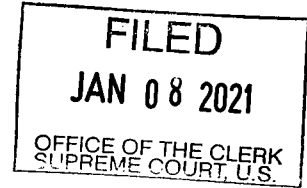


20-7319
No. _____

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

Jamaa Johnson — PETITIONER
(Your Name)

vs.

United States of America RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jamaa Johnson
(Your Name) Federal Correctional
Institution Petersburg Law

P.O. Box 1000

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Petersburg, Virginia 23804

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(Phone Number)

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Pinkerton v. United States, 328 U.S. 640 (1946)

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United States v. Brady, 928 F. 2d 844, 851

United States v. Chittenden, 848 F. 3d 188 (4th Cir. 2017)

United States v. Pimental, 107 F. 3d 1339 United States v. Watts, 519 U.S. 148 (1997)

RELEVANT PROVISIONS INVOLVED

Hobbs Act

Sixth Amendment

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 11, 2020

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A. Due to covid, an extension of 150 days was granted

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

I. Questions Presented

1. Does an acquittal under a *Pinkerton* liability question safeguard against the acquitted conduct from being calculated into the sentencing guidelines as in *Watts*?

2. Is there a difference in the courts use of discretion at sentencing with regard to whether the *Pinkerton* Question is one of “amount attributed” as opposed to guilt or innocence?

3. Did the court violate the petitioner’s Sixth amendment right to jury trial when it allowed the probation office to use discretion in calculating acquitted conduct into Advisory Sentencing Guidelines?

The Petitioner, Jamaa Johnson, requests that the Court issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 11, 2020. Note: Due to public health concerns relating to Covid-19, the deadline for filing this Petition was extended 150 days, or January 8, 2021.

II. Statement of the case

This case arises from a conspiracy to commit a series of robberies in Virginia and West Virginia. The Government alleged that Johnson was a member of this conspiracy and that he participated in the robberies of Leair Lipscomb and Cabell Franklin. In its Fifth Superseding Indictment, the Government charged Johnson with two counts of Hobbs Act robbery and one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951, two counts of use of firearms in a crime of violence and one count of conspiracy to use firearm in a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A), (o), one count of being a felon in possession of a firearm in violation of 922(g)(1), and one count of witness tampering, in violation of 18 U.S.C. § 1512(b)(1).

At trial, three of Johnson’s alleged co-conspirators – Robert Barcliff, Keith Glenn, and Brandon Davis – testified against Johnson as did victim Cabell Franklin and Johnson’s former girlfriend, Megan Smith. Barcliff testified that he and a group of friends from Wytheville, Virginia, including Johnson,

devised a plan to rob drug dealers. Johnson suggested robbing Lipscomb, a drug dealer who was known to possess pills, cocaine and marijuana. Barcliff testified that he, Johnson, and Glenn drove to Lipscomb's home to commit the robbery. Barcliff and Glen entered the home, restrained Lipscomb at gunpoint, and took marijuana, cash, and apparel. According to Barcliff, Johnson "drove the car and...helped load the items." Both Barcliff and Glenn testified that Barcliff carried a firearm and showed it to Johnson in the car.

Barcliff and Davis also implicated Johnson in the Franklin robbery. Barcliff testified that Johnson agreed to drive the group to Franklin's home; once there, Johnson was to help secure Franklin by holding him at gunpoint. But the robbery did not go according to plan. When Franklin answered the door, Davis began to wrestle him and struck him in the head with a firearm; Barcliff also stabbed him with a knife. Johnson held Franklin's father at gunpoint and ordered him not to move. Barcliff then rejoined Davis upstairs and the two decided to leave the home. Shortly thereafter, according to Barcliff and Davis, Johnson ran out of the house saying, "I shot him". Franklin had been shot in the left leg, although he testified that he could not identify his assailant who was wearing a bandana. Smith, Johnson's girlfriend at the time of the robbery, testified that Johnson admitted to shooting Franklin so that he could escape from the home.

At the conclusion of the evidence, the district court explained to the jury that a "crime of violence," for purposes of § 924(c), is a felony that "(a) has an element of use, attempted use, or threatened use of physical force against the person or property of another, or (b) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The district court also instructed the jury that Hobbs Act conspiracy constitutes a crime of violence.

After two days of deliberations, the jury told the court that it had reached a unanimous verdict. The jury found Johnson guilty of Hobbs Act conspiracy, firearms conspiracy, and witness tampering. The jury acquitted Johnson of being a felon in possession of a firearm and two counts of Hobbs Act

robbery. But with respect to the two counts of use of a firearm in a crime of violence (in connection with the Lipscomb and Franklin robberies), the district court determined that the jury's verdict form was incomplete. The Government had alleged that Johnson violated § 924(c) on two theories – first, that Johnson was liable for his co-conspirators' use of firearms under *Pinkerton v. United States*, 328 U.S. 640 (1946); second, that Johnson had himself used a firearm. The jury found Johnson guilty on the first theory but failed to answer whether Johnson was guilty on the second.

Johnson moved for a mistrial. The district court denied the motion and directed the jury to continue deliberating with respect to the unanswered questions. Later that day, the jury submitted a note to the court asking whether it could change its verdict as to the §924(c) counts. The district court responded that the jury could do so. Johnson again moved for a mistrial, which the district court denied. Shortly thereafter, the jury submitted its final verdict, this time acquitting Johnson of the § 924(c) counts on both of the Government's theories.

Although the jury convicted Johnson of Hobbs Act conspiracy and firearms conspiracy, the verdict form did not specify which offenses Johnson had conspired to commit (the object offenses"). For purposes of sentencing, the district court found that Johnson had conspired to commit the Lipscomb and Franklin robberies. The court calculated an offense level of 35 and a criminal history category of IV and imposed, among other adjustments, a seven-level enhancement for discharge of a firearm during the Franklin robbery, U.S.S.G. §2B3.1(b)(2)(A), and a four-level enhancement for serious bodily injury to Franklin, § 2B3.1(b)(3)(B). The court sentenced Johnson to 235 months' imprisonment – the bottom of the Guidelines range. The court also sentenced Johnson to three years of supervised release and imposed a \$300 special assessment. Johnson appealed.

III. Reasons for Granting the Petition

1. Does an acquittal under a Pinkerton liability question safeguard against the acquitted conduct from being calculated into the sentencing guidelines as in *Watts*?

Johnson's acquitted conduct should not be used in calculating his sentence because it undermines the jury's verdict.

In *United States v. Watts*, police discovered cocaine base in a kitchen cabinet and two loaded guns and ammunition hidden in a bedroom closet of Watts' house. A jury convicted Watts of possessing cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) but acquitted him of using a firearm in relation to a drug offense, in violation of 18 U.S.C. § 924(c). Despite Watts' acquittal on the firearms count, the District Court found by a preponderance of the evidence that Watts had possessed the guns in connection with the drug offense. In calculating Watts' sentence, the court therefore added two points to his base offense level under the United States Sentencing Commission Guidelines Manual §2D1.1(b)(1) (Nov. 1995) (USSG). The Court of Appeals vacated the sentence, holding that "a sentencing judge may not, 'under any standard of proof,' rely on facts of which the defendant was acquitted." 67 F. 3d, at 797 (quoting *United States v. Brady*, 928 F. 2d 844, 851, and n. 12 (CA9 1991), abrogated on other grounds, *Nichols v. United States*, 511 U.S. 738 (1994)) (emphasis added in *Watts*).

In *Watts*, the Court has assimilated a very broad language in the application of the use of acquitted conduct at sentencing when the verdict is "general" because there is no precedent set when the verdict is "not general". The courts remain divided due to this lack of clarity. Here, Johnson was sentenced to approximately ten additional years (nearly doubling his sentence) for conduct the jury acquitted him of. It was not difficult for the jury to acquit Johnson of using a firearm because the victim, Cabell Franklin, testified that Johnson was not the shooter. How is it appropriate to nearly double a Defendant's sentence for a crime he was never convicted of?

Judges can punish people for crimes they are not convicted of in court known as judicial findings. It allows judges to sentence Defendants for crimes they are indicted for regardless of whether that charge is dropped in a plea deal or they are acquitted by the jury. A bill to end this practice has been introduced in the Senate called Prohibiting Punishment of Acquitted Conduct Act of 2019 (S. 2566). This bill has bipartisan support and is currently sponsored by, among others, Senators Dick Durbin and Cory Booker. (<http://www.nationalprisonconsultants.com>). Congress enacted the Sentencing Reform Act to curtail inconsistency and unpredictability in sentencing that had been exacerbated by the broad discretion afforded judges working within statutory ranges. This act eventually brought about the federal sentencing guidelines, which are designed to facilitate uniformity by providing formulaic procedures to calculate a sentence based on consideration of "relevant conduct" and the jury's verdict.

Here, in Johnson's case, the jury verdict is dominated by acquitted conduct including Pinkerton liability acquittals which differs vastly from *Watts*. Given the court has held that a substantively unreasonable penalty is illegal, Scalia argued in his dissent:

"It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It may not be found by a judge.

The late Scalia further stated that, because the court had yet to explicitly set forth this reasoning, the circuit courts had taken silence as license to permit unreasonable sentences based on judicial fact-finding".

2. Is there a difference in the courts use of discretion at sentencing with regard to whether the Pinkerton Question is one of "amount attributed" as opposed to guilt or innocence?

Johnson did not commit the crime of shooting the victim and in fact was acquitted of this crime.

Here, counsel states as follows:

Counsel: "I would also like to point out that I have—while I understand the rationale about acquitted conduct, certainly, one can be acquitted of a substantive offense but still conspire to commit it. I understand that principle. What I am most troubled by is the Pinkerton Liability. The only additional element to a Pinkerton liability charge that isn't in the conspiracy is that the co-conspirators at least had to commit the offense. In this case, the co-conspirators were sitting on

the witness stand and said they committed it. So, that certainly wasn't a reason for the jury dismissing the Pinkerton Liability and it shouldn't be a reason for the Court to dismiss that. So, it doesn't make sense to me that a defendant can be convicted of this conspiracy and not end also be acquitted of Pinkerton Liability under the facts of this case. That's all the argument I have on that your Honor. -I'm not going to belabor that point." See (J.A. pgs. 671-672)

The Court: Well, the thing that I...the thing that troubles is not the word, but the thing that is hard to get past is that the jury found him not guilty of count I based beyond a reasonable doubt standard. If he didn't conspire – if he wasn't part of the conspiracy for the first Leair Lipscomb robbery and Cabell Franklin robbery, what did he conspire to do? I mean that's, that's the –that's the thing that I am struggling with on this and I think we have to give some respect to the jury's verdict. And I understand that, the conviction of the conspiracy but the acquittal on the substantive counts a challenge, but so my—that's why I asked the question, can I consider-is there any reason that I cannot consider the jury's verdict when I consider this issue?" See (J.A. pg. 673 lines 8-22).

These questions among others went unanswered and ignored due to the lack of guidance on acquitted conduct in its various scenarios. The Court enhanced Johnson by the preponderance of the evidence standard, disavowing not only the jury's verdict of acquittal on all substantive offenses, but also disavowing the shooting victim's testimony. The pertinent part of the victim's testimony is as follows:

Counsel: Do you remember telling Detective Tate and Detective Daniels that you actually knew who it was who shot you? Do you remember that?

Cabell Franklin: I believe I said it was Andrew Coleman, yes, sir.

Counsel: Andrew Coleman? As a matter of fact, you didn't *say* you believed it was Andrew Coleman. Do you remember that?

Cabell Franklin: Yes, sir. See (J.A. pg. 245 lines 1-7 Cabell Franklin Testimony).

Counsel: Thank you sir. Before you spoke with Detective Daniels and Detective Tate and Detective Daniels, you had studied the photograph on Facebook of Mr. Andrew Coleman; isn't that correct?

Cabell Franklin: Yes, sir.

Counsel: And you noticed that photograph had images of Mr. Tate holding two pistols; is that true?

Cabell Franklin: I remember that, yes sir. See (J.A. pg. 248-49 Cabell Franklin Testimony).

Again, the Court enhanced Johnson by seven points for discharging a firearm inside of the conspiracy in which he was acquitted under the Pinkerton Liability questions. These questions predicated on the same conspiracy which asked specifically if Johnson personally discharged a firearm or if he

should be held liable for firearm being used, carried, brandished or discharged out of the act of his co-conspirators. The courts reasoning at sentencing for enhancing him seven points for discharging a firearm was stated as follows:

The Court: “Beyond that, with regard to the enhancements, the defendant doesn’t have to be the shooter to get tagged with the enhancements related to the shooting of Cabell Franklin. That’s not how it works. So, in terms of the guideline calculation, it doesn’t matter if he is the one who shot him or not, okay? See (J.A. 758 lines 13-18 sentencing transcripts).

The guidance in which the court used in this case was based primarily on the holding of *Watts v. United States*. *Watts* provides no real clarity to acquittals under Pinkerton Liability Questions. *Watts* only brings guidance to general verdicts. The outcome in Johnson’s case is an excellent example of “narrow rulings being broadly applied”. And in his case, it led to his constitutional rights being violated.

Pinkerton Liability questions are often requested, and in some statutes required to determine specific liability inside of a conspiracy. There have been large amounts of precedent set to guide the courts on Pinkerton Liability questions predicated on drug conspiracies, financial conspiracies and other conspiracies where “amount attributable” questions are asked. In instances where “amount attributable” questions are answered, the jury’s verdict safeguards sentencing judges from extending liability above the jury’s findings, thus limiting the court’s discretion at sentencing. “Defendant’s liability was already limited by Pinkerton”. See *United States v. Chittenden*, 848 F. 3d 188 (4th Cir. 2017).

In the case at hand the broad discretion advised by *Watts* directly conflicts with the safeguards at sentencing empowered by Pinkerton Questions. The Court assumes because the Pinkerton Questions in Johnson’s case are ones of guilt or no guilt, that the safeguards the jury answers reflect are not the same as it would be with a Pinkerton Question of “amount attributable”. Johnson is aware of the difference in context of the two types of questions. However, the context of the questions does not change the elements in which the court must prove in order to hold him accountable of Pinkerton questions. Regardless of that type of conspiracy the Pinkerton predicated in its holding remains relevant.

First, the offense defined in the substantive count was committed by a member of the conspiracy.

Second, the substantive crime was committed during the existence of life of and in furtherance of the goals of the conspiracy.

Third, that at the time this offense was committed, the defendant was consideration was a member of the conspiracy. (See *Pinkerton v. United States*, 511 U.S. 738 (1994).

It is implausible for the court to still hold its views on enhancement for the shooting of Cabell Franklin if it respects *Pinkerton* as it relates to conspiracies generally.

Although *Pimentel-Lopez v. United States* is a drug conspiracy instead of a Hobbs Act Conspiracy the Court makes a constitutional finding that relates to Johnson and his *Pinkerton* argument. “The Judge may of course, depart upward from the sentencing range generated by the jury findings. Also, where the jury makes no finding as to quantity or finds an unspecified amount, there would be no inconsistency between the verdict and any quantity that the judge finds during sentencing”.

In Johnson’s case this line of guidance continues into his case. The court would have been correct in enhancing him seven points for discharging a firearm inside of the conspiracy count had the jury not specified in the form of a *Pinkerton* question that he wasn’t liable. When the government opted to add *Pinkerton* Questions to the jury instructions “the jury answered the questions it was asked and so their vote was cast. The government cannot disavow the finding that the jury makes as a result”. See *United States v. Pimental*, 107 F. 3d at 1339 n. 2.

In *United States v. Watts* states that “acquitted conduct can be considered if the verdict is general”. In Johnson’s case, the scenario of the jury verdict is far from general. Johnson was found guilty of Conspiracy to Hobbs Act Robbery and then found not guilty of every substantive offense in which the Government presented at trial including acquittals of aiding and abetting those offenses. Along with those acquittals, he was also found not guilty of felon in possession of a firearm and the *Pinkerton* Liability Question asking the jury specifically on both robberies that the government presented if he

should be held liable for the use of those firearms in any way. The jury rejected the government's evidence. (See J.A. 467-475 Jury Verdict).

Johnson's case firmly strengthens Justice Stevens dissent in *Watts*. "It is difficult to square this explicit statutory comment to impose incremental punishment of "multiple offenses" of which a defendant "is convicted" with the conclusion that Congress intended incremental punishment for each offense of which a defendant has been acquitted" (See *Watts* 519 U.S. 169). While acquitted conduct may be considered at some point during sentencing, in the case at hand, allowing the courts to consider all acquitted conduct as general (as it overlooked the difference of an acquittal on a Pinkerton Question making it general) and the calculated acquitted conduct in the advisory guidelines eviscerated the value of the jury's verdict.

3. Did the court violate the petitioner's Sixth amendment right to jury trial when it allowed the probation office to use discretion in calculating acquitted conduct into Advisory Sentencing Guidelines?

Acquitted conduct sentencing robs individuals of their Sixth Amendment rights to trial by jury by divesting citizens of their historical and constitutional role in the administration of criminal justice. At sentencing Johnson was severely prejudiced by allowing the courts to "consider" acquitted conduct based on advisory guidelines that already considered acquitted conduct – this violated Johnson's sixth amendment rights.

Johnson contends that the remedy to acquitted conduct sentencing issues would be to calculate advisory guidelines in reverence with the jury's trial. At sentencing the court uses a guideline that reflects the jury's verdict and then "considers" acquitted conduct applying a variance if necessary, which would hold the courts accountable for drastic increases and reasonings.

"Although the district court has discretion to depart from the guidelines, the court "must consult those guidelines and take them into account at sentencing." See (*United States v. Booker* 220. 264, 125 S. Ct. 738 160 L. Ed. 2d 621 (2005).

Johnson's remedy would be the conduit that ties Watts, Pinkerton and Booker together in constitutionally sound logic. Johnson doesn't argue that the courts should not have broad discretion at sentencing. However, to allow district courts to use the preponderance of the evidence standard after a jury has heard the evidence at trial and found it lacking and thus acquitted him of specific acts would violate the accused right to trial by jury.

Conclusion

In conclusion the courts should grant writ of certiorari in order to clarify and protect the Sixth Amendment and to guarantee that every fact necessary to convict and hold a defendant accountable must be found by a jury. In this case the court transcripts of the trial and jury's verdict, conclusively prove that the shooting victim in the Cabell Franklin robbery knew the shooter to be someone other than Jamaa Johnson, which led the jury to specifically find him not guilty of the robbery and the shooting. The jury also found him not liable for the use of firearms in this specific robbery out of the acts of his co-conspirators. These are facts that are completely inconsistent in contrast to the Probationer's calculation of the guidelines and the Court's view of the case at sentencing.

After the testimony of the shooting victim and the jury's verdict, that should have been the end of the allegations concerning Johnson's liability inside of the conspiracy with regards to the Cabell Franklin robbery. However, the Court believing it could exercise its broad discretion based on prior narrow rulings, disregarded the distinction between special verdicts and general verdicts when considering the Pinkerton questions as general which severely punished Jamaa Johnson for the shooting conduct of Cabell Franklin.

We pray that this Honorable Court correct this constitutional violation by clarifying the differences in special verdict acquittals and general verdict acquittals and in doing so begin the process of ruling the discretionary power given to probationers and to Courts by proper use of advisory sentencing guidelines.

Alternatively, we pray this Honorable Court will remand this case back to the lower court with an Order to revisit the calculation of the sentence with a goal of protecting Defendant's Sixth Amendment right to trial by jury.

Respectfully Submitted,

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