No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KEENAN ROLLERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a sentencing judge increasing a criminal defendant's punishment for acts charged but acquitted by the jury violates the jury trial guarantee of the Sixth Amendment and the Due Process Clause of the Fifth Amendment.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner, defendant-appellant below, is Keenan Rollerson.

Respondent is the United States of America, appellee below.

RELATED PROCEEDINGS

Seventh Circuit Court of Appeals:

United States v. Keenan Rollerson, No. 20-2258, United States Court of Appeals for the Seventh Circuit. Judgment entered July 30, 2021. *United States v. Rollerson,* 7 F.4th 565 (CA7 2021)

United States District Court for the Southern District of Indiana:

United States v. Rollerson, No. 1:17-cr-00101. Judgement and conviction entered July 2, 2020.

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United States v. Rollerson, 7 F.4th 565 (CA7 2021)

JURISDICTION

The court of appeals' judgment was entered on July 30, 2021. Mr. Rollerson's Petition is thus due by October 28, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "[n]o person shall … be deprived of … liberty … without due process of law …."

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a … trial, by an impartial jury …."

STATEMENTOF THE CASE

This case presents a question that is fundamental to the fairness of the criminal justice system: Whether a sentencing judge may punish an individual for crimes that the jury case has concluded the individual did not commit in that very same case.

That is precisely what happened here. Finding by a preponderance of the evidence that Petitioner Keenan Rollerson had committed multiple offenses for which the jury had just acquitted him, the district court increased Petitioner's base offense level under the Guidelines, thereby more than doubling his sentence. Doing so violated Petitioner's rights to due process and to have his culpability determined conclusively by a jury of his peers. Worse yet, this same sentencing practice has been sanctioned by every Court of Appeals in mistaken reliance on this Court's decisions in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), and *United States*

v. Booker, 543 U.S. 220 (2005). Those decisions do not support the sentence enhancement imposed on Petitioner here for unproven conduct for which the jury acquitted him at trial.

A. District Court Proceedings

The government asserted that on four occasions, Rollerson sold heroin and fentanyl to an informant at an Indianapolis apartment. *United States v. Rollerson*, 7 F.4th 565, 568 (7th Cir. 2021). The police used these controlled buys to secure search warrants for the apartment and for Rollerson's home. After setting up surveillance at both addresses, the police stopped Rollerson for speeding and a gun and marijuana from his car. Rollerson admitted the gun and marijuana were his. *Id.*

Rollerson was in possession of a key to a stash house apartment where he told police they would find multiple kilograms of heroin hidden. *Id.* The search of the apartment actually uncovered four kilograms of fentanyl, fifty-two grams of heroin, ninety-seven grams of cocaine, and two hundred thirty-six grams of tramadol, as well as digital scales, and multiple firearms. *Id.*

A grand jury indicted Rollerson on eight charges: Possession with Intent to Distribute Fentanyl (Count 1), Heroin (Count 2), Cocaine (Count 3), and Tramadol (Count 4), as well as Unlawful Possession of Firearms by a Convicted Felon (Counts 5–8). The case went to trial, where the jury convicted Rollerson on Counts 2 and 5–8 (heroin and firearm offenses) but acquitted him on Counts 1, 3, and 4 (the fentanyl, cocaine, and tramadol). *Id.*

The Presentence Investigation Report (PSR) recommended a Sentencing Guideline range of 262 to 327 months for Count 2, based upon a quantity of drugs that included not only the heroin in the offense of conviction but also the fentanyl, cocaine, and tramadol from the acquitted counts and the four controlled buys used to obtain the search warrants. *Id.* Without

these uncharged and acquitted drug quantities, Rollerson's guideline range for Count 2 would have been a much lower 110 to 137 months. *Id.* at 569.

The district court overruled Rollerson's objections to the use of acquittal conduct and explained that the trial evidence connecting Rollerson to the stash house—including but not limited to the mail addressed to him and the key in his possession—established his possession of those drugs by a preponderance of the evidence despite the jury's verdict. *Id.* Accordingly, the judge sentenced Rollerson within the recommended guideline range: 276 months for Count 2, as well as 120 months for each gun charge (Counts 5–8), all to run concurrently. *Id.*

B. The Opinion Of The Court Of Appeals

Mr. Rollerson appealed his sentence as unconstitutional and substantively unreasonable, both based on the use of acquitted conduct and the additional unproven uncharged transactions with the undercover informant. The Seventh Circuit rejected his challenge, finding that the possession of the drugs for which Mr. Rollerson had been acquitted was supported by a preponderance of the evidence and that "the practice of considering acquitted conduct at sentencing is controversial but is clearly allowed if the conduct is proven by a preponderance of the evidence." *Id.* at 570 & n. 1 (*citing United States v. Watts*, 519 U.S. 148, 149, (1997); *United States v. Waltower*, 643 F.3d 572, 577 (CA7 2011). The Seventh Circuit thus affirmed Petitioner's sentence.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NECESSARY TO CORRECT THE CIRCUITS' MISAPPLICATION OF THIS COURT'S FIFTH AND SIXTH AMENDMENT JURISPRUDENCE.

The presumption that a defendant is innocent until proven guilty is "axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."

Coffin v. United States, 156 U.S. 432, 453 (1895). To defeat that presumption and obtain a conviction, the government must surmount two procedural hurdles. First, the Government must prove, beyond a reasonable doubt, that the defendant committed each element of the charged offense. *See U.S. Const, amend. V*; *In re Winship*, 397 U.S. 358, 361-364 (1970). Second, the government must make that showing to the satisfaction of a jury of the defendant's peers. *U.S. Const, amend. VI*; *see Williams v. Florida*, 399 U.S. 78, 100 (1970).

The Seventh Circuit Court of Appeals violated both of these requirements by sanctioning the district court's increase of Keenan Rollerson's sentence for heroin possession based on crimes for which he was acquitted by the jury (possession of fentanyl, tramadol, and cocaine with intent to distribute). The primary case relied upon by the Seventh Circuit in denying Petitioner's appeal, and indeed the primary case ultimately relied upon in every Circuit in determining that district courts may sentence a criminal defendant based on conduct for which they were acquitted by a jury is *United States v. Watts*, 519 U.S. 148 (1997).

In *Watts*, this Court held that "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. Stressing that convictions require proof beyond a reasonable doubt, whereas sentencing factors require proof by only a preponderance of the evidence, the Court observed that "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Id.* at 156 (*quoting Dowling v. United States*, 493 U.S. 342, 349 (1990)), in which the Court noted that acquitted conduct could nevertheless be presented as evidence under Fed. R. Evid. 404(b)).

Although *Watts* was a *per curiam* opinion, it was not without controversy even at the time it was issued. Dissenting in *Watts,* Justice Stevens argued that the decision was a perverse result that did not follow from any precedent or statutory interpretation. *Id.* at 165. Justice Stevens noted that the court's opinion ignored "the fact that respected jurists all over the country have been critical of the interaction between the Sentencing Guidelines' mechanical approach and the application of a preponderance of the evidence standard to so-called relevant conduct." *Id.*, n3. (*citing United States v. Silverman*, 976 F.2d 1502, 1519, 1527 (C.A.6 1992) (Merritt, C. J., dissenting); Id., at 1533 (Martin, J., dissenting); *United States v. Concepcion*, 983 F.2d 369, 389, 396 (C.A.2 1992) (Newman, C. J., concurring) ("A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal"); *United States v. Galloway*, 976 F.2d 414, 436 (C.A.8 1992) (Bright, J., dissenting, joined by Arnold, C. J., Lay, J., and McMillian, J.); *United States v. Restrepo*, 946 F.2d 654, 663 (C.A.9 1991) (Pregerson, J., dissenting, joined by Hug, J.); *id.*, at 664 (Norris, J., dissenting, joined by Hug, J., Pregerson, J., and D.W. Nelson, J.); *United States v. Lanoue*, 71 F.3d 966, 984 (C.A.1 1995) ("Although it makes no difference in this case, we believe that a defendant's Fifth and Sixth Amendment right to have a jury determine his guilt beyond a reasonable doubt is trampled when he is imprisoned (for any length of time) on the basis of conduct of which a jury has necessarily acquitted him"). Justice Stevens ultimately concluded that "[t]he 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 [longstanding procedural requirements enshrined in our constitutional] jurisprudence" *Id.* 169.

Separately dissenting in *Watts*, Justice Kennedy criticized the Court for "shrugging off" the "distinction between uncharged conduct and conduct related to a charge for which the

defendant was acquitted." *Id.* 170. Justice Kennedy noted that the case "raises a question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system" and "that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal." *Id.*

In *United States v. Booker*, the Court appeared to limit *Watts* and minimize its precedential value. *See* 543 U.S. 220, 240 n.4 (2005) ("*Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us in these cases." (*citing* 519 U.S. at 171 (Kennedy, J., dissenting))). However, Courts of Appeal have broadly held that *Watts* survived *Booker* and thus permit reliance on evidence of acquitted conduct by sentencing courts. *See* Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235, 258-60 & nn. 142-52 (2009).

But the practice of relying on acquitted conduct in sentencing has not gone unquestioned among federal judges. *See, e.g., United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part) ("[T]here are good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness ...."); *id.* at 408 (Millett, J., concurring) (agreeing that Circuit precedent compelled the court's conclusion but writing separately to stress that "the constitutionally troubling use of acquitted conduct" to increase a sentence "guts the role of the jury in preserving individual liberty and preventing oppression by the government"); *United States v. Canania*, 532 F.3d 764, 778 (8th Cir. 2008) (Bright, J., concurring) (noting that "the consideration of 'acquitted conduct' undermines the notice requirement that is at the heart of any criminal proceeding" and wondering

"what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing"). As Justice Breyer has explained, in certain cases it would be "egregious" to "punish[] an offender convicted of one crime as if he had committed another." *Apprendi v. New Jersey*, 530 U.S. 466, 562 (2000) (Breyer, J., dissenting). For example, it would violate due process to charge "an offender with five counts of embezzlement" and "ask [] the judge to impose maximum and consecutive sentences because the embezzler murdered his employer," *id.* - or to ask "a judge to sentence an individual for murder though convicted only of making an illegal lane change *Blakely v. Washington*, 542 U.S. 296, 344 (2004) (Breyer, J., dissenting). Justice Kavanaugh has gone so far as to state that reliance on acquitted conduct in sentencing "seems a dubious infringement of the right[] to due process." *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc), cert. denied, 137 S. Ct. 37 (2016).

Some state high courts, too, have rejected the finding of *Watts. State v. Koch,* 107 Hawai'i 215, 112 P.3d 69, 79 (2005) (holding that the circuit court had erred by assuming, in sentencing the defendant, that he "had engaged in unlawful conduct of which he had been expressly acquitted"). *People v. Beck*, 504 Mich. 605, 609, 939 N.W.2d 213, 216 (2019), *cert. denied sub nom. Michigan v. Beck*, 140 S. Ct. 1243 (2020) ("Once acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime."). *See, also, State v. Cote,* 129 N.H. 358, 375, 530 A.2d 775 (1987) (concluding that "the presumption of innocence is as much ensconced in our due process as the right to counsel,"); *State v. Marley*, 321 N.C. 415, 425, 364 S.E.2d 133 (1988) ("due process and fundamental fairness precluded the trial court from aggravating defendant's second degree murder sentence with the single element—premeditation and deliberation—which, in this case, distinguished first degree murder

after the jury had acquitted defendant of first degree murder"). Most recently, the Supreme Court of New Jersey held on September 21, 2021:

> We hold that the findings of juries cannot be nullified through lower-standard fact findings at sentencing. The trial court, after presiding over a trial and hearing all the evidence, may well have a different view of the case than the jury. But once the jury has spoken through its verdict of acquittal, that verdict is final and unassailable. The public's confidence in the criminal justice system and the rule of law is premised on that understanding. Fundamental fairness simply cannot let stand the perverse result of allowing in through the back door at sentencing conduct that the jury rejected at trial.

State v. Melvin, 248 N.J. 321, 258 A.3d 1075 (2021).

The Michigan and New Jersey Supreme Courts each distinguished *Watts* on the ground that it considered the use of acquitted conduct not through the lens of due process, but rather only in "the double-jeopardy context." *Beck*, 939 N.W.2d at 224; *Melvin*, 248 N.J. 321, 258. They further determined that case law relating to uncharged conduct was inapposite with respect to acquitted conduct and found that existing United States Supreme Court jurisprudence did not prevent them from holding that reliance on acquitted conduct at sentencing is barred by the Due Process Clause of the Fourteenth Amendment. *Id.*

These decisions underscore the sea change that has occurred in the Court's jurisprudence since 1997 when it decided *Watts*. In *Jones v. United States*, 526 U.S. 227, 232, (1999), and then *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court established the following constitutional rule: "[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, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. The Court further noted that its rule was grounded in the "Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment." *Id.* at 476. The "*Apprendi* revolution," as it has been called, has wrought

significant changes in sentencing practices in state and federal courts. *See generally United States v. Booker*, 543 U.S. 220 (2005). While not directly controlling of the issue in this Petition, *Apprendi* and its progeny reaffirm the centrality of a jury's fact-finding function when a court sentences a defendant. The course of development of jurisprudence since *Watts* demonstrates that its broad acceptance and expansion by the Circuits is unfounded and misplaced.

As the Court explained in *Blakely v. Washington*, 542 U.S. 296 (2004), "the judge's authority to sentence derives wholly from the jury's verdict." *Id.* at 306. And what the jury can give, it can also take away: Just as a conviction authorizes the judge to fashion a sentence that appropriately punishes the defendant for that crime, so too must an acquittal strip the judge of all power to impose punishment on the basis of that alleged-but-acquitted crime.

These principles reflect the longstanding and indispensable role of the jury in the criminal justice system. For centuries, the jury has functioned as a "circuitbreaker in the State's machinery of justice," *Blakely*, 542 U.S. at 306-07. That function "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Id.* at 305-06. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Id.* at 306.

The jury could not discharge its vital functions "if it were relegated to making a determination that the defendant at some point did something wrong, a [determination which would be a] mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish." *Id.* at 306-07. That, however, is exactly what acquitted-conduct sentencing achieves by freeing the judge to rely on alleged crimes expressly rejected by the jury as a basis for imposing a more severe sentence than he otherwise could. *See, e.g., United States v. Broxmeyer*, 699 F.3d 265, 298 (CA2 2012) (Jacobs, C.J., dissenting) (noting that, under

current circuit precedent, "the offense of federal conviction has become just a peg on which to hang a comprehensive moral accounting").

Permitting a defendant to be sentenced based upon conduct for which he has been acquitted is at odds with the Court's broader jurisprudence interpreting the procedural protections of the Fifth and Sixth Amendments. The Court has previously held, for example, that a conviction obtained in violation of a defendant's right to counsel cannot be used to enhance a sentence. *United States v. Tucker*, 404 U.S. 443, 449 (1972). There is no logic in a system that treats the product of ineffective representation more favorably than the outcome of a successful representation.

Sentencing based on acquitted conduct likewise undoes this Court's assurance that the Government may not evade Fifth and Sixth Amendment protections by effecting a "conversion from separate crime to sentence enhancement." *Blakely*, 542 U.S. at 307 n.ll.

In addition, sentencing consideration of acquitted conduct means that a defendant "can receive the same sentence whether he is convicted or acquitted" of a particular crime. *United States v. Concepcion*, 983 F.2d 369, 395 (CA2 1993) (Newman, J., dissenting from denial of rehearing *en banc*); *see also United States v. White*, 551 F.3d 381, 387 (CA6 2008) (*en banc*) (Merritt, J., joined by Martin, Daughtrey, Moore, Cole, and Clay, JJ., dissenting) (acquitted-conduct sentencing "violates both our common law heritage and common sense"); *United States v. Mercado*, 474 F.3d 654, 662 (CA9 2007) (B. Fletcher, J., dissenting) (acquitted-conduct sentencing "thwarts the express will of the jury").

This state of affairs is unacceptable in our criminal justice system. It is well established that "the law 'attaches particular significance to an acquittal."' *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980). And it is clear that, following conviction, a criminal defendant

"retains an interest in a sentencing proceeding that is fundamentally fair." *Betterman v. Montana*, 136 S. Ct. 1609, 1617 (2016). Sentencing a defendant based on conduct for which a jury has acquitted is flatly inconsistent with these fundamental constitutional principles.

In light of this Court's oft-repeated instruction that lower courts should "leav[e] to this Court the prerogative of overruling its own decisions," *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989), and, more significantly, the circuits' adherence to a misapplication of *Watts* that has persisted post-*Booker*, it is inconceivable that the Courts of Appeals will correct their course absent this Court's intervention. Consequently, the time is overdue for the Court to re-examine this issue and this case offers an ideal vehicle to do so.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

October 28, 2021
DATE

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