No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2020

ANTHONY DON BROWN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN A. KUCHERA
210 N. 6th St.
Waco, Texas 76701
(254) 754-3075
(254) 756-2193 (facsimile)
johnkuchera@210law.com
SBN 00792137

Attorney for Petitioner

Questions Presented

1. Under *Class v. United States,* 138 S.Ct. 798 (2018), when a defendant argues on appeal that his sentence was imposed in violation of his Fifth Amendment right to due process and Sixth Amendment right to notice (in that he had no notice based on pleading to the charged offense that he would later be sentenced for a completely different offense), is the appeal properly barred by a waiver of appeal provision in the plea agreement?

1. When the Government agrees as part of a plea agreement not to:

> bring any additional charges against the defendant based on the conduct underlying and related to the defendant's plea of guilty

but then agrees with a cross-reference to a completely different offense recommended by the presentencing investigation report – that changes the defendant's advisory sentencing range from 10-16 months to 70-87 months – has the Government thereby breached the plea agreement?

Table of Contents

Table of Authorities

Page(s)

Cases

Statutes

Sentencing Guidelines

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Anthony Don Brown respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit dismissing Brown's appeal is styled: *United States v. Brown,* 821 F. App'x 394, 2020 U.S. App. LEXIS 29709 (5th Cir. 2020).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit dismissing Brown's appeal was announced on September 17, 2020 and is attached hereto as Appendix A. Brown filed a petition for rehearing which was denied October 30, 2020. The denial is attached hereto as Appendix B. Pursuant to Supreme Court Rule 13(3), this Petition has been filed within 90 days of the date of the denial of the petition for rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions

U.S. Const. amend. V.

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

U.S. Const. amend. VI.

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]

U.S.S.G. Provisions

U.S.S.G. § 2K1.1 (2018) Unlawful . . . Possession . . . of Firearms or Ammunition

> (a) Base Offense Level (Apply the Greatest):
>
> . . .
>
> (6) 14, if the defendant . . . was a prohibited person at the time the defendant committed the instant offense;
>
> . . .
>
> (c) Cross Reference
>
> (1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense . . . , apply –
>
> (A) § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determine above[.]

Statement of the Case

Brown pled guilty pursuant to a plea agreement to the felony offense of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). The plea agreement included the following provision:

> **Government's agreement:** The government will not bring any additional charges against the defendant based upon the conduct underlying and *related* to the defendant's plea of guilty and will move to dismiss, at sentencing, any remaining counts other than those to which the defendant is pleading guilty.

Brown's plea agreement also included a provision wherein he waived his rights to appeal his conviction and sentence.

The sentencing guideline generally applicable to a felon in possession case is U.S.S.G. § 2K2.1. U.S.S.G. App. A. Section 2K2.1 provides that the base offense level is 14 if the defendant was a prohibited person (which includes a person with a prior felony conviction) at the time he committed the offense. U.S.S.G. § 2K2.1(a)(6). However, § 2K2.1(c) provides for a cross reference:

> If the defendant used or possessed any firearm . . . cited in the offense of conviction in connection with the commission or attempted commission of another offense . . . , apply § 2X1.1(Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above(.)

U.S.S.G. § 2K2.1(c)(1)(A). Because Brown was found to be in possession of methamphetamine (later determined to be "Ice") at the time he possessed the firearm described in the indictment, the presentence investigation report (PSR) applied this cross-reference and assigned Brown a base offense level of 28 based on U.S.S.G. § 2D1.1(c)(6) ("at least 35 G but less than 50 G of "Ice").

Brown objected to application of the cross-reference, arguing that it violated the plea agreement by effectively bringing an additional charge against him. The Government argued in favor of the application of the cross-reference:

> The defendant objects to the application of the cross-reference set forth in U.S.S.G. §2K2.1, arguing that the offense level should be based solely on the defendant's felonious possession of a firearm. For the reasons set forth in the PSR Addendum, the government disagrees with the objection, and requests that the Court overrule the objection.

The district court adopted the PSR and sentenced Brown on the basis of the cross-reference.

Brown argued on appeal that because the Government breached the plea agreement by arguing in favor of the cross-reference, his appeal

should not be barred by the waiver of appeal provision in the plea agreement.

Brown also relied on *Class v. United States,* 138 S.Ct. 798 (2018) in arguing that the waiver of appeal provision should not bar his appeal. More specifically, he argued that his Fifth Amendment right to due process and Sixth Amendment right to notice were violated in that he was sentenced for an offense (possession with intent to distribute "ice") for which he was not charged and did not admit to. In *Class,* wherein the defendant waived his right to appeal but argued on appeal that the statue of conviction was unconstitutional, the Supreme Court noted as to the appeal waiver:

> [The appeal waiver] does not expressly refer to a waiver of the appeal right here at issue. And if it is interpreted as expressly including that appeal right, it was wrong[.]

Id. at 806-07.

In its brief, the Government argued that *Class* didn't apply to Brown's situation because the constitutional challenge in *Class* was to the statute of conviction itself, not to the application of a cross reference. Brown responded by pointing out that both cases involve complaints regarding the constitutional right to notice:

Rodney Class was indicted for possession of a firearm while on the ground of the United States Capitol in Washington, D.C. *United States v. Class,* 930 F.3d 460, 462 (D.C. Cir. 2019). He made two constitutional arguments:

> [F]irst, that the ban as applied to Class's conduct violates his Second Amendment right to bear arms, and second, that the ban violates the *Fifth Amendment's Due Process* Clause because the law defining the Capitol Grounds is complicated enough that Class *lacked notice* that he was on them. (Emphasis added.)

Id. at 463. Brown's due process notice argument is very similar to Class's second argument, to-wit:

> Brown's . . . Sixth Amendment *right to notice* w[as] violated in that he was sentenced for an offense (possession with intent to distribute "ice") for which he was not charged and did not admit to.

The Fifth Circuit dismissed Brown's appeal based on the waiver of appeal provision in the plea agreement.

First Reason for Granting the Writ: *The Fifth Circuit's dismissal of Brown's appeal in the face of his constitutional arguments is inconsistent with this Court's decision in Class v. United States,* 138 S.Ct. 798 (2018).

(a) Constitutional rights to notice and due process

Under the Fifth Amendment, a defendant has a "substantial right to be tried only on charges presented in an indictment returned by a grand jury." *United States v. Miller,* 471 U.S. 130, 140 (1985). When a grand jury returns an indictment, due process requires that the indictment provide the defendant with adequate notice of the crime with which he has been charged. *Russell v. United States,* 369 U.S. 749, 763-64 (1962). An indictment's most basic function is to fairly inform the defendant of the charge against him. *United States v. Chaney,* 964 F.2d 437, 447 (5th Cir. 1992). Thus, a defendant has a Fifth Amendment right to indictment by a grand jury and a Sixth Amendment right to notice of the charges against him. *United States v. Stuckey,* 220 F.3d 976, 981 & n. 5 (8th Cir. 2000).

A defendant cannot be convicted for a crime for which he was not charged. *Cole v. Arkansas,* 333 U.S. 196, 201 (1948); *See Ricalday v.*

Procunier, 736 F.2d 203, 307 (5th Cir. 1984) ("[A] violation of the due process clause results when a criminal defendant is convicted of a crime he was never charged with committing[.]").

(b) The charge forms the basis for the punishment

"The defendant's ability to predict with certainty the judgment from the face of the felony indictment flow[s] from the invariable linkage of punishment with crime." *Apprendi v. New Jersey,* 530 U.S. 466, 478 (2000). "[A]n accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason." *S. Union Co. v. United States*, 567 U.S. 343, 356 (2012). Thus, a sentence must be based upon the crime of conviction. *See Alleyne v. United States*, 570 U.S. 99, 115 (2013) ("It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny[.]"). Due process protections apply not only to substantive criminal laws "but also to statutes fixing sentences." *Johnson v. United States,* 135 S.Ct. 2551, 2557 (2015); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). The Supreme Court has held that

the Sixth Amendment requires that any fact "essential to the punishment" must be admitted by the defendant or proved to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490.

(c) United States v. Class

In *United States v. Class,* wherein the defendant pled guilty to possession of a firearm on Capitol grounds, his plea agreement "included an explicit waiver of appeal rights as to sentencing errors and collateral attacks on the conviction[.]" 2016 U.S. App. LEXIS 12620, at *4 (D.C. Cir. 2016). He appealed nonetheless, raising three constitutional arguments. The D.C. Circuit dismissed the appeal on the basis that unconditional guilty pleas waived claims of error on appeal, "even constitutional claims." *Id.* at *3. The U.S. Supreme Court granted cert., and while acknowledging the waiver of appeal language, noted "the agreement said nothing about the right to raise on direct appeal a claim that the statute of conviction was unconstitutional." *Class v. United States*, 138 S. Ct. 798, 802 (2018). While the main holding in *Class* was that an unconditional guilty plea does not waive the right to raise a

constitutional argument on appeal, the Court also addressed the waiver of appeal language in the defendant's plea agreement:

> [T]he Government argues that Class "expressly waived" his right to appeal his constitutional claim. . . . The Government concedes that the written plea agreement, which sets forth the "Complete Agreement" between Class and the Government . . . does not contain this waiver. *. . .* Rather, the Government relies on the fact that during the Rule 11 plea colloquy, the District Court Judge stated that, under the written plea agreement, Class was "giving up [his] right to appeal [his] conviction." *. . .* And Class agreed. We do not see why the District Court Judge's statement should bar Class' constitutional claims. *It was made to ensure Class understood "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." . . . It does not expressly refer to a waiver of the appeal right here at issue.* And if it is interpreted as expressly including that appeal right, *it was wrong*, as the Government acknowledged at oral argument. . . . these circumstances, Class' acquiescence neither expressly nor implicitly waived his right to appeal his constitutional claims. (Emphasis added.).

Id. at 806-07.

(d) Subsequent Supreme Court cases applying Class; Wolfe and Ward

In *Wolfe v. Virgina,* 139 S.Ct. 790 (2019), wherein the petitioner Wolfe had obtained habeas relief (based on egregious prosecutorial

misconduct) from a death sentence in the Fourth Circuit and had his case returned to the State of Virginia for a new trial, the State (without conducting a new investigation or obtaining new information) immediately filed six additional charges against Wolfe. Petitioner's Cert. Petition pg. 1. Faced with the possibility of another death sentence, Wolfe entered a guilty plea pursuant to a plea agreement and received an 83-year sentence. *Id.* at pg. 2. Wolfe appealed, arguing vindictive prosecution. *Id.* The Virginia Court of appeals refused to consider the merits of the claims, on the basis that Wolfe had entered a non-conditional guilty plea. *Id.*

Wolfe petitioned this Court, citing *Class*:

> [A] plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the State may not constitutionally prosecute.

Class, 138 S.Ct. at 801; Petitioner's Cert. Petition pg. 2. And this Court vacated Wolfe's judgment "in light of" *Class*. *Wolfe v. Virgina,* 139 S.Ct. 790 (2019).

Ward v. United States, 139 S.Ct. 66 (2018) began in 2011 when petitioner Ward pled guilty to possession of an unregistered firearm (a violation of District of Columbia statute) pursuant to a plea bargain.

United States v. Ward, No. 2011 CF2 005519, slip op. at 2 (Superior Ct. D.C. Feb. 11, 2016). Four years later Ward sought to withdraw his guilty plea (denied) at the trial court level, arguing ineffective assistance of counsel, in part based on trial counsel's failure to file a motion to suppress based on an illegal search. *Id.,* slip op. at 6. Ward appealed to the District of Columbia Court of Appeals, arguing (in addition to his ineffective assistance of counsel claim) that the government could not "constitutionally prosecute" him because his Second Amendment right to bear arms was violated (statute of conviction was unconstitutional), and his Fourth Amendment rights by an illegal search. *Ward v. United States,* No. 16-CO-241, slip op. at 5 (App. D.C. Apr. 28, 2017). The Court of Appeals held that Ward's stand-alone Second Amendment and Fourth Amendment arguments "have been foreclosed by appellant's guilty plea[.]" *Id.*, slip op. at 7.

Ward then filed a *pro se* petition for writ of certiorari to this Court, again raising his ineffective assistance and Second Amendment arguments. Ward argued as follows regarding his Second Amendment claim:

> The District of Columbia Court of Appeals has ruled that the Petitioner cannot assert his constitutional rights in the instant case due to his guilty plea. . . . This conflicts with this Court's ruling that "Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." *Menna v. New York,* 423 U.S. 61, 62 (1975).

Petitioner's Cert. Petition pg. 16. This Court granted Ward's cert. petition and remanded the case back to the District of Columbia Court of Appeals "in light of *Class v. United States*[.]" 139 S.Ct. 66 (2018).

(e) Summary

In *Class,* this Court held:

> [T]he claims at issue here do not fall within any of the categories of claims that Class' plea agreement forbids him to raise on direct appeal. They challenge the Government's power to criminalize Class' (admitted) conduct. They thereby call into question the Government's power to "constitutionally prosecute" him.

Class, 138 S.Ct. at 805. Brown's claim is similar; i.e., the government should not be able to constitutionally prosecute him for crime for which he was not charged and to which he did not admit guilt,

Second Reason for Granting the Writ: *The Fifth Circuit's determination that the Government's arguing in favor of the cross-reference did not constitute a breach of the plea agreement is at odds with decisions from other circuits.*

In *United States v. Lombard,* 72 F.3d 170 (1st Cir. 1995), the defendant was convicted by a jury of (among other things) possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). *Id.* at 174. However, the district court applied the § 2K2.1(c) cross-reference to § 2X1.1 and sentenced the defendant to life in prison, finding that the firearm at issue had been used to commit first degree murder. *Id.* at 175. The defendant argued that the life sentenced violated his rights under the Due Process Clause. *Id.* at 174. The First Circuit affirmed the conviction but vacated the sentence:

> The mandatory imposition of a life sentence here raises questions of whether such a result was strictly intended by the Sentencing Guidelines and whether the method followed to produce that result comports with the Due Process Clause. Our focus is on the process by which the result was reached.

Id. at 175.

> [T]he [Supreme Court] Court has 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, 88 (1986).

Id. at 176.

> Here, . . . the tail has wagged the dog. The consideration of the murders at Lombard's sentencing upstaged his conviction for firearms possession. The circumstances of this case that have combined to produce this effect raise grave constitutional concerns[.]

Id. at 177.

> [T]he cross-reference to the first-degree murder guideline essentially *displaced* the lower Guidelines range that otherwise would have applied. As a result, the sentence to be imposed for Lombard's firearms 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 in "enhancing" or "adjusting" Lombard's firearms conviction, the reality is that the murders were treated as the gravamen of the offense.

Id. at 178.

> [T]hrough the mechanisms of the Guidelines and accompanying legal doctrines, the sentencing phase of the defendant's trial produced the conclusion he had committed murder and mandated imposition of a life sentence, but without the protections which normally attend the criminal process[.]

Id. at 179-80.

In *United States v. Stubbs,* 279 F.3d 402 (6th Cir. 2002), the defendant pled guilty to a violation of 18 U.S.C. § 924(o), conspiracy to use a firearm during a drug trafficking crime, but was sentenced for a

different offense, a violation of 18 U.S.C. § 924(c), which carries a mandatory 60-month consecutive sentence. *Id.* at 405. This was accomplished by way of a U.S.S.G. § 2K2.1(c) cross-reference to U.S.S.G. § 2X1.1 which instructs that the base offense level for the inchoate offense (e.g. conspiracy) is to be from the substantive offense. The defendant argued for the first time on appeal that he should not have been sentenced for violating § 924(c) when the offense for which he was charged to which he plead was § 924(o). *Id.* at 406. Reviewing for plain error, the Sixth Circuit agreed:

> We agree with Defendant that he was improperly sentenced under § 924(c) when he was charged with and pleaded guilty to a violation of § 924(o). We reject the government's contention that Defendant's sentence is proper under USSG § 2K2.1(c)[.]

Stubbs, 279 F.3d at 406-07.

> [I]t is well-established that after an indictment has been returned, its charge may not be broadened except by amendment by the grand jury itself.

Id. at 407.

> There can be no doubt that § 924(c) and § 924(o) charge different offenses. . . . Because the government cannot broaden the scope of the indictment without an amendment by the grand jury, Defendant cannot be sentenced under § 924(c) unless the indictment charged him with a violation of §

> 924(c). We therefore conclude that it was plain error for the district court to sentence Defendant under § 924(c) when he had only pleaded guilty to a violation of § 924(o) and the penalties of that statute are clear on its face.
>
> We reject the government's contention that Defendant's sentence is proper under USSG § 2K2.1(c). *Foremost, the government cannot evade the constitutional requirements of the Sixth Amendment and due process by application of the sentencing guidelines. Application of the cross-reference provision as the government suggests leads to a change in both the crime of conviction* and the statutory sentencing range. This result runs contrary to fundamental principles of due process, the Sixth Amendment right to notice through indictment by a grand jury[.] (Emphasis added.)

Id. at 409.

> There is no question that our criminal justice system is sorely lacking in the procedural safeguards mandated by the Constitution *when a defendant can be charged with one crime and sentenced for another.* Inasmuch as an error of this magnitude, an error which runs contrary to the administration of justice and the fundamental constitutional principles of due process and the Sixth Amendment right to notice, substantially and adversely affects the integrity of the judicial process, we are compelled to correct it. (Emphasis added.)

Id. at 410.[1]

In *United States v. Tucker*, 1998 U.S. App. LEXIS 29353 (4th Cir. 1998) (unpublished), the defendant pled guilty to being a felon in

[1] *Stubbs* was temporarily overruled by *Harris v. United States,* 536 U.S. 545 (2002). However *Harris* was subsequently overruled by *Alleyne v. United States,* 570 U.S. 99, 103 (2013). *Stubbs* once again became good law.

possession of a firearm pursuant to a plea agreement that included the following provision: "[T]he parties hereby stipulate and agree that the total relevant conduct of the defendant would be 1086.70 grams of cocaine base, also known as crack." *Id.* at *2-3. The PSR noted that under the felon in possession guideline, the defendant's base offense level would have been 24, but the PSR applied a cross-reference to the homicide guideline (supported by the government at sentencing) because the defendant had used a firearm in another offense which resulted in a death, thereby increasing the base offense level to 43. *Id.* at *3-5. The defendant argued for the first time on appeal that the government breached the plea agreement by arguing at sentencing that the cross-reference should be applied after previously stipulating in the plea agreement that the "total relevant conduct" was 1086.70 grams of crack. *Id.* at *5-6. Reviewing for plain error, the Fourth Circuit agreed and vacated the sentence:

> At no time was Tucker informed that the murder he had procured with an illegally possessed firearm might be part of his relevant conduct. The term "total relevant conduct" is unambiguous, and thus the government cannot limit its scope after the fact[.] It is clear also that Tucker's plea was induced, at least in part, by the government's agreement to stipulate to certain relevant conduct. Subsequently, the government argued vigorously at sentencing that the murder should be

> included as relevant conduct through application of the cross-reference, with the result that the offense level was increased substantially. We are persuaded that the plea agreement required the government to take no position on the probation officer's recommendation that the cross-reference be applied. . . . For the reasons discussed, we are constrained to vacate the sentence and remand for resentencing.

Id. at *8-9; *See also Gautt v. Lewis,* 489 F.3d 993 (9th Cir. 2007) (Defendant's due process right to be informed of the charges against him violated where defendant was charged under a statute (carrying a maximum ten-year sentence) but sentenced to nearly fifty years in prison under a second statute that carried a twenty-five year to life punishment.).

Conclusion

For the foregoing reasons, Petitioner Brown respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ John A. Kuchera
JOHN A. KUCHERA
210 N. 6th St.
Waco, Texas 76701
(254) 754-3075
(254) 756-2193 (facsimile)
johnkuchera@210law.com
SBN. 00792137

Attorney for Petitioner

Certificate of Service

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 19th day of November 2020.

/s/ John A. Kuchera
John A. Kuchera, Attorney for
Petitioner Anthony Don Brown