

No. _____

In the Supreme Court of the United States

DARIN M. OGDEN,

Petitioner.

v.

STATE OF IDAHO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment prohibits a state court from basing a criminal defendant's sentence on conduct for which a jury has acquitted the defendant.

RELATED PROCEEDINGS AND OPINION BELOW

The following proceeding are directly related to this case within the meaning of Rule 14.1(b)(iii).

Supreme Court of the State of Idaho, Docket Nos. 48301 & 48302.

Opinion of the Idaho Supreme Court Reported as: *State v. Ogden*, 519 P.3d 1198 (Idaho 2022).

District Court for the Fourth Judicial District of Idaho: *State v. Darin Ogden*, Ada County No. CR01-18-45881 and CR01-19-19834 (August 5, 2020).

JURISDICTION

The judgment of the Idaho Supreme Court for which Petitioner seeks review was entered on November 2, 2022. The Idaho Court affirmed Petitioner's sentence. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a) as Petitioner asserted below and asserts here the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

... nor shall any state deprive any person of life, liberty or property, without due process of law.

STATEMENT

A jury acquitted Darin Ogden of four counts of Lewd and Lascivious Conduct with a Minor and one count of Disseminating Materials Harmful to Minors. He was convicted of one count of Sexual Exploitation of a Child and one Count of Sexual Battery. The sentencing court considered the facts of the acquitted counts when imposing a 30-year sentence.

The Idaho Supreme Court vacated the Sexual Exploitation of Child conviction for evidentiary errors and affirmed the conviction and sentence for the Lewd Conduct conviction. In affirming the remaining sentence, the Idaho Court rejected Mr. Ogden's argument that the sentence should be vacated because the sentencing court should not have considered the facts related to the acquitted counts during sentencing.

The Idaho Supreme Court wrote:

[T]his Court has recognized that a trial court may specifically consider a “defendant’s prior conduct for which he was tried and acquitted.” *State v. Flowers*, 150 Idaho 568, 574, 249 P.3d 367, 373 (2011) (*citing United States v. Watts*, 519 U.S. 148, 156, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997)). The law plainly supports including a defendant’s past charged conduct, even if he has been acquitted of the charges:

Information that a sentencing court can rely upon includes a defendant’s past criminal behavior that resulted in a conviction, *Witte v. United States*, 515 U.S. 389, 397 [115 S.Ct. 2199, 132 L.Ed.2d 351] (1995); the defendant’s prior uncharged criminal conduct, *id.*; and the defendant’s prior conduct for which he was tried and acquitted. *United States v. Watts*, 519 U.S. 148, 156 [117 S.Ct. 633, 136 L.Ed.2d 554] (1997).

Id.

State v. Ogden, 519 P.3d 1198, 1215 (Idaho 2022).

REASONS FOR GRANTING THE WRIT

This State Court case raises a question which is also presented in the following

pending petitions for writ of certiorari in cases arising from the lower Federal Courts:

- *McClinton v. United States*, Docket No. 21-1557.
- *Luczak v. United States*, Docket No. 21-8190.
- *Shaw v. United States*, Docket No. 21-118.
- *Karr v. United States*, Docket No. 22-5345; and
- *Bullock v. United States*. Docket No. 22-5828.

The Petitioners in *Shaw v. United States, supra.*, and *Luzak v. United States, supra.*, present the question of whether this Court should overturn its decision in *United States v. Watts*, 519 U.S. 148 (1997). The Idaho Supreme Court relied upon *Watts* in rejecting Mr. Ogden's argument. *State v. Ogden*, 519 P.3d at 1215 (Appendix A).

Petitioner asks this Court to grant the writ of certiorari to the Idaho Supreme Court and stay the case pending resolution of the related cases. Upon resolution of those cases, this Court should summarily vacate the Idaho Supreme Court's affirmation of the sentence and remand the case for reconsideration. S.Ct. Rule 16.1.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted this 31st day of January 2023.

/s/Dennis Benjamin
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