No. _____

IN THE

Supreme Court of the United States

DAVID A. BRIDGEWATER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth and Sixth Amendments prohibit a court from relying solely on dismissed conduct to impose an otherwise substantively unreasonable sentence?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner David A. Bridgewater was Defendant-Appellant in the Court of Appeals. The United States of America was the Appellee.

Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David A. Bridgewater respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

DECISION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is available at 950 F.3d 928, and is reprinted in the Appendix (App.) at 1a.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 19, 2020. App. 1a. On March 19, 2020, the Supreme Court extended the time to file a petition to 150 days from the date of the lower court judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

STATEMENT OF THE CASE

An indictment charged Petitioner David A. Bridgewater with attempted enticement of a minor in violation of 18 U.S.C. § 2422(b) and soliciting an obscene visual depiction of a minor in violation of 18 U.S.C. § 2522A(a)(3)(B). ECF No. 22. Pursuant to a plea agreement, Mr. Bridgewater agreed to plead guilty to soliciting an obscene visual depiction of a minor and the government agreed to dismiss the count

charging him with attempted enticement of a minor. ECF Nos. 29, 32. The district court accepted the guilty plea. ECF No. 29.

U.S. Probation calculated a base offense level of 22 with a two-level enhancement for use of a computer or interactive computer service for the possession transmission, receipt, or distribution of the material. ECF No. 37, p. 6. After a three-level reduction for acceptance of responsibility, his total offense level was 21. *Id.* With a criminal history category of I, his sentencing range was 37 to 46 months. *Id.* The statutory range of imprisonment was five to 20 years. *Id.* at 11. Probation and the parties agreed that the effective guideline range was 60 months. *Id.*; ECF No. 32, p. 3.

At sentencing, both Mr. Bridgewater and the government recommended a sentence of 60 months. Mr. Bridgewater argued numerous mitigating factors, including a traumatic childhood that included sexual abuse, multiple serious medical conditions, and the absence of any criminal record. ECF No. 38; Sent. Tr. (7/23/19), pp. 8-15. Although it noted that the crime was serious and that there were aggravating facts, the government argued that a 60-month sentence was appropriate in light of the 18 U.S.C. § 3553(a) factors and Mr. Bridgewater's offer to plead guilty early in the case. *Id.* at 7. The government offered no evidence to prove the allegations related to the attempted-enticement count.

The district court rejected the parties' recommendation and reasoned that an above-guideline sentence was appropriate, relying solely on "the specific offense conduct underlying the solicitation of a visual depiction of a minor." *Id.* at 18. The

district court concluded that this conduct was not outweighed by the acknowledged mitigating factors: "[n]o criminal history"; "factors in [Mr. Bridgewater's] upbringing"; "a father who never acknowledged [Mr. Bridgewater]"; childhood sexual abuse and bullying; and many serious medical conditions. *Id.* at 20-21. The court imposed a sentence of 78 months' incarceration, seven years of supervised release, a $150 fine, and a $100 special assessment. *Id.* at 22.

On appeal, Mr. Bridgewater argued that his above-guideline sentence was substantively unreasonable in light of the disparity with other defendants' sentences and the lack of evidence that he would recidivate. He also argued that the district court's reliance on dismissed conduct infringed on his rights to due process and to a jury trial. On February 19, 2020, the United States Court of Appeals for the Seventh Circuit affirmed the district court. *United States v. Bridgewater*, 950 F.3d 928, 939 (7th Cir. 2020). The court concluded that the sentencing disparity was not unwarranted and that the district court adequately explained why the dismissed conduct aggravated the offense. *Id.* at 937-38. As to Mr. Bridgewater's constitutional claims, the court concluded that *United States v. Watts*, 519 U.S. 148 (1997), foreclosed his argument that considering dismissed conduct was contrary to the Fifth and Sixth Amendments. *Id.* at 938.

REASONS FOR GRANTING THE WRIT

I. This Court should correct the Courts of Appeals' unanimous practice of refusing to apply the *Apprendi* rule to sentences that would be substantively unreasonable absent the sentencing court's reliance on judge-found facts.

Here, the sentencing court made it clear that its above-guideline sentence was based solely on the dismissed enticement conduct that was described only in the presentence report. Absent reliance on the dismissed conduct, the sentence would have been substantively unreasonable. Although the court imposed a sharp variance from the 60-month guideline recommended by both parties, the Court of Appeals affirmed the sentence.

Courts of Appeals are unanimous in finding no constitutional infirmity to increasing a sentence based solely on judicially-found facts so long as the sentence is within the statutory range. *See Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., dissenting) (collecting cases). According to *Apprendi* and its progeny, however, it is unconstitutional to increase a sentence based solely on judicially-found facts. Nevertheless, Courts of Appeal have reasoned that this Court's silence on the issue equates approval as long as the sentence is below the statutory maximum. *Id.* This Court should end its silence on the matter and condemn the practice of increasing sentences based solely on judicial factfinding.

A. This Court's recent sentencing jurisprudence, in *Apprendi* and its progeny, holds that a judge may not increase a sentence based only on judicially-found facts.

Since 2000, this Court's sentencing jurisprudence has made it clear that the reliance on judicially-found facts to increase a sentence is constitutionally infirm. In

Apprendi v. New Jersey, this Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. 530 U.S. 466, 490 (2000). The *Apprendi* Court struck down as unconstitutional a hate-crime statute that permitted the sentencing court to impose a sentence above the statutory maximum if it found certain facts by a preponderance of the evidence. *Id.* at 468-69. Four years later, in *Blakely v. Washington*, this Court considered the constitutionality of a state mandatory sentencing-guideline scheme that permitted a court to impose an above-guideline sentence upon a judicial finding of an "aggravating factor" that justified an above-guideline sentence. 542 U.S. 296, 299-300 (2004). This Court concluded that under *Apprendi* the statutory maximum was "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* at 303 (emphasis in original). Under a mandatory-guideline scheme, therefore, *Apprendi* forbids an above-guideline sentence based solely on judicially-found facts. *Id.* at 303-04; *see also United States v. Booker*, 543 U.S. 220, 231-32 (2005) (extending *Blakely* to the federal sentencing guidelines).

Apprendi and *Blakely* established that the Fifth Amendment Due Process Clause and the Sixth Amendment's notice and jury trial guarantees "undisputedly entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi*, 530 at 476-77 (internal brackets and quotation marks omitted). These constitutional guarantees, this Court explained, require that punishment be "invariably linked" to

the crime of conviction. *Id.* at 478, 484 (internal brackets omitted) ("due process and associate jury protections extend" to "determinations" related to "the length of a sentence"); *see also Booker*, 543 U.S. at 238-39 ("The Framers . . . understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases.") (quoting A. Hamilton, The Federalist No. 83, p. 499) (C. Rossiter ed. 1961)).

Several jurists have recognized the constitutional problems associated with the imposition of increased sentenced based solely on judge-found facts. Justice Scalia explained:

> We have held that a substantively unreasonable penalty is illegal and must be set aside. *Gall v. United States*, 552 U.S. 38, 51 (2007). It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge.

Jones, 135 S. Ct. at 8 (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from the denial of certiorari). Justice Gorsuch, in a Tenth Circuit opinion, found constitutionally "questionable" judicial fact finding that increases a defendant's sentence. *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014). Justice Kavanaugh, in a D.C. Circuit concurrence, explained:

> Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial. If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a

> five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20–year sentence?

United States v. Bell, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc).

B. A sentence that, but for the judge-found facts, would be substantively unreasonable is contrary to *Apprendi* and its progeny.

Since *Booker*, the Federal Sentencing Guidelines are discretionary and sentences are reviewed for reasonableness. *Rita v. United States*, 551 U.S. 338, 368 (2007); *see also Cunningham v. California*, 549 U.S. 270, 287 (2007). Appellate courts review sentences for reasonableness under an abuse-of-discretion standard, considering whether the district court "properly analyzed the relevant sentencing factors" set forth in 18 U.S.C. § 3553(a). *Rita*, 551 U.S. at 356; *see also Booker*, 543 U.S. at 261. When considering a non-Guidelines sentence, appellate courts must "consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of variation." *Gall*, 552 U.S. at 50. "[A] major departure should be supported by a more significant justification than a minor one." *Id.*

Courts of Appeals, however, have unanimously ignored the *Apprendi* rule and permitted courts to increase sentences based solely on facts related to the offense and the offender that have not been found by the jury or admitted by the defendant. *See, e.g.*, *United States v. St. Hill*, 768 F.3d 33, 39 (1st Cir. 2014) (Torruella, J., concurring) ("All too often, prosecutors charge individuals with relatively minor crimes, carrying

correspondingly short sentences," only to argue at sentencing for "significantly enhanced terms" based on "on other crimes that have not been charged."); *United States v. Broxmeyer*, 699 F.3d 265, 298 (2d Cir. 2012) (Jacobs, CJ., dissenting) (noting in dissent that a 30-year sentence relying on uncharged conduct rendered "the offense of federal conviction . . . a peg on which to hang a comprehensive moral accounting").

Here, Mr. Bridgewater's sentence would be substantively unreasonable but for the judge-found facts. The district judge explicitly stated that she was imposing an above-guideline sentence after finding by a preponderance of the evidence "the specific offense conduct underlying the solicitation of a visual depiction of a minor." Sent. Tr. (7/23/19), p. 18. The dismissed conduct served as the basis on which the "degree of [his] criminal culpability [was] assessed." *Apprendi*, 530 U.S. at 485. Even though the district judge clearly relied only on the dismissed conduct to impose a substantially-above guideline sentence, the Seventh Circuit upheld the sentence.

This Court has yet to consider "whether the Sixth Amendment is violated when courts impose sentences that, but for a judge-found fact, would be reversed for substantive unreasonableness." *Jones*, 135 S. Ct. at 9 (Scalia, J., dissenting). "The door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall*, 552 U.S. at 60 (Scalia, J., dissenting).

Simply put, under *Apprendi* "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a

reasonable doubt, not merely by a preponderance of the evidence." *Cunningham*, 549 U.S. at 281. "It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury." *Jones*, 135 S. Ct. at 8.

II. *Watts* considered only the Double Jeopardy Clause and does not foreclose the question presented in this case. Alternatively, this Court should revisit *Watts* because its stare decisis value is minimal and it cannot be squared with *Apprendi* and its progeny.

Watts considered only a "very narrow" question of whether "the Double Jeopardy Clause permitted a court to consider acquitted conduct in sentencing a defendant under the Guidelines." *Booker*, 543 U.S. at 240 & n.4. Nevertheless, the Seventh Circuit, like other appellate courts, cited to *Watts* as authority for upholding a sentence based on judge-found facts. *Bridgewater*, 950 F.3d at 938.

If, however, *Watts* is read as foreclosing the Fifth and Sixth Amendment Arguments presented in this Petition, it cannot be squared with *Apprendi* and its progeny. Stare decisis is "at its weakest when [the Court] interpret[s] the Constitution because a mistaken judicial interpretation of that supreme law is often practically impossible to correct through other means." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (internal quotation marks omitted). When revisiting a precedent "this Court has traditionally considered the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Id.* (internal quotation marks omitted). Here, the factors weigh against reliance on *Watts* as foreclosing the questions presented.

Watts "did not even have the benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 n.4; *see also Hohn v. United States*, 524 U.S. 236, 251 (1998) (explaining that the Court is "less constrained" by opinions "rendered without full briefing or argument"). *Watts* did not consider the Sixth Amendment jury-trial right in its reasoning. Reliance interests are not in question because any new rule announced would, like *Apprendi*, not meet the demanding *Teague* test for retroactive application.

Finally, this Court's subsequent sentencing jurisprudence warrants revisiting the *Watts* opinion. This Court has issued multiple opinions clarifying the Sixth Amendment's applications to sentencing since *Watts*. *See, e.g.*, *Apprendi*, 530 U.S. at 466; *Ring v. Arizona*, 536 U.S. 584 (2002) (Sixth Amendment requires the jury to find aggravating factors necessary for a death sentence); *Blakely*, 542 U.S. at 296. This Court has also explained that the Due Process Clause in conjunction with the Sixth Amendment mandates that "each element of a crime be proved to a jury beyond a reasonable doubt." *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016). *Watts*' inconsistency with *Apprendi* and its progeny warrants consideration of whether courts may impose otherwise substantively unreasonable sentences based only on dismissed conduct.

Here, this Court should grant certiorari and hold that Mr. Bridgewater's sentence violates the Fifth and Sixth Amendments because it could "not have been upheld" on appeal absent the judge-found facts. *Gall*, 552 U.S. at 60 (Scalia, J., concurring).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Dated: July 20, 2020

Respectfully submitted,

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