No.

In the
Supreme Court of the United States

JACOB RAY OWENS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner pleaded guilty to conspiracy to possess with intent to distribute methamphetamine. He admitted to the district court only to possession of 10.6 ounces of the drug. Based on his criminal history, this conduct would subject him to an advisory federal Sentencing Guidelines range of 210 to 262 months. Regardless, the court, based on its own fact-finding, held the Petitioner responsible for an additional 5 pounds of methamphetamine despite his denial of any involvement with this additional amount at his plea hearing. This judge-found fact subjected the Petitioner to an advisory Guidelines range of 324 to 405 months, and ultimately resulted in his sentence of 324 months.

> The question presented is whether Petitioner's sentence violates the Sixth Amendment because its reasonableness depends upon a fact found by the court that was not admitted by the Petitioner or proved to a jury beyond a reasonable doubt.

PARTIES TO THE PROCEEDINGS

All parties to the Petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

LIST OF DIRECTLY RELATED CASES

None.

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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit, *United States v. Jacob Ray Owens*, No. 20-50184 (5th Cir. Aug. 17, 2020) is attached to this petition as an appendix.

JURISDICTION

The court of appeals entered judgment in this case on August 17, 2020. On March 19, 2020, by general order, the Court extended the time to file petitions to 150 days from the date of the lower court judgment. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury . . . ."

STATEMENT OF THE CASE

A. INTRODUCTION

Under the system of reasonableness review mandated by *United States v. Booker*, 543 U.S. 220 (2005), sentences that are reasonable only because of a judge-found fact, even within a statutory maximum, violate the Sixth Amendment. The courts of appeals, however, have uniformly refused to recognize this constitutional violation. The clear and simple facts of this case present an ideal vehicle to vindicate the bright-line rule this Court announced in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that any fact

(other than a prior conviction) that increases the range of a criminal punishment must be found by a jury or admitted by the defendant.

B. FACTUAL AND PROCEDURAL BACKGROUND

This is a criminal case arising out of the Western District of Texas.

Jacob Owens was charged in one count of a three-count indictment with conspiracy to possess with intent to distribute a controlled substance. He pleaded guilty to this count. Petitioner did so without a plea agreement. The only factual basis to support his plea was the oral one he agreed to at his re-arraignment hearing. Principally, he admitted that

> [o]n November 5, 2018, Arizona DPS conducted a traffic stop occupied by known coconspirators of [a co-defendant] and arrested all three individuals for possession of approximately 10.6 ounces of methamphetamine. Owens was a part of this arrest.

At the hearing, Owens specifically denied any involvement with five pounds of methamphetamine obtained by a cooperating source and others on November 24, 2018.

Based on these admitted facts, the court accepted his guilty plea.

Following his plea, a U.S. probation officer prepared a Presentence Investigation Report (PSR). In a section of the report entitled, "The Offense Conduct," the officer stated, in addition to the 10.8 ounces of methamphetamine that Owens admitted being caught with at his re-arraignment hearing, he also "picked up [the] **five pounds** of methamphetamine" with which he had denied involvement. According to the

PSR, a co-defendant revealed the information about these additional five pounds of methamphetamine during their interview with Drug Enforcement Administration agents.

Based on this information, the probation officer determined that "[t]he total amount of actual methamphetamine attributable to Owens is 90.6 oz[s.] or 2.56 kilograms."

The officer calculated that, under the Sentencing Guidelines, Owens's total offense level should be a 37. This amount included a base offense level of 36 for the quantity of methamphetamine for which he was held responsible. The officer added two levels to this base level because of her finding that the offense involved the importation of methamphetamine. Two additional levels were added because of the officer's finding that Owens was a leader of the conspiracy. The officer adjusted the total offense level down by three levels for Owens's acceptance of responsibility. The officer also found the Petitioner had a criminal history score of eleven and a criminal history category of V.

Having found a criminal history category of V and a total offense level of 37, the officer stated in her report that the Guidelines range for imprisonment was 324 to 405 months under the Sentencing Guidelines.

In objections to the PSR, Owens's trial attorney specifically objected to the amount of methamphetamine attributed to him. The objection argued that the Petitioner was arrested on November 5, 2018 and "remained

incarcerated during the subsequent events and did not participate in [them]." In response, the officer wrote the court that "it was revealed that Owens [and two others] picked up five pounds (80 ounces) of methamphetamine form [sic] Mexico. The date of this occurrence is unknown."

Owens later filed a motion to withdraw his guilty plea. At the hearing on this motion, the magistrate judge observed that "it's without question, you dispute the factual basis with respect to those drug quantities and everything in there with respect to those dates [including November 24, 2018]." Owens personally told the court, "it was like you said, it concerns me because we disputed all of the amounts [including the five pounds of methamphetamine], you know, in open court. And then, I got the PSI back and it was saying -- they recommend that I still be charged with all that." He also said, "I didn't want to plead guilty to anything that happened after I was already incarcerated on November 22nd in California. That was my main -- that was my main thing . . . And it just kind of scared me. That was all."

In response, the magistrate judge stated that "I appreciate what you're saying, I do, but it's like there's not a solution to it because I never know -- none of us never know what probation is going to gather."

Ultimately, the court denied the motion.

At Owens's sentencing hearing, his attorney objected to any methamphetamine being attributed to his client beyond the 10.6 ounces

found when he was arrested because "[h]e remained incarcerated from that date forward."

The Government claimed that "what is being referred to [in the PSR] is a trip prior to that November 24th incident." The Court stated that the co-defendant, who is relied on in the report, "is talking about a trip to Mexico with Mr. Owens where they picked up 5 pounds. It doesn't say a date. I don't think that's required. It's within the term of the conspiracy."

Owens personally said to the Court: "The 5-pound deal, it says in their statements that that happened November 24th." Owens's attorney further added, "we believe [the co-defendant] was referencing a date of November 24, 2018, on these 5 to 10 pounds. . . . it's impossible for Mr. Owens to have been part of a transaction if he was incarcerated."

The court during its colloquy on this objection asked the probation officer, "[w]hat I am saying is that there is reliable information from [the co-defendant] that you [Owens] were with him along with a female picking up 5 pounds, which is roughly 80 ounces. Right?" To which the officer responded, "[y]es, Your Honor."

Again, Owens told the court, "[t]he 80 [ounces] never happened. I never had anything to do with that."

Owens's attorney concluded his argument on the objection by stating, "just to sum it up for Mr. Owens, we're simply asking the Court to look at the evidence and the facts and then find that the government hasn't proven this

by the preponderance of the evidence standard." The court in response stated that "based on the response of the probation officer, [the Government's attorney's] response, my comments and all that, the objection is overruled." The Petitioner did not specifically object to the trial court's use of "judge-found facts."

The district court entered its judgment and Petitioner timely appealed. On appeal before the U.S. Court of Appeals for the Fifth Circuit, Petitioner submitted an unopposed motion for summary affirmance in light of binding circuit precedent, and a letter brief addressing the following issue: "Whether his imprisonment sentence violates the Sixth Amendment because its reasonableness depends upon facts found by the court that were not admitted to by the Defendant or proved to a jury beyond a reasonable doubt." He conceded that the argument was foreclosed by *United States v. Hernandez*, 633 F.3d 370, 374 (5th Cir. 2011). The court of appeals granted the motion and affirmed the judgment of the district court.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD APPLY THE BRIGHT-LINE RULE IN *APPRENDI V. NEW JERSEY* TO CASES IN WHICH THE REASONABLENESS OF A SENTENCE DEPENDS UPON FACTS NOT ADMITTED BY THE DEFENDANT OR FOUND BY A JURY.

This case provides the Court the ideal opportunity to resolve the conflict between (1) *Apprendi's* bright-line rule that the Sixth Amendment

requires that any fact (other than a prior conviction) that increases the "prescribed range of penalties to which a criminal defendant is exposed" must be treated as an element to be found by a jury or admitted by the defense, 530 U.S. at 490, and (2) the refusal of the courts of appeals to apply this rule and the reasoning behind it to cases in which the lawfulness or "reasonableness" of a sentence (within the statutory maximum) depends on judge-found facts.

The application of the *Apprendi* rule led the Court in *Booker* to declare that the federal sentencing guidelines, which required the application of particular sentences based on facts found by a judge, to be an unconstitutional usurpation of the jury's fact-finding function guaranteed by the Sixth Amendment. 543 U.S. at 244. Instead of returning to the sentencing court the discretion to set a criminal defendant's sentence within the range set out by the particular statute, the Court chose to remedy this scheme by making the Guidelines "effectively advisory." *Id.* at 245. But the Guidelines are not quite advisory because the Court *required* the sentencing court to consider the Guidelines range and tailor the sentence in light of the sentencing factors set out in 18 U.S.C. § 3553(a). *Id.* As Justice Sotomayor has explained: "The Guidelines anchor every sentence imposed in federal district courts. They are, in a real sense, the basis for the sentence." *Beckles v. United States*, 137 S. Ct. 886, 898 (2017) (Sotomayor, J., concurring) (internal citation and quotation omitted).

Booker did, though, leave undisturbed the practice of using judge-found facts as the basis for sentencing decisions. 543 U.S. at 252. To ensure that the sentencing court's discretion hewed to these new constraints, the Court required the courts of appeals to review sentences for "unreasonableness." *Id.* at 261.

A logical consequence of the inherent limits of the sentencing court's discretion under this remedial scheme is that, for some sentences, the reasonableness of the sentence will be based on facts not found by a jury or admitted by the defendant in violation of the Sixth Amendment. As the late Justice Scalia noted in his concurrence in *Rita v. United States*, "there will inevitably be *some* constitutional violations under a system of substantive reasonableness review, because there will be some sentences that will be upheld as reasonable only because of the existence of judge-found facts." 551 U.S. 338, 374 (2007) (Scalia, J., concurring).

The courts of appeals, however, have consistently ruled against such as-applied challenges, reasoning that judicial fact-finding can never violate the Sixth Amendment so long as the sentence falls within the statutory maximum.[1] The Fifth Circuit, in particular, has been and continues to be

[1] *See, e.g.*, *United States v. Ulbricht*, 858 F.3d 71, 134 n.72 (2d Cir. 2017) (stating that the argument that "judicial factfinding violates a defendant's constitutional right to a jury trial where the factfinding renders reasonable an otherwise substantially unreasonable sentence . . . has no support in existing law"); *United States v. Freeman*, 763 F.3d 322, 339 n.6 (3d Cir. 2014) ("We are unpersuaded by this argument, as every other court to consider the issue, including our own, has rejected it."); *United States v. Benkahla*, 530 F.3d 300, 312 (4th Cir. 2008) ("Sentencing judges may find facts relevant to determining a Guidelines range by a preponderance of the evidence, so long as that Guidelines sentence is treated as advisory and falls within the statutory maximum authorized by the jury's verdict."); *United States v.*

emphatic on this point: "courts can engage in judicial factfinding where the defendant's sentence ultimately falls within the statutory maximum term." *See United States v. Hebert*, 813 F.3d 551, 564 (5th Cir. 2015).

Yet, this view is fundamentally flawed. As Justice Gorsuch has pointed out, the Court has "used the term 'statutory maximum' to refer to the harshest sentence the law allows a court to impose based on facts a jury has found or the defendant has admitted." *See Hester v. United States*, 139 S. Ct. 509, 510 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (citing *Blakely v. Washington*, 542 U.S. 296, 303 (2004)).

In a nutshell, "[i]f 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

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Hernandez, 633 F.3d 370, 374 (5th Cir. 2011) ("Irrespective of whether Supreme Court precedent has foreclosed as-applied Sixth Amendment challenges to sentences within the statutory maximum that are reasonable only if based on judge-found facts, such challenges are foreclosed under our precedent."); *United States v. White*, 551 F.3d 381, 384-85 (6th Cir. 2008) ("In the post-*Booker* world, the relevant statutory ceiling is no longer the Guidelines range but the maximum penalty authorized by the United States Code."); *United States v. Ashqar*, 582 F.3d 819, 824-25 (7th Cir. 2009) ("So long as the Guidelines are advisory, the maximum a judge may impose is the *statutory* maximum."); *United States v. Treadwell*, 593 F.3d 990, 1017-18 (9th Cir. 2010) ("The mere fact that, on appeal, we review the sentence imposed for 'reasonableness' does not lower the relevant *statutory* maximum below that set by the United States Code."), *overruled on other grounds by United States v. Miller*, 953 F.3d 1095, 1103 n.10 (9th Cir. 2020); *United States v. Redcorn*, 528 F.3d 727, 745-46 (10th Cir. 2008) ("The district court was within its constitutional authority in finding the facts that led to discretionary sentences within those statutory ranges."); *United States v. Ghertler*, 605 F.3d 1256, 1268 (11th Cir. 2010) ("[O]ur precedent holds that district courts are permitted to find facts at sentencing 'so long as the judicial factfinding does not increase the defendant's sentence beyond the *statutory* maximum triggered by the facts conceded or found by a jury beyond a reasonable doubt.'"); *United States v. Jones*, 744 F.3d 1362, 1370 (D.C. Cir. 2014) ("[J]udicial fact-finding does 'not implicate the Sixth Amendment even if it yield[s] a sentence above that based on a plea or verdict alone.'").

sentence to, say, a 20-year sentence?" *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) (citing *In re Winship*, 397 U.S. 358 (1970)).

Regrettably, as Justice Scalia noted, "the Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range." *Jones v. United States*, 574 U.S. 948, 948 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari) (citing cases). This view, however, is not without its critics on the courts of appeals, as now-Justice Gorsuch recognized as a circuit judge, "[i]t is far from certain whether the Constitution allows" "a district judge [to] . . . increase a defendant's sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant's consent." *See, e.g., United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (citing *Jones*, 574 U.S. at 948).

The fundamental constitutional flaw of the mandatory Guidelines system was that "[i]t became the judge, not the jury, who determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance." *Booker*, 543 U.S. at 236. A holding that would allow a sentencing court full discretion to set a sentence anywhere within a statutory maximum once the necessary facts of the offense were admitted by the defendant or found by a jury would

correct this flaw. Such is not, however, the case in the remedial scheme established by *Booker.* After *Booker*, the sentencing court is free to sentence within the statutory maximum, provided that upon review the sentence is "reasonable." The lower courts' view fails to account for the post-*Booker* limit on the sentencing court's discretion to set sentences within a statutory maximum.

This reasonableness requirement is a real constraint on the sentencing court's discretion. To be reasonable, the sentence must be anchored by facts, not whim or caprice. At sentencing, the court "must make an individualized assessment based on the *facts* presented." *Gall v. United States*, 552 U.S. 38, 50 (2007) (emphasis added). Under the remedial scheme, facts that have the effect of making an otherwise unreasonable sentence reasonable are "necessary" facts that must be established by a jury verdict or admitted to by the defendant. This means that "for every given crime there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant. *Every* sentence higher than that is legally authorized only by some judge-found fact, in violation of the Sixth Amendment." *Rita*, 551 U.S. at 372 (Scalia, J., joined by Thomas, J., concurring) (emphasis in original). This concern was echoed by Justice Alito in his dissent in *Cunningham v. California*, which Justices Kennedy and Breyer joined, who observed that "[i]f reasonableness review is more than just an empty exercise, there inevitably will be *some* sentences that, absent

any judge-found aggravating fact, will be unreasonable," because post-*Booker* "a sentencing judge operating under a reasonableness constraint must find facts beyond the jury's verdict in order to justify the imposition of at least some sentences at the high end of the statutory range." 549 U.S. 270, 309 n.11 (2007) (Alito, J., joined by Kennedy & Breyer, JJ., dissenting). The courts of appeals fail to recognize that the mere fact that a defendant was sentenced within the maximum allowed by a particular statute is of no constitutional consequence. *Blakely*, 542 U.S. at 303-04; *see supra* note 1 (citing cases).

This Court continues to apply the bright-line rule in *Apprendi* that "any fact that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict is an element that must be submitted to a jury" in cases involving plea bargains, criminal fines, mandatory minimums, and capital punishment. *See Hurst v. Florida*, 577 U.S. 92, 97-98 (2016) (alteration and internal quotations omitted) (citing cases). In *Hurst*, the Court held that a capital sentence violated the Sixth Amendment because a judge increased the defendant's "authorized punishment based on her own factfinding" to a death sentence where the maximum punishment the defendant "could have received without any judge-made findings was life in prison without parole." *Id.* at 99. In *Mathis v. United States*, the Court also held that under the Armed Career Criminal Act, a sentencing judge cannot make a factual inquiry into a defendant's conduct during a prior crime of

conviction to determine if it qualifies as a predicate crime under the Act and would enhance punishment; he can only look to the elements of that prior offense. 136 S. Ct. 2243, 2252 (2016). "[The sentencing judge] is prohibited from conducting such an inquiry himself . . . . He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.*

By refusing to find a Sixth Amendment violation where a sentence is reasonable only because of judge-found facts, the courts of appeals are eroding the Sixth Amendment's right to a jury trial, which guarantees that "the jury would still stand between the individual and the power of the government." *Booker*, 543 U.S. at 237. This issue has been fully developed in the lower courts, and the injury to the constitutional rights of criminal defendants is both obvious and widespread. "[T]he time is ripe for the Supreme Court to resolve the contradictions in Sixth Amendment and sentencing precedent." *See Bell*, 808 F.3d at 929 (Millett, J., concurring in denial of rehearing en banc) ("agree[ing] with Justices Scalia, Thomas, and Ginsburg . . . that the circuit case law's incursion on the Sixth Amendment has gone on long enough") (internal quotation and citation omitted)).

II. THE STRAIGHTFORWARD FACTS OF THIS CASE PRESENT AN IDEAL VEHICLE FOR ADDRESSING THE AS-APPLIED CHALLENGE UNDER THE SIXTH AMENDMENT TO SENTENCES WHOSE REASONABLENESS RESTS UPON JUDGE-FOUND FACTS.

This case presents an ideal vehicle to resolve the issue left open in *Rita*. In *Rita*, where Justice Scalia set out his basis for an as-applied Sixth Amendment challenge, the majority of the Court did not dispute his analysis, but observed that the remedial "sentencing scheme will *ordinarily* raise no Sixth Amendment concern." 551 U.S. at 354. (emphasis added). In a concurring opinion, Justice Stevens, joined by Justice Ginsburg, wrote that an as-applied challenge should be "decided if and when [a non-hypothetical case] arises." *Id.* at 365-66 (Stevens, J., joined by Ginsburg, J., concurring). This is that non-hypothetical case where the reasonableness of the sentence rests solely upon judge-found facts.

Owens pleaded guilty to conspiracy to possess with intent to distribute a controlled substance. In support of his plea, he admitted as true in open court that he was arrested on November 5, 2018 with two other conspirators with 10.6 ounces of methamphetamine.

Owens and his trial attorney specifically and repeatedly denied the fact found by the probation officer that he was involved with five additional pounds of methamphetamine.

The judge disregarded the only facts that Owens admitted as true in open court and held him responsible for an additional five pounds of the drug. This was the "necessary" fact to support the reasonableness of the sentence.

This judge-found fact added four levels to Owens's total offense level under the Sentencing Guidelines, raising his total offense level from a 33 to a 37, and changed his Guidelines range for imprisonment from 210 to 262 months to 324 to 405 months. This judge-found fact ultimately produced a sentence of 324 months. It is the reason for the sentence and consequently its "reasonableness."

Owens's sentence should not be increased based on a fact found by a probation officer in her review of the record of an interview by Drug Enforcement Administration agents of a co-defendant. This is not a "fact[ ] encompassed by the jury verdict or guilty plea." *Rita*, 551 U.S. at 375 (Scalia, J., concurring). This is a judge-found fact.

Because the reasonableness of Owens's sentence depends on a fact found only by the sentencing judge, the sentence violates the Sixth Amendment's fundamental guarantee contained in the requirement of trial by impartial jury in criminal prosecutions that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted to by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 543 U.S. at 244.

Given that the law in the court of appeals was well settled that an as-applied Sixth Amendment challenge to the unreasonableness of a sentence is foreclosed, *Hernandez*, 633 F.3d at 374, it would have been futile to object on

this basis to the trial court. Appellate review does not require "counsel's . . . making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." *Johnson v. United States*, 520 U.S. 461, 468 (1997).

Letting this constitutional error go uncorrected seriously undermines the public's faith in our criminal justice system and leads to the regrettable view that such hard-won rights as trial by jury are backed only by paper guarantees that are the relics of a simpler time when the people feared their government more than they valued its efficiency.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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DATED: January 7, 2021

APPENDIX

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
Clerk

No. 20-50184
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JACOB RAY OWENS,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:19-CR-44-2

Before KING, SMITH, and WILSON, *Circuit Judges*.

PER CURIAM:*

Jacob Owens appeals his sentence for conspiracy to possess with intent to distribute fifty grams or more of methamphetamine. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(A), 846. As Owens acknowledges, his as-applied Sixth Amendment sentencing challenge is foreclosed by circuit precedent. *See*

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

United States v. Hernandez, 633 F.3d 370, 374 (5th Cir. 2011); *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Accordingly, his motion for summary disposition is GRANTED, and the judgment is AFFIRMED.