No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

FRANKIE WASHINGTON,

Petitioner,

v.

DEBORAH JOHNSON, Warden,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Apprendi v. New Jersey* 530 U.S. 466 (2000), it violates the Sixth Amendment to sentence a defendant to a higher statutory maximum term based on facts found by the sentencing court that were neither alleged in the indictment nor found by a jury beyond a reasonable doubt. The circuits are split on the standard for reviewing the harmlessness of *Apprendi* error at sentencing. The question presented is whether review is for whether the sentence was greater than authorized absent the error or whether review is of the entire record, as permitted for trial error, to determine whether the result would have been the same absent the error.

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TO THE UNITED STATES COURT OF APPEALS
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PETITION FOR A WRIT OF CERTIORARI

Frankie Washington respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum disposition of the court of appeals in not reported in the Federal Reporter, but is available online at 751 Fed.Appx. 1032 (9th Cir. 2019). App., *infra*, 1a-2a.

JURISDICTION

The Ninth Circuit entered its memorandum decision and judgment on February 11, 2019. This petition is timely filed pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution reads:

> 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 defence.

28 U.S.C. § 2254(d) reads:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

> claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim— (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

Petitioner was convicted of, inter alia, six counts of attempted murder in the Los Angeles County Superior Court, Los Angeles, California. At the time of petitioner's February 21, 2003 sentencing, the punishment for attempted murder under California law was five, seven or nine years. California law mandated the middle term, seven years, as the presumptive term and allowed a lower or higher sentence upon a finding of factors in mitigation or aggravation. The sentencing court sentenced petitioner to the high term of nine years and imposed consecutive sentences on the other counts for a total prison term of twenty-nine years. The court found the offense was aggravated "due to the

degree of danger and the use of high-powered weapons."

A. State court proceedings

Petitioner was convicted, following a jury trial, in Los Angeles County Superior Court of six counts of attempted murder (counts 8-13; Cal. Penal Code § 664/187), three counts of assault with a firearm (counts 1-3; Cal. Penal Code § 245(a)(2), making a terrorist threat (count 4; Cal. Penal Code § 422), first degree burglary (count 5; Cal. Penal Code § 459), kidnapping (count 6; Cal. Penal Code § 207), and shooting into an inhabited dwelling house (count 7; Cal. Penal Code § 247). In seven of those counts (4-6, 8-13), the jury found true the enhancement that a principal was armed with a firearm. (Cal. Penal Code § 12022(a)(1)).

At the February 21, 2003 sentencing, the Superior Court sentenced petitioner to state prison for a term of twenty-nine years. The court selected the attempted murder in count eight as the principal term. On that count, the court imposed the upper term of nine years as the base term and an additional one year for the firearm enhancement. The court ran the other counts and enhancements consecutive to count

eight (with the exception of count seven which the court stayed) for a total term of 29 years. The court selected the upper term on count eight "due to the degree of danger and the use of high-powered weapons." App., *infra*, 23a.

Petitioner appealed to the California Court of Appeal, challenging her conviction and sentence. She argued the sentencing court's selection of the "upper term of nine years without factual findings by a jury or admission by appellant to justify aggravating the term constituted *Blakely*[1] error."

The California Court of Appeal rejected the claim, citing the California Supreme Court's decision in *People v. Black*, 35 Cal. 4th 1238 (Cal. 2005). *Black* held that the judge's selection of the upper term did not implicate the defendant's right to a jury trial and was merely an exercise of the court's sentencing discretion. App., *infra*, 23a.

Petitioner filed a petition for review in the California Supreme Court that included the claim that the court's selection of the upper term violated the Sixth Amendment. The California Supreme Court denied the petition without comment on January 25, 2006.

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[1] *Blakely v. Washington*, 542 U.S. 296 (2004).

B. Federal court proceedings

Petitioner timely filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 alleging that her custody under the California judgment violated the United States Constitution. Later, petitioner attempted to amend the petition to add a claim that her state-court sentence violated the Sixth Amendment under *Cunningham v. California*, 549 U.S. 270 (2007), but the court denied the amendment without prejudice, finding the claim unexhausted. The district court eventually dismissed the petition with prejudice on December 22, 2008. CR 125, 126.

In 2016, the district court—prompted by petitioner's filing of a subsequent federal habeas corpus petition, alleging a *Cunningham* violation and noting that the district court had failed to reach the merits of her claim in the instant case—appointed counsel to address whether petitioner should be allowed to pursue that claim. Petitioner moved under Fed. R. Civ. P. 60(b) to reopen the instant case, and the court granted the motion.

The court referred the case to the magistrate judge for a determination of the merits of the claim. Following supplemental briefing, the

magistrate judge issued a report and recommendation, recommending denial of the claim. App., *infra*, 25a-35a. The district court accepted the report and recommendation and issued judgment denying the petition with prejudice. App., *infra*, 37a40a.

Petitioner appealed to the Ninth Circuit Court of Appeals. The appeal argued that the state court's rejection of the Sixth Amendment claim was contrary to *Apprendi v. New Jersey*, 530 U.S. 466 (2000) within the meaning of 28 U.S.C. § 2254(d)(1), and consequently, the California court's rejection of the claim was not entitled to deference. *Panetti v. Quarterman,* 551 U.S. 930, 948 (2007).

Under de novo review, the sentence violated the Sixth Amendment. At the time of Ms. Washington's offense and sentencing, California law required a finding of circumstances in aggravation before an upper-term sentence could be imposed. Cal. Penal Code § 1170(b) (West 2001); Cal. Rules of Court 4.420(a). The sentencing court found that the degree of danger and use of high-powered weapons as circumstances in aggravation and reasons for imposing the upper term. These reasons were not found true by the jury, were not admitted by petitioner, and were not within the exception for prior convictions.

Accordingly, the trial court's imposition of the upper term based on facts not found by a jury violated the Sixth Amendment. *Cunningham*, 549 U.S. at 293.

The appeal further argued that the Sixth Amendment error was not harmless. The factors found by the trial court to increase the statutory maximum, degree of danger and use of high-powered, weapons, did not necessarily make the offense more aggravated than the "ordinary" attempted murder.

The Ninth Circuit affirmed the denial of the writ. It held the admitted Sixth Amendment error was harmless given the "overwhelming evidence of dangerousness." The memorandum opinion found that there was no reasonable probability that a jury would not have found the offense was aggravated by the manner of its commission. App., *infra*, 2a.

REASONS FOR GRANTING THE WRIT

In *Apprendi*, this Court held that the Sixth Amendment requires any fact, other than a prior conviction, that increases the statutory maximum sentence be submitted to a jury and proved beyond a reasonable doubt. Because the error is constitutional, reversal is required

unless the government proves the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Washington v. Recuenco*, 548 U.S. 212, 218-19 (2006). This Court has, however, never resolved the standard for determining whether *Apprendi* error at *sentencing* can be harmless, and the circuits have applied starkly different and conflicting standards in resolving that issue.

A. *Apprendi* sentencing error

This case involves preserved *Apprendi* error at sentencing to be distinguished from *Apprendi* error at trial. Sentencing error occurs when a defendant is sentenced for a crime for which she was neither indicted or tried. Trial error occurs when a defendant is properly charged and convicted but one of the elements of the offense was not submitted to the jury. *United States v. Lewis*, 802 F.3d 449, 455 n.6 (3d Cir. 2015) (en banc) (plurality opinion); *United States v. Johnson*, 899 F.3d 191, 198 (3d Cir. 2018).

This case involves sentencing error. Petitioner was charged and convicted of six counts of attempted murder. She was, however, sentenced to the aggravated term based on facts that were neither alleged in the charging document nor found by the jury. As in *Lewis*, no error

occurred in petitioner's charge or trial; the charging document did not omit any element of the attempted murder offense, and the jury was properly instructed. Petitioner was properly convicted of attempted murder, but sentenced for a different, aggravated offense. The *Apprendi* error occurred at sentencing.

B. The circuit split

1. Review of the record evidence for harmless error

Some circuits make no distinction between *Apprendi* trial error and *Apprendi* sentencing error. They simply apply the harmless-error standard from *Neder v. United States*, 527 U.S. 1 (1999). In *Neder*, this Court held that the Sixth Amendment error in omitting an element of the offense from the jury charge and verdict was subject to harmless-error analysis. The Court found the error harmless beyond a reasonable doubt because the "omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Id.* at 17.

The Sixth Circuit has adopted this approach. In *United States v. Stewart*, 306 F.3d 295 (6th Cir. 2002), *Apprendi* error occurred when the defendants were sentenced based on drug quantities that were not

found by the jury. The Sixth Circuit reviewed for harmless error and examined the entire record to determine where the omitted element—drug quantity— was supported by uncontroverted evidence or whether there was record evidence that could lead to a contrary finding. *Id.* at 232.

The First Circuit engages in a similar analysis. In *United States v. Harakaly*, 734 F.3d 88 (1st Cir. 2013), the defendant was sentenced to a mandatory minimum based on the sentencing court's finding that he was responsible for more than fifty grams of methamphetamine in violation of *Apprendi* and *Alleyne v. United States*, 570 U.S. 99 (2013). The First Circuit conducted harmless-error review and found the error harmless because the "evidence Harakaly was responsible for more than fifty grams of methamphetamine was overwhelming." 734 F.3d at 96. *See also United States v. McIvery*, 806 F.3d 645, 651 (1st Cir. 2015) (*Alleyne* error harmless where overwhelming, unchallenged evidence established requisite drug quantity to support mandatory minimum sentence). The Fourth Circuit also reviews for harmless error by looking to the record, finding *Apprendi* error harmless where there is overwhelming or uncontroverted evidence establishing the omitted jury

finding. *See, e.g., United States v. Dyess*, 730 F.3d 354, 361 (4th Cir. 2013) (*Apprendi* error not subject to correction because record reveals indisputable evidence establishing sufficient drug quantity to support sentence); *United States v. Mackins*, 315 F.3d 399, 408 (4th Cir. 2003) (same).

2. Review for whether error contributed to sentence

Other circuits apply a different, more tailored, approach to harmless-error review for sentencing error. The Third Circuit explained the difference. The question for *Apprendi* sentencing error is whether "the error did or did not 'contribute to the sentence obtained.'" *Lewis*, 802 F.3d at 456 (quoting *Sochor v. Florida*, 504 U.S. 527, 539). *Lewis* elaborated:

> In other words, harmless-error review for a sentencing error requires a determination of whether the error "would have made no difference to the sentence." *Parker v. Dugger*, 498 U.S. 308, 319 (1991). This analysis contrasts with the analysis appropriate for trial errors, which turns on whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999). Because we are

> confronted here with a sentencing error, we do not conduct the analysis reserved for trial errors.

Id. The focus is specifically on the sentence, not the trial record.

The Eighth Circuit also follows this approach. In *United States v. Maynie*, 257 F.3d 908 (8th Cir. 2001), the defendants were convicted of conspiracy to distribute cocaine base in violation of 21 U.S.C. §§ 841(a), 846 (1984) and each was sentenced to mandatory life imprisonment based on the trial court's finding that they were responsible for 50 grams or more of cocaine base and had two or more prior convictions for a felony drug offense. The issue of drug quantity, however, was not submitted to the jury in violation of *Apprendi*.

On appeal, the government argued the *Apprendi* error was harmless because there was overwhelming evidence that the defendants were responsible for 50 grams or more of crack cocaine. The Eighth Circuit rejected that argument, finding that type of harmless-error review inappropriate where the error involved the government's failure to charge an element of the offense in the indictment, and "the district court's imposition of a sentence which both exceeds the crime charged by the government and exceeds the punishment authorized for the

offense of conviction." *Maynie*, 257 F.3d at 920. Because the offense of conviction permitted a sentence no greater than thirty years, the error was not harmless.

In *United States v. Jordan*, 291 F.3d 1091 (9th Cir. 2002), the Ninth Circuit described the two approaches for determining whether *Apprenedi* error was harmless. It could follow the first course and canvass the record to determine whether, had the defendant been properly indicted and the jury properly instructed, the appellate court could say "beyond any reasonable doubt that the defendant would have been found guilty of the more severely punishable crime." *Id*. at 1095. Or it could, like *Lewis* and *Maynie*, "look only at the sentence received to see if it is greater than the maximum sentence the defendant should have faced." *Id*.

The Ninth Circuit chose the latter approach. When the missing element was neither alleged nor proved to the jury beyond a reasonable doubt, there are simply too many unknowns to say that the error was harmless where the defendant received a sentence that was greater than the maximum authorized by the facts found by the jury. *Id*. at 1096-97; *See also United States v. Minore*, 292 F.3d 1109, 1122 n.12

(9th Cir. 2002) (review for whether the defendant received a sentence greater than authorized absent the error).[2]

C. The Court should grant the petition and resolve the conflict in favor of review of the sentence

Review for harmless *Apprendi* error that permits examination of the trial record to determine whether there is sufficient evidence to support the uncharged offense and punishment subverts the principles of *Apprendi*. "The motivating principle behind *Apprendi* and *Alleyne* is that judges must not decide facts that change the mandatory maximum or minimum; juries must do so." *Lewis*, 802 F.3d at 456. To permit an affirmance "because the evidence is overwhelming" runs counter to this principle by allowing judges to decide the facts that change the maximum sentence. *Id*.

That was the case here. Ms. Washington received a sentence greater than that authorized by the offense of conviction based on facts

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[2] The Ninth Circuit has subsequently backed off this approach and now sanctions a harmless-error finding where the evidence is "overwhelming and uncontroverted." *United States v. Zepeda-Martinez*, 470 F.3d 909, 913 (9th Cir. 2006). The Ninth Circuit's shift has been criticized as unsupported and unnecessary. *United States v. Guerrero-Jasso*, 752 F.3d 1186, 1196-1204 (9th Cir. 2014) (Berzon, J., concurring opnion).

that were neither charged nor found by a jury beyond a reasonable doubt. Had the Ninth Circuit applied the mode of harmless-error analysis true to the principles of *Apprendi*, the undisputed *Apprendi* error would have been remedied. This Court should grant the petition resolve the circuit split and hold that *Apprendi* sentencing error cannot be harmless where the defendant receives a greater sentence than the sentence authorized for the offense charged and the conviction found by the jury beyond a reasonable doubt.

CONCLUSION

For all the foregoing reasons, petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

DATED: May 13, 2019

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