IN THE
SUPREME COURT OF THE UNITED STATES

NO.

RICHARD PARRISH,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
No. 17-CR-20807

PETITION FOR WRIT OF CERTIORARI

FEDERAL COMMUNITY DEFENDER

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QUESTIONS PRESENTED FOR REVIEW

Sentences based on unreliable information violate Due Process, *see United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948), and sentencing factors must be supported by sufficient indicia of reliability, *see Gall v. United States*, 552 U.S. 38 (2007); *United States v. Watts*, 519 U.S. 148 (1997). Richard Parrish's sentence was based, in part, on a finding of fact that both parties agreed was unfounded.

Is resentencing required when a sentencing judge relied on an assumption that both parties agree is without evidentiary support?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

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IN THE
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On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Richard Parrish respectfully petitions this Court for a writ of certiorari to review the judgement of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's unpublished order denying petition for rehearing en banc is included the Appendix at A-1. The Sixth Circuit's published opinion affirming Mr. Parrish's sentence is included in the Appendix at A-2 and reported at *United States v. Parrish*, 915 F.3d 1043 (6th Cir. 2019). The district court's sentencing judgement is included in the Appendix at A-3. The transcript from Mr. Parrish's sentencing hearing is included in the Appendix at A-4.

STATEMENT OF JURISDICTION

Mr. Parrish invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) (2012) and Part III of the Rules of the Supreme Court of the United States. The court of appeals issued its order affirming Mr. Parrish's sentence on April 3, 2019. This petition is filed within 90 days of that order, so this petition is timely filed pursuant to Supreme Court Rule 13.1.

STATEMENT OF THE CASE

Richard Parrish is serving a 250-month sentence in federal custody for a controlled substances distribution offense. In June 2018, prison officials received an anonymous tip from a woman that Mr. Parrish was texting her from within the prison. Prison guards searched Mr. Parrish's cell and found a cellular telephone.

The government chose to prosecute him for possession of contraband in prison, a misdemeanor carrying a maximum penalty of one year in prison. Mr. Parrish accepted responsibility, pled guilty, and had a sentencing hearing all in one day. Consequently, the district court did not have a pre-sentence report for the hearing, which meant the court could rely on only the submissions of the parties. Everyone agreed there was no evidence that Mr. Parrish used the cell phone to conduct criminal activity.

Yet, the district court, on its own, leaped to the conclusion that Mr. Parrish used the phone to harass someone:

> THE COURT: In this matter, the Bureau of Prisons became aware of the situation—from just reading the memos—because some third-party who he was texting, a woman, contacted them. So that's fairly disturbing because, obviously, it wasn't his family or they wouldn't have turned him in. Somebody turned him in that didn't want him to contact them. So this is a different case, though. I have seen another one. At least in my mind if he was contacting his family, that's—you know, it's not right, but … But he's contacting somebody that didn't want him to contact them and turned him in, which is pretty acute in this day and age especially.

(A-4 at R. 21, Tr. Hr'g, PgID 56–57.) The court concluded that Mr. Parrish's conduct warranted a stiff penalty: five months' imprisonment tacked onto his existing sentence. (*Id.*, PgID 58.)

On appeal, Mr. Parrish argued that the district court's reliance on an unsubstantiated fact rendered his sentence substantively unreasonable. The majority affirmed the sentence after first concluding that the claim was procedural, and thus subject to plain-error review because Mr. Parrish did not lodge a formal objection. The standard of review did not matter, however, because the majority saw no error "plain or otherwise." *United States v. Parrish*, 915 F.3d 1043, 1048 (6th Cir. 2019). The majority believed the district court did not unreasonably infer that the woman who reported that Mr. Parrish was texting her did not want contact with him. *Id.* To reach this conclusion, the majority rejected Mr. Parrish's unrebutted assertion that he was using the cell phone to contact his children, reasoning that his children might not have welcomed his calls. *Id.*

Judge Keith dissented and forcefully argued that appellate courts "should be careful not to affirm sentences based on such unreasonable speculation." *Id.* at 1050. He pointed out two critical facts in the record: (1) there was no information about who the person was, her motivations for providing the tip, and the extent of her contact with Mr. Parrish; and (2) the government conceded there was no evidence Mr. Parrish engaged in nefarious activity. (*Id.* at 8.) Judge Keith believed that the

district court (and the majority) had to "make[] several inferential leaps" and "treated . . . assumptions as fact," and so the sentence could not stand. *Id.*

REASONS TO GRANT THE WRIT

This petition presents a question that arises frequently in sentencing appeals about the quantum and quality of evidence required for district courts to increase a person's sentence. The Sixth Circuit misapplied this Court's precedents holding factual findings at sentencing ought to be supported by the preponderance of the evidence. *See United States v. Watts*, 519 U.S. 148, 156 (1997). This question is exceptionally important because it relates to the most critical aspect of the federal criminal legal system — sentencing.

A. This Petition Presents Questions of Exceptional Importance

Now, plea bargaining "*is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (internal quotation marks omitted). Once a defendant decides to plead guilty, the sentencing hearing is the most important part of the criminal proceeding. As the importance of sentencing hearings has increased, sentencing judges must resolve numerous factual disputes before selecting a sentence. Sentencing appeals comprise the majority of criminal appeals this Court handles. Clear rules are essential. This Court must rein in district court fact-finding at sentencing.

District courts possess tremendous discretion in sentencing. *See Beckles v. United States*, 137 S. Ct. 886, 893 (2017) ("[T]his Court has never doubted the

authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." (internal quotation marks omitted)). But that discretion is not unfettered; a sentence based on materially untrue assumptions "is inconsistent with due process of law." *Burke*, 334 U.S. at 741. A sentence is based on unreliable evidence if such evidence is "'[a] point, part, line, or quantity from which a [sentence] proceeds.'" *Hughes v. United States*, 138 S. Ct. 1765, 1775 (2018) (quoting Black's Law Dictionary 180 (10th ed. 2014)). That is just as true when the unreliable evidence is used to accept the Guidelines' recommendation as it is when used to vary upwards.

Unrestrained judicial fact-finding at sentencing has constitutional implications. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Cunningham v. California*, 549 U.S. 270, 274 (2007), the Court clarified that a law which placed "sentence-elevating fact-finding within the judge's province [violated] a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." More recently, the Court held that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 103 (2013).

These cases clarified important sentencing principles: juries—not judges—must find facts that increase defendants' sentences. But crucial questions about constitutional limits at sentencing hearings remain unanswered, particularly about

the use of uncharged, dismissed, and acquitted charges in final sentencing decisions. And this case reveals a troubling example of how little actual evidence is used to justify putting a person in prison.

When this Court denied certiorari in *Jones*, 135 S. Ct. at 8–9, it left untouched the question of the permissibility of sentencing based on uncharged or acquitted conduct; three Justices dissented. *Id.* at 8–9 (Scalia, J. dissenting, joined by Thomas, J. and Ginsburg, J.) ("Petitioners present a strong case that, but for the judge's finding of fact, their sentences would have been 'substantively unreasonable' and therefore illegal. If so, their constitutional rights were violated.") (citation omitted). Since then, the use of uncharged conduct to enhance sentences has continued unchecked in most Circuits.

Several judges have also expressed concern about the constitutional basis for allowing judges to find facts of serious misconduct at sentencing. *See, e.g.*, *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) (reliance on acquitted or uncharged conduct to impose higher sentences "seems a dubious infringement of the rights to due process and to a jury trial."); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (questioning whether a district court can "decrease or increase defendant's sentence . . . based on facts the judge finds without the aid of a jury or the defendant's consent"); *United States v. Fitch*, 659 F.3d 788, 800 (9th Cir. 2011) (Goodwin, J., dissenting) (criticizing a sentence for fraud that was significantly higher

because the district court believed the defendant committed murder without "clear and convincing evidence" of that fact); *United States v. Fisher*, 502 F.3d 293, 311 (3d Cir. 2007) (Rendell, J., concurring) ("A defendant's due process rights are implicated when facts found by a judge under a preponderance standard concerning a separate, uncharged crime result in a dramatic increase in the sentence actually imposed on the defendant for the crime of conviction, so as to suggest that the defendant is really being sentenced for the uncharged crime rather than the crime of conviction."); *United States v. Grier*, 475 F.3d 556, 574 (3d Cir. 2007) (en banc) (Ambro, J., concurring) (criticizing the use of uncharged, unproven conduct to increase a person's sentence). "[D]istrict judges are no more infallible than other human beings, and every once in a while they issue sentences that clearly overstate the egregiousness of the circumstances." *United States v. Heard*, 749 F. App'x 367, 376 (6th Cir. 2018) (Moore, J., concurring in part and dissenting in part).

This case presents a clear example of judicial fact-finding at sentencing run amok. What makes this case so remarkable is that both parties agree there is no evidence in the record to support the district court's conclusion that Mr. Parrish was engaged in illegal activity. And so, when the district court is presented with unrebutted evidence of how the phone was used (Mr. Parrish's statement) or no evidence at all, there should be some limits on when a district court can and should speculate about what may or may not have happened.

Intervention by this court is particularly important in a case like this, where the

sentencing hearing was the most consequential part of the criminal proceedings. Due process demands that sentencing decisions not be based on materially false or unreliable information. *Adams*, 873 F.3d at 517 (citing, *inter alia*, *Tucker*, 404 U.S. at 447; *Burke*, 334 U.S. at 741). The unrestrained judicial fact-finding at sentencing "has gone on long enough." *Jones*, 135 S. Ct. at 9 (Scalia, J., dissenting from the denial of certiorari). This case provides this Court with an opportunity to rein in district courts' ability to speculate about what occurred to increase a person's sentence.

B. The Sixth Circuit's Analysis Conflicts with this Court's Teachings

Although the evidentiary standards at sentencing hearings are more lenient than those used at trial, district courts are not free to accept as evidence anything under the sun and rely on it to impose a sentence. This Court has held that a preponderance of the evidence standard at sentencing satisfies due process, *Watts*, 519 U.S. at 156, and circuits have interpreted this to mean district courts must use the preponderance-of-the-evidence standard to find various sentencing factors. *United States v. Brika*, 487 F.3d 450, 458-59 (6th Cir. 2007) (citing *United States v. Watts*, 519 U.S. 148, 157 (1997) ("We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.")). "[A] preponderance of the evidence means such evidence as, when considered and compared with the evidence opposed to it, has more convincing force, and produces [the] belief that what is sought to be proved is more likely true than not

true." 3 Fed. Jury Prac. & Instr. § 104:01 (6th ed.).

The evidence in this record does not satisfy that standard. Anonymous tips are notoriously problematic. When police seek warrants on the basis of information provided by a witness known to the police, but not the judge, the affidavit must include facts about the "'veracity' and 'basis of knowledge' of persons supplying the hearsay information." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The list of cases reiterating this point is long.[1] Yet the district court had no information about the anonymous tipster even though the preponderance standard that applies at sentencing hearings is higher than the standard for establishing probable cause. *See id.* (probable cause, unlike preponderance of the evidence, is flexible and requires only a "fair probability" that a crime occurred and that evidence will be in a particular place). Under these precedents, it's doubtful a magistrate judge could or would find probable cause to believe Mr. Parrish contacted the tipster for a nefarious purpose. If that is so, then there is not enough evidence in the record to find by a preponderance of the evidence that he did so.

[1] *See, e.g.*, *United States v. Luong*, 470 F.3d 898, 903 (9th Cir. 2006) ("[F]or an anonymous tip to be accorded any weight, officers must provide some basis to believe that the tip is true." (internal quotation marks omitted)); *United States v. Helton*, 314 F.3d 812, 820 (6th Cir. 2003) ("Anonymous tips . . . demand more stringent scrutiny of their veracity, reliability, and basis of knowledge than reports from confidential informants."); *United States v. Deleon*, 88 F. Supp. 3d 786, 792 (E.D. Mich. 2015) (noting that an affidavit without any information about how the informant learned of information would be fatal but for the informant's well-established reliability).

C. The Sixth Circuit's Analysis Conflicts with the Jurisprudence of Other Circuits

The opinion below also creates an untenable situation because of the conflict it creates with other circuit courts of appeals. Although direct comparisons in the context of sentencing pose difficulty given the individualized nature of the proceeding, a few cases highlight the divide between the courts.

The First Circuit vacated a sentence for illegal re-entry imposed after a district court incorrectly found that the defendant had re-entered the United States twice. *United States v. Gonzalez-Castillo,* 562 F.3d 80, 83 (1st Cir. 2009). The district court's sentencing error was plain and affected the outcome of the sentencing because the court focused on the deterrence value of a lengthier sentence. *See id.* Citing *Townsend*, 334 U.S. at 740–41, the First Circuit ultimately concluded "that basing a substantial criminal sentence on a non-existent material fact threatens to compromise the fairness, integrity, or public reputation of the proceedings," because of the Due Process right not to be sentenced based on false or materially incorrect information. *Id.* at 83–84. The Seventh Circuit confronted a similar factual misapprehension and reached the same conclusion. *See United States v. Corona-Gonzalez*, 628 F.3d 336, 340 (7th Cir. 2010) (determining that the district court erred in formulating the petitioner's sentence after it wrongly found the petitioner had previously re-entered the United States illegally).

The Third Circuit has similarly found a sentence unreasonable when the

district court erroneously believed the defendant prepared over 2,000 fraudulent tax returns, when the actual number was only 79. *United States v. Desrosiers*, 568 F. App'x 163, 166 (3d Cir. 2014). This sentence could not stand because, even though the error did not affect the range of the advisory guidelines, the district court was still obligated to "consider the proper facts when exercising its discretion," and the reliance on incorrect information seriously undermined public confidence in the proceedings. *Id.* at 167. Indeed, reversal was warranted even though the government argued that the district court could reasonably infer that the true number of fraudulent tax returns filed exceeded 2,000. *Id.* Unlike the Sixth Circuit here, the Third Circuit refused to "make an inference on the District Court's behalf in an effort to substantiate its reasoning—particularly where such an inference would be contrary to the record[.]" *Id.*

The rationale in these decisions stands in stark contrast to the rationale offered by the lower court, which upheld the district court's decision to rely on an unsubstantiated assumption. This Court should take this opportunity to explain for district courts and the courts of appeals the importance of ensuring sentences are based on factual findings, not hunches, or "the morning's horoscope." *Parrish*, 915 F.3d at 1050 (Keith, J., dissenting) (quotation marks omitted).

CONCLUSION

This Court should grant Mr. Parrish's petition.

Respectfully submitted,

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Dated: June 25, 2019