IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 2018

MARCHELLO DSAUN McCAIN,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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Questions Presented

In McCain's false statement involving terrorism prosecution, the district court applied the terrorism enhancement of Guideline Section 3A1.4 and calculated a guideline range greater than the statutory maximum for the false statement offense.

1. Does *Apprendi v. New Jersey*, 530 U.S. 466 (2000), prohibit the calculation of a guideline range longer than the statutory maximum for the offense of conviction and achieved by repurposing statutory maxima from an unrelated group of offenses?

2. Does United States Sentencing Guideline Section 5A1.2(a) cap the recommended guideline sentence at the statutory maximum for the false statement group?

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:

List of Directly Related Proceedings

1. United States District Court for the Southern District of California, *United States v. McCain*, No. 15cr0174-W. The district court entered the judgment and commitment on January 16, 2018.

2. United States Court of Appeals for the Ninth Circuit, *United States v. McCain*, No. 18-50013, The Ninth Circuit entered judgment on May 6, 2019, and denied a petition for rehearing and suggestion for rehearing en banc, on August 21, 2019.

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Petitioner, Marchello Dsaun McCain, asks for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered May 6, 2019.

Opinion Below

The decision of the court of appeals, *United States v. McCain*, 769 F. App'x 510 (9th Cir. 2019), is attached as Appendix A.

Jurisdiction

The Ninth Circuit denied a timely petition for rehearing and suggestion for

rehearing en banc on August 21, 2019.[1] This petition is being filed within 90 days.

The Court has jurisdiction under 28 U.S.C. § 1254(1).

Involved Federal Law

United States Constitution, Amendments Five and Six:

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

> 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 defense.

United States Sentencing Guidelines Sections 5G1.1 and 5G1.2.[2]

Statement of the Case

The United States arrested Marchello McCain after Marchello's brother,

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[1] *United States v. McCain*, No. 18-50013, 2019 U.S. App. LEXIS 24954 (9th Cir. Aug. 21, 2019).

[2] Set out in Appendix D of Involved Federal Law.

Douglas, was killed in Syria while fighting for ISIS. Marchello McCain has a prior assault with a deadly weapon conviction. The United States had video of McCain possessing firearms at a gun range and arrested him for it. The FBI then interviewed McCain about his brother's connection to ISIS.

The second superseding (and final) indictment against McCain alleged possession of firearms and body armor by a violent felon and one count of making a false statement involving international terrorism. The parties arrived at a plea agreement with stipulated guidelines regarding the guns and body armor count (77-96 months and no terrorism enhancement.) Regarding the false statement offense, the parties disagreed about whether the terrorism enhancement applied and the plea agreement left it as a disputed issue. The Probation Officer recommended the terrorism enhancement and the United States asked for it. McCain opposed the terrorism enhancement because his crime was not intended to promote an international crime of terrorism nor did it actually obstruct justice as the terrorism enhancement requires. McCain also argued that irrespective of whether the enhancement applied, both *Apprendi*[3] and the grouping guidelines prevented the district court from calculating a guideline range and imposing a sentence greater than the statutory maximum for the offense of conviction.[4]

The district court's held a sentencing hearing in which the United States

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[3] *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[4] U.S.S.G. §§ 5G1.1, 5G1.2.

called a cooperating witness who testified about McCain's participation in a material support conspiracy to provide foreign fighters in Syria. McCain disagreed with that recitation of the facts and objected that the eight-year statutory maximum for the Section 1001(a)(2) offense should cap the terrorism enhancement at ninety-six months per *Apprendi* and Application Note 3(b) to Guideline Section 5G1.2. The eight-year statutory maximum is the only one to which the terrorism enhancement applies – the guideline calculations for the firearms were not subject to the terrorism enhancement – and thus false statement offense group should be capped at the eight-year statutory maximum.

The Ninth Circuit rejected McCain's argument and held that the district court's factual findings were proper.[5] Further, the Ninth Circuit held that there was no *Apprendi* issue whatsoever because all *Apprendi* requires is that the sentence on the count of conviction on the judgment is at or beneath the statutory maximum:

> Since the sentence imposed on the count with the highest statutory maximum (the felon in possession charge's 120 months) was adequate to achieve the total punishment, the court correctly set the other sentences (including the false statement charge's 96-month statutory maximum) to run concurrently. *See* U.S.S.G. § 5G1.2(c). Although the statutory maximum on the felon in possession count was higher than the statutory maximum for the false statement count, that does not mean the district court "ignored" the latter or failed to properly apply U.S.S.G. § 5G1.1, as McCain argues.

United States v. McCain, 2019 U.S. App. LEXIS 13512 at *2-3.

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[5] *United States v. McCain*, 2019 U.S. App. LEXIS 13512, at *1-2.

Reasons to Grant the Writ

1. The Ninth Circuit's Decision Conflicts with *Apprendi*.

Supreme Court Rule 10(c) says that certiorari is appropriate if a United States court of appeals decides an important federal question in a way that conflicts with this Court's precedent. This Court's *Apprendi* precedent says that a mandatory guideline finding which increases the punishment range beyond the statutory maximum for the offense is unconstitutional because it violates the Fifth Amendment and Sixth Amendment. *United States v. Haymond*, 139 S. Ct. 2369, 2379 (2019) (invalidating a supervised release violation based on judicial fact-finding). Over repeated objection, the government sought a guideline enhancement which involved different facts and different findings than the false statement offense to which McCain pled guilty. There is no dispute that the terrorism enhancement of Guideline Section 3A1.4 is what elevated the guideline beyond the eight-year statutory maximum for a false statement offense to a guideline range beginning at fifteen years, eight months and ending at nineteen years, seven months. There was no dispute that this elevated guidelines range did not apply to the firearms and body armor counts. Nor is there any dispute that the district court sentenced per the enhancement in arriving at the ten-year sentence it imposed.

McCain appealed his ten-year sentence to the Ninth Circuit and argued that the district court was not allowed to simply repurpose the statutory maxima of a group of unrelated offenses in order to satisfy a ten-year sentence on the eight-year count. The Ninth Circuit disagreed and said that so long as judgment for the false

statement count was no more than the eight-year statutory maximum for the offense, there was no *Apprendi* error:

> McCain's argument that applying the enhancement violated his rights under *Apprendi* fails because *Apprendi* is only implicated where a court imposes a sentence above the statutory maximum. *See Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *United States v. Ochoa*, 311 F.3d 1133, 1136 (9th Cir. 2002); *United States v. Garcia-Sanchez*, 238 F.3d 1200, 1201 (9th Cir. 2001). Here, the court sentenced McCain to the statutory maximum for each count. McCain cites no case where a court found *Apprendi* error in a sentence below or at the statutory maximum.[6]

The Ninth Circuit is not being fair to McCain's citations. McCain argued in his reply brief that *Alleyne v. United States*[7] shows that *Apprendi* applies to sentences beneath the statutory maximum. McCain also cited to *United States v. Booker*[8] as proof that the *Apprendi* rule applies to required punishment increases irrespective of whether the statutory maximum is exceeded. And *Booker* was presaged by *Blakely v. Washington*[9] which said that the "jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish."

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[6] *United States v. McCain*, 769 F. App'x 510, 510 (9th Cir. 2019).

[7] *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151 (2013).

[8] *United States v. Booker*, 543 U.S. 220 (2005).

[9] *Blakely v. Washington*, 542 U.S. 296, 306-07, 124 S. Ct. 2531, 2539 (2004).

The Ninth Circuit's understanding of *Apprendi* as being confined to only the question of whether the sentence exceeds the statutory maximum cannot be reconciled with the *Alleyne*, *Booker*, nor *Blakely*. And *Apprendi* itself rejected the constitutional work-around of substituting in other, unrelated statutory maxima by finding that Charles Apprendi had been prejudiced even though his twelve-year sentence could have been imposed by with consecutive sentences which putatively answered the problem of raising the statutory maximum.[10] This Court rejected that specious alternative because the constitutional question was "whether the 12-year sentence imposed on Count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count."[11]

In McCain's case, it is conceded below that the statements charged in the indictment and contained in McCain's plea agreement do not justify imposition of the terrorism enhancement.[12] The terrorism enhancement, mandatory as an adjustment,[13] required the district court to calculate a guideline range that exceeded the eight-year maximum by another seven years, eight months, and was

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[10] *Apprendi v. New Jersey*, 530 U.S. at 474.

[11] *Id.*

[12] Clerk's Record 75, p.29 ("While the United States concedes that Defendant's admissions in the plea agreement, alone, may not support the application of the terrorism enhancement, the consideration of additional facts contained in the PSR and the Government's Sentencing Memorandum do.")

[13] *United States v. Colussi*, 22 F.3d 218, 219 (9th Cir. 1994) ("In the context of adjustments, the Guidelines use mandatory language. *See, e.g.*, U.S.S.G. § 3A1, U.S.S.G. § 3B1, U.S.S.G. § 3C1.")

the legal basis for ten-year sentence imposed by the district court.

The Ninth Circuit's focus on solely what the judgment says the sentence is for the count of conviction eviscerates the *Apprendi* rule. Long before *Apprendi,* the rule was that a defendant could not be sentenced to a term longer than that authorized by the statute.[14] This limitation seems tautologically true since a law cannot sensibly said to have a "maximum" if a judge can impose more than what the maximum allows.

Two months after the Ninth Circuit's decision in McCain's matter, this Court's decision in *United States v. Haymond*, 139 S. Ct. 2369, 2379 (2019), would apply *Apprendi* to a supervised release violation because of judicial fact-finding that required the imposition of a statutory minimum mandatory. In holding the sentence unconstitutional, *Haymond* reaffirmed the centrality of the jury as being the only body which can find facts that aggravate a punishment beyond a statutory maximum:

> Our precedents, *Apprendi*, *Blakely*, and *Alleyne* included, have repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a "sentencing enhancement." Calling part of a criminal prosecution a "sentence modification" imposed at a "postjudgment sentence-administration proceeding" can fare no better. As this Court

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[14] *Edwards v. United States*, 523 U.S. 511, 515, 118 S. Ct. 1475, 1477 (1998) ("Of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines. USSG § 5G1.1.")

> has repeatedly explained, any "increase in a defendant's authorized punishment contingent on the finding of a fact" requires a jury and proof beyond a reasonable doubt "no matter" what the government chooses to call the exercise.[15]

Here, the mandatory application of the terrorism enhancement is the calculation that caused the district court to impose a sentence two years longer than the statutory maximum for McCain's false statement offense.

The guideline calculation, as a matter of law, required the district court to aggravate the punishment because the guideline range frames the sentencing: it is the "starting point and ... initial benchmark," that district courts must "remain cognizant of" throughout the sentencing, and that "anchor[s] ... the district court's discretion."[16] Thus, "[e]ven if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence.*"[17]

In McCain's case, the basis for the district court's imposition of the enhancement was for facts that were not alleged against McCain, that he never admitted to, and that the district court found existed based on proof less than

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[15] *United States v. Haymond*, 139 S. Ct. at 2379 (citing *Ring v. Arizona*, 536 U.S. 584, 602, 122 S. Ct. 2428, 2439 (2002).)

[16] *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016) (quotations and citations omitted).

[17] *Id.* (quoting *Peugh v. United States*, 569 U.S. 530, 133 S. Ct. 2072, 2083 (2013)) (other quotations omitted, emphasis in original).

beyond a reasonable doubt. The district court imposed a sentence greater than the statutory maximum for the charge that was the subject of the calculation, the false statement. This is reversible error under *Apprendi.*[18]

2. The Ninth Circuit could have construed Guideline Section 5G1.2 to avoid this constitutional issue.

Here is what United States Sentencing Guideline Section 5G1.2 says:

> (B) Effect on Guidelines Range of Mandatory Minimum or Statutory Maximum.—The defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, see §5G1.1, but also in a multiple-count case.
>
> In particular, where a statutorily required minimum sentence on any count is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence on that count shall be the guideline sentence on all counts. See §5G1.1(b). Similarly, where a statutorily required minimum sentence on any count is greater than the minimum of the applicable guideline range, the guideline range for all counts is restricted by that statutorily required minimum sentence. See §5G1.1(c)(2) and accompanying Commentary.
>
> However, where a statutorily authorized maximum sentence on a particular count is less than the minimum of the applicable guideline range, the sentence imposed on that count shall not be greater than the statutorily authorized maximum sentence on that count. See §5G1.1(a).

If McCain's case was just a single count case involving a violation of the false statement statute and the district court applied the terrorism enhancement, McCain's statutory maximum sentence and his guideline range would become the same under Guideline Section 5G1.1(a). As McCain's case is a multiple-count case,

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[18] *United States v. Tighe*, 266 F.3d 1187, 1195 (9th Cir. 2001) (imposing sentence above statutory maximum on uncharged, judicially found facts violates *Apprendi*).

Section 5G1.2 Application Note 3(b) governs and it says that statutory minima and maxima apply the same in multi-count cases as they do in single count cases. And if McCain were being sentenced for a single count of 18 U.S.C. Section 1001(a)(2), then his statutory maximum would be eight years and because "the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." U.S.S.G. 5G1.1(a). Application Note 3 gives the answer to how statutory maximum for multiple count cases: "The defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, *see* §5G1.1, but also in a multiple-count case."

The core constitutional concern of *Apprendi* is the use of judicial fact-finding. The terrorism enhancement and how it was assessed in this case is precisely the judicially-determined punishment that *Apprendi* was meant to prevent. McCain's admissions are not sufficient by themselves to get the enhancement. The government conceded as much by calling the cooperating witness at McCain's sentencing to give the district court the grounds ultimately used to impose the enhancement. This was judicial fact-finding filtered through a mandatory Chapter III adjustments which are compulsory changes to the guideline range.[19] Under the district court's view, as adopted by the Ninth Circuit, the district court was required

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[19] *See, e.g., United States v. Colussi*, 22 F.3d 218, 219 (9th Cir. 1994).

to calculate a guideline range that exceeded the statutory maximum for the group of offenses to which it applied. Mandatory judicial fact-finding that increases the punishment is unconstitutional.[20] The federal guidelines were susceptible to this same challenge which is why *United States v. Booker*[21] created the current system of guidelines which must be consulted, but not necessarily followed. But labels are not supposed to matter: under *Apprendi* "the relevant inquiry is one not of form, but of effect." *Id.* at 604 . Here, the district court is making a mandatory finding about uncharged, contested facts in order to elevate the guideline range beyond the statutory maximum for the offense. The district court did not disregard the guideline range in this case; the judicially found facts elevated the punishment.

McCain's construction of the guidelines, which limits the guidelines sentence for a "group" to the statutory maximum for that group, avoids significant constitutional questions.[22] This Court has a way to grant review and yet issue a focused decision which make the statutory maximum for offense matter. The statutory maximum for the offense of conviction should matter when deciding what the maximum allowable sentence is. *See* 18 U.S.C. Section 3581 (class D felonies have a maximum allowable sentence of six years in custody). As Chief Justice Rehnquist observed in dissent, the maximum punishment is set by the statute:

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[20] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

[21] *United States v. Booker*, 543 U.S. 220 (2005).

[22] *Jones v. United States*, 526 U.S. at 239.

"First, as the Court itself seems to recognize, the maximum punishment authorized for respondent's original offense is not the Guidelines range, but the maximum statutory sentence. *See* 18 U.S.C. §§ 1703(a), 3553(b), 3559(a)(4), and 3581(b)(4)." *United States v. Granderson*, 511 U.S. 39, 77 n.8, 114 S. Ct. 1259, 1279 (1994).

Conclusion

McCain's sentence was based on facts neither charged nor found nor admitted by McCain and these findings caused a sentence greater than the eight-year statutory maximum applicable to McCain's offense. This was both constitutionally intolerable and legally avoidable by simply using the statutory maximum for the group when calculating the applicable range under Guideline Section 5G12. A writ of certiorari is warranted.

Respectfully submitted,

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