

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

KENNETH WAYNE MORGAN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

***ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT***

PETITION FOR A WRIT OF CERTIORARI

JON M. SANDS
Federal Public Defender

*DANIEL L. KAPLAN
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700
* *Counsel of Record*

Date Sent by Federal Express Overnight Delivery: December 13, 2017

QUESTION PRESENTED

Is the right to jury trial guaranteed by the Sixth Amendment violated when a district court elevates a defendant's sentencing range under the United States Sentencing Guidelines on the basis of conduct of which the jury acquitted him?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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Petitioner Kenneth Wayne Morgan, Jr. respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 19, 2017.

OPINION BELOW

The court of appeals' memorandum (App. A) is designated "Not for Publication," but is available on Westlaw at 2017 WL 4150340. The district court's sentencing decision (App. C) is unreported.

JURISDICTION

The United States District Court for the District of Arizona had jurisdiction over the government's federal charges against Mr. Morgan pursuant to 18 U.S.C. § 3231. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 19, 2017. App. A at 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides as follows:

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 defense.

STATEMENT OF THE CASE

Kenneth Wayne Morgan, Jr. is a construction worker, field laborer, father of three, and member of the Gila River Indian Community (the Community), an

Indian tribe occupying a reservation just south of Phoenix, Arizona. In January of 2014 Mr. Morgan had a fight with his father's girlfriend's son Anthony Gutierrez during which Mr. Gutierrez sustained a laceration to the left side of his head. Several months later the government procured an indictment charging Mr. Morgan with two counts: assault resulting in serious bodily injury in violation of 18 U.S.C. §§ 113(a)(6) and 1153, and assault with a dangerous weapon in violation of 18 U.S.C. §§ 113(a)(3) and 1153. Mr. Morgan pleaded not guilty and invoked his right to a jury trial.

In its opening statement, the government asserted that the evidence would show that Mr. Morgan "ambushed" Mr. Gutierrez "with a knife, slashing him across the side of the head." Mr. Morgan's counsel asserted that the case "boil[ed] down to" "Who wielded the knife? Who used the knife first? Who took up the knife?" Mr. Morgan's counsel acknowledged that Mr. Morgan started the fight by punching Mr. Gutierrez, but noted that the evidence would not prove that Mr. Morgan was the one who introduced a knife into the fight.

The two trial witnesses who saw portions of the fight were Adrenann Thomas and Uriah Miguel, Jr. Neither of them claimed to have seen how Mr. Gutierrez was injured. Adrenann testified that when the fight took place she was living with Mr. Gutierrez and her four children in a house within the boundaries of the Community. It was evening, she and Mr. Gutierrez were in the kitchen, and Mr. Gutierrez was heating up food in the microwave oven. There was a knock at the door. Mr. Gutierrez opened it and returned to the microwave. Barbara Evans, who Adrenann

knew through family, came in, followed by Ms. Evans' girlfriend Candice Thomas. At first Adrenann did not notice anyone else, but then she saw Mr. Morgan "crouching down" behind the two women, looking "mad" and "determined." Suddenly Mr. Morgan emerged and punched Mr. Gutierrez, knocking him sideways. Adrenann screamed, grabbed her five-year-old son, ran out the back door, and missed the rest of the fight.

When she heard "everything get quiet," Adrenann went back inside. Mr. Morgan was gone. She called for Mr. Gutierrez, but he did not answer. She saw blood on the floor leading to her room, and noticed that the door to her room and the television were damaged. Eventually she found Mr. Gutierrez in the bathroom, bleeding from a head wound. She called 911. On cross-examination, Adrenann confirmed that she did not see Mr. Morgan with a knife, that Mr. Gutierrez was in the kitchen when the fight began, and that as a resident of the house, Mr. Gutierrez knew where the knives were kept.

The government also called Adrenann's oldest child Uriah Miguel, Jr. Uriah was twelve years old when the fight took place, and fourteen when he testified. Uriah also saw Mr. Morgan begin the fight by "punch[ing]" Mr. Gutierrez. He saw Mr. Gutierrez "turn[] around and tr[y] to fight back." He saw Mr. Gutierrez run into the living room, at which point Ms. Evans "took me and my brother that went to sleep on the couch into our room." At some point Uriah came out of his room and saw Mr. Gutierrez using a television to block Mr. Morgan. Mr. Gutierrez ran to Adrenann's room and tried to close the door. Mr. Morgan pushed at the door, but

Mr. Gutierrez blocked it with his body. Uriah saw “something shiny” in Mr. Morgan’s hands. Unable to get into Adrenann’s bedroom, Mr. Morgan gave up and left the house.

The jury returned a mixed verdict, convicting Mr. Morgan of assault resulting in serious bodily injury and acquitting him of assault with a dangerous weapon.

In the presentence report, the probation officer noted that the base offense level pursuant to Guidelines §2A2.2 was 14, but – citing an “investigation” indicating that Mr. Morgan had injured Mr. Gutierrez with a knife – added four levels for use of a “dangerous weapon” pursuant to Guidelines §2A2.2(b)(2)(B), boosting the offense level to 18. He then added six more levels in light of the “life threatening” nature of Mr. Gutierrez’s injury, yielding an adjusted offense level of 24. Mr. Morgan had nine criminal history points, and committed the instant offense while under another criminal sentence, yielding a criminal history score of 11 and a criminal history category of V. With an offense level of 24 and a criminal history category of V, Mr. Morgan’s Guidelines sentencing range was 92 to 115 months. The probation officer recommended a sentence at the 115-month top of the range, asserting that Mr. Morgan had a “serious anger management problem, coupled with substance abuse issues and lack of impulse control.”

Mr. Morgan filed written objections challenging (among other things) the recommended dangerous weapon enhancement. App. B at 2-3. While acknowledging that *United States v. Watts*, 519 U.S. 148 (1997), has been held to be to the contrary, he argued that elevating his sentence in connection with conduct of which the jury

acquitted him – *i.e.*, the use of a dangerous weapon charged in the acquitted Count 2 – violated “basic notions of justice.” App. B at 3.

At the sentencing hearing, the district court overruled Mr. Morgan’s objection to the dangerous weapon enhancement. The court stated: “I understand and respect your argument that once the defendant has been found not guilty of assault with a dangerous weapon that it would be your position that that should not be usable in arriving at a sentence or the appropriate sentencing guidelines under Count 1 . . . Even though I respect that argument, I don’t think it’s the law.” App. C at 2-3. The court sentenced Mr. Morgan to 108 months of incarceration, followed by a three-year term of supervised release.

Mr. Morgan appealed the judgment to the Ninth Circuit, which affirmed. App. A. With respect to Mr. Morgan’s objection to the use of acquitted conduct to boost his sentence, the Ninth Circuit cited its opinion in *United States v. Mercado*, 474 F.3d 654 (9th Cir. 2007), for the proposition that “[n]o Sixth Amendment violation occurs ‘when sentencing judges consider conduct underlying acquitted counts.’” App. A at 4-5 (quoting *Mercado*, 474 F.3d at 657-58).

REASON FOR GRANTING THE WRIT

This Court has not yet decided, but should decide, whether a district court may rely on acquitted conduct in calculating the applicable sentencing range under the Guidelines. Sup. Ct. R. 10(c). The answer to the question should be governed by this Court’s decision in *Blakely v. Washington*, 542 U.S. 296 (2004), which established that when a judge uses facts beyond the elements of the offense of

conviction to enhance the defendant's sentence, the Sixth Amendment is violated because "the verdict alone does not authorize the sentence." *Id.* at 305 n.8.

Nevertheless, many courts have mistakenly held that this Court's decision in *United States v. Watts*, 519 U.S. 148 (1997), bars the extension of *Blakely* to the question of whether acquitted conduct may be used in sentencing. It does not. Indeed, *Watts* addressed the question of whether sentencing on the basis of acquitted conduct violates the Double Jeopardy Clause, not the Sixth Amendment. *Watts*, 519 U.S. at 149-57. Only this Court may authoritatively correct the lower courts' widespread misapplication of *Watts*, and this case presents an appropriate vehicle for it to do so.

ARGUMENT

This Court has Not Decided, but Should Now Decide, Whether the Sixth Amendment Prohibits Sentencing Courts from Relying on Acquitted Conduct to Calculate the Applicable Sentencing Range under the Sentencing Guidelines.

In *United States v. Watts*, 519 U.S. 148 (1997), this Court held that the Double Jeopardy Clause does not prohibit a sentencing court from considering acquitted conduct to calculate a defendant's Guidelines sentencing range. *Id.* at 154-57. The Court did not address whether using acquitted conduct in this fashion violated the Sixth Amendment right to jury trial. *United States v. Booker*, 543 U.S. 220, 240 (2005). Indeed, Justice Breyer recognized that the Guidelines' treatment of acquitted conduct is in conflict with the jury trial right. *Watts*, 519 U.S. at 159 (suggesting that the United States Sentencing Commission revisit the issue "[g]iven

the role that juries and acquittals play in our system”) (Breyer, J., concurring). Justice Kennedy also observed in a dissent 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.* at 170 (Kennedy, J., dissenting). The *Booker* majority emphasized that *Watts* did not address “any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment,” and that *Watts* “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.” *Booker*, 543 U.S. at 240 & n.4.

Since *Watts* was decided, the Court has issued a series of opinions emphasizing the exceptional importance of the jury’s structural role as it relates to punishment. *See Cunningham v. California*, 549 U.S. 270 (2007); *Booker*, 543 U.S. at 220; *Blakely*, 542 U.S. at 313-14; *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Those decisions make plain that the Sixth Amendment guarantees a sentence that is wholly authorized by the jury’s verdict. *Cunningham*, 549 U.S. at 290 (“If the jury’s verdict alone does not authorize the sentence . . . the Sixth Amendment requirement is not satisfied.”); *Blakely*, 542 U.S. at 306 (*Apprendi* “ensur[es] that the judge’s authority to sentence derives wholly from the jury’s verdict”); *Apprendi*, 530 U.S. at 483 n.10 (“The judge’s role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury.”).

Nevertheless, although *Watts* did not hold that consideration of acquitted conduct in sentencing is permissible under the Sixth Amendment, the courts of appeals have considered themselves bound by *Watts* and have uniformly held that a sentencing court may rely on acquitted conduct to calculate the guideline range without violating the Sixth Amendment. *See, e.g., United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc); *United States v. Mercado*, 474 F.3d 654, 657 (9th Cir. 2007); *United States v. Dorcely*, 454 F.3d 366, 371-73 (D.C. Cir. 2006); *United States v. Gobbi*, 471 F.3d 302, 313-14 (1st Cir. 2006); *United States v. Valdez*, 453 F.3d 252, 264 (5th Cir. 2006); *United States v. Hayward*, 177 F. App'x 214, 215 (3d Cir. 2006); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States v. Ashworth*, 139 F. App'x 525, 527 (4th Cir. 2005) (per curiam); *United States v. Price*, 418 F.3d 771, 787-88 & n.7 (7th Cir. 2005); *United States v. Vaughn*, 430 F.3d 518, 526-27 (2d Cir. 2005); *but cf. United States v. Duncan*, 400 F.3d 1297, 1304-05 & n.7 (11th Cir. 2005) (recognizing that *Watts* does not control the question for purposes of the Sixth Amendment, but holding that the Sixth Amendment does not prohibit the sentencing court from relying on acquitted conduct).

At the same time, individual judges have recognized that this view of *Watts* does not sit comfortably with this Court's more recent caselaw. Judge Merritt of the Sixth Circuit noted that "the majority's simple and single-minded reliance on *Watts* as authority for enhancements based on acquitted conduct is obviously a mistake." *White*, 551 F.3d at 392 (Merritt, J., dissenting). Judge Barkett of the Eleventh Circuit recognized that "the holding of *Watts*, explicitly disavowed by the Supreme

Court as a matter of Sixth Amendment law, has no bearing on [sentence enhancements based on acquitted conduct] in light of the Court’s more recent and relevant rulings in [*Apprendi*], [*Ring*], *Blakely*, and *Booker*,” but felt bound by circuit precedent to concur in the court’s judgment that the Due Process Clause does not prohibit the use of acquitted conduct at sentencing. *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring specially). Judge Barkett complained that “it pervert[s] our system of justice [to] allow[] a defendant to suffer punishment for a criminal charge for which he or she was acquitted.” *Id.* at 1350 (Barkett, J., concurring specially) (internal quotation marks omitted). Judge Betty Fletcher of the Ninth Circuit wrote that “[d]espite th[e] clear limitation of *Watts*’ holding, the majority here applies *Watts* to the Sixth Amendment issue before us, ignoring *Booker*’s requirement that the jury’s verdict alone must authorize a defendant’s sentence. This application defies logic.” *Mercado*, 474 F.3d at 658 (B. Fletcher, J., dissenting) (citation omitted).

Judge Ambro of the Third Circuit opined that, although he believed the court to be bound by *Watts*, the better rule would be that:

constitutional protections apply not only to those facts that authorize the ‘statutory maximum’ (as phrased by *Apprendi*), but to every fact (save prior convictions) identified by the law itself as deserving of additional punishment, no matter what that fact may be called. Only in this way can the principles of *Apprendi*—followed through in *Blakely*, *Booker*, and, most recently, *Cunningham*—be fully respected.

United States v. Grier, 475 F.3d 556, 574 (3d Cir. 2007) (en banc) (Ambro, J., concurring in the judgment) (citation and footnotes omitted). Writing in dissent in the same case, Judge Sloviter, joined by Judge McKee, described the majority’s

decision as without precedent or persuasive rationale, and “a regrettable erosion of a criminal defendant’s constitutional right to due process.” *Id.* at 600 (Sloviter, J., dissenting).

In the Eighth Circuit, Judge Bright described “the unfairness perpetuated by the use of ‘acquitted conduct’ at sentencing in federal district courts” as “uniquely malevolent.” *United States v. Canania*, 532 F.3d 764, 777 (8th Cir. 2008) (Bright, J., concurring). He “urge[d] the Supreme Court to re-examine [the use of acquitted conduct to enhance a sentence] forthwith.” *Id.* In the Sixth Circuit, Judge Merritt, joined by five other judges, wrote in dissent from an en banc decision that the current system of permitting facts that were rejected by the jury to serve as the basis for the guideline calculation operates as an “incremental degradation” of the jury right, “sever[ing] ‘the invariable linkage of punishment with crime.’” *White*, 551 F.3d at 393-94 (Merritt, J., dissenting) (quoting *Apprendi*, 530 U.S. at 478-79).

District court judges have also chafed at the conflict between the broad interpretation of *Watts* and this Court’s subsequent decisions. For example, Judge Gertner of the District of Massachusetts found that “[i]t makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, and also conclude that the fruits of the jury’s efforts can be ignored with impunity by the judge in sentencing.” *United States v. Pimental*, 367 F. Supp. 2d 143, 150 (D. Mass 2005) (citation omitted). Judge Marbley of the Southern District of Ohio concluded that “considering acquitted conduct would disregard completely the jury’s role in

determining guilt and innocence.” *United States v. Coleman*, 370 F. Supp. 2d 661, 673 (S.D. Ohio 2005). Judge Hellerstein of the Southern District of New York refused to consider acquitted conduct out of respect for the jury’s verdict. *United States v. Carvajal*, 2005 WL 476125, *4-*5 (S.D.N.Y. Feb. 22, 2005).

It is no answer to point out that the Court made the Guidelines “advisory” in *Booker*, 543 U.S. at 245-46. Factfinding under the Guidelines remains determinate, and where judge-made findings regarding acquitted conduct are involved, they are central to both the sentencing process and the sentencing determination’s ability to withstand review. The “district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range,” and “to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.” *Gall v. United States*, 552 U.S. 38, 49 (2007). When the judge “decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance,” must give a “more significant justification” for a major departure than a minor one, and “must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.” *Id.* at 50. An appellate court may presume a within-Guidelines sentence, including a sentence based in part on judge-made findings regarding acquitted conduct, to be reasonable. *Rita v. United States*, 551 U.S. 338, 345-46 (2007). Where acquitted conduct enters into the Guidelines calculation, it will thus be integral to every stage of the sentencing process.

In sum, the Ninth Circuit’s decision below exemplifies a widespread and pernicious misreading of the scope of this Court’s decision in *Watts*. The Court should grant certiorari to correct this misreading, confirm the application of its more recent Sixth Amendment precedents to acquitted conduct, and hold that the use of acquitted conduct to enhance a defendant’s Guidelines sentencing range violates the Sixth Amendment.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted on December 13, 2017.

JON M. SANDS
Federal Public Defender

/s Daniel L. Kaplan
*DANIEL L. KAPLAN
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700
* *Counsel of Record*