No. 18-6896

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Jeffrey S. Wingate — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Sixth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jeffrey S. Wingate
(Your Name)

LSCI Butner, PO Box 999
(Address)

Butner, NC 27509-0999
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1.) Does a substantially greater sentence imposed based primarily on a count for which a grand jury refused to indict and which did not appear in a superseding indictment or information comprise plain and prejudicial error sufficient to warrant examination of counsel's performance under Strickland; First Prong?

2.) Does a sentence enhancement based on uncharged conduct comprising an "infamous crime" for which a grand jury refused to return an indictment and which was not presented by information violate the Presentment and Due Process clauses of the Fifth Amendment?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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TABLE OF AUTHORITIES

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 B to the petition and is

[ ] reported at Case No. 18-5313; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[X] reported at 2018 U.S. DIST. Lexis 41873; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.
The opinion of the Magistrate Court appears at Appendix C to the petition and is [X] reported at 2018 U.S. Dist. Lexis 42742.

[ ] 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[ ] is unpublished.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 July 12th 2018.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 4, 2018, and a copy of the order denying rehearing appears at Appendix A.

[ ] 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. § 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).

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY WINGATE,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

Jeffrey Wingate respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The decisions of the Sixth Circuit, each styled United States v. Wingate, are reproduced in Appendix A and B to the petition and are unpublished. The decisions of the United States District Court for the Eastern District of Kentucky, each styled United States v. Wingate, are reproduced in Appendix C and D to the petition and are unpublished.

JURISDICTION

The Sixth Circuit issued its opinion and order (Pet. App. A) on August 16, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and under Hohn v. United States, 524 US. 236, 118 S. Ct. 1969 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Presentment Clause of the Fifth Amendment to the United States

Constitution provides: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "No person shall be --- deprived of life, liberty or property without due process of law...."

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

On July 10, 2014 a grand jury seated in Lexington, Kentucky issued a 21 count indictment charging eleven individuals with controlled substance offenses. Wingate was named in five counts: Count 2 - Conspiracy to Distribute Heroin and Counts 17 - 20 for possessing controlled substances and possessing a firearm. Nine other defendants were charged with conspiracy to distribute oxycodone in Count 1 of the same indictment. Wingate was not charged in the conspiracy count.

Wingate's counsel negotiated a plea agreement to resolve the indictment. The factual basis set forth for Wingate's plea to oxycodone possession reads:

- On June 12th 2014, Wingate was traffic stopped on Northbound Interstate 75 in Madison County, Kentucky after Law Enforcement learned that he had concluded a meeting with his source of supply. During the traffic stop, Wingate was found in possession of three ounces of heroin, and approximately 1,100 oxycodone 30 milligram pills. Wingate was arrested after the discovery of the drugs in his vehicle.

- During a Mirandized interview following his arrest, Wingate admitted to conspiracy with Gonzalaz, Spence, and his source of supply to distribute oxycodone pills.

- The Defendant acknowledges that he is responsible for conspiracy to distribute approximately 20,000 oxycodone 30 milligram pills. This number is based on the Defendant acquiring approximately 1,000 pills every two weeks (approximately 2,000 pills per month) from September 2013 through May of 2014, and includes the oxycodone pills found in the Defendant's possession during the traffic stop on June

> 12th 2014, and the oxycodone pills found during the execution of the search warrant on his residence the same day. The Defendant further acknowledges that he conspired to distribute 5 ounces of heroin (141.75 grams). The marijuana equivalency for the oxycodone pills and heroin attributable to the Defendant is 4341.75 kilograms of marijuana.

The government neither revisited the grand jury to obtain a superseding indictment, nor did it seek to amend the indictment in connection with Wingate's re-arraignment. Nevertheless, the counseled plea agreement recited a wholly extra-indictment crime - a conspiracy to distribute oxycodone pills between individuals who were named jointly in none of the indictment's counts.

ARGUMENT

I. Summary.

The case at bar features a sentence of 150 months imposed for the crime of conspiracy to distribute oxycodone when the indictment contains no count for that offense. The government did not seek an amendment to the indictment in connection with entry of Wingate's guilty plea or his sentencing. Wingate's plea colloquy contained no reference to an amended indictment or superseding information that could support a sentence for conspiracy to distribute oxycodone. Accordingly, Wingate proceeded to sentencing upon an uncharged count for which he could not have been convicted at trial or legally sentenced.

A criminal prosecution in the district court may be instituted only by indictment unless either (1) the offense is a misdemeanor or a petty offense or (2) the defendant waives prosecution by indictment. In some, but not every circuit, when an indictment is required, failing to charge the defendant by indictment is a jurisdictional defect that deprives the district court of power to act and is fatal to a conviction resulting from the use of another charging instrument. C.f. United States v. Cocoman, 903 F.2d 127, 129 (2d Cir. 1990) (lack

of indictment in federal felony case is jurisdictional defect); United States v. Hartwell, 448 F.3d 707, 714-717 (4th Cir. 2006) (fact that defendant was charged by information rather than by indictment, in prosecution for offense potentially carrying death penalty, did not deprive district court of subject matter jurisdiction). Further, where the allegations contained in the indictment do not support the enhanced sentence imposed, principles first announced in Alleyne and Apprendi render the sentence illegal and void, if for no other reason than the maximum punishment for a crime not found in the indictment is no punishment at all.

II. The Court Should Address the Constitutional Limits of Convictions Based on Defective Indictments.

An indictment serves three constitutional functions, none of which were satisfied in the case at bar. First, it fulfills the Sixth Amendment "apprisal" requirement by providing a defendant with notice of the charges against him in order that the defendant may prepare a defense. "The indictment must, in order to inform the court what punishment to inflict, contain an averment of every particular thing which enter into the punishment. Blakely v. Washington, 542 U.S. 296, 301-302, 124 S. Ct. 2531 (2004) (quoting 1 J. Bishop, Criminal Procedure § 81, at 55 (2d ed. 1872)). This principle "pervades the entire system of the adjudged law of criminal procedure. It is not made apparent to our understanding by a single case only, but by all cases." Criminal Procedure, §81, at 51; see also, Apprendi v. New Jersey, 530 U.S. 466, 510-11, 120 S. Ct. 2348 (Thomas, J., concurring).

Second, it effectuates the Fifth Amendment's double jeopardy provision by insulating a defendant from reprosecution for the same offense. Where the possible punishment is pegged to the sum or substance stolen or sold, the indictment must contain a specific allegation to the value or the contraband. S. Union Co. v.

United States, 567 U.S. 343 (2012); see also, Apprendi, 530 U.S. at 502, n. 2 (Thomas, J. concurring); United States v. Budd, 496 F.3d 517, 521 (6th Cir. 2007) (citing United States v. Stirone, 361 U.S. 212, 80 S. Ct. 270 (1960)).

Third, the indictment shields an accused from unwarranted and unfounded charges of involvement in serious crimes by interposing the independent judgment of the grand jury in accordance with the Fifth Amendment's guarantee that prosecutions for "infamous" crimes may only be commenced by grand jury indictment. Harris v. United States, 536 U.S. 545, 122 S. Ct. 2406 (2002); Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887 (1974); United States v. Reasor, 418 F.3d 466 (5th Cir. 2005) (only grand jury can issue or amend indictment for "infamous" crime); United States v. Mutchler, 333 F. Supp. 2d 828 (S.D. Iowa 2004) (mere aggravating factors are not criminal conduct and therefore are not "infamous crimes").

The Sixth Circuit interprets the decision in United States v. Cotton, 535 U.S. 625, 630 122 S. Ct. 1781 (2002) as holding that claims of "defects to an indictment do not deprive a court of its power to adjudicate a case." Short v. United States, 471 F.3d 686, 697 (2006). Accordingly, the Circuit has reasoned that "whatever the effect of a defective indictment, it does not deprive the district court of subject matter jurisdiction." Id. at 697. Subsequently, the Third Circuit, acknowledging a circuit split on topic, further limited "whatever effect" a defective grand jury product might have to something beneath substantive error and, therefore, meaningless unless a convict can overcome the harmless error doctrine. United States v. Stevenson, 832 F.3d 412, 426 (3d Cir. 2016); c.f. United States v. Omer, 395 F.3d 1087, 1088 (9th Cir. 2005) (indictment defect is structural).

The shift towards a constricted view of the personal right to an indictment containing a jury charge including each element of an offense suffers from

internal contradiction, as the same panels upholding sentences grounded on insufficient indictments pay lip service to venerable platitudes concerning the essential role of grand juries. E.g. United States v. Prentiss, 256 F.3d 971, 984 (10th Cir. 2001) (en banc), overruled on other grounds as recognized by United States v. Sinks, 473 F.3d 1315, 1321 (10th Cir. 2007) ("[A] defendant's right to have a petit jury find each element of the charged offense beyond a reasonable doubt is no less important than a defendant's right to have each element of the same offense presented to a grand jury."); Stevenson, 832 F.3d at 426 (concluding that Supreme Court holding in Cotton requires that "Fifth Amendment grand jury right and Sixth Amendment petit jury right ... should be protected equally" because each "serve 'vital functions.'") Yet, a petit jury finding that the prosecution satisfied some, but not all elements of an offense would never be deemed harmless if a judge suffering a disoriented moment elected to enter a resulting judgment of conviction.

As a result, while most circuits know that a defective indictment must have some meaning (hence the Sixth Circuit's woeful reference to "whatever effect" a defect may have), it neither means as much in the terms of the core purposes of an indictment (defendant apprisal, bulwark against exercise of state power) as once it did and, since Cotton, does not appear to mean much at all. Worse, the confusion resulting from a lack of outer bounds being set on the Cotton opinion's reasoning means a defective indictment carries a different legal meaning depending on where inside the United States the charging document issues.

The reasoning found in the Cotton opinion has been applied to grind away at the state's duty to gain grand ~~jury~~ Jury consent to a degree that warants the erection of a border beyond which enthusiastic circuits may not pass. The Sixth Circuit's own expansive interpretation of the Cotton holding amplified a much more circumspect holding, rendered all the more narrow by topical rulings by the

Supreme Court in 2016 (Molina-Martinez v. United States, 136 S. Ct. 1338) and 2018 (Rosales-Mireles v. United States, 585 U.S. ___, 138 S. Ct. 1897 (2018); see Short at 697. Far from the sweeping jurisdictional holding described by the Short panel, the Cotton court avoided the question of whether Apprendi error is structural and held, instead that an indictment which failed to recite an enhanceable drug weight does not always satisfy the "fourth prong" of plain error review. As such, an appellate court may only vacate a resulting judgment with enhanced penalties if the error seriously affected the fairness, integrity or public reputation of judicial proceedings. The Cotton majority reasoned that the presence of overwhelming evidence of guilt rendered any blight on the reputation of past judicial proceedings tolerable.

The pivotal element of the Cotton holding is commonly referred to among those practitioners focused on the 50% of the federal docket dealing with post-judgment criminal proceedings as the "fourth prong of the Olano test." And, the same "Fourth Prong" subsequently underwent significant further scrutiny with results that suggest circuit-level decisions in the vein of the Sixth Circuit's Short are inconsistent with a present understanding of indictments and sentencing.

Speaking for a 7-2 majority in Rosales-Mireles, Justice Sotomeyer both confirmed the presence of a "reasonable probability that [a defendant] would have been subject to a different sentence but for [a Guidelines] error" and directed that a Guidelines error that satisfies Olano's other plain error requirements generally will affect the fairness, integrity or public reputation of underlying judicial proceedings. In the normal course of affairs, such an error will warrant relief under the "fourth prong".[1]

Along the way, the Rosales-Mireles majority explicitly rejected two dissenting justices' defense of the practice of sustaining sentences infected with "procedural defects" but falling somewhere beneath an all-out wrongful conviction.

The minority position explicitly relied on an interpretation of the Cotton holding consistent with the Sixth Circuit's misguided jurisprudence for its authoritative support. Id. (Thomas, dissenting). According to the majority, Cotton does "not stand for the view ... that procedural errors are unimportant or could never satisfy Olano's fourth prong, especially where ... the defendant has shown a likelihood that the error affected the substantive outcome." Rosales-Mireles, n. 3, 138 S. Ct. 2701 (2018); Molina-Martinez, 578 U.S. ___, 136 S. Ct. 1338 (2016). Because "[i]n the ordinary case, proof of a plain Guidelines error that affects the defendant's substantial rights is sufficient to meet [the defendant's] burden," id., n.4, the technical nature of an error, like the failure to present a superseding information to which a defendant conceding guilt may have acceded, does not insulate sentencing proceedings in the face of a heightened Guidelines sentencing range. To say the least, the expansive view of Cotton has been undermined by subsequent clarifying decisions. Accordingly, the minority circuit view - that an indictment defect of great enough proportion can be a structural defect requiring a conviction be vacated - should be sustained in light of more recent governing law.

The limited view of the importance of a correct, complete indictment adopted by the Sixth Circuit and applicable to the case at bar can best be corrected (or, endorsed) by granting review in a case scrutinizing the most expansive gulf between indictment and conviction. Wingate presents the outer limits of an

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[1] In so doing, the Court both redefined the limits of the "fourth prong" as a cure all for defective indictments (a la the Cotton indictment) and invoked the specter of outcome prejudice at sentencing sufficient to carry the oft-recited second element of an ineffective counsel claim. Both holdings are important here because the Wingate indictment is more deficient than the charging document considered in Cotton and because Wingate's appeal waiver in his plea agreement relegated him to the Strickland-controlled post-conviction hearing process to bring the missing indictment (and resulting higher sentence) to the court's attention. See §4, infra.

indictment defect and, in so doing, poses the unanswered question of where those limits lie. The Wingate grand jury did not omit a sentencing fact or even an element of an offense. Rather, the jurors made an affirmative choice to forego charging Wingate with the entire conspiracy offense for which he was later sentenced.

The Wingate indictment contains counts for conspiracy to distribute heroin (2 defendants), possession of a small amount of oxycodone with intent to distribute it (Wingate alone), and large scale conspiracy to distribute oxycodone (9 defendants). It is neither fair, nor reasonable to assume the grand jurors merely overlooked Wingate's name in making out the oxycodone conspiracy. The same were comfortable indicting Wingate for some controlled substance offenses and were comfortable indicting him for a conspiracy crime based on heroin-related evidence. The most reasonable inference flowing from the grand jury's selective indictment was a lack of sufficient evidence to return an indictment against Wingate for criminal involvement in an oxycodone conspiracy. Accordingly, the omission of Wingate from Count 1 should be considered an intentional and intelligent choice. And, an instance where conduct has gone uncharged because of grand juror reticence and not mere prosecutorial selectivity provides the clearest and broadest divide between uncharged conduct and punishment imposed for the same conduct that any analyst could hope to find.

II. A Sentence Based on Conduct for Which a Grand Jury Declined to Indict Invites a Review of Uncharged Conduct Sentencing Practices.

The unindicted crime of oxycodone distribution conspiracy drove the calculation of a Guideline range between 168 and 210 months based on a stipulation contained in the plea agreement concerning the total number of prescription pills Wingate conspired to sell. In the absence of the conspiracy charge, Wingate would have been sentenced based on the 1,100 oxycodone pills found in his possession

which he intended to distribute. Indictment, Count 17; PSR, p. 8. The associated guideline range would have been 63 to 78 months. If sentenced for a conspiracy offense of any kind, Wingate would have proceeded with an unknowable drug weight because no conclusion was ever reached concerning the overall scope of the heroin distribution conspiracy, Indictment, Count 2, or Wingate's role in it. PSR 4-8. All that is known on the single count of conspiracy with which Wingate was charged is that a grand jury found he possessed a discrete amount of purchased heroin, a fact which does not support the notion of an equivalent potential sentence to the oxycodone conspiracy missing from the indictment.

While sentencing based upon uncharged conduct is broadly permitted when proved by a preponderance of evidence, the practice has garnered significant skepticism. See, e.g. Gerald Leonard & Christine Dieter, Punishment Without Conviction: Controlling the Use of Unconvicted Conduct in Federal Sentencing, 17 BERKELY J. CRIM. L. 260, 261 (2012) (collecting cases). The practice has survived in federal courts despite a variety of consitutional challenges, and despite the Supreme Court's pronouncement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." United States v. Booker, 543 U.S. 220, 244, 125 S. Ct. 738. Coupled with the court's opinion in Apprendi (itself the logical wellspring from which Booker drew) equating the importance of an indictment with that of a petit jury finding, the Booker decision rightly presupposed an indictment supporting the plea or jury finding. It should be read to include "charged by a grand jury or waived to a judge by the defendant" to the list of prerequisites for a fact to be used against a citizen at sentencing.

To sustain the practice of sentencing on uncharged conduct after Booker, circuit panels, but not the Supreme Court itself, have deployed two rationales.

First, for the notion that uncharged conduct is a proper source of information for sentencing a related offense, circuits have reached for pre-Booker authority, relying primarily on the decision in United States v. Watts, 519 U.S. 148, 117 S. Ct. 633 (1997). Watts held that the Double Jeopardy Cause of the Fifth Amendment does not bar a sentencing court from considering conduct of which the defendant has been acquitted, so long as that conduct has been proved by a preponderance of the evidence. Circuits, including the Sixth, from which this action originated, have uniformly determined that Watts remains good law even after the apparent limitations on its reasoning expressed in both Apprendi and Booker. See United States v. White, 551 F.3d 381, 382 (6th Cir. 2008) (en banc); see, also, United States v. Farias, 469 F.3d 393, 399 (5th Cir. 2006). The post-Booker adherence to Watts has arisen even in the face of criticism, in significant part, expressly due to the fact that this Court has not revisited the Watts holding. Farias at 399; see, also, Cunningham v. California, 549 U.S. 270, 27494, 127 S. Ct. 856 (2007).

Second, circuit courts rely on a legal fiction derived from the so-called "remedial holding" authored by Justice Breyer in the split Booker decision. That authority salvaged the Sentencing Guideline structure from the court's observation that mandatory guideline sentences run contrary to the Sixth Amendment jury guarantee (the Booker "constitutional holding") by declaring all guideline calculations merely "advisory." Uncharged conduct being as "advisory" as any other sentencing factor, circuit courts have shrugged off challenges to its use even when, as here, the addition of uncharged conduct caused the guideline range, itself, to project a substantially higher projected sentencing range.

Some panels and district courts have sought a "third way" between turning a blind eye towards extraneous conduct that might inform a sentencing judge about the character of a convict and a short circuit whereby sentences are imposed for

crimes the government lacked evidence to prove beyond a reasonable doubt. The patchwork of district judges and the Tenth Circuit (the single regional court to expressly adopt it) refer to the rule as the "relatedness principle" and deploy it to reject requested enhancements which seek to punish for uncharged conduct that is unrelated to the count of conviction. United States v. Allen, 488 F.3d 1244 (10th Cir. 2007); United States v. Chandler, U.S. Dist. LEXIS 14213, Case No. 15-20246 (E.D. Mich. Jan. 30, 2018) citing United States v. Cross, 121 F.3d 234, 238-39 (6th Cir. 1997) (rejecting cross-reference to murder within context of controlled substance offense). Curiously, the courts imposing a relatedness doctrine find support for it in Watts; the same line of authority relied upon by panels endorsing enhancements for any conduct -- charged, convicted, acquitted, or never-before-mentioned. According to the "relatedness" courts, Watts and its core precedent, Witte v. United States, stand for the notion that the severability of a crime of conviction and a crime of enhancement is really what matters at sentencing. To wit:

> To the extent that the Guidelines aggravate punishment for related conduct outside the elements of the crime on the theory that such conduct bears on the "character of the offense" the offender is punished only for the fact that the present offense was carried out in a manner that warrants increased punishment, not for a different offense (which that offense may or may not constitute).

Witte, 515 U.S. 389, 402-3, 115 S. Ct. 2199 (1995). Requiring a "relatedness" rule to parse between those instances wherein uncharged conduct "contextualizes" an offense and those instances in which it could infringe upon the Sixth Amendment's reservation to the jury of the power to find those facts essential to punishment remains just one expression of a broader struggle to synthesize jurisprudence that appears to authorize punishment for untried offenses under a preponderance of the evidence standard while hinting (on an "advisory only" basis) that judges should not actually impose it. See, e.g., United States v. Staten,

466 F.3d 708, 720 (9th Cir. 2006) (applying "clear and convincing evidence" standard where a sentencing factor had an extremely disproportionate effect on the ultimate sentence as a form of limiting the boundlessness of a Watts-only approach to enhanceable conduct).

The drive behind variant efforts to articulate some control feature on the incursion upon traditional ideas of Sixth Amendment jury rights is a byproduct of a widespread interpretation of Booker's "remedial holding" as entirely mooting the "constitutional holding." The reasoning flows: since the Guidelines are no longer mandatory, judge-found facts do not run afoul of the Fifth or Sixth Amendments. Accordingly, all facts satisfying a preponderance of the evidence standard satisfy the Constitution. See, e.g., United States v. Fisher, 502 F.3d 293, 305-06 (3d Cir. 2007); United States v. Villareal-Amarillas, 562 F.3d 892, 897-98 (8th Cr. 2009).

The same courts have stubbornly declined to acknowledge the Court's now swollen catalogue of instruction emphasizing the centrality of a defendant's Guidelines calculation in the sentencing process. See Gall v. United States, 552 U.S. 38, 128 S. Ct. 586, 596 (2007) (correct Guideline range calculation essential beginning point for procedurally reasonable sentence); Rosales-Mireles, 585 U.S. ___ (June 18, 2018) (an unintentional Guidelines error sufficiently determinative of sentence to constitute plain error resulting in "reasonable probability that [defendant] would have been subject to a different sentence but for the error"). The credibility, then, of the legal fiction of the "mere advisory" nature of the Guidelines has frayed, as more and more federal courts acknowledge that they are more or less, back to where they were before Booker downgraded Guidelines from requirements to inputs. Or, as traced by one current member of the Court in dicta offered during his tenure on an appellate circuit:

> [T]he bottom line, at least as a descriptive matter, is that

> the Guidelines determine the final sentence in most cases. ... [M]any key facts used to calculate the sentence are still being determined by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt. The oddity of all this is perhaps best highlighted by the fact that courts are still using **acquitted** conduct to increase sentences beyond what the defendant otherwise could have received - notwithstanding that five justice in the Booker constitutional opinion stated that the Constitution requires that facts used to increase a sentence beyond what the defendant otherwise could have received be proved **to a jury beyond a reasonable doubt.** In short, we appear to be back almost where we were pre-Booker.

United States v. Henry, 42 F.3d 910, 919-20, 34 U.S. App. D.C. 149 (D.C. Cir. 2007) (Kavanaugh, J., concurring) (emphasis in original).

Booker truly means little if the controlling feature of a sentence was first rejected by the grand jury responsible for the underlying case. The equivalence between uncharged conduct, as presented here, and the acquitted conduct questioned by Justice Kavanaugh for Sixth Amendment purposes is sufficient to permit the instant action to serve as the vehicle to re-impose the boundaries intended by Booker and guide lower courts away from the use of unindicted or untried crimes in the near-dispositive Guidelines calculations that are inexorably tied into the length of sentences actually imposed.

IV. The Habeas Posture of the Present Action Does Not Undermine Its Qualification for Certiorari.

In Hohn v. United States, the Supreme Court held, notwithstanding inapposite prior authority, that it possesses jurisdiction under 28 U.S.C. §1254(1) to review the denial of an application for a certificate of appealability by a circuit judge or panel. 524 U.S. 236, 118 S. Ct. 1969 (1998). In reaching its conclusion, the Court construed the Anti-Terrorism and Effective Death Penalty Act broadly, rejecting a literal interpretation that would have deprived the court of jurisdiction over petitions such as the one at bar and thereby denied habeas corpus petitioners at least one full (three-court) round of federal post-conviction review. Id. Therefore, no jurisdictional bar is present.

Following the holding in Rosales-Mireles, there remains no real question over whether a counseled guideline error satisfies the Strickland prejudice prong. The Court has now determined that just such an error is, in the normal course of affairs, one that is likely to result in a different sentence and one that impugns the integrity of proceedings in a district court. Nearly the same standard is dictated for a prejudicial error by counsel. Glover v. United States, 531 U.S. 198, 121 S. Ct. 696 (2001) (increase in sentence of at least six months was prejudicial in relation to an ineffective assistance of counsel claim under Strickland because "any amount of actual jail time has Sixth Amendment significance"); United States v. Vazquez, 271 F.3d 93 (3d Cir. 2001)(en banc)(Sloviter, J. dissenting) (substantial rights always impaired where counsel error yields higher sentencing range).

The only remaining consideration is whether Wingate should have been afforded the opportunity to show deficient performance by counsel. In this respect, it is important to note that a Certificate of Appealability should be granted if reasonable jurists could reach opposing conclusions on the matter raised. It is not even necessary for jurists to lack unanimity so long as the matter is debatable.

Wingate raised enough of a question in the courts below to render an oversight by his lawyer of the fact that Wingate was pleading to an uncharged offense debatably deficient. A defendant's right to effective counsel includes the period of his representation during a plea process as well as during trial. Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 307(1985) In that context, an attorney is "deficient" under Strickland's performance prong if he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment...." 466 U.S. at 68. Ignorance of sentencing law can satisfy the deficient performance test, see, e.g., Meyers v. Gillis, 142 F.3d 664 (3d Cir.

1998), as can ignorance of the content of an indictment. Keto v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887 (1951). The confluence of those two possibilities presented by Wingate, therefore, falls well within the zone of deficiency necessary to render the constitutional adequacy of Wingate's legal advice "debatable." Because the certificate of appealability context requires no more, the case at bar favors certiorari because of its post-conviction posture.

CONCLUSION

The apparent conflicts facing circuit and district courts struggling to apply Cotton's core principles manifest in two forms, both of which are presented by the instant fact pattern. First, courts have clearly reached opposite conclusions concerning the degree to which a grand jury must necessarily participate to vest the district court with jurisdiction. Here, a clear and obvious disconnect is present between the crimes presented to the grand jury and the crime for which Wingate was convicted, if only because the plea agreement spells out the conviction in special detail not available through the opaque jury deliberation process. A side-by-side comparison of the indictment, which lacks any reference to Wingate's involvement in an oxycodone conspiracy and the plea agreement, which focuses on just that offense, places the excision of the grand jury from the district court's exercise of power front and center. Second, the case at bar presents a clear instance of a plain error infecting the sentencing process by elevating the sentencing guideline range in reliance on uncharged conduct. No clearer example of a sentence based on uncharged conduct could be subjected to consideration than a case in which a grand jury declined to indict on the count which later formed the basis of defendant's guideline calculation. Accordingly, the Wingate sentence presents a rare opportunity to address the scope of Apprendi's dictate requiring that "any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment ..."

435 U.S. at 476, not from the perspective of a fact supporting a sentencing enhancement, but instead from an indictment missing the whole crime that yielded a higher sentencing range.

Respectfully submitted,

Jeffrey Wingate

Jeffrey Wingate

Dated: 11-13-18