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In The
Supreme Court of the United States

ORLANDO BELL,

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

PETITION FOR WRIT OF CERTIORARI

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Dated: September 10, 2020

QUESTION PRESENTED

Whether the Fifth and Sixth Amendments prohibit a federal court from basing a defendant's sentence on conduct for which the jury acquitted the defendant.

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceeding are Orlando Bell, Petitioner and defendant/appellant below and the United States, Respondent.

RELATED CASES

The other defendants in the case before the United States District Court for the District of Columbia were:

- Wayne Holroyd pleaded guilty and is currently appealing the District Court's denial of his Motion for Compassionate Release, Record No. 20-3049;
- Kelby Gordon was convicted following a jury trial and is currently appealing the sentence imposed (for reasons other than those raised in this petition), Record No. 19-3024;
- Harry Keels entered a guilty plea and appealed his sentence (for reasons other than those raised in this petition); on February 4, 2020, the sentence was affirmed, Record No. 18-3088;
- Nicole Redd, Crevonte Johnson, and Steven Anderson entered guilty pleas.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDING	ii
RELATED CASES	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	v
OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	2
REASON FOR GRANTING THE PETITION	4
I. <i>Watts</i> Did Not Consider Whether Use of Acquitted Conduct Violated the Due Process Clause or the Sixth Amendment	4
II. Due Process Rights Are Violated when Sentencing Is Based on Acquitted Conduct.....	6
III. Sixth Amendment Rights Are Violated when a Defendant is Sentenced on Facts Rejected by a Jury	7
CONCLUSION.....	8
APPENDIX:	
Judgment of The United States Court of Appeals For the District of Columbia entered June 26, 2020	1a

Judgment of
The United States District Court for
The District of Columbia
entered March 18, 2019..... 5a

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	6, 7
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	7
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004)	7
<i>In re Winship</i> , 397 U.S. 358 (1970)	6
<i>United States v. Bell</i> , 808 F.3d 926 (D.C. Cir. 2015)	5, 6
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	6
<i>United States v. Faust</i> , 456 F.3d 1342 (11th Cir. 2006)	5
<i>United States v. Haymond</i> , 139 S. Ct. 2369, 204 L. Ed. 2d 897 (2019)	7
<i>United States v. Henry</i> , 472 F.3d 910 (D.C. Cir. 2007)	5
<i>United States v. Mercado</i> , 474 F.3d 654 (9th Cir. 2007)	5
<i>United States v. Papakee</i> , 573 F.3d 569 (8th Cir. 2009)	5
<i>United States v. Sabillon-Umana</i> , 772 F.3d 1328 (10th Cir. 2014)	4
<i>United States v. Settles</i> , 530 F.3d 920 (D.C. Cir. 2008)	3, 4, 5

United States v. Watts,
519 U.S. 148 (1997) 3, 4, 8

United States v. White,
551 F.3d 381 (6th Cir. 2008) 5

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend V *passim*

U.S. CONST. amend VI *passim*

STATUTES

18 U.S.C. § 924(c) 2, 3

21 U.S.C. § 841(a)(1) 2

21 U.S.C. § 841(b)(10)(c) 2

21 U.S.C. § 846 2

28 U.S.C. § 1254(1) 1

In the Supreme Court of the United States

No.

ORLANDO BELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner Orlando Bell respectfully petitions for a writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit to review the judgment against him in *United States v. Orlando Bell*, Record No. 19-3020.

OPINION BELOW

The opinion of the Court of Appeals is available at 811 Fed. Appx. 7 (D.C. Cir. 2020). App. 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). App. 1a.

CONSTITUTIONAL PROVISIONS INVOLVED

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

This case presents a critical issue that has concerned courts across the country. That is, whether use of acquitted conduct to determine a defendant's sentence violates the defendant's rights guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

Antonio Bell was arrested on December 8, 2017. He was charged along with six others with various narcotics and firearm charges. The initial indictment, returned on December 5, 2017, charged Bell with Conspiracy to Distribute and Possess with Intent to Distribute Cocaine Base, in violation of 21 U.S.C. § 846; Unlawful Possession with Intent to Distribute Cocaine Base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(10)(C); Using, Carrying, Possessing a Firearm During a Drug Trafficking Offense, in violation of 18 U.S.C. § 924(c), which incorporated the substantive drug count as the predicate offense.

A Superseding Indictment was returned on February 8, 2018; the three counts charging Bell remained the same, albeit with differently numbered counts. Bell proceeded to a single defendant jury trial on October 24, 2018 - the co-defendants either entered guilty pleas or their cases were severed. The jury returned a verdict on October 31, 2018, finding Bell not guilty on the Conspiracy Count and guilty on the other two counts.

Bell filed a sentencing memorandum in which he argued that to sentence him based on acquitted conduct would violate his constitutional rights. First, it violates Due Process rights under the Fifth Amendment; Second, it violates the defendant's right to a jury under the Sixth Amendment." Relying on *United States v. Settles*, 530 F.3d 920 (D.C. Cir. 2008), which in turn relied upon *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), the district court determined that it could consider acquitted conduct without violating the defendant's Due Process rights or the Sixth Amendment. The Court of Appeals, also relying on *Settles*, found no abuse of discretion. As a result, Bell's sentencing guideline range was 63 to 78 months, rather than 27-33 months. He was sentenced to 70 months, followed by a five-year consecutive sentence for the § 924(c) conviction.

REASON FOR GRANTING THE PETITION

I. Watts Did Not Consider Whether Use of Acquitted Conduct Violated the Due Process Clause or the Sixth Amendment

Contrary to the D.C. Circuit's opinion in *Settles* and the opinions of nearly every circuit that has addressed this issue, the *Watts* decision did not rule that the use of acquitted conduct in determining a sentence does not violate either Due Process or the Sixth Amendment. Indeed, the ruling in *Watts* was quite limited:

“The Court of Appeals’ position to the contrary not only conflicts with the implications of the Guidelines, but it also seems to be based on erroneous views of our *double jeopardy* jurisprudence. The Court of Appeals asserted that, when a sentencing court considers facts underlying a charge on which the jury returned a verdict of not guilty, the defendant ‘suffer[s] punishment for a criminal charge for which he or she was acquitted.’ *Watts*, 67 F.3d, at 797 (quoting *Brady*, 928 F.2d, at 851). As we explained in *Witte*, however, sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction. 515 U.S., at 402-403, 115 S. Ct., at 2207-2208. In *Witte*, we held that a sentencing court could, consistent with the *Double Jeopardy Clause*, consider uncharged cocaine importation in imposing a sentence on marijuana charges that was within the statutory range, without precluding the defendant’s subsequent prosecution for the cocaine offense.”

United States v. Watts, 519 U.S. at 154–55 (emphasis added).

Indeed, these constitutional violations have been raised many times, but no defendant has succeeded in winning a majority ruling finding that use of acquitted conduct at sentencing violates Due Process and the Sixth Amendment. But this does not mean that all appellate judges wholeheartedly accept the majority rulings. For instance, in *United States v. Sabillon-Umana*, 772 F.3d 1328 (10th Cir. 2014), then Judge-Gorsuch wrote in his dissenting opinion, “It is far from certain whether the

Constitution allows,” a sentencing judge to increase a defendant’s sentence based on acquitted conduct. And then-Judge Kavanaugh routinely spoke out against the use of acquitted conduct to increase a defendant’s sentence: “I share Judge Millett’s overarching concern about the use of acquitted conduct at sentencing, as I have written before. *See, e.g., United States v. Settles*, 530 F.3d 920, 923–24 (D.C. Cir. 2008); *see also United States v. Henry*, 472 F.3d 910, 918–22 (D.C. Cir. 2007) (Kavanaugh, J., concurring).” *United States v. Bell*, 808 F.3d 926, 927 (D.C. Cir. 2015). *See also United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., dissenting) (“Although [Circuit precedent] expressly authorized the district court to enhance Faust’s sentence for conduct of which a jury found him innocent, I strongly believe this precedent is incorrect, and that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.”); *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting) (“Reliance on acquitted conduct in sentencing diminishes the jury’s role and dramatically undermines the protections enshrined in the Sixth Amendment.”); *United States v. White*, 551 F.3d 381, 387 (6th Cir. 2008) (Merritt, J., dissenting) (“I conclude that punishment for acquitted conduct poses unique constitutional problems and must be avoided.”); *United States v. Papakee*, 573 F.3d 569, 578 (8th Cir. 2009) (Bright, J., dissenting), (“But I will reiterate that the use of ‘acquitted conduct’ at sentencing in federal district courts is uniquely malevolent. We must end the pernicious practice of imprisoning a defendant

for crimes that a jury found he did not commit. It is now incumbent on the Supreme Court to correct this injustice.”) (internal citation and quotation marks omitted).

Although this Court has never held that use of acquitted conduct at sentencing violates Due Process and the Sixth Amendment, Courts of Appeal routinely hold that it has. And because of these holdings, any appellate argument alleging violation of constitutional rights is doomed to fail from the start: “Because the District Court did not abuse its discretion by applying settled and binding precedent to the facts before it (the only way in which Bell asserts the District Court erred here), we affirm.”

United States v. Bell, 811 Fed. Appx. at 10.

Mr. Bell submits that the time is ripe for this Court to address this issue head on so that Mr. Bell and other defendants in Bell’s position can be sentenced fairly and be afforded the constitutional protections of the Due Process Clause and the Sixth Amendment.

II. Due Process Rights Are Violated when Sentencing Is Based on Acquitted Conduct

A district court violates a defendant’s Fifth Amendment Due Process Rights when it increases the defendant’s punishment conduct based on facts rejected by a jury, but which the sentencing court nevertheless finds as proven by a preponderance of the evidence. As this Court has held, the Fifth Amendment’s Due Process Clause requires every element of a crime to be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362 (1970). Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *United States v. Booker*, 543 U.S. 220 (2005), this requirement includes any fact that alters the Sentencing Guideline range. By using the acquitted

conduct to increase a defendant's sentence, the sentencing court violates a defendant's Fifth Amendment Due Process rights.

III. Sixth Amendment Rights Are Violated when a Defendant is Sentenced on Facts Rejected by a Jury

This Court has long recognized the sanctity of jury verdicts. The jury "has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). When a district court uses acquitted conduct to impose a greater sentence than it otherwise could, it denies the defendant's Sixth Amendment right to a jury trial. The Sixth Amendment right to a jury trial guarantees that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." *Apprendi*, 530 U.S. at 490. "The statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely based on facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303 (2004).

"While trial practices ca[n] change in the course of centuries and still remain true to the principles that emerged from the Framer's design, in the years since *Apprendi* this Court has not hesitated to strike down other innovations that fail to respect the jury's supervisory function." *United States v. Haymond*, 139 S. Ct. 2369, 2377, 204 L. Ed. 2d 897 (2019) (holding that a federal statute governing revocation of supervised release, authorizing a new mandatory minimum sentence based on a judge's fact-finding by a preponderance of the evidence, violated the Due Process Clause and the Sixth Amendment right to jury trial, as applied). By allowing judges

and prosecutors to override a jury's factual findings and sentence a defendant to a greater period of incarceration than s/he otherwise would have faced strikes at the very core of what the Sixth Amendment was meant to protect.

CONCLUSION

This case presents an ideal vehicle for resolution of the question presented. It would allow the Court to finally lay to rest what the *Watts* decision held and what it did not hold. It provides this Court with the opportunity to address concerns repeatedly raised both by district court and appellate court judges. Finally, it would give this Court the opportunity to reinforce the Founder's constitutional guarantees as set forth in the Due Process Clause and the Sixth Amendment.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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