to determine if Petitioner "conspired to distribute 28-plus grams of crack," whether beyond a reasonable doubt for the purposes of applying the five-year mandatory minimum sentence, or a lesser sentence under a lower standard. The

misapprehension by both the district court and the First Circuit was that if the **very presence** of crack was proven, by any standard, Petitioner would be subject to the harsher crack cocaine punishments prescribed by statute or the Guidelines.

The government had the same misapprehension, as its strategy was to introduce any available evidence suggesting Petitioner was involved with crack cocaine. However, it did not charge Petitioner with being **involved** with crack cocaine, it indicted him for being in a **conspiracy to distribute** crack cocaine. That is the plain meaning of the written indictment. *See Lamie v. United States*, 540 U.S. 526, 534 (2004) (where the "language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.").

Once the district court determined that Petitioner had no liability for any of the codefendants' criminal activity, save for Rivera, the government's case against him narrowed considerably. All that mattered was his relationship to Rivera which was, as the evidence clearly showed, that of buyer/seller. It is here that the district court's conclusions regarding Petitioner's criminal liability, and the First Circuit's subsequent affirmation, runs aground, even when viewed in the light most favorable to the government, *i.e.*, that the parties were discussing crack cocaine during the intercepted phone call.

Although it was Rivera who spoke the term "whip it," the government contended Rivera was confirming that Petitioner made crack from the cocaine Rivera previously sold him.[6] The district court was ultimately persuaded: "I easily find by a preponderance that Mr. Price was involved in selling crack, and that Mr. Rivera knew that, or it was reasonably foreseeable to him." No evidence was presented at trial that Petitioner was selling crack.

More to the point, the evidence did not show in any way that the presence of crack furthered the conspiracy between Petitioner and Rivera, no matter what was foreseeable to either of them. Under the relevant conduct provision of the Guidelines, a defendant is accountable for all reasonably

[6] Presumably from the March 1 sale.

foreseeable conduct undertaken by his coconspirators in furtherance of the conspiracy. U.S.S.G. § 1B1.3(a)(1)(B).

The phone call (and the government's line sheet transcription) does not support the charge that the presence of crack cocaine, whether Petitioner produced it or not, furthered the conspiracy between Petitioner and Rivera or was undertaken in concert with each other. In fact, a simpler interpretation of the call, one that Petitioner argues is more reasonable, contradicts the view that the men were partners in a joint endeavor. Rivera's call to Petitioner was nothing more than a sales call from a supplier to a reliable customer.

Rivera sent a text message saying, "I got some heat," which he then followed up with a phone call to inform Petitioner that the "heat" was a new supply of cocaine for sale. After reminding Petitioner of the cocaine he sold him a few weeks earlier Rivera then confirmed Petitioner's satisfaction with that purchase: "[Y]ou said it didn't give you no problem." Rivera transitioned by telling Petitioner about the improved product he was now selling "I got some grease!" (High quality, uncut powder cocaine). Petitioner responded by ordering 31 grams, with a promise that if he was satisfied with the quality he would buy more: "If it's straight, bro, I'll grab another nine or something later, man. Real shit, if it's what it supposed to be." Rivera concluded by assuring Petitioner he could return the merchandise if not satisfied: "[I]f you don't like it you bring it right back. I'm telling you, the, it's the shit!"

This Court has said that the heart of a conspiracy is "an agreement to commit an unlawful act." *Iannelli v. United States*, 420 U.S. 770, 777 (1975). There is no question Petitioner and Rivera agreed to commit an unlawful act – Rivera had cocaine to sell and Petitioner was interested in buying it. The government's charge, however, which resulted in Petitioner's high sentence, was that the two were working together to distribute crack cocaine. But that conduct is nowhere in evidence. It is clear from the conversation that even if both had made crack cocaine from the powder supply Rivera previously sold, they did not do it together and none of the resulting crack was sold together or profits shared, *etc*. Further, there is not a single mention of what Petitioner planned to do with the new cocaine he agreed

over the phone to buy, and Rivera did not ask. The reasonable inference here is that Rivera did not care because his objective was to sell the cocaine. Once the sale concluded, the goal of that conspiracy was achieved and the parties were on their own. *See United States v. Moss*, 9 F.3d 543, 549 (6th Cir. 1993) (citing *Wong Sun v. United States*, 371 U.S. 471, 490 (1963)).

The First Circuit's decision would codify the theory that a criminal conspiracy between a drug dealer and a buyer is endless and continues long after conclusion of the sale, which is the unlawful conduct to which the parties have agreed. This Court must grant certiorari to reverse this action.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ George F. Gormley

_____

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JANUARY 22, 2020