No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

_____

***DAKOTA MANUCY CONSTANTIN*, Petitioner**

v.

***FLORIDA*, Respondent.**

On Petition for a Writ of Certiorari
to the Florida Fifth District Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

CONSTANTIN WAS DENIED DUE PROCESS WHEN THE SENTENCING COURT RELIED UPON UNCHARGED CONDUCT IN IMPOSING A SENTENCE IN EXCESS OF THAT RECOMMENDED BY THE ADVISORY STATE SENTENCING GUIDELINES.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

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The Petitioner, DAKOTA MANUCY CONSTANTIN, respectfully prays that a writ of certiorari be issued to review the decision of the Florida Fifth District Court of Appeals in this case.

OPINION BELOW

The Florida Fifth District Court of Appeals decision, *Constantin v. Florida*, is reported at 301 So. 3d 449. The decision entered July 24, 2020 and rehearing *en banc* was denied September 1, 2020. A copy of the opinion is included in the attached appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the Florida Fifth District Court of Appeals pursuant to Title 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime . . . without due process of law.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Judge Jay P. Cohen of the Florida Fifth District Court of Appeal set forth the relevant procedural history and facts in his dissent to the panel opinion in the state direct appeal below:

> Dakota Constantin ("Constantin") appeals from the judgment and sentence entered after he pled no contest to possession with intent to sell cannabis while armed and tampering with evidence. He raises two points on appeal, only one of which merits discussion. Constantin argues that the trial court committed fundamental error by considering improper sentencing factors. I agree and would reverse and remand for resentencing before a different judge.
>
> This case involves a number of criminal defendants, some of whom were juveniles at the time of the incident, including Constantin. It is undisputed that Sarah Itani and Kahlil Cooke arranged a meeting with Race Arthur to purportedly purchase marijuana from Arthur. In actuality, Itani and Cooke, along with two other individuals, Dalton Faulkner and Gerald Evans, intended to rob Arthur. Evans was armed with a handgun, while Cooke had brass knuckles supplied by Faulkner.
>
> Constantin, who was Arthur's cousin, accompanied him to the drug deal, and both were armed. It is undisputed that Arthur arranged the deal, possessed the drugs, and was going to receive the proceeds from the transaction. Upon arrival, while Itani pretended to inspect the merchandise, Cooke and Evans, wearing masks, approached and began beating Constantin and Arthur. During the struggle, gunshots were exchanged by both sides, which resulted in Constantin and Arthur shooting and killing Cooke.
>
> The State charged the parties in two distinct groups. The first group consisted of Constantin and Arthur, who were charged with possession with intent to sell cannabis while armed and tampering with evidence, second and third-degree felonies, respectively. The second group

included those who conspired to rob Arthur. Each individual within that group was charged with varying levels of second-degree felony murder in addition to several forms of robbery. Those charges ranged from life felonies to second-degree felonies, and each person within the second group faced sentences upwards to life imprisonment. All parties entered no contest pleas.

Itani, Arthur, and Constantin were sentenced on the same day. Itani was sentenced first. The trial court commented that it hoped that people who thought marijuana was "not a big deal" would pay attention to the case, because what "seemed initially like a simple marijuana drug transaction ended up with one person dead and a bunch of young people going to spend a lot of their time in prison and their lives ruined as well." Itani received a sentence of twelve years in the Department of Corrections.

The sentencing of Arthur and Constantin followed. During their sentencing, the State conceded that it could not charge either Arthur or Constantin with Cooke's death because it had insufficient evidence to do so. The State noted:

> As you know, the current state of the law is that it must be disproven that it was not selfdefense. And in this particular case the way the circumstances of these facts and evidence fell out it was impossible to disprove that this was self-defense.
>
> The deceased individual and his friends were committing a forcible felony on these young men, which by the state of the law provides a presumption that they were in fear of their life and was justified in using deadly force. The evidence in this case also showed that the two bullets that struck the deceased's body entered into his side, not in the front, not in the back. There was no clarity. It made it very—and it was—it was—we strongly considered those charges, but as an officer of the court we can't bring charges unless we can prove it, and in this particular case that was the reason we charged the case the way we did.

> And it's brought a lot of consternation to a lot of individuals, and rightfully so, and I understand that, and would feel the same way if I was in their position as well, but, again, I'm an officer of the court. Our office is—we are made up of officers of the court that can only pursue cases where there is evidence.

Despite that acknowledgement and the significant differences in how the two groups were charged, the State took the position that all the participants should be treated the same: that if Arthur and Constantin had not agreed to do a drug deal, "this wouldn't have happened."

The trial court's comments in sentencing Arthur and Constantin were consistent with the State's position. In sentencing Arthur, the trial court remarked:

> The bottom line here is you brought a gun to a drug deal. You were engaged in a drug deal. You could have made the decision to not engage in a drug deal. You could have made the decision to not bring a gun to a drug deal. Had you made either of those decisions, you wouldn't be standing here facing the serious charges that you're facing today and the decedent in this case would still be alive.
>
> It is one thing to assert self-defense, and I appreciate the State clearing up why they did not charge Mr. Arthur and [Constantin] with felony murder. I understand the current state of the law with regards to self-defense does make it difficult for the State in facts like this to bring that type of charge. But it's one thing to engage in self-defense and shoot somebody when you're engaging in lawful activities. It's another thing to engage in selfdefense and shoot somebody when you are not engaged in lawful activities. You were not engaged in lawful activities. You were engaged in a drug deal. As a result of your actions, somebody's dead.

When sentencing Constantin, the trial court repeated its comments from Itani's sentencing that it wished other juveniles who thought "marijuana [was] not a big deal" could see what happened in the case. The court then told Constantin:

> I cannot, again, lose sight of the fact that somebody's dead, that somebody is dead as a result of a drug deal that you participated in. Wasn't your weed, you weren't going to get the money, but you knew a drug deal was going to happen. I mean, you testified to that. That's no mystery.
>
> You knew a drug deal was going to happen, you took a gun there, and because of that drug deal that you and your cousin were involved in, because of bringing a gun, and because of the conduct of the folks on the other side of this drug deal that went bad, there's somebody dead today, and dead in part because of the bullets that you fired and dead in part because of the bullet that your cousin fired and dead in part because of the conduct of the decedent and—his cohorts as well. So I take all that into consideration when I impose sentence in this case.

Constantin, who was seventeen years old at the time of the offense, had no prior criminal history. The Department of Juvenile Justice recommended a probationary sentence and the State of Florida PreSentence Investigation recommended a youthful offender sentence followed by community control. Constantin's sentencing guideline scoresheet called for a non-state prison sentence. Despite these recommendations, the trial court sentenced Constantin to ten years on the first count and five years on the second count in the Department of Corrections, with the sentences to run concurrently.

On appeal, Constantin argues that the trial court improperly considered an uncharged, unsubstantiated allegation in imposing a ten-year sentence. He acknowledges that he failed to contemporaneously object to the trial court's comments. As a result, this Court may consider the error only if it is fundamental. *Jackson v. State*, 983 So. 2d 562, 574

(Fla. 2008).

Appellate courts review claims that a sentence was based on consideration of improper factors under the de novo standard. *Kenner v. State*, 208 So. 3d 271, 277 (Fla. 5th DCA 2016). Although appellate courts generally may not review a sentence that is within statutory limits under the Criminal Punishment Code, "an exception exists when the trial court considers constitutionally impermissible factors in imposing a sentence." *Berben v. State*, 268 So. 3d 235, 237 (Fla. 5th DCA 2019) (citing *Kenner*, 208 So. 3d at 277). One such impermissible factor is a trial court's consideration of uncharged, unsubstantiated crimes or misconduct. *Nusspickel v. State*, 966 So. 2d 441, 445 (Fla. 2d DCA 2007) ("Unsubstantiated allegations of misconduct or speculation that the defendant probably committed other crimes may not be relied upon by a trial court in imposing sentence."). "'[W]hen a trial court relies on impermissible factors in sentencing a defendant, the court violates the defendant's due process rights,' committing fundamental error." *Berben*, 268 So. 3d at 237 (alteration in original) (quoting *N.D.W. v. State*, 235 So. 3d 1001, 1002 (Fla. 2d DCA 2017)).

There is no need to speculate or guess whether the trial court, in sentencing Constantin on a drug-related charge, punished Constantin for uncharged conduct. During the course of the sentencing, the trial court made repeated references to Cooke's death and held both Arthur and Constantin responsible, despite neither being charged in his death. The similarity in sentences imposed between the two groups only serves to substantiate Constantin's claim that the trial court considered and punished Constantin for Cooke's death in imposing sentence.

Additionally, the trial court ignored the State's concession that it could not disprove that Constantin had acted in self-defense. Although Constantin's use of force during the drug transaction could have been a relevant factor in determining whether he lawfully used deadly force, see § 776.012(2), Fla. Stat. (2018), the State acknowledged that it could not charge Constantin due to the circumstances of the incident. The State explained to the trial court that it had "strongly considered" charging Constantin with Cooke's death but decided not to because it

> would have been "impossible" to overcome the presumption that Constantin had used lawful force.
>
> The Legislature created the offense of possession of cannabis with intent to sell while armed. It determined the points to be used in sentencing that offense. The Legislature specifically factored in the bringing of a gun to a drug deal, a fact prominently mentioned by the trial court. The State was well aware of those elements. It admitted having considered bringing more serious charges against Constantin, and acknowledged there was insufficient evidence to do so. It is disingenuous for the State to decline to charge Constantin with Cooke's death either directly or as a principal, and then argue that Constantin should receive the same sentence as those charged with Cooke's death.
>
> In summation, when the trial court sentenced Constantin, it improperly considered the uncharged death of Cooke and whether Constantin had engaged in lawful self-defense, which infringed on his due process rights. See *Tharp v. State*, 273 So. 3d 269, 271 (Fla. 2d DCA 2019) (stating that improper considerations of subsequent uncharged conduct in sentencing violates defendant's due process rights); see also *Berben*, 268 So. 3d at 237.
>
> Accordingly, I would reverse and remand for resentencing before a different judge.

Constantin v. State, 301 So. 3d 449, 449-453 (Fla. 5th DCA 2020) (Cohen, J., dissenting) (footnotes omitted).

REASONS FOR GRANTING THE WRIT

CONSTANTIN WAS DENIED DUE PROCESS WHEN THE SENTENCING COURT RELIED UPON UNCHARGED CONDUCT IN IMPOSING A SENTENCE IN EXCESS OF THAT RECOMMENDED BY THE ADVISORY STATE SENTENCING GUIDELINES.

Justice Kavanaugh in his concurrence in *United States v. Bell*, 808 F.3d 926, 927-28 (D.C. Cir. 2015) explained the problem and in effect why certiorari should be granted in this case:

> Here's the issue: Based on a defendant's conduct apart from the conduct encompassed by the offense of conviction — in other words, based on a defendant's uncharged or acquitted conduct — a judge may impose a sentence higher than the sentence the judge would have imposed absent consideration of that uncharged or acquitted conduct. The judge may do so as long as the factual finding regarding that conduct does not increase the statutory sentencing range for the offense of conviction alone. The Sixth Amendment's Jury Trial Clause is deemed satisfied because the judge's factual finding does not increase the statutory sentencing range established by the jury's finding of guilt on the offense of conviction. See *Booker*, 543 U.S. at 267 (remedial opinion).[1] And the Fifth Amendment's Due Process Clause is deemed satisfied because a judge finds the relevant conduct in a traditional adversarial procedure. See *McMillan v. Pennsylvania*, 477 U.S. 79, 91-93, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986).
>
> Judge Millett cogently expresses her concern about sentencing judges' reliance on acquitted conduct at sentencing. Even though the Sentencing Guidelines are now advisory, rather than mandatory, she advocates barring consideration of acquitted conduct in calculating the advisory Guidelines offense level.

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[1] *United States v. Booker*, 543 U.S. 220 (2005).

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, 382 U.S. App. D.C. 7 (D.C. Cir. 2008); see also *United States v. Henry*, 472 F.3d 910, 918-22, 374 U.S. App. D.C. 149 (D.C. Cir. 2007) (Kavanaugh, J., concurring). Of course, resolving that concern as a constitutional matter would likely require a significant revamp of criminal sentencing jurisprudence — a revamp that the Supreme Court lurched toward in cases such as *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), but backed away from in its remedial opinion in *Booker*.

Taken to its logical conclusion, the *Blakely* approach would require a jury to find beyond a reasonable doubt the conduct used to set or increase a defendant's sentence, at least in structured or guided-discretion sentencing regimes. A judge could not rely on acquitted conduct to increase a sentence, even if the judge found the conduct proved by a preponderance of the evidence. A judge likewise could not rely on uncharged conduct to increase a sentence, even if the judge found the conduct proved by a preponderance of the evidence.

At least as a matter of policy, if not also as a matter of constitutional law, I would have little problem with a new federal sentencing regime along those lines. Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial. If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20-year sentence? Cf. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

But that would be a constitutional rule far different from the one we now have or have historically had. As the Supreme Court has said many times: "We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. . . . For when a trial judge exercises his discretion to select a specific sentence

> within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *Booker*, 543 U.S. at 233; see also *Williams v. New York*, 337 U.S. 241, 246-52, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). To quote a recent case: "While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing. . . . We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." *Alleyne v. United States*, 133 S. Ct. 2151, 2161 n.2, 2163, 186 L. Ed. 2d 314 (2013).

United States v. Bell, 808 F.3d 926, 927-28 (D.C. Cir. 2015) (Kavanaugh, J., Concurring)

As with the federal sentencing guidelines, so to the Florida sentencing guidelines are advisory. They must be correctly determined, but once determined a sentencing judge may impose any sentence up to the statutory maximum. The Florida sentencing guidelines in this case called for a non-state prison sentence, meaning a sentence of a year or less in a county jail or on community control or probation. Instead the judge ignored the sentencing guidelines and solely based on uncharged conduct, imposed a ten year prison sentence on this first offense juvenile.[2]

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[2] A legal fact not explained in Judge Cohen's dissent, *infra*, is that under Florida's Stand Your Ground immunity statutes, not only was such uncharged conduct unchargeable, as the state candidly conceded at sentencing, but it should have been barred from consideration at sentencing based on this same statutory immunity. Under the Stand Your Ground law, a person is generally "immune from criminal prosecution and civil action" when that person justifiably uses or threatens to use force under certain circumstances. § 776.032(1), Fla. Stat. (2017); see ch. 2005-27, Laws of Fla. The criminal immunity "includes arresting, detaining in

Justice, then Judge, Kavanaugh in *Bell* explained that it "would be a constitutional rule far different from the one we now have or have historically had" to limit the use of uncharged conduct at sentencing.

Now is the time for this Court to adopt a "far different rule" and prohibit sentencing judges from increasing sentences based on uncharged or acquitted conduct.

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custody, and charging or prosecuting the defendant." § 776.032(1), Fla. Stat.

CONCLUSION

Based on the foregoing argument, Petitioner Constantin respectfully requests this Honorable Court grant certiorari to decide the above question.

Respectfully submitted,

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