No. 20-1614

In the Supreme Court of the United States

JOHN D. LEONTARITIS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an interrogatory given to the jury in this case led it to make an affirmative determination as to the upper bound of drug quantity that would be binding for sentencing purposes.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 977 F.3d 447.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2020. A petition for rehearing was denied on December 16, 2020 (Pet. App. 35-36). By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing, as long as that judgment or order was issued before July 19, 2021. The petition for a writ of certiorari was filed on Monday, May 17, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioner was convicted on one count of conspiring to possess with the intent to distribute methamphetamine, in violation of 21 U.S.C. 841(b)(1)(C) and 846, and 18 U.S.C. 2; and one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(a) and (h), and 2. Judgment 1; see Indictment 1-3. He was sentenced to 240 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-19.

1. From 2004 to 2017, petitioner owned and operated a luxury car dealership in suburban Houston, Texas. Amended Presentence Investigation Report (PSR) ¶ 6. In 2015, he paid an associate to introduce him to Cloyd Guillory, whom petitioner knew to be the leader of an organization engaged in trafficking large quantities of MDMA and methamphetamine. PSR ¶¶ 3-5, 7. Petitioner entered into an arrangement with Guillory in which petitioner would sell cars to Guillory in return for cash that petitioner knew Guillory had obtained from drug proceeds. PSR ¶¶ 7-8. Petitioner never reported those payments to legal authorities, such as the IRS, which requires reporting of transactions involving more than $10,000. PSR ¶ 7.

The arrangement was designed to allow petitioner to launder money for Guillory; for example, petitioner sold Guillory a Lamborghini for more than $400,000 in cash (derived from drug-trafficking proceeds), and then "rent[ed]" the car back from Guillory to conceal the drug proceeds being repaid to Guillory. PSR ¶¶ 7-8; see PSR ¶ 9. Petitioner would also keep the vehicles that he sold to Guillory in his own name or a business name

in order both to avoid raising suspicions about Guillory's large purchases and to allow him to assert a lien and recover any car that was seized by law enforcement. PSR ¶¶ 7-8. On other occasions, petitioner accepted large cash payments from Guillory, and then paid for a luxury penthouse suite, a luxury home, and several luxury trips for Guillory and his friends and coconspirators. PSR ¶ 10.

2. A federal grand jury in the Eastern District of Texas charged petitioner with conspiring to possess with the intent to distribute methamphetamine, in violation of 21 U.S.C. 841(b)(1)(C) and 846, and 18 U.S.C. 2; and conspiring to commit money laundering, in violation of 18 U.S.C. 1956(a) and (h), and 2. Indictment 1-3.

Following a seven-day jury trial, the district court instructed the jury that "[t]he government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant." D. Ct. Doc. 74, at 2 (Dec. 3, 2018) (Jury Instructions). On the drug-conspiracy count, the court explained to the jury that the government needed to prove, among other things, that "the defendant knew or reasonably should have known that the scope of the conspiracy involved at least 500 grams of a mixture or substance containing a detectable amount of methamphetamine." *Id.* at 14.

The jury's verdict form, see Pet. App. 64-67, provided blank space for the general verdict of guilty or not guilty on each count, *id.* at 64, 66. The form also directed that if the jury found petitioner guilty on the drug-conspiracy count, it should decide two "special issues": (1) "the quantity of methamphetamine attributable to the overall scope of the conspiracy" and (2) "the quantity of methamphetamine for which [petitioner]

was accountable." *Id.* at 64-65. For each of those two special issues, the form offered three options:

___ 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine

___ 50 grams or more but less than 500 grams of a mixture or substance containing a detectable amount of methamphetamine

___ Less than 50 grams of a mixture or substance containing a detectable amount of methamphetamine

Id. at 65.

The jury indicated on the form that it found petitioner guilty on both counts. Pet. App. 64, 66. On the first special issue, involving "the quantity of methamphetamine attributable to the overall conspiracy," the jury marked with an "X" the blank next to the first option ("500 grams or more"); and on the second issue, involving "the quantity of methamphetamine for which [petitioner] was accountable," the jury marked with an "X" the blank next to the third option ("Less than 50 grams"). *Id.* at 64-65. As to the money-laundering count, the jury further indicated that the government had proved beyond a reasonable doubt that petitioner "intended to promote the distribution of a controlled substance (methamphetamine) by the conspiracy," "knew that the transaction or transactions were designed to conceal the proceeds of the distribution of a controlled substance (methamphetamine) by the conspiracy," and "knowingly engaged in, or attempted to engage in, a monetary transaction or transactions involving criminally derived property * * * that was

derived from the distribution of a controlled substance (methamphetamine)." *Id.* at 66-67.

At sentencing, the district court adopted the Probation Office's recommendation that petitioner was responsible for 176 kilograms of methamphetamine under principles of relevant conduct. Pet. App. 49; see PSR ¶¶ 16-17, 24. The Probation Office had arrived at that figure by converting the $800,000 that petitioner was responsible for laundering into an equivalent amount of methamphetamine. PSR ¶¶ 16-17. In adopting that approach, the court acknowledged the jury's drug-quantity finding, but stated that the court's role was to find the quantity of drugs attributable to petitioner by "a preponderance of the evidence," which was "a different standard" from what the jury had applied. Pet. App. 49. The court explained that it was "very familiar with drug conspiracies"; found that petitioner "was vital to this conspiracy as in the banking function"; and concluded that it could find the amount of drugs attributable to petitioner "based on conversion of money and drugs." *Id.* at 49-50.

The district court subsequently determined that the advisory guidelines range was 360 to 480 months of imprisonment, truncated from 360 months to life imprisonment because each count carried a 20-year statutory maximum sentence. Pet. App. 53; see PSR ¶ 71. The court sentenced petitioner to 240 months of imprisonment on each count, with the terms to run concurrently. Judgment 2; Pet. App. 58. The court also explained that it "would have imposed the same sentence without regard to the applicable guideline range in light of the factors set forth in 18 U.S.C. Section 3553(a)." Pet. App. 62.

3. The court of appeals affirmed. Pet. App. 1-19.

As relevant here, the court of appeals rejected petitioner's argument that the jury's answer to the interrogatory on the verdict form represented a finding beyond a reasonable doubt that petitioner was accountable for no more than 50 grams of methamphetamine, and that such a finding would constitutionally preclude the district court from holding petitioner accountable for 176 kilograms for purposes of sentencing. See Pet. App. 3. The court "read [the jury's verdict form] the other way," namely, as a finding "that the Government failed to prove 50 or more grams beyond a reasonable doubt." *Ibid.* The court observed that its understanding of the finding was "consistent with the vast majority of circuits that have considered" similar verdict forms. *Ibid.* (citing *United States* v. *Lopez-Esmurria*, 714 Fed. Appx. 125, 127 (3d Cir. 2017); *United States* v. *Webb*, 545 F.3d 673, 678 (8th Cir. 2008), cert. denied, 556 U.S. 1194 (2009); *United States* v. *Florez*, 447 F.3d 145, 156 (2d Cir.), cert. denied, 549 U.S. 1040 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 684-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Goodine*, 326 F.3d 26, 33-34 (1st Cir. 2003), cert. denied, 541 U.S. 902 (2004); and *United States* v. *Smith*, 308 F.3d 726, 744-745 (7th Cir. 2002)).

The court of appeals found the Ninth Circuit's decision in *United States* v. *Pimentel-Lopez*, 828 F.3d 1173 (2016), opinion amended and superseded, 859 F.3d 1134 (2017), to be "unpersuasive," Pet. App. 5 n.1. And it stated that petitioner's argument in reliance on *Pimentel-Lopez* "fail[ed] to recognize the difference between" drug-quantity findings that affect "statutory minimums and maximums," which must be submitted to the jury, and those that "relate[] to the calculation and application of the Sentencing Guidelines," which are

"within the judge's duty, not the jury's." *Id.* at 4. The court of appeals explained that this Court's decision in *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), made clear "that a district judge may rely on conduct proven by a preponderance of the evidence even if the jury did not find the same conduct proven beyond a reasonable doubt at trial." Pet. App. 4. The court of appeals also concluded that "[e]ven if the charge in this case suggested some intent to bind the district judge's sentencing discretion, mistakes in jury charges do not change the way a jury's role is assessed." *Id.* at 5.

Judge Elrod dissented in relevant part, disagreeing with the majority on how to read the jury form and taking the view that, on her reading, an error occurred at sentencing. See Pet. App. 9-19.

ARGUMENT

Petitioner renews his contention (Pet. 5-18) that the jury made an affirmative finding as to the upper bound of drug quantity that resulted in a constitutional error at his sentencing. That contention lacks merit. Petitioner does not dispute (Pet. 13) that a district court may take into account at sentencing relevant conduct that it finds by a preponderance of the evidence, even if the jury declined to find such conduct under the more demanding standard of proof beyond a reasonable doubt. Petitioner's contention thus relies on the fact-bound premise that the jury in his case did not simply find that the government had failed to prove beyond a reasonable doubt that petitioner was accountable for 50 grams or more of methamphetamine, but affirmatively found that petitioner was accountable for no more than 50 grams. That premise is incorrect, and petitioner's disagreement with both lower courts' understanding of

the instructions and verdict form in this case does not warrant this Court's review.

1. As this Court confirmed in *United States* v. *Booker*, 543 U.S. 220 (2005), the Fifth and Sixth Amendments permit a sentencing judge to "rely for sentencing purposes upon a fact that a jury had found unproved," as long as the sentence is at or below the statutory maximum for the crime whose elements the jury has found beyond a reasonable doubt. *Id.* at 251 (emphasis omitted). And Congress has made clear as a statutory matter that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661. Every court of appeals with criminal jurisdiction has accordingly recognized that a court may consider for sentencing purposes relevant conduct that the jury declined to find under the more exacting standard applicable for purposes of trial, see U.S. Br. in Opp. at 12, *Asaro* v. *United States*, No. 19-107 (Nov. 12, 2019) (listing cases), and this Court has repeatedly and recently denied petitions for writs of certiorari challenging that practice, *e.g.*, *Bell* v. *United States*, 141 S. Ct. 1239 (2021) (No. 20-5689); *Asaro* v. *United States*, 140 S. Ct. 1104 (2020) (No. 19-107); see U.S. Br. in Opp. at 6 n.1, *Bell* v. *United States*, No. 20-5689 (Dec. 11, 2020) (listing cases).

Petitioner does not question that principle, and indeed agrees that even if a jury expressly declines to find a fact beyond a reasonable doubt, a sentencing court is "free to find the same fact under a less stringent standard of proof" when determining his advisory guidelines range. Pet. 13 (citation omitted). And petitioner does

not suggest that the court's finding that he was in fact accountable for 176 kilograms of methamphetamine lacks record support or was otherwise clearly erroneous. His claim of sentencing error instead rests on the premise that the jury in his case made an *affirmative* finding, beyond a reasonable doubt, that petitioner was accountable for *no more than* 50 grams of methamphetamine that would preclude any attribution of a higher amount for sentencing purposes. See Pet. 6-7, 9-12. That premise is not correct—and even if it were, the factbound interpretation of the special-verdict form adopted by both of the lower courts does not warrant this Court's review.

Both of the lower courts correctly recognized that the verdict form in this case established only that the government had failed to prove beyond a reasonable doubt that petitioner was accountable for 50 grams or more of methamphetamine. As the court of appeals observed (Pet. App. 3), the district court's general instructions to the jury made clear that "[t]he government has the burden of proving the defendant guilty beyond a reasonable doubt," Jury Instructions 2, and its instructions on the drug-conspiracy count specifically instructed jurors that "to find the defendant guilty of this crime, you must be convinced that the government has proved each of the [elements] beyond a reasonable doubt," *id.* at 13; see *id.* at 19. Likewise, the district court's final instruction to the jury admonished jurors to "[r]emember at all times, you are judges—judges of the facts. Your duty is to decide whether the government has proved the defendant guilty beyond a reasonable doubt." *Id.* at 20. The jurors would thus have understood that their duty was simply to determine

whether the government had proved the requisite elements or facts beyond a reasonable doubt.

In arguing otherwise, petitioner focuses (see Pet. 3, 11-12) on the verdict form's request for the jury to "[i]ndicate below your unanimous finding beyond a reasonable doubt of the quantity of methamphetamine, if any, attributable to the defendant," and the jury's selection of "Less than 50 grams of a mixture or substance containing a detectable amount of methamphetamine." Pet. App. 65. Petitioner reads too much into the form, which the district court informed the jury had been "prepared for [its] convenience," Jury Instructions 21. Particularly given the court's repeated emphasis on the government's bearing the burden of proof, see *id.* at 2, 19-20, the jury would have understood its task as simply determining which of the options on the verdict form—corresponding to the three crimes in subparagraphs (A), (B), and (C) of 18 U.S.C. 841(b)(1), respectively—was the one that the government had proved beyond a reasonable doubt.

The jury was not, however, asked to find beyond a reasonable doubt that petitioner that petitioner was affirmatively innocent of conduct to which a higher quantity would be attributable. Nothing in a criminal case turns on proof of a defendant's innocence beyond a reasonable doubt, and neither the prosecution nor the defense has either a basis or an incentive to ask the jury to find it. And if the jury instructions in this case had in fact required such a finding, the jury could easily have found itself in a situation in which it could not select *any* of the three options on the verdict form. The jury might, for example, have found proof beyond a reasonable doubt of 40 grams of methamphetamine, but acknowledged the possibility—subject to reasonable

doubt—of more. Such a jury could not responsibly have returned a verdict that it understood as affirmatively ruling out additional drugs. It instead would have found none of the options appropriate.

Petitioner presents little reason to interpret the jury instructions and court-prepared verdict form to contain such a fundamental flaw. Moreover, even assuming the jury did believe that it was determining the absence of a higher drug quantity beyond a reasonable doubt, petitioner identifies no precedent of this Court that would make such a determination preclusive for purposes of imposing a sentence within the statutory range for the crimes whose elements the jury found beyond a reasonable doubt. Among other things, the evidentiary constraints (constitutional and otherwise) are less stringent at sentencing than at trial, see Fed. R. Evid. 1101(d)(3); cf. *Payne* v. *Tennessee*, 501 U.S. 808, 820-821 (1991), meaning that sentencing may be premised on a materially different record. Petitioner's reliance (Pet. 17) on *Prentice* v. *Zane's Administrator*, 49 U.S. (8 How.) 470 (1850), and *Suydam* v. *Williamson*, 61 U.S. (20 How.) 427 (1858)—which reiterate that factfinding in a civil case under a preponderance standard is for the jury, not the judge, see U.S. Const. Amend. VII—is thus misplaced here.

2. Contrary to petitioner's suggestion (Pet. 10-11, 13-14), the decision below does not implicate any conflict in the courts of appeals that would warrant this Court's review. Every other court of appeals, save the Ninth Circuit in a single decision, to address jury findings on similarly worded verdict forms has declined to interpret them in the manner that petitioner urges here. See Pet. App. 3-4 (listing cases). And the Ninth Circuit decision in *United States* v. *Pimentel-Lopez*, 859 F.3d

1134 (2017), is an outlier that viewed the form and instructions there as a "blunder," notwithstanding the district court's own contrary understanding. *Id.* at 1142; see *id.* at 1141-1143.

The prospective importance of the divergent approach reflected in the singular *Pimintel-Lopez* decision is far from clear. Although the verdict form in *Pimintel-Lopez* mirrored the one here, see 859 F.3d at 1139, the panel's updated opinion following the denial of rehearing en banc provided guidance for rewording the form to avoid similar difficulties in the future, *id.* at 1142. Particularly given the variety of context-specific instructions and verdict forms given to juries in different cases, the issue here may not recur with sufficient frequency to warrant this Court's intervention.

3. In any event, this case would be a poor vehicle in which to address the proper interpretation of a verdict form like the one in this case, because petitioner would be unlikely to benefit from a decision in his favor. Petitioner challenges only the procedure used to calculate his advisory sentencing guidelines range. As it stands, the district court already granted petitioner a significant downward variance, and imposed concurrent sentences on the two counts of conviction despite the Probation Office's recommendation that the sentences be imposed consecutively. See Addendum to PSR at 32 (C.A. ROA 2873). And in doing so, the court made clear that it would have imposed the same 240-month sentence "without regard to the applicable guideline range in light of the factors set forth in 18 U.S.C. Section 3553(a)." Pet. App. 61-62. Petitioner's sentence is therefore unlikely to change even if he is resentenced using a different advisory guidelines range.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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