

No. _____

In the Supreme Court of the United States

YONELL ALLUMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

To the Honorable Sonia Sotomayor, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Second Circuit:

1. Pursuant to Supreme Court Rule 13.5, petitioner Yonell Allums respectfully requests a 60-day extension of time, until Monday, January 10, 2022, within which to file a petition for a writ of certiorari. The United States Court of Appeals for the Second Circuit issued its opinion on June 4, 2021. A copy of the opinion is attached. The Second Circuit denied petitioner's rehearing petition on August 13, 2021. A copy of the order is attached. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

2. Absent an extension, a petition for a writ of certiorari would be due on November 11, 2021. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case.

3. This case concerns whether the Fifth and Sixth Amendments prohibit a federal judge from determining, by a mere preponderance of the evidence at sentencing, facts necessary to permit the imposition of a sentence a decade longer than what would otherwise be substantively reasonable.

4. This case is essentially the mirror image of *Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., dissenting from denial of certiorari), a case in which three members of this Court—Justices Scalia, Ginsburg, and Thomas—dissented from the denial of certiorari. As in that case, a jury convicted petitioner of crimes involving a small amounts of drugs, but acquitted him of far more serious crimes involving the use of firearms in furtherance of a drug distribution conspiracy and the trafficking of kilograms of cocaine and hundreds of grams of crack. *Id.* at 948. And, as in *Jones*, petitioner’s unadjusted Guidelines range would have involved a high end of 71 months, but petitioner was instead sentenced to 240 months (20 years) on the basis of facts found exclusively by the judge and rejected by the jury.¹ *Id.* at 949-50. Even the most harshly punished Defendant in *Jones* received only 225 months, *Id.* at 950, a case where Justices Scalia, Ginsburg, and Thomas opined that the petitioners had “present[ed] a strong case that, but for the judge’s finding of fact, their sentences would have been ‘substantively unreasonable’ and therefore illegal.” *Id.* at 948.

¹ Due to an earlier conviction, Mr. Allums’s mandatory minimum sentence would have been 10 years (120 months) notwithstanding the unadjusted Guidelines sentencing range. But the unadjusted Guidelines range approximates the culpability of the conduct for which Mr. Allums was convicted, making the substantively reasonable sentence based solely on the jury’s findings far less than 20 years in prison.

5. At sentencing in this case, the judge found Mr. Allums intended to distribute 50 kilograms or more of cocaine, an amount an order of magnitude higher than the amount the jury expressly rejected. The judge also found that Mr. Allums carried a firearm in furtherance of a drug trafficking crime, a charge the jury also rejected. The base offense level for petitioner was calculated under the Sentencing Guidelines *as if* he had engaged in these more serious crimes of which he was in fact *acquitted*, resulting in a sentencing range of 360 months to life imprisonment. If the range had been calculated based solely upon the convicted crimes, it would have been 57 to 71 months imprisonment. The judge ultimately sentenced Mr. Allums to 240 months of imprisonment, a sentence more than three times higher than his unadjusted sentencing range and *double* the mandatory minimum he faced due to his prior conviction.

6. Mr. Allums appealed his sentence, arguing squarely that his Fifth and Sixth Amendment rights were violated by the district court's factfinding, but the Second Circuit Court of Appeals affirmed. Reviewing the sentencing court's legal application of the Guidelines *de novo* and its underlying factual findings (found by a preponderance of the evidence) for clear error, the Second Circuit held that there was sufficient evidence to support the court's findings for the drug quantity and firearm use, both of which were rejected by the jury. The Court found the 240 months imprisonment was substantially below the Guidelines sentence of 360 months (elevated to 360 months by the judge's factual findings), and given the seriousness of the offenses the judge found Mr. Allums had engaged in, and petitioner's criminal history, the 240 months sentence was not substantively unreasonable.

7. Mr. Allums timely sought rehearing or rehearing en banc seeking a holding on the precise question he raises here, namely, whether his sentence *would have been* substantively unreasonable absent the judge’s findings, and whether, if so, reliance on those facts violated the Fifth and Sixth Amendments. But the Second Circuit denied rehearing and rehearing en banc without opinion.

8. This is an exceptionally important case. As three members of this Court stated in *Jones*, and as the history of the Fifth and Sixth Amendments establishes, “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.*” *Id.* (emphasis added). “*It may not be found by a judge.*” *Id.* at 949 (emphasis added). Here, only the judge’s findings that Mr. Allums *in fact* used a firearm in furtherance of a drug distribution conspiracy, that he *in fact* conspired to distribute 50 kilograms of cocaine, and that he *in fact* conspired to distribute 280 grams of crack, make Mr. Allums’s 20-year sentence substantively reasonable. Without them, Mr. Allums’s sentence would be substantively unreasonable. The judge’s findings are particularly troubling “because not only did no jury convict [Mr. Allums] ... of the offense[s] the sentencing judge thought ... [him] guilty of, but a jury *acquitted [him]* of [those] offense[s].” *Id.* (emphasis in original).

9. The decision below allows a sentencing judge using a much lower evidentiary standard to take the place of a jury on the question that is often just as critical to a criminal defendant as whether he proves his innocence, namely, whether he committed a sufficiently serious crime to warrant a multi-decade punishment. This case presents a question

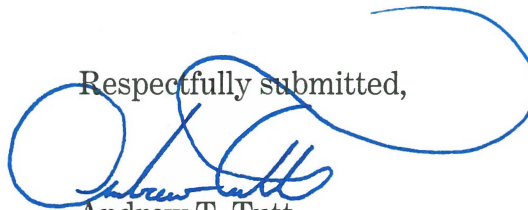
essential to safeguarding Constitutional rights of criminal defendants and promoting respect for the criminal justice system. The courts of appeals' misplaced reliance upon *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), has undermined the fundamental role of the jury. Only this Court can ensure that the right of every person to an impartial jury for the trial of all crimes is protected.

10. Petitioner respectfully requests an extension of time to file a petition for certiorari. At the rehearing stage, petitioner engaged additional counsel who were not previously involved in the case. A 60-day extension would allow counsel sufficient time to fully examine the decision's consequences, research and analyze the issues presented, and prepare the petition for filing. Additionally, the undersigned counsel have a number of other pending matters that will interfere with counsel's ability to file the petition on or before November 11, 2021.

Wherefore, petitioner, Yonell Allums, respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari to Monday, January 10, 2022.

October 21, 2021

Respectfully submitted,



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