19-5754

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

CHARMAR BROWN- PETITIONER

VS.

UNITED STATES- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

CharMar Brown
Reg. No. 20267-047
FCI MANCHESTER
P.O. BOX 4000
MANCHESTER, KY

QUESTIONS PRESENTED

1. Whether Magwood extended to challenges to the original undisturbed conviction, following a new judgment?

2. Whether Murder Cross-reference U.S.S.G. 2D1.1(d)(1) cross referencing 2A1.1 which instructs the court to impose a mandatory life sentence, is unconstitutional even under an advisory Guideline regime?

LIST OF PARTIES

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

TABLE OF CONTENTS

INDEX TO APPENDICES

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 bellow.

OPINIONS BELOW

[ ] For cases from federal courts:

The opinion for the United States court of appeals appears at Appendix A to the petition.

The opinion of the United States district court appears at Appendix B to the petition.

The opinion for the United States court of appeals rehearing/rehearing en banc appears at Appendix C to the petition.

JURISDICTION

[ ] For case from federal courts:

The date on which the United States Court of Appeals decided my case was February 15, 2019.

A timely petition for rehearing/rehearing en banc was denied by the United States Court of Appeals on the following date: March 28,2019, and a copy of the order denying rehearing appears at Appendix C.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

This is a writ of certiorari being filed from an appeal denial from the Eighth Circuit.

The Course of Proceedings and Disposition in the Court Below

In January 2007, the Grand Jury for the U.S. District Court for the District of Nebraska returned a fifth superseding indictment, naming Brown in five charges:

Count I: conspiring from approximately October 2004 until June 2006 to possess with the intent to distribute more than 1,000 kilograms of marijuana, in violation of 21 U.S.C. § 841(b)(1)(A) and § 846;

Count II: using, carrying, possessing and discharging a firearm during in relation to a drug trafficking crime that occurred on or about October 3, 2005, in violation of 18 U.S.C. § 924(c)(1)(A) and (C)(i);

Count IV: using, carry, possessing and discharging a firearm during and in relation to a drug trafficking crime that occurred on or about May 3 and 4, 2005, in violation of 924(c)(1)(A) and (C)(i);

Count VI: possession on or about April 3 and 4, 2006 with intent to distribute more than 100 kilograms of marijuana, in violation of § 841(a)(1) and (b)(1)(B); and

Count VII: using, carrying, possessing, and discharging a firearm during and in relation to a drug trafficking crime that occurred on or about April 3 and 4, 2006, in violation of § 924(c)(1)(A) and (C)(i).

Brown pleaded not guilty and proceeded to trial represented at trial by attorney Michael Levy. The trial spanned from September 25 to October 25, 2007. Following presentation of the evidence, the jury returned verdicts of guilty on all counts. In particular the jury found that, as to Count VI, Brown was responsible for "at least 100 killograms" of marijuana. The probation office's presentence investigation report ("PSR") relied upon a cross-reference in the U.S. Sentencing Guidelines (§ 2D1.1(d)(1)) to First Degree Murder to find

that the Guidelines range for Count I (the drug conspiracy) was life.

Brown filed several objections to the PSR. This included an objection on constitutional grounds to the use of the cross-refernce at U.S.S.G. § 2D1.1(d)(1) to apply § 2A1.1 and increase Brown's offense level to 43 for First-Degree Murder.

At sentencing Mr. Levy noted the objection on Sixth Ammendment grounds stating it's a violation of a defendant's Sixth Amendment right for a court rather than a jury to find a defendant committed First Degree Murder. The district court overruled the objection, finding on its own that Brown acted in concert with Dale Giles to cause the death of three people. That raised the base offense level to 43 with Brown having a Criminal History Category I, his resulting Guidelines "range" was life.

The dictrict court's judgment order imposed life for Count I and Count VI based upon the Gudelines, to run concurrently with each other. Mr. Levy timely filed a notice of appeal for Brown. Unfortunately, Mr. Levy became terminally ill. Before he passed away, he moved for appointment of new counsel.

Appointed counsel, Jessica Milburn, did not raise the preserved Sixth Amendment challenge to the murder Guideline cross-reference. She raised several other arguments on appeal, including a challenge to the jury instructions for the § 924(c)(1) charges. United States v. Brown, 560 F.3d 754,766 (8th Cir. 2009). The Court agreed that the instructions were erroneous but found that the error only affected Brown's substantial rights as to Count VII. The Court reversed the conviction on Count VII and ordered a general remand for resentencing.

The district court recongnized that, to follow the Eighth Circuit's mandate, it needed "to resentence" Brown without a term for Count VII. The district court announced an intention to "issue a new judment and commitment order eliminating the reference to the finding of guilt on Count VII and eliminating the reference to the 300-month term on Count VII." The Court asked counsel if anyone believed the judge's "job should be any different from that." The attorneys did not object. Brown asked the judge how much discretion she had as to the resentencing. She responded, "I don't believe I have any discretion." With that, the hearing (which ladsted no more than three minutes, from 3:32 p.m. to 3:34 p.m) was over. The district court did not reconsider any 18 U.S.C. § 3553(a) factors, impose sentence in Brown's presence, or notify him of the right to appeal.

Two days later, the district court issued an amended judgment order, eliminating the sentence for Count Seven, but once again unconstitutionally sentencing Brown to life on Count Six, for an effective sentence of life plus 420 months. The amended judgment falsely stated that the district court had advised Brown of his right to appeal following the imposition of sentence.

Another two days later, the district court recorded the Eighth Circuit's order granting Ms. Milburn's request to withdraw as counsel on appeal. Ms. Milburn remained counsel for Brown in the district court. But at no time did she ever make Brown aware of the amended judgment order or the right to appeal it or consult with Brown about the pros or cons of appealing. Nearly four years later, Brown learned through his own efforts that the district court had entered the amended judgment and had a right to appeal it--far too late to appeal.

Brown, through Tracy L. Hightower-Henne, timely filed a motion to vacate under 28 U.S.C. § 2255 motion raising five grounds for relief. She failed to notice (or noticed and failed to raise) the illegal life sentence as to Count Six. She also failed to notice or raise Brown's previous counsel error in failing to counsel Brown regarding the right to appeal or the pros and cons of appealing.

The district court summarily dismissed two claims. After hearing from the government, the district court rejected the remaining claims and denied Brown's § 2255 motion. Both the district court and the Appeals court denied Brown's requests for certificate of appeal appealability .

Represented by Jeffery Brandt, Brown filed a second-in-time motion under § 2255. The district court appeared to assume the motion was successive and denied it for failing to obtain an order from the court of Appeals authorizing the filing. The district court also denied Brown's request for certificate of appealability.

Brown filed a timely appeal but sought remand for the district court to rule on whether his second-in-time § 2255 motion was the type that did not need authorization from the court of appeals. The Eighth Circuit Court of Appeals denied his application for certificate of appealability and denied the motion for remand as moot. But it ordered the district court "to correct its judgment to reflect that Appellant Charmar Brown's sentence on Count 6 is 480 months," effectively granting Brown partial relief.

About a year later, the district court followed the Court's instructions and entered an amended judgment, resentencing Brown on each count and altering the sentence as to Count VI to 480 months. Brown

Brown timely appealed from that final judgment rasing several claims. Brown argued that because the district court entered a new judgment by altering his sentence from life to 480 months in light of Magwood v. Patterson he was entitled to address his sentence anew.

Despite the substantive change to Brown's sentence, the Appeals Court denied his appeal ruling the change in his sentence was a result of a clerical error. Brown remains incarcerated at FCI Manchester in Mancherster, KY under a sentence of life plus 420 months.

LAW AND ARGUMENT

I. The Murder Cross-reference U.S.S.G. § 2D1.1(d)(1) cross-referencing 2A1.1 is unconstitutional even under an advisory guideline system.

A. The use of judge found facts of seperate crimes extend far beyond what the Constitution allows.

This case concerns some of the most fundamental rights guaranteed by our constitution and give rise to questions of territorial jurisdiction, due process protections, and the right to a jury trial.

The mandatory life sentence Brown received resulted from the convergence of several doctrines in sentencing law, each individually well accepted. However in some instances the whole can become greater and different than simply the sum of it's parts. Opperating together these individual doctrines each reflecting compromises in our criminal jurisprudence, in this extreme case threaten in combination to erode rights that the constitution does permit to be compromised.

Murder Cross-reference U.S.S.G. § 2D1.1(d)(1) violates both the Fifth and Sixth Amendment and calls into question the Courts authority to sentence a defendant for a crime the court lacks the power to adjudicate. U.S.S.G. § 2D1.1(d)(1) states:

> If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

This sentencing guideline permits a sentencing court to impose a mandatory life sentence for an un-charged, un-tried, non-admitted, never-convicted, non-federal crime without notice. The mandatory

imposition of life sentence for an uncharged crime by applying the Murder Cross-reference raise serious questions of what place does a mandatory guideline have under an advisory sentencing regime and whether such a result was strictly intended by the sentencing guidelines.

B. In light of Booker 2D1.1(d)(1) cross referencing 2A1.1 is unconstitutional.

In United States v. Booker, 543 U.S. 220,125 S. Ct. 738 (2005), this Court ruled the guidelines were no longer mandatory. The guidelines were to be treated as advisory and just one factor in the district court's sentencing decision.

On its face, everything changed after Booker's decison-at least everything changed as to the language the courts used at sentencing hearings and when reviewing those sentences on appeal. But as a practical matter, very little really changed.

Before Booker, "[e]xcept in limited cicumstances, district courts lacked discretion to depart from the Guidelines range." Dillon v. United States, 560 U.S. 817,820,130 S. Ct. 2683 (2010) (citing Burns v. United States, 501 U.S. 129,133,111 S. Ct. 2182 (1991)). The same system- one that this Court described as "mandatory" (see Booker, 543 U.S. at 263 refering to "that mandatory system") is in place today. The district court must begin with the correctly-caculated Guideline range and "remain cognizant of the [Guidelines] throughout the sentencing process." Gall v. United States, 552 U.S. 38,50 n.6,128 S. Ct. 586 (2007). As a matter of law, and just as before Booker, a sentence within the Guidelines range is presumptively reasonable and lawful, and any "major departure" from that range requires "significant justification." Id. at 50,51.

"[The old system is just continuing on as though nothing had happened- continuing under the pretext that the guidelines are only 'advisory'***." United States v. Thompson, 515 F.3d 556,569 (6th Cir. 2008) (Merritt,J., dissentening). Just as before Booker, the Guidelines are a "lodestone of sentencing." see Peugh v. United States, 133 S. Ct. 2072,2084, 186 L. Ed. 2d 84 (2013) Sentences are still "anchored by the Guidelines." Id. at 2083-84. Even after the Guidelines were referred to as "advisory," the Supreme Court has found that the Guidelines are "law" for the purposes of sentencing. Id. at 2072,2084,2085-87. They have the "force as the framework for sentencing." Id. at 2083. They "represent the Federal Government's authoritative view of the appropriate sentences for specific crimes." Id. at 2085. Just as before Booker, "the Guideline range is intended to, and usually does, exert controlling influence on the sentence that the court will impose." Id. And because, in the usual case, "the judge will use the Guidelines range as the starting point in the analysis and impose a sentence within the range," Freeman v. United States, 546 U.S. 522, 131 S. Ct. 2685, 2692 (2011), "the Guidelines demark the defacto boundaries of a legally authorized sentnece in the mine run of cases." Bell, 808 F.3d at 931 (Millett,J., concurring the denial of rehearing en banc).

"[There is no denying that the post-Booker system in substance closely resembles the pre-Booker Guidelines system in constitutionally relevant respects." see Henry, 472 F.3d 919 (Kavanaugh,J., concurring). "Four of the five Justices who joined the Booker remedial opinion, including its author Justice Breyer,

did not find any constitutional problem with the Guidelines to begin with. So it is understandable that the current system as applied is not a major departure from the pre-Booker Guidelines system." Id. See Booker, 543 U.S. at 312-13 (Scalia, J., dissenting in part) (stating the Booker remedial opinion may convey message that "little has changed" from mandtory Guidelines system). What has further complicated things, many of the Guideline provisions which pre-date Booker have woven within the use of strong mandatory language as evident by the Murder Cross-reference.

In light of Booker 2D1.1 (d)(1) cross referencing 2A1.1 (a), is unconstitutional. The Guideline provision 2D1.1 (d)(1) relies on the murder statue 18 U.S.C. 1111. This statue has specific elements that must be found by a jury in order to convict. Written within the statue's penalty application instructions section (b), after a defendant is found of murder in the first degree he shall be punished by death or by imprisonment for life. Additionally the court is instructed to apply 2A1.1 (First Degree Murder) Guideline provision, which calls for a base offense level of 43 and a sentencing range of Life. Anytime these two provisions are applied mandatory life becomes the "advisory" sentencing range. There is no other sentence for the court to consider.

In the U.S. Sentencing Commission effort to develop sentencing ranges, the Commission was required to develop U.S. Sentencing Guidelines consistent with all pertinent provisions of title 18, United States Code. Offense level 43 corresponds to the mandatory minimum sentence of life codified in 18 U.S.C.S § 1111, a provision with which the Guidelines must be consistent. At least where a single sentence is compelled by statue, a sentencing range is

properly limited to that sentence. A court therefore does not decide whether a "range" is more than one suggested sentence where no other particular sentence is mandated by statue. In fact 2A1.1(a)(2)(A) Application Notes affirms this in the instructions for Imposition of Life Sentence:

> In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. A downward departure would not be appropriate in such a case. A downward departure from a mandatory statutory term of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantail assistnace, as provided in 18 U.S.C § 3553(e).

When ever the court looks to this Guideline and follow the "advisory" instructions given, the sentence becomes mandatory. The sentencing range becomes life or whatever the statutory maximum sentence the offense of conviction prescribe.

Even if the Guidelines are not effectively mandatory in their entirety, the Murder Cross-reference is different. Most Guidelines increases result in an increased range of punishment, such as a two level increase based upon an aggravated role enhancement or a call for a specific increased offense level (such as the increase for career offenders, U.S.S.G. § 4B1.(B)). In contrast the language contained in the Murder Cross-reference Guideline mandates that a life sentence be imposed in every case, regardless of the defendant's criminal history and treats the defendant's offense of conviction as if it were murder.

And while the district court has the discretion to depart from the Guidelines in general, the language contained in the Murder Cross-reference courts consider in sentencing cause the court to believe it has limited discretion to depart downward from a life sentence.

The district court in Brown's case believed it was required to impose a life sentence, consistent with the sentence Brown's more culpable codefendant received. On that finding, the district court applied the Murder Cross-reference, which called for base offense level 43. The court imposed a life sentence on count one and 480 months (40 years), the statutory maximum for count six. A week later based on the belief that the court was mandated to impose a life sentence on all Brown's marijuana counts, the court issued an Amended Judgment on 2/8/2008 changing Brown's sentence from 480 months to life. After Brown was in part successful on direct appeal the Eighth Circuit remanded him back to the district court for a full resentencing on 7/20/2009. During Brown's resentencing hearing the court asked Brown if he had anything that he would like to say before the court imposed its sentence. Brown asked Judge SmithCamp if she had any discretion to sentence him to another sentence other than the sentence that he had previously received, in response Judge SmithCamp stated she did not believe she had any discretion at that time. (See Exhibit A Resentencing Transcripts)

The use of this Guideline with its mandatory lanuage violates the Fith and Sixth Amendment and is in direct conflict with this Courts ruling in Booker. Brown's sentence is thus unconstitutional and must be vacated.

C. A Defendant's Due Process Rights are violated when the the Murder Cross-reference 2D1.1(d)(1) and 2A1.1 is applied at sentencing without notice.

The use of the Murder Cross-reference Guideline violates principles guaranteed by the Bill of Rights. This Constitutional and statutory error significantly affects a defendant's liberty interests in a way implicates due process of law. And, in most cases reveals a lack of congruence or consistency between on the one hand, the crime as charged in the indictment and found by the jury and, on the other, the crime for which the defendant is sentenced. It is thus possible to view the consequences of relevant error in one of two ways: (1) either the defendant was improperly sentenced to a greater penalty than the one authorized by Congress for the crime of which he was justly convicted; or (2) the defendant was improperly convicted because the crime of conviction was not fully alleged in the indictment and found by the jury.

The Constitution requires that defendants receive fair notice of the allegations against them. Specifically the Fifth Amendment provides that "no person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment...nor be deprived of life, liberty or property, without due process of law".

The notice requirment not only stems from specific language of the Constitution, but also forms the cornerstone of due process. Justice Cardozo, still under the pre-incorporation doctrine wrote that trial by jury may be abolished. Indictments by a grand jury may give way to informations by a public officer. The privilege against self-incrimination may be withdrawn and the accused put upon a stand as a witness for the state. What may not be taken away is notice of the

charge and an adequate opportunity to be heard in defense of it. Snyder v. Massachsetts, 291 U.S. 97, 105, 78 L. Ed. 674, 54 S. Ct. 330 (1934). As Justice Black wrote, No principle of due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. Cole v. Arkansas, 333 U.S. 196, 201, 92 L. Ed. 644, 68 S. Ct. 514 (1948). Thus, in light of the real charges for which a defendant may be sentenced, a failure to provide notice of the Murder Cross-reference application violates the general principles of due process requiring fair notice to the defendant of the nature of the crime against which he must defend himself.

In addition to this, the "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute a crime with which he or she is charged". In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct 1068 (1970).

This Court's decisions on sentencing, while generally endorsing rules that permit sentence enhancements to be based on conduct not proved to the same degree required to support a conviction, have not embraced the concept that those rules are free from constitutional constraints. The Court in McMillan, cautioned against permitting a sentence enhancement to be the "tail which wags the dog of the substantive offense." McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411 L. ed 2d 67 (1986). In cases like Brown's where the Murder Cross-reference 2D1.1(d)(1) is applied the tail has wagged the dog. The consideration of the murders at Brown's sentencing

upstaged his conviction for marijuana distribution. The effect there permitted the harshest penalty outside of capital punishment to be imposed not for conduct charged and convicted, but for other conduct of a seperate and distinct crime as to which there was at sentencing, at best a shadow of the usual procedural protections. The other conduct (murder) was by all accounts the most serious sort, but exactly the kind of crime our jurisprudence normally requires the government to charge in an indictment and meet its full burden of proof. Brown was charged in state court with the murders that were the subject of his enhancement, yet when put to the test in state court these charges were dismissed. (See Exhibit B)

A charge of murder represents the very archetype of conduct that has historically been treated in the Anglo-American legal tradition as requiring proof beyond a reasonable doubt. A rule structure that bars conviction of a marijuana conspiracy or firearm charge except on proof beyond a reasonable doubt, but then permits imposition of a life sentence upon proof of a murder by a preponderance of the evidence attaches, in effect, the lesser procedural protections to the issue that would naturally be viewed as having the greater significance. Unlike certain "relevant conduct" that simply call for a determinate increase in a defendant's base offense level (BOL) based on specified factual findings, when 2D1.1(d)(1) and 2A1.1 Murder Cross-reference is applied the dictrict is required to calculate a defendant's BOL as if his offense of conviction had been murder.

In Brown's case the cross-referemce to the First Degree Murder Guideline essentially displaced the lower Guideline range that would have applied. As a result, the sentence to be imposed for Brown's

marijuana conviction was the same as the sentence that would have been imposed for a federal murder conviction: a mandatory term of life. Despite the nominal characterization of the murders as conduct that was considered as relevant conduct in enhancing or adjusting Brown's sentence for marijuana distrubution, the reality is that the murders were treated as the gravamen of the offense. Brown went from facing a term of years to life without parole, a punishment that represents the second most severe penalty known to law. This qualitative difference between the life sentence imposed and the term of years that Brown otherwise may have received for selling marijuana implicates basic concerns of proportionality both between the enhancement and base sentence and between the offense and punishment as a whole. The comparative severity of the enhancement invites scruntiny of the weight given to factfinding by allocating the murders to the sentencing phase, with its looser procedural contraints and lesser burden of proof. It raises the danger of the defendant's trial and conviction being turned into a means of achieving an end that could not be achieved directly: the imposition of life sentence "enhancement" based on a federally unprosecutable murder. Additionally the defendant being misled by the charge and the course of the proceedings into believing that his crime was of a smaller magnitude than the Sentencing Guidelines mandate.

This Court has long recongnized that due process forbids grossly unfair procedures when a person's liberty is at stake. Specicifically, this Court has indicated that (1) judges are sometimes limited from imposing distinct new punishments based on "a new finding of fact that was not an ingredient of the offense charged," Specht v.

Patterson, 386 U.S. 605 (1967); (2) the "safeguards of due process" in criminal cases are "concerned with substance rather than [any] kind of formalism, "Mullaney v. Wilbur, 421 U.S. 684 (1975); and (3) constitutional concerns are raised whenever sentencing findings become "a tail which wags the dog of the substantive offense," or when the government restructures criminal prosecutions "to evade the commands" of the Constitution. McMillan v. Pennsylvania, 477 U.S. 79 (1986). The simple principle that unifies these decisions is fatal to the use of this unconstitutional legal practice. If the governement wish to punish and convict a defendant for murder, it must indict him and try him, but what it cannot do is use a conviction of lesser charge as springboard for de facto convicting him of murder in a judicial proceeding without notice, with no jury, the civil standard of proof, and none of the criminal justice system's fundamental rules and procedures. Due process forbids prosecutors from manipulating the crminal justice system to evade its core protections. That principle bars prosecutors from waylaying a defendant at sentencing with allegations of a far more serious crime for which he has never been indicted or convicted, allegations that depend, moreover, on evidence which prosecutors are apparently unwilling to subject to the crucible of a criminal trial or test against the burden of proof they must carry there. Due process demands more.

D. Applying the Murder Cross-reference Guideline violates Protections the Sixth Amendment guarantees.

The continued use of the Murder Cross-reference runs afoul the principles established by the Sixth Amendment and strips the accused of protections he has against arbitrary prosecution. The Sixth Amendment requires that the accused be informed of the nature and cause of the charge against him; This requirement appears not once, but twice. (* Fifth Amendment provides for fair notice by presentment or indictment) This repetition of the right indicates the significance that Founders attached to the right to receive fair notice of the crime the defendant must defend against. Additionally the Sixth Amendment affords defendants the right to a speedy and public trial, by an impartial jury. That jury trial right is "no mere procedural formality," but rather a fundamental reservation of power in our constitutional structure" (see Blakely v. Washington, 542 U.S. 296, 124, S. Ct. 2531, 306 (2004).

There is a common thread to the Supreme Court's Sixth Amendment jurisprudence. Every fact which is "legally essential to the punishment" imposed must be charged in the indictiment and proved to a jury." Blakely v. Washington, 542 U.S. 296, 302 n.5 (2004) (citing 1 J. Bishop, Criminal Procedure, ch 6, pp. 50, 56 (2 ed. 1872); Apprendi v. New Jersey, 530 U.S. 466, 476-483, 489-490 (2000). This Court has time and time again set forth this "pragmatic, practical, nonformalistic rule in terms that cannot be mistaken[.]" Oregon v. Ice, 556 U.S._, 128 S.Ct 2465 (2009) (Scalia, J., dissenting); see also, United States v. Booker, 553 U.S. 220, 232 (2005); California v. Cunningham, 549 U.S. 270, 283-284 (2007).

All crimes are defined by statue. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch)(1812). The Constitution commands that a defendant may not be convicted of a crime unless the Government proves him guilty beyond a reasonable doubt. In Re Winship, 397 U.S. 358 (1970), before a jury, U.S. Constitution Amendment Six, every "element" of such crimes, that is every substantive component of the statutory definition of the offense, must be proven to the satisfaction of the jury for the conviction to be valid. This rule also applies easily enough to the federal sentencing system that uses sentencing guidelines combined with substantive reasonableness review.

In Rita v. United States, 551 U.S. 388 (2007), for example, the Court approved the use of an appellate court's presumption of reasonableness for a Guideline-range sentence. In a separate concurrence, Justice Scalia faulted the Court for failing to explain why, under an advisory sentencing system with substantive reasonableness reviw, judge-made facts are never legally necessary to the punishment imposed. Rita at 369 (Scalia, J., concurring in part, concurring in the judgment). Justice Scalia noted that under reasonableness review "for every given crime there is some maximum sentence that will be upheld as reasonable based only on facts found by a jury or admitted by the defendant." Id. Thus, if reasonableness review removes certain sentences from beyond the autority of district courts to impose, then "[e]very sentence higher than that is legally authorized only by some judge-found fact." Id. Based upon this reasoning, Jusitce Scalia believed that if certain judge-found facts are used to justify the reasonableness of a sentence, a defendant could, in turn, make a compelling as-applied Sixth Amendment challenge to his sentence. Id. The Rita majority acknowledged the

Sixth Amendment concerns, but stated that those concerns were not presented by the case. Id. (See also, Marlowe v. United, 128 S.Ct. 450 (2008)).

The relevant inquiry is, therefore whether a sentencing judge has impermissibly increased a sentence on the basis of facts not reflected in the jury's verdict, if those facts are legally essential to the punishment imposed. Blakely at 303-304.

Brown's sentence easily satisfies this requirement. Brown was found guilty of conspiracy to distribute over 1,000 kilograms of marijuana. The jury verdict was silent however on questions of Brown's role in the offense and whether he committed murder. Based solely on the jury's verdict alone and his criminal history within category I, Brown faced a Guideline range of 121 to 151 months imprisonment.

The sentencing judge in his case increased the Guideline range based on its own independent findings that Brown played a role in the murders during the course of the conspiracy. This finding increased Brown's Guideline sentencing range to life imprisonment. Brown's sentence was therefore increased from an initial range of 10-12 years to mandatory life based on findings outside the jury's verdict.

While most judge-found facts under advisory Guidelines are not automatically essential to the punishment imposed, when reasonableness review is placed into the equation, the calculus changes. The only possible way that Brown's life sentence for a drug offense involving over 1,000 kilograms of marijuana as a first time offender could be found substantively reasonable is if the judge-found facts are used in justifying the reasonableness of the sentence. This is

because the reasonableness "range of choice" must necessarily be limitted to some outer sentence that can be imposed. Rita at354. Given the range of choice, it is unlikely that the sentencing Court could impose a life sentence on Brown in the absence of Guideline enhancing facts or extraordinary circumstances. Because the sentencing judge could not have imposed a substantively reasonable life sentence without additional non-verdict facts, those facts were legally necessary to imposing the life sentence Brown received.

When facts are legally necessary to punishment imposed, the full protection of the Sixth Amendemnt applies. Booker at 232; Blakely at 303-304. This is true regardless of whether a judge's authority to impose an increased sentence depend on a specific fact, one of several specified facts, any agravating fact, or some extraordinary circumstance, for "it remains the case that the jury's verdict alone does not authorize the sentence." Blakely at 305. Brown's sentence was based upon facts not found by a jury and without those facts his life sentence could not be legally imposed.

Even though the Guidelines are now advisory, sentencing judges still feel the gravitational pull of the Guidelines when imposing sentences. The Court's recent decisions in Alleyne and Peugh, and Justice Thomas' concurrence in Alleyne suggest that at least some justices see no logical distinction between the elements of an offense and sentencing facts that are used to increase a sentence. Indeed, as this Court explained in Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856 (2007), "under the Sixth Amendment, any fact that exposes a defendnat to a greater potential sentence must be found by a jury, not a judge." Id. at 863-64. Some judges believe that,

following Blakely, Booker and Cunningham, sentencing judges are not empowered "to make findings of fact beyond the facts of the jury verdict or guilty plea--new fact findings that ratchet up the sentence." United States v. Love, 289 Fed. Appx. 889, 894 (6th Cir. 2008) (Merritt, J., concurring). Accordingly, although Booker announced that the Guideline were now to be called "advisory," the Guidelines remain exactly what they were before Booker- the expected range of punishment and final range of punishment in all but a very small percentage of cases. Now is the time for this Court to expressly recognize that the same rationale behind the Apprendi rule applying to statutory ranges necessarily leads to a conclusion that the rule applies to the system that establishes the de facto range for punishment in nearly every case-the Federal Sentencing Guidelines. As a result, the Murder Cross-refernce 2D1.1(d)(1) violates the Sixth Amendment and is unconstitutional.

E. Murder Cross-reference 2D1.1(d)(1) does not give the Court jurisdiction to impose a life sentence for a Non-Federal Murder.

The scope of the indictment goes to existence of the trial court's jurisdiction. Stirone v. United States, 361 U.S. 212, 213 (1990); Ex Parte Bain, 121 U.S. 1 (1886). A prosecutor cannot make an end-run around the jurisdictional prerequisite of an indictment by charging any federal offense, and then proceding to prosecute a defendant during the sentencing phase for a different, at times unrelated offense. Likewise, a prosecutor cannot make this juridicti jurisdictional end-run, and then urge the Court to sentence the defendant for an offense for which the defendant ws neither charged nor convicted. A fundamental premise of our Constitution is that it

is not what one "realy" does that can be punished, but only that conduct which is proven at trial. The mandate of the U.S. Constitution is simple and direct: "If the law identifies a fact that warrants deprivation of a defendant;s liberty or an increase in the deprivation such fact must be proven to a jury beyond a reasonable doubt." See U.S. Constitution Article III 2.

The Government did not charge Brown with murder in his indictment, therefore the district court lacked jurisdiction to adjudicate Brown on the charge of murder. Without impugning the principle that uncharged conduct may be considered in determining a defendant's sentence, the fact that the Nebraska state court dismissed these same murders that were the basis for Brown's enhancement for lack of evidence presents another concern. The Nebraska court that had jurisdiction to charge and try Brown and his codefendants believed there wasn't enough proof to substain a First Degree Murder conviction.

The Murder Cross-reference rely on 18 U.S.C 1111 the statue for federal murder. In order for the Federal Government to have jurisdiction to charge murder there must be some federal nexus. The murder must have taken place within the territorial or maritime jurisdiction of the United States. The speculative loose language of 2D1.1(d)(1) which states: "If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder)"...is problematic for several reasons. First the judge becomes the fact finder and must determine if the murder the Government speculates the defendant is involved in was done willfully and deliberate with malice aforethought.

Secondly, the phrase had such killing taken place within the territorial or maritime jurisdiction of the United States, indicates the Court lack the authority to adjudicate a defendant's guilt.

The particular murders at issue were outside the sphere of the federal prosecutor's criminal charging power. Brown was not charged with the murder in the federal indictment; the murders themselves were not alleged by the Government to be an object of Brown's conspiracy; and the federal jury was not required to make any factual determination regarding the commission of the murders. Yet it would ignore reality not to recognize that the federal prosecution arose out of and was driven by the murders, and tht the prosecution was well aware that the Sentencing Guidelines would require consideration of the murders at sentencing. This summary process in practice efectively overshadows the lesser offense charged, as in Brown's case marijuana charges. Such a practice raises serious questions as to the proper allocation of procedural protections attendant to trial versus sentencing. Although Brown's marijuana offense was the vehicle by which he was brought into the federal criminal justice system, the life sentencing he received resulted from the district court's finding that Brown committed First Degree Murder.

The question is obvious, if the court lacks jurisdictional authority to entertain charges of murder commited outside of it's jurisdiction, how can that same court then exercise authority to sentence a defendant based on murders it has no authority to adjudicate? For this reason and the others stated above, U.S.S.G. § 2D1.1(d)(1) is unconstitutional.

II. When an Amended Judgment Order Substantively Changes the Term of Imprisonment and Makes Errors "a Second Time," the defendant may raise those Errors on Appeal from the new Amended Judment.

This Court has established tha a new judgment entered a result of substantive matter re-sets the table for criminal procedures that follow sentencing. See Magwood v. Patterson, 561 U.S. 320,338,120 S. Ct. 2788 (2010)("[T]he existence of a new judgment is dispositive."). This is true even if the lower court re-imposes the same convictions and sentence after consideration and rejection of legal or factual issues. "An error made second time is still a new error." Id. at 339. And while the seminal Supreme Court case the cite today (Magwood) was issued in 2010, this is a holding a long time in the making.

Twenty years ago, the Supreme Court allowed a claim to proceed under a petition for writ of habeas corpus despite new Anti-terrorism and Death Penalty Act ("AEDPA") rules because the claim at issue could not have been brought any erlier. Stewart v. Martinez-Villareal, 523 U.S. 637,639-40, 118 S. Ct. 1618 (1998). The petitioner had filed a fourth habeas petition based upon the Supreme Court's decision in Ford v. Wainwright, 477 U.S. 399,410,106 S. Ct. 2595 (1986) (recognizing an Eighth Amendment right against insane prisoners). Because petitioner's claim had not been raised and denied before (and subject to res judicata) and therefore had "not been ripe for resolution" before, the Supreme Court found that it was not "second or successive" and allowed the claim to proceed. Id. at 645.

Circuit courts followed this lead, recognizing that first habeas actions (with that term including both § 2254 and § 2255 actions) were not to be counted against a petitioner if the action were

successful in bringing the petitioner back in time to a first direct appeal or even further back to a new sentencing hearing. For example, in In re Goddard, 170 F.3d 435 (4th Cir. 1999), the Fourth Circuit noted that a defendant filing a first § 2255 solely for reinstatement of appellate rights robbed of him as a result of ineffective assistance of counsel would not be penalized as filing a "second or successive" § 2255 motion when filing a "second" (in chronological terms) § 2255 motion to challenge his convictions and sentence. Id. at 435. See, also, McIver v. United States, 307 F. 3d 1327,1330 (11th Cir. 2002); In re Olabode, 325 F.3d 166,173 (3d Cir. 2003); Shepeck v. United States, 150 F.3d 800,801 (7th Cir. 1998) (per curiam) (concluding that an order granting a § 2255 motion and reimposing sentence because counsel failed to file a direct appeal "resets to zero the counter of collateral attacks pursued"); United States v. Scott. 124 F 3d 1328, 1330 (10th Cir. 1997) (per curiam). And a defendant who won his first § 2255 motion in order to be re-sentenced and then later filed a second § 2255 motion was permitted to proceed as if the second-in-time motion was a first § 2255 motion. In re Taylor, 171 F. 3d 185 (4th Cir. 1999).

To some degree, this case law was not completely settled until the Supreme Court spoke in Magwood. There, a state defendant who had lost his state appeal --- filed a federal habeas petition. Magwood, 561 U.S. at 323. The federal district court conditionally granted the writ as to the sentence. Id. The state trial court conducted a new sentencing hearing and entered a new judgment order. The defendant filed a new federal habeas petition challenging the new sentence. Id.

When the district court again granted relief and the state appealed, the Eleventh Circuit reversed, ruling that the second federal habeas petition was an unreviewable second or successive petition because the claims could have been raised following the first sentencing hearing. Id. The Supreme Court disagreed, finding that "new judgment intervening between" two habeas petitions did not mean that the challenges to the "new judgment" was "second or successive" and that even arguments that could have been raised following the first sentencing hearing could now be raised. Id. at 323-24,356-57.

Although Magwood was decided in the context of the constraints of AEDPA and whether a habeas petition was second or successive, the same principles apply to an appeal following an amended judgment order. Just as it was the petitioner in Magwood's first application challenging the new judgment, this would have been Brown's first appeal following the judgment order correcting his sentence. Just as the errors the petitioner in Magwood alleged were new, the errors Brown raised were new. The errors alleged are new because an error made "a second time is still a new error." Id.

Since the Magwood ruling courts have split as to whether Magwood extends to convictions as well as sentences. And while the petitioner in Magwood was only seeking to collaterally attack his new sentence and not his conviction, of the eight federal appellate court that have addressed it, "six(the Second,Third,Fourth,Sixth, Ninth, and Eleventh Circuits) have held that the judgment-based analysis of Magwood compels the conclusion that a habeas petition filed after resentencing and the corresponding issuance of a new judgment may not be barred as second or successive, whether the petitioner is challenging his new sentence or the constitutionality of his original

undisturbed conviction." Long v. United States, 163 A.3d 777, 784, 2017 D.C. App. LEXIS 201 (D.C. Ct. App., Jul. 20, 2017) (citing Johnson v. United States, 623 F.3d 41,46 (2d Cir. 2010); In re Brown, 594 Fed. Appx. &26,&29 (3d Cir. 2014); In re Gray, 850 F.3d 139,142-43 (4th Cir. 2017); King v. Morgan, 807 F.3d 154, 157 (6th Cir. 2015); Wentzell v. Neven, 674 F.3d 1124, 1126-28 (9th Cir. 2012); Insignares v. Sec'y, Fla Dep't of Corr., 755 F.3d 1273, 1281 (11th Cir. 2014)(per curiam). "Courts have long acknowledged and this Court has confirmed that a final judgment of conviction includes both the adjudication of guilt (conviction) and the sentence." Gray, 850 F.3d at 141 (citing Deal, 508 U.S. at 132). "Accordingly, then, when a defendant is resentenced, he or she is confirmed pursuant to a new judgment even if the adjudication of guilt is undisturbed." Id. at 142 (citing King, 807 F.3d at 158).

King concluded that an amended judgement that changes only the sentence nevertheless reinstates the convictions and, thus, resets the stage for what arguments and procedures are available to the defendant. "As a matter of custom and usage,*** a judgment in a criminal case 'includes both the adjudication of guilt and the sentence.' King, 807 F.3d at 157 (quoting Deal, 508 U.S. 129, at 132 and Rashad v. Lafler, 675 F.3d 564,568 (6th Cir. 2012)). The King court held that even when the only change in the proceeding "relates to the sentence, the new judgment will reinstate the coviction and the modified sentence." Id. at 158. And because "the existence of a new judgment is disositive" in resetting the 'second or successive' count," id. (quoting Magwood, 561 U.S. at 338), "the existence of a new judgment permits a new application to attack the sentence, the conviction, or both." Id.

The Eighth Circuit is expressly against such rulings. Along with Fifth and Seventh Circuits, the Eighth Circuit in Brown's case did not reach the same conclusion as the six other Circuit Courts who have addressed this issue, creating a circuit split between the Circuits. The Eighth Circuit ruled that Brown was not intitled to have his claims addressed because his sentence correction was a result of a clerical error.

Brown's sentence was imposed twice. The sentence imposed exceeded the statutory maximum making his sentence unconstitutional. When the court corrected his sentence there was a substantive change to his sentence. Brown has never received the opportunity to challenge the sentence imposed due to his counsel's failure to inform him of his right to appeal. A miscarriage of justice would result from

a decision not to allow Brown the opportunity to challenge his sentence.

CONCLUSION

Beyond the case law above, allowing Brown's challenges below serves justice in his case. Brown's original sentencing counsel challenged the murder cross-reference and filed a notice of appeal when the district court overruled those arguments. Unfortunately, original sentencing counsel fell ill, and depite a direct conflict with Brown, Ms. Milburn represented him on direct. Failiing to advise him of his right to appeal his sentence.

For these reasons and in light of the case law, Brown ask this Court to grant writ to address this unsettled question among the Circuits.

The petition for writ of certiorari should be granted.

Respectfully submitted,

Date: 6-27-2019