

No. 20-1693

IN THE
Supreme Court of the United States

ERICK ALLEN OSBY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

SUPPLEMENTAL BRIEF OF PETITIONER

EASHA ANAND
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
2443 Fillmore St., #380-15875
San Francisco, CA 94115
(510) 588-1274
easha.anand@macarthurjustice.org

GEREMY C. KAMENS
Federal Public Defender
CAROLINE S. PLATT
Appellate Attorney
Counsel of Record
SUZANNE KATCHMAR
Assistant Federal Public Defender
OFFICE OF THE FEDERAL PUBLIC
DEFENDER FOR THE EASTERN DISTRICT OF
VIRGINIA
1650 King St., Suite 500
Alexandria, VA 22314
(703) 600-0800
caroline_platt@fd.org

Counsel for Petitioner

SUPPLEMENTAL BRIEF OF PETITIONER

Erick Allen Osby submits this supplemental brief under this Court's Rule 15.8 to bring the Court's attention to a new decision supporting his petition for certiorari.

The question presented is whether basing a criminal defendant's sentence on charges of which the jury acquitted him violates the Fifth or Sixth Amendments.

The state and federal courts are divided over this issue. The federal courts of appeals have uniformly concluded that this Court's decision in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), precludes challenges to the use of acquitted conduct at sentencing, whether those objections are made on the basis of the Double Jeopardy Clause, the Fifth Amendment Due Process Clause, or the Sixth Amendment jury trial right. *See* Pet. 8-9, 19-21. Several State high courts have disagreed with the use of acquitted conduct. *See* Pet. 24-25.

The Supreme Court of New Jersey addressed the use of acquitted conduct at sentencing yesterday in *New Jersey v. Melvin*, ___ A.3d ___, 2021 WL 4314078 (N.J. Sept. 23, 2021). The Supreme Court of New Jersey described the question presented as follows: "Melvin requests that this Court join states like Michigan, Hawaii, North Carolina, New Hampshire, and Georgia in prohibiting a trial court from using acquitted conduct to determine a defendant's sentence." *Id.* at *12.

The Supreme Court of New Jersey considered this Court's decisions in *Watts*, *supra*, and the decisions of other State Supreme Courts, and concluded that *Watts* does not preclude due process constitutional challenges to the use of acquitted conduct in sentencing, but rather was limited to the Double Jeopardy Clause. The court stated:

“We agree with the Michigan Supreme Court that *Watts* is not dispositive of the due process challenge presently before this Court. As clarified in *Booker*, *Watts* was cabined specifically to the question of whether the practice of using acquitted conduct at sentencing was inconsistent with double jeopardy.” *Melvin*, supra, at *15.

The Supreme Court of New Jersey then considered its own Constitution and precedent, and concluded that the use of acquitted conduct at sentencing is unconstitutional. The court wrote:

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.

Id. at *18.

This decision deepens the split noted by Mr. Osby in his petition, both with respect to the meaning of this Court’s decision in *Watts*, and also as to the constitutionality of the use of acquitted conduct at sentencing. The *Melvin* decision thus strengthens Mr. Osby’s argument that this Court’s review is necessary. The Court should not let the split persist any longer.

CONCLUSION

The Court should grant Mr. Osby’s petition for certiorari and reverse the Fourth Circuit’s judgment.

Respectfully submitted,

Caroline S. Platt

EASHA ANAND
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
2443 Fillmore St., #380-15875
San Francisco, CA 94115
(510) 588-1274
easha.anand@macarthurjustice.org

GEREMY C. KAMENS
Federal Public Defender
CAROLINE S. PLATT
Appellate Attorney
Counsel of Record
SUZANNE KATCHMAR
Assistant Federal Public
Defender
OFFICE OF THE FEDERAL PUBLIC
DEFENDER FOR THE EASTERN
DISTRICT OF VIRGINIA
1650 King St., Suite 500
Alexandria, VA 22314
(703) 600-0800
caroline_platt@fd.org

Counsel for Petitioner

September 24, 2021