No. 20-5689

IN THE SUPREME COURT OF THE UNITED STATES

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioner's Fifth and Sixth Amendment rights in considering conduct at issue in a charge that the jury did not find beyond a reasonable doubt, but that the court found by a preponderance of the evidence, in determining his sentence.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.D.C.):

United States v. Johnson, No. 17-cr-234 (Mar. 18, 2019)

United States Court of Appeals (D.C. Cir.):

United States v. Bell, No. 19-3020 (June 26, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 811 Fed. Appx. 7.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2020. The petition for a writ of certiorari was filed on September 10, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of possessing cocaine base (crack cocaine) with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and of using, carrying, or possessing a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1) (2012). Pet. App. 1a, 5a-6a. The district court sentenced petitioner to 130 months of imprisonment. Id. at 7a. The court of appeals affirmed. Id. at 1a-4a.

1. Petitioner was part of a drug-distribution operation that was active in and around the 2600 block of Birney Place, S.E., in Washington, D.C. Presentence Investigation Report (PSR) ¶ 15. Special agents with the Federal Bureau of Investigation (FBI) began investigating the operation around July 2015, and, in the course of their investigation, they obtained judicial authorization to intercept telephone calls to and from phones used by members of the drug-distribution group. Ibid. Between January and April 2017, the FBI intercepted six telephone calls from petitioner arranging to buy a total of 35 grams of crack cocaine from Wayne Holroyd, a crack-cocaine distributor. PSR ¶¶ 15, 19-20. Another Birney Place dealer, Lorenzo Moore, later testified at trial that he separately sold more than 28 grams of crack cocaine to petitioner, see C.A. App. 394-395, which petitioner then resold, PSR ¶ 18.

On March 8, 2017, the FBI intercepted a call from petitioner to Holroyd stating that he wanted "two." PSR ¶ 16. A law enforcement agent then observed petitioner meet briefly with Holroyd. Ibid. The FBI asked the United States Park Police to pull over petitioner's vehicle, which they did later that day. Ibid.; C.A. Supp. App. 29-34. During subsequent searches, the Park Police found a loaded .25 caliber handgun in petitioner's pocket and two plastic sandwich bags, hidden in petitioner's buttocks, containing roughly seven grams of crack cocaine. PSR ¶ 16; C.A. Supp. App. 37-39.

2. A federal grand jury charged petitioner with conspiring to distribute and to possess with the intent to distribute at least 28 grams of cocaine base, in violation of 21 U.S.C. 846; possessing cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and using, carrying, or possessing a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1) (2012). C.A. App. 34-35, 37, 49. A jury found petitioner guilty on the possession-with-intent-to-distribute and firearm counts but acquitted petitioner on the conspiracy count. Id. at 452-454.

In its presentence report, the Probation Office determined that petitioner possessed at least 35 grams of crack cocaine with the intent to distribute it, based on the evidence of his arranged purchases from Holroyd and Moore. PSR ¶¶ 18-20, 22. The Probation Office thus calculated a base offense level of 24 for petitioner's

possession-with-intent-to-distribute count. PSR ¶ 43; see Sentencing Guidelines § 2D1.1(c)(8) (providing a base offense level of 24 where the offense involved at least 28 but less than 112 grams of cocaine base).

Petitioner objected to that base offense level, arguing that a lower quantity of drugs should be attributed to him because the jury had acquitted him on the conspiracy count. C.A. App. 474-478; Addendum to PSR. Petitioner noted that the possession-with-intent-to-distribute count on which he was convicted related specifically to his possession of about seven grams of crack cocaine at the time of his arrest, and not the larger quantity of crack cocaine he had purchased and redistributed in connection with the conspiracy offense on which he was acquitted. C.A. App. 474-475; see id. at 49. Although petitioner acknowledged that this Court's decision in United States v. Watts, 519 U.S. 148 (1997) (per curiam), allows a district court to consider acquitted conduct when determining the appropriate guidelines range, petitioner argued that doing so would violate his rights under the Fifth and Sixth Amendments. C.A. App. 474-478. Petitioner therefore asserted that his base offense level under the drug guideline should be 16. Id. at 478; Addendum to PSR; see Sentencing Guidelines § 2D1.1(c)(12) (providing a base offense level of 16 where the offense involved at least 5.6 but less than 11.2 grams of cocaine base).

Relying on circuit precedent, the district court overruled petitioner's objection and agreed with the Probation Office that 24 was the correct base offense level under the drug guideline. C.A. App. 490-492 (citing United States v. Settles, 530 F.3d 920 (D.C. Cir. 2008), cert. denied, 555 U.S. 1140 (2009)). The court "credited * * * the testimony of Lorenzo Moore" and relied on "the intercepted phone calls between [petitioner] and Mr. Holroyd" to find by a preponderance of the evidence that petitioner had obtained at least 35 grams of cocaine base. Id. at 491-492. The court also found that this conduct was "highly relevant to the convicted conduct" because "[i]t shows a pattern and practice of which the convicted conduct was a part." Id. at 491.

After applying an additional enhancement, the district court determined that petitioner's total offense level for his drug conviction was 26, which resulted in a guidelines range of 63 to 78 months of imprisonment for that count. C.A. App. 497-498. The court ultimately imposed an aggregate sentence of 130 months of imprisonment, consisting of 70 months of imprisonment for the possession-with-intent-to-distribute offense and a consecutive term of 60 months of imprisonment for the firearm offense. Pet. App. 7a; C.A. App. 512.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-4a. The court noted that petitioner acknowledged that "the state of the law permits sentencing based on acquitted conduct" and sought only "to preserve" his Fifth and Sixth

Amendment arguments "for when that law is changed." Id. at 3a (citations omitted). Citing this Court's decision in Watts, the court of appeals determined that the district court "did not abuse its discretion by applying settled and binding precedent to the facts before it." Ibid.

ARGUMENT

Petitioner contends (Pet. 6-8) that the district court violated the Fifth and Sixth Amendments by sentencing him based on conduct that the court found by a preponderance of the evidence, but that was at issue in a charge that the jury did not find beyond a reasonable doubt. This Court has repeatedly and recently denied petitions for writs of certiorari challenging the reliance on acquitted conduct at sentencing.[1] And for the reasons set forth in the government's briefs in opposition to the petitions for writs of certiorari in Asaro v. United States and Martinez v. United States, this case likewise does not warrant the Court's review. See Br. in Opp. at 7-15, Asaro v. United States, 140 S. Ct. 1104

[1] See, e.g., Ludwikowski v. United States, No. 19-1293 (Nov. 23, 2020); Santiago v. United States, No. 20-5436 (Oct. 5, 2020); Duheart v. United States, 140 S. Ct. 2819 (2020) (No. 19-8342); Price v. United States, 140 S. Ct. 2743 (2020) (No. 19-7479); Rhodes v. United States, 140 S. Ct. 2678 (2020) (No. 19-7215); Bagcho v. United States, 140 S. Ct. 2677 (2020) (No. 19-7001); Baxter v. United States, 140 S. Ct. 2676 (2020) (No. 19-6647); Mosley v. United States, 140 S. Ct. 2537 (2020) (No. 19-7516); Martinez v. United States, 140 S. Ct. 1128 (2020) (No. 19-5346); Asaro v. United States, 140 S. Ct. 1104 (2020) (No. 19-107); see also Br. in Opp. at 14, Asaro, supra (No. 19-107) (collecting additional cases).

(2020) (No. 19-107); Br. in Opp. at 8-15, Martinez v. United States, 140 S. Ct. 1128 (2020) (No. 19-5346).[2]

1. In accord with every other federal court of appeals with criminal jurisdiction, see Br. in Opp. at 12, Asaro, supra (No. 19-107); Br. in Opp. at 12-13, Martinez, supra (No. 19-5346), the court of appeals below correctly recognized that this case is controlled by United States v. Watts, 519 U.S. 148 (1997) (per curiam). In Watts, this Court explained that under the then-mandatory Sentencing Guidelines, "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." Id. at 157. The district court's sentencing determination in this case reflects a straightforward application of that principle.

Petitioner suggests (Pet. 4) that the Court's holding in Watts is limited to the double jeopardy context. But, as explained in detail in the government's brief in opposition in Asaro, Watts's clear import is that courts may take acquitted conduct into account at sentencing without offending either the Fifth or Sixth Amendments to the Constitution. See Br. in Opp. at 9-12, Asaro, supra (No. 19-107).

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[2] We have served petitioner with a copy of the government's briefs in opposition in Asaro and Martinez. Those briefs are also available on the Court's electronic docket.

To the extent that petitioner suggests (Pet. 6-8) that United States v. Booker, 543 U.S. 220 (2005), Blakely v. Washington, 542 U.S. 296 (2004), and Apprendi v. New Jersey, 530 U.S. 466 (2000), are inconsistent with Watts, he is mistaken. In holding that the Sentencing Guidelines are advisory rather than mandatory, the Court in Booker took care to confirm that a judge may constitutionally base a defendant's sentence on conduct that was not found by the jury, so long as the sentence is at or below the statutory maximum. After emphasizing a judge's "broad discretion in imposing a sentence within a statutory range," 434 U.S. at 233, Booker cited Watts for the proposition that "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found unproved (beyond a reasonable doubt)," id. at 251 (emphasis omitted).

Similarly, neither Apprendi, where this Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury," 530 U.S. at 490, nor Blakely, which extended that principle to a state-law system of mandatory sentencing guidelines, see 542 U.S. at 303-304, suggests that petitioner's sentence violates the Fifth or Sixth Amendments. The statutory maximums for petitioner's offenses of conviction are 240 months of imprisonment for the drug conviction and life imprisonment for the firearm conviction, see PSR ¶¶ 108-109, and the Sentencing Guidelines are advisory rather than mandatory,

Booker, 543 U.S. at 245. Petitioner's 70-month sentence for the drug offense and 60-month sentence for the firearm offense thus do not exceed the statutory maximums for those offenses and do not violate Booker, Apprendi, Blakely, or any other decision of this Court.

2. Petitioner asserts (Pet. 6, 8) that this Court's review is warranted because the courts of appeals have uniformly recognized that the use of acquitted conduct at sentencing does not violate the Fifth and Sixth Amendments. The absence of any disagreement in the courts of appeals on the question presented is a reason to deny review, not to grant it. See Sup. Ct. R. 10. And in any event, this Court's intervention is not necessary to address any asserted policy concerns with the correct sentencing scheme. Congress currently is considering a bill to amend 18 U.S.C. 3661 to prohibit consideration of acquitted conduct at sentencing except in mitigation, see S. 2566, 116th Cong., 1st Sess. (2019); the Sentencing Commission can promulgate Guidelines to preclude reliance on acquitted conduct; and individual sentencing courts retain discretion to consider the extent to which acquitted conduct should carry weight in their assessment of a defendant's "background, character, and conduct" for the purpose of imposing a sentence in a given case, 18 U.S.C. 3661. See Br. in Opp. at 15, Asaro, supra (No. 19-107); Br. in Opp. at 14-15, Martinez, supra (No. 19-5346).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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