No. _____

In The
Supreme Court of the United States

JOHN D. LEONTARITIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This criminal case's questions concern the impact of jury findings on sentencing. Both recur frequently, especially in cases about drugs. Both are the subject of circuit splits expressly acknowledged by the panel's majority and dissenting opinions. Both are presented squarely in a clean procedural vehicle. And as to both issues, the panel majority opinion is wrong and the Petitioner is right.

1. Whether, if a jury is instructed to "determine" a fact by indicating a "unanimous finding beyond a reasonable doubt" and does so, the resulting verdict indicates a finding beyond a reasonable doubt, as opposed to a mere failure to find.

2. Whether, if a jury verdict finds a fact beyond a reasonable doubt, a district court's sentencing decision must accept the jury's determination or instead may base the sentence on its own independent finding that contradicts the jury's.

RELATED CASES

United States of America v. John D. Leontaritis, No. 19-40498 in the United States Court of Appeals for the Fifth Circuit. Judgment entered October 9, 2020.

United States of America v. John D. Leontaritis, No. 1:18-cr-00023-MAC-KFG-1 in the United States District Court for the Eastern District of Texas. Judgment entered May 17, 2019.

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PETITION FOR A WRIT OF CERTIORARI

John D. Leontaritis petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The Fifth Circuit's opinion is reported at 977 F.3d 447 and reprinted at App. 1. The Fifth Circuit's order denying Petitioner's petition for rehearing en banc is unreported and reprinted at App. 35–36.

JURISDICTION

28 U.S.C. § 1254(1) confers jurisdiction on this Court. The Fifth Circuit entered the judgment at issue on October 9, 2020, and entered an order denying rehearing en banc on December 16, 2020.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment of the Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

STATEMENT OF THE CASE

This petition presents two important questions that arise in many criminal cases, especially those about drugs. Both entail acknowledged circuit splits—an opinion below called one a "deeply entrenched circuit split," App. 16—and a clean procedural posture makes this case an optimal vehicle for resolving both.

The most pertinent facts are all procedural and pertain to sentencing. They pit the jury's findings against the district court's.

Petitioner "John D. Leontaritis was charged with one count of conspiracy to possess with the intent to distribute and distribute 500 grams or more of a mixture containing methamphetamine and one count of conspiracy to commit money laundering." App. 1. After the jury found Petitioner guilty of a conspiracy involving 176 kilograms of drugs, sentencing required a finding of the *amount* of drugs reasonably foreseeable to Petitioner within the scope of the conspiracy. App. 1–2.

The district court sentenced Petitioner by finding him personally responsible for all 176 kilograms of the drugs. App. 1–3. Critically, though, the district court

made this finding in contradiction of a special jury verdict that found Petitioner personally responsible for *less than 50 grams of the drugs*. App. 1–3. The pertinent jury question and answer are as follows:

> You must next determine the quantity of methamphetamine for which the defendant was accountable. Indicate below your unanimous finding beyond a reasonable doubt of the quantity of methamphetamine, if any, attributable to the defendant. The defendant is accountable only for the quantity of methamphetamine with which he was directly involved and all reasonably foreseeable quantities of methamphetamine within the scope of the conspiracy reasonably foreseeable to him.
>
> ___ 500 grams or more of a mixture or substance containing detectable amount of methamphetamine.
>
> ___ 50 grams or more but less than 500 grams of a mixture or substance containing a detectable amount of methamphetamine.
>
> _X_ Less than 50 grams of a mixture or substance containing a detectable amount of methamphetamine.

App. 2–3.

By using its own its own 176kg amount finding instead of the jury's <50g amount finding, the district court drastically increased the ultimate punishment. App. 2–3. It sentenced Petitioner to the the statutory maximum for the large amount (concurrent terms of

240 months of imprisonment plus three years of supervised release). App. 2. That sentence would not have been available had he used the jury's finding.

"Leontaritis appeal[ed], arguing that the district court erred in finding that the amount of drugs reasonably foreseeable to him within the scope of the conspiracy was 176 kilograms." App. 2. "Citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), he contend[ed] that the district court was bound by the jury's finding that he was accountable for less than 50 grams of methamphetamine and that the district court's alleged disregard of this finding violated the Fifth and Sixth Amendments." App. 2.

The Fifth Circuit affirmed 2-1. Judge Haynes authored the panel's majority opinion and was joined by Judge Higginbotham. Two key holdings occurred. Both holdings divided the court, as they have divided the circuits nationwide.

First, the Fifth Circuit's majority opinion decided the verdict-construction question about what the jury's amount verdict means. App. 3–4. It recognized that "Leontaritis argues that the jury *found beyond a reasonable doubt* that he was accountable for less than 50 grams." App. 3 (emphasis added). But the majority held that the verdict means only that "the Government *failed to prove* 50 or more grams beyond a reasonable doubt." App. 3 (emphasis added).

Judge Elrod dissented from the majority's holding about verdict construction. App. 9–19. She agreed with

Petitioner that the jury had made an affirmative amount finding: "We must take the verdict form as we find it, and the jury-finding language in this special interrogatory and response constitutes an affirmative finding by the jury." App. 16.

Second, the majority decided the verdict-impact question about whether, assuming that the jury had found the amount beyond a reasonable doubt, the district court's sentencing decision had to accept the jury's amount determination, as opposed to utilizing its own contradictory amount finding. App. 4–6. It recognized that Petitioner presented a "properly preserved constitutional challenge" to the government's latter view. App. 2. But the majority upheld the district court's decision to base sentencing on the district court's own independent amount finding that contradicted the jury's. App. 4–6.

Judge Elrod dissented from the majority's holding about verdict impact. App. 9–19. She deemed the majority to have committed a "fundamental error: its conclusion that the judge can contradict the jury's factual findings at sentencing." App. 17.

REASONS FOR GRANTING THE PETITION

This case presents two important questions of criminal trial procedure regarding sentencing. Both recur frequently in cases large and small. Both entail circuit splits that were expressly acknowledged by the majority and dissenting opinions below. Both are

presented squarely in a clean procedural vehicle. And as to both issues, the decision below is wrong.

After the jury found Petitioner guilty of a conspiracy involving 176 kilograms of drugs, the district court sentenced Petitioner by finding him responsible for all 176 kilograms. Critically, though, the district court made this finding in contradiction of a special jury verdict finding Petitioner accountable for less than 50 grams. App. 2–3. Two questions warranting certiorari arise.

1. Question one concerns verdict construction. Does a special verdict like Petitioner's indicate a finding beyond a reasonable doubt, as opposed to a mere failure to find? This verdict format is not unique to Petitioner. It is ubiquitous, and its construction matters because findings made beyond a reasonable doubt trigger very different legal consequences than mere failures to find.

The verdict-construction issue is two-sided, and this case tees the two options up squarely. Petitioner's position is that "the jury found beyond a reasonable doubt that he was accountable for less than 50 grams." App. 3. But the court below adopted the government's opposing position and "read it the other way: that the Government failed to prove 50 or more grams beyond a reasonable doubt." App. 3.

An acknowledged circuit split exists, and it is deep. App. 3. The majority below sided with what it called the "vast majority of circuits." App. 3. It expressly rejected the Ninth Circuit's contrary decision in *United States v. Pimentel-Lopez*, 859 F.3d 1134 (9th Cir. 2017)

(Kozinski, J.), which the panel below rightly acknowledged "came out the way [Petitioner] requests." App. 3. Judge Elrod's dissenting opinion rightly calls the state of play a "deeply entrenched circuit split." App. 16.

On the merits of the verdict-construction issue, Petitioner is correct and the panel is wrong for the reasons given by Judge Elrod's dissenting opinion below and by Judge Kozinski's opinion for the Ninth Circuit in *Pimentel-Lopez*. Jury verdicts like this plainly constitute affirmative findings of fact—not failures to find. Review is needed to correct the Fifth Circuit and other courts that are resolving this critical issue wrongly.

2. Question two concerns the verdict's impact on sentencing. Assuming that a verdict finds a fact like drug amount beyond a reasonable doubt, must a district court's sentencing decision accept the jury's amount determination, or may a district court base the sentence on its own independent amount finding that contradicts the jury's? This question arises frequently, not just in drug cases but across the board.

The verdict-impact issue is two-sided, and this case tees the two options up squarely. Petitioner argued that "the district court was bound by the jury's finding that he was accountable for less than 50 grams of methamphetamine and that the district court's alleged disregard of this finding violated the Fifth and Sixth Amendments." App. 2. But the panel accepted the government's contrary view. App. 4–6. It upheld the district court's decision to override the jury verdict and

base sentencing on a different finding using a preponderance of the evidence. App. 4–6.

Another acknowledged circuit split exists. App. 4–6. The decision below expressly recognizes that circuit decisions on this issue are "conflicting." App. 5. In particular, the Fifth Circuit rule is expressly contrary to Judge Kozinski's opinion for the Ninth Circuit in *Pimentel-Lopez*, 859 F.3d 1134. App. 5.

On the verdict-impact issue's merits, Petitioner is correct. The Fifth Circuit's rule wrong for the reasons given by Judge Elrod's dissent below and Judge Kozinski in *Pimentel-Lopez*. It is also wrong by virtue of the long-overlooked decisions of this Court in cases such as *Prentice v. Zane's Adm'r*, 49 U.S. (8 How.) 470, 484 (1850) ("In all special verdicts, the judges will not adjudge upon any matter of fact, but that which the jury declare to be true by their own finding; and therefore the judges will not adjudge upon an inquisition or aliquid tale found at large in a special verdict, for their finding the inquisition does not affirm that all in it is true."), and *Suydam v. Williamson*, 61 U.S. 427, 433 (1858) ("it is of the very essence of a special verdict, that the jury should find the facts on which the court is to pronounce the judgment according to law, and the court, in giving judgment, is confined to the facts so found").

I. The petition should be granted to resolve the verdict-construction question.

A. The issue is presented squarely in an optimal vehicle.

The first question that warrants review concerns verdict construction. Does a special verdict like Petitioner's indicate a finding beyond a reasonable doubt, as opposed to a mere failure to find?

The verdict-construction question arises in this case quite squarely. After the jury found Leontaritis guilty of a conspiracy involving 176 kilograms, the district court sentenced the defendant by finding by a preponderance of the evidence that he was responsible for all 176 kilograms. Critically, though, this finding ran headlong into the special jury verdict that found beyond a reasonable doubt that Leontaritis was accountable for *less than 50 grams* of the conspiracy's drugs. App. 2–3 (block quoted above).

Before the court of appeals decided whether this verdict could be contradicted by the district court, it had to determine the verdict's meaning. Does this verdict indicate a finding beyond a reasonable doubt, or does it indicate a mere failure to find?

Petitioner staked out the position that "the jury found beyond a reasonable doubt that he was accountable for less than 50 grams." App. 3. But the panel held that this verdict means the "Government failed to prove 50 or more grams beyond a reasonable doubt." App. 3. Some circuits agree with the panel and

government, while other circuit jurists agree with Petitioner. The resulting circuit split was rightly acknowledged by both the majority and dissenting opinions below.

B. A "deeply entrenched circuit split" exists.

On one hand, the panel majority claims that its construction—the verdict indicates a mere failure to find—is upheld in the "majority of circuits." App. 3. To say so it cites *United States v. Lopez-Esmurria*, 714 F. App'x 125, 127 (3d Cir. 2017) (unpublished), *United States v. Webb*, 545 F.3d 673, 678 (8th Cir. 2008), *United States v. Florez*, 447 F.3d 145, 156 (2d Cir. 2006), *United States v. Magallanez*, 408 F.3d 672, 684–85 (10th Cir. 2005), *United States v. Goodine*, 326 F.3d 26, 33–34 (1st Cir. 2003), and *United States v. Smith*, 308 F.3d 726, 744–45 (7th Cir. 2002).

On the other hand, Petitioner's construction—the verdict indicates a finding beyond a reasonable doubt—is the law in at least one other circuit. The Ninth Circuit adopted this construction in *United States v. Pimentel-Lopez*, 859 F.3d 1134, 1140 (9th Cir. 2017) (Kozinski, J.), a case that the panel here acknowledged "came out the way Leontaritis requests." App. 3–4.

Judge Elrod's dissenting opinion below rightly calls this issue's state of affairs an "entrenched circuit split." App. 16. Indeed, that opinion rightly calls it not just an "entrenched" split but a "deeply entrenched split." App. 16.

No more percolation is needed. The two sides have been fully staked out, with the Fifth Circuit opinion below and Judge Kozinski's opinion for the Ninth Circuit in *Pimentel-Lopez* exemplifying them.

C. The decision below is wrong.

On the merits, Petitioner is correct and the Fifth Circuit majority is wrong for the reasons given by Judge Elrod's dissenting opinion: "The interrogatory and response plainly give the jury's affirmative finding that Leontaritis was accountable for less than 50 grams of methamphetamine mixture." App. 10. "We must take the verdict form as we find it, and the jury-finding language in this special interrogatory and response constitutes an affirmative finding by the jury." App. 16. The solution really is that simple, which is why the contrary result employed by the Fifth Circuit and others causes such serious disarray.

"The only way to read the special interrogatory differently is by actually changing the words of the interrogatory." App. 10. "That is exactly what the government did." App. 10. "Twice in its brief [below], the government claim[ed] that '[t]he jury unanimously found beyond a reasonable doubt that Leontaritis was responsible for up to 50 grams.'" App. 10. "The government's change of 'less than' to 'up to' fits its theory that the jury did not weigh in on amounts more than 50 grams—a position otherwise untenable since 'less than' is plainly inconsistent with 'more than.' It does

not, however, fit the actual words of the special interrogatory." *Id.*

The law about how to construe jury verdicts should be principled and reliable. The rule employed below is neither. It departs from the verdict's text without justification. Instead of supplying a rule of accuracy and consistency, the court below embraced a rule that portends chaos and instability. It leaves litigants without any way of knowing what other verdict findings might not mean what they say.

Standing alone, this aspect of the decision below is important enough, divisive enough, and erroneous enough to warrant review. But the case for review is made even stronger by a second deserving issue that can be addressed in one fell corrective swoop.

II. The petition should be granted to resolve the verdict-impact question.

A. The question is presented squarely in an optimal vehicle.

The second question that warrants review concerns a special jury verdict's *impact* on sentencing. Assuming that a verdict affirmatively finds a sentencing fact beyond a reasonable doubt, must a district court's sentencing decision *accept* the jury's amount determination, or may a district court *contradict* the jury's finding and base the sentence on its own independent finding?

To be clear, the question presented here is *not* about what to do if "the jury failed to find a fact under the exacting standard applicable to criminal cases." *Pimentel-Lopez*, 859 F.3d at 1140. "Where this happens, the district judge is free to find the same fact under a less stringent standard of proof." *Id.* "Rather, what we have here is a case where the jury made an affirmative finding, under the highest standard of proof known to our law, that the amount of methamphetamine attributable to defendant is less than 50 grams." *Id.* The resulting issue is whether, even as to facts that a district court is generally responsible for adjudicating in the sentencing process, a district court can perform that function by "contradicting the jury on a fact it found as a result of its deliberations." *Id.*

The Court has come close to granting a petition on this subject before, *Jones v. United States*, 574 U.S. 948 (2014) (Scalia, Thomas, and Ginsburg, JJ., dissenting from the denial of certiorari), and rightly so. At its root are "constitutional protections of surpassing importance," *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Petitioner's case is the optimal vehicle with which to resolve the key conflict.

B. The panel's decision entails another important circuit split.

The panel below held that district courts *can* override a jury verdict like Petitioner's and base sentencing on their own independent findings. App. 4–6. That, according to the panel, is a rule compelled by prior Fifth

Circuit precedent. App. 4–6. (citing *United States v. Hinojosa*, 749 F.3d 407, 412–13 (5th Cir. 2014), and *United States v. Romans*, 823 F.3d 299, 316–17 (5th Cir. 2016)).

On the other hand lies Petitioner's position that "the district court was bound by the jury's finding that he was accountable for less than 50 grams of methamphetamine." App. 2. That is the rule in the Ninth Circuit, due again to Judge Kozinski's opinion in *Pimentel-Lopez*, 859 F.3d 1134. *See* App. 5.

The circuit split that this decision causes is openly acknowledged. The panel recognized the conflict it created. It identified the Ninth Circuit's *Pimentel-Lopez* decision as holding to the contrary and deemed it "unpersuasive." App. 5 n.1.

C. The decision below is wrong.

On the merits, the decision below resolved the verdict-impact issue erroneously. Assuming that a special jury verdict finds a fact relevant to sentencing beyond a reasonable doubt, the district court's sentencing decision *cannot* replace it with an independent judicial finding that contradicts the jury's.

Judge Elrod's dissenting opinion both frames the issue correctly and espouses the correct position. As to framing, Judge Elrod's dissenting opinion correctly shows that *United States v. Booker*, 543 U.S. 220 (2005)—which the majority thought pertinent—is

beside the point. App. 18 ("*Booker* does not settle all questions regarding the relationship of the judge and the jury at sentencing, and it does not address the question presented by this case: can a district court's sentence contradict an affirmative finding by the jury?"). As to the real issue, Judge Elrod's dissenting opinion rightly concludes that, "if the jury has affirmatively found a specific fact, rather than having simply decided that the government did not meet its burden of proof on related facts, then the court may not make a finding inconsistent with or impose a sentence beyond a limit set by the jury's finding." App. 18–19.

Likewise, Judge Kozinski's opinion for the Ninth Circuit in *Pimentel-Lopez* provides a complete solution to the second question presented. It debunks virtually all of the reasoning that the panel below embraced, and does so in enough detail to warrant an extended block quotation:

> Some of our sister circuits seem to have held that a jury's special-verdict finding that the quantity of drugs involved in the crime is less than a particular amount did not preclude the judge from finding a greater quantity for purposes of sentencing. But those cases did not directly address the argument raised by Pimentel-Lopez—that the affirmative finding by the jury that the quantity of drugs involved was less than a specific amount precluded a contradictory finding by the district judge during sentencing.

All four cases held that the district court's sentencing did not violate the *Apprendi* line of cases. But, as explained above, *Apprendi* has no bearing on our analysis. In addition, the other circuits addressed the drug quantity finding only in passing, while emphasizing the less demanding preponderance-of-the-evidence standard governing judicial factfinding at sentencing. They therefore implicitly relied on the holding of *Watts* to the effect 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." The rationale of *Watts* is that "[a]n acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt." This rationale is inapplicable where, as here, we have an affirmative finding that the amount in question is less than a particular amount. Or, to put it differently, there is no inconsistency between a jury's acquittal as to a particular fact that had to be proved beyond a reasonable doubt and a later finding that the same fact is proved by a preponderance of the evidence. But there *is* an inconsistency between a jury's finding that the amount is *less* than 50 grams and a later finding by the judge that the amount is *more* than 50 grams.

. . .

Going forward, the Jury Instructions Committee may well revise the model verdict

> form for determining the amount of controlled substance for § 841(b)(1) purposes, as they frequently do. But our review today must be based on the verdict form that was actually used in this case. Using this verdict form, the jury found that the amount of controlled substance "attributable to Jesus Pimentel-Lopez [was] . . . [l]ess than 50 grams of a substance containing a detectable amount of methamphetamine." Despite this finding, the district court enhanced defendant's sentence based on a contradictory finding that more than 50 grams of a controlled substance were involved in defendant's crimes. Because the district court may not contradict an affirmative finding by the jury, we must vacate the sentence and remand with instructions that defendant be resentenced on the premise that his crimes involved less than 50 grams of drugs.

Pimentel-Lopez, 859 F.3d at 1140–43 (citations omitted).

This Court has on point precedent as well. Direct support for Petitioner's position comes from this Court's decisions in *Prentice v. Zane's Administrator*, 49 U.S. (8 How.) 470, 484 (1850) ("In all special verdicts, the judges will not adjudge upon any matter of fact, but that which the jury declare to be true by their own finding; and therefore the judges will not adjudge upon an inquisition or aliquid tale found at large in a special verdict, for their finding the inquisition does not affirm that all in it is true."), and *Suydam v. Williamson*, 61 U.S. 427, 433 (1858) ("it is of the very essence of a

special verdict, that the jury should find the facts on which the court is to pronounce the judgment according to law, and the court, in giving judgment, is confined to the facts so found"). The time has come to unify the rule nationwide by holding that the jury's verdict in cases like this must be honored.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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