No. 20-6837

IN THE SUPREME COURT OF THE UNITED STATES

JACOB RAY OWENS, 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 petitioner's Sixth Amendment right to a jury trial was violated when the district court relied on its factual findings about petitioner's conduct to impose a sentence that is below the statutory maximum for the crime of conviction but is longer than petitioner contends otherwise would have been reasonable.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. Owens, No. 19-cr-44 (Mar. 10, 2020)

United States Court of Appeals (5th Cir.):

United States v. Owens, No. 20-50184 (Aug. 17, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 815 Fed. Appx. 818.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2020. The petition for a writ of certiorari was filed on January 7, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of conspiring to possess with intent to distribute 50 grams or more of actual methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), and 846. Judgment 1. He was sentenced to 324 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-2.

1. In August 2018, the Drug Enforcement Administration (DEA) began investigating a suspected methamphetamine-trafficking ring operating in and around Midland, Texas. Presentence Investigation Report (PSR) ¶ 3. The DEA's investigation focused on the activities of Brian Edward Stowe, an individual who (according to information provided by a cooperator) had recently traveled to Tijuana, Mexico for the purpose of procuring methamphetamine to distribute in the Midland area. Ibid.

On November 5, 2018, Arizona law enforcement officers conducted a traffic stop on a vehicle carrying petitioner and two others. PSR ¶ 4. The officers discovered approximately 10.6 ounces of methamphetamine and arrested the occupants. Ibid. While in custody, petitioner placed multiple calls to Stowe, at various points telling Stowe that they "need to get things going when

[petitioner] gets released," discussing how Stowe would "salvage the business," and asking Stowe for money to bond out of jail. Ibid.

On January 2, 2019, Stowe was arrested by Midland police for theft of property and unauthorized use of a motor vehicle. PSR ¶ 6. The next day, DEA agents interviewed Stowe, who admitted that he and petitioner were partners in selling methamphetamine. Ibid. Stowe also recounted to the agents how he, petitioner, and another co-conspirator had acquired and transported five pounds of methamphetamine during a trip to Tijuana. PSR ¶ 7.

2. a. A grand jury in the Western District of Texas indicted petitioner and Stowe on one count of conspiring to possess with intent to distribute 50 grams or more of actual methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), and 846. The statutory maximum sentence for that offense is life imprisonment. See 21 U.S.C. 841(b)(1)(A).

b. Petitioner pleaded guilty without a plea agreement. Judgment 1; 6/21/19 Hearing Tr. (Plea Tr.) 8. As a factual basis for the plea, the government represented that it could prove beyond a reasonable doubt that, inter alia, petitioner had been "arrested * * * for possession of approximately 10.6 ounces of methamphetamine" discovered during the November 5, 2018 traffic stop, Plea Tr. 16; a cooperating source had told law enforcement

that certain co-conspirators had "obtained five pounds of methamphetamine" on November 24, 2018, and "transported the methamphetamine * * * into the United States" en route to Midland, id. at 17-18; a known co-conspirator "was arrested by the Midland Police Department in possession of approximately 261.8 gross grams of methamphetamine" on November 28, 2018, id. at 17; another cooperating source had told the DEA "that [petitioner] and Stowe are partners and that [petitioner] was supposed to take over the methamphetamine business Stowe made because Stowe was planning to retire," id. at 18; and "Stowe was found to be in possession of approximately 37.8 gross grams of methamphetamine and two firearms" during a traffic stop on February 8, 2019, id. at 18-19.

Petitioner, through counsel, objected to the government's factual basis with respect to "three dates that were mentioned that are dealing with quantities, and [were] not necessary to get above the 50 grams under the indictment." Plea Tr. 19. Specifically, petitioner disputed responsibility for the methamphetamine allegedly trafficked on November 24, 2018; November 28, 2018; and February 8, 2019. Id. at 20. He otherwise agreed to the government's factual basis. Ibid.

c. In preparation for sentencing, the Probation Office prepared a draft presentence report to determine petitioner's offense level under the advisory Sentencing Guidelines for his

offense of conviction. After reciting evidence about the extent of the methamphetamine-trafficking conspiracy operated by petitioner, Stowe, and others, PSR ¶¶ 3-10, the Probation Office determined that petitioner was "accountable for at least 2.56 kilograms of actual methamphetamine," PSR ¶ 11 (emphasis and footnote omitted). Specifically, the Probation Office referenced petitioner's "arrest[] with approximately 10.6 ounces of methamphetamine" on November 5, 2018, and Stowe's admission that "[petitioner], Stowe[,] and a female picked up five pounds (80 ounces) of methamphetamine f[ro]m Mexico" on a separate occasion, yielding a "total amount of actual methamphetamine attributable to [petitioner]" of "90.6 oz or 2.56 kilograms." PSR ¶ 11 n.2.

Based in part on that drug-quantity calculation, the Probation Office identified a base offense level of 36. PSR ¶ 16. That level was then increased to account for petitioner's importation of methamphetamine into the United States, PSR ¶ 17, and for his role as a leader of the conspiracy, PSR ¶ 18, but decreased in light of his acceptance of responsibility, PSR ¶ 23, and his subsequent assistance to law enforcement, PSR ¶ 24, resulting in a total offense level of 37, PSR ¶ 25. Taking into account petitioner's significant criminal history (Category V), PSR ¶ 33, the Probation Office determined that the recommended imprisonment range was 324 to 405 months, PSR ¶ 56.

d. After seeing the draft presentence report, petitioner moved to withdraw his guilty plea. D. Ct. Doc. 89 (Dec. 2, 2019). Petitioner stated (without elaboration) that "the Government failed to disclose pertinent discovery involving the relevant conduct in this case until after he plead[ed] guilty" and that "the failure to disclose this relevant discovery and material evidence affected his ability to make an informed decision about pleading guilty." Id. at 1.

At a hearing on that motion, petitioner's counsel elaborated that it was "the paragraphs [in the presentence report] dealing with the relevant conduct" that "alarmed" petitioner, specifically the "five pounds [of methamphetamine] * * * ultimately attributed to him." 1/15/20 Hearing Tr. 3. Petitioner's counsel acknowledged that petitioner was "aware of that [drug quantity] because that was read in as part of the factual basis in the plea agreement." Ibid. Counsel stated that he had "tried to explain" to petitioner that the drug quantities stated in the presentence report are "something we would challenge at sentencing." Id. at 4.

The magistrate judge recommended denial of petitioner's plea-withdrawal motion, noting that "the objections only pertained to the relevant conduct to be considered during the sentencing phase" and "did not affect [petitioner]'s guilty plea." D. Ct. Doc. 96,

at 1 (Jan. 17, 2020). The district court accepted that recommendation. D. Ct. Doc. 97 (Feb. 6, 2020).

e. At sentencing, the district court resolved disputes concerning the Sentencing Guidelines and ultimately imposed a sentence of 324 months of imprisonment. 3/4/20 Sentencing Tr. (Sent. Tr.) 1-36. After a lengthy discussion of the co-conspirator admissions upon which the Probation Office's drug-quantity estimate was based, the court described the 2.56-kilogram figure as "a very conservative estimate and a reliable estimate" and overruled petitioner's objection. Id. at 15; see id. at 5, 9 (court noting that the drug-quantity estimate was "conservative" and "on the low side"); see also id. at 29-30 (government explaining that petitioner "received somewhat of a windfall with the way this has all been calculated").

In addition, the district court agreed with the Probation Office that petitioner's offense level was appropriately increased for his practice of importing drugs from Mexico, Sent. Tr. 19-20, and his leadership role in the conspiracy, id. at 20-21. The district court also agreed with the Probation Office that petitioner's extensive criminal history placed him in Category V, which the court observed was notable given that petitioner was only 26 years old. See id. at 28; see ibid. ("[I]t's like you're a house on fire to just get in trouble."). The court determined

that the Sentencing Guidelines recommended a term of imprisonment ranging from 324 to 405 months. Id. at 25. After considering "the sentencing factors set forth in" 18 U.S.C. 3553(a), the court sentenced petitioner to 324 months of imprisonment -- the bottom of the advisory Guidelines range -- to be followed by five years of supervised release. Id. at 34.

3. The court of appeals affirmed. Pet. App. 1-2. Petitioner did not renew on appeal any of the factual objections to the presentence report that he had raised in the district court. Instead, he argued for the first time that, "[b]ecause the reasonableness of [his] sentence depends on a fact found only by the sentencing judge, the sentence violates the Sixth Amendment." Pet. C.A. Br. 9; see ibid. (arguing that "it would have been futile to object on this basis to the trial court"). "Recognizing that relief [was] foreclosed" by circuit precedent, petitioner moved the court of appeals to "summarily affirm the judgment of conviction and sentence to permit him to seek further review." Ibid. The court of appeals granted that motion. Pet. App. 2.

ARGUMENT

Petitioner contends (Pet. 6-13) that his sentence for conspiring to possess with intent to distribute methamphetamine, which fell below the statutory maximum, was imposed in violation of the Sixth Amendment because in his view the sentence is

reasonable only in light of judicially determined facts about his involvement in the drug-trafficking conspiracy to which he pleaded guilty. This Court has recently and repeatedly denied petitions for writs of certiorari involving such claims, which are foreclosed by this Court's precedent and implicate no conflict among the courts of appeals. See, e.g., Gamez-Castaneda v. United States, No. 20-6954 (Feb. 22, 2021); Cole v. United States, 141 S. Ct. 606 (2020) (No. 20-5709); Saucedo v. United States, 141 S. Ct. 404 (2020) (No. 20-5156); Hernandez-Castillo v. United States, 140 S. Ct. 253 (2019) (No. 19-5259); Sorrels v. United States, 140 S. Ct. 172 (2019) (No. 18-9563); White v. United States, 139 S. Ct. 1208 (2019) (No. 18-7181); Figueroa v. United States, 139 S. Ct. 1194 (2019) (No. 18-7068); Chavez v. United States, 139 S. Ct. 614 (2018) (No. 18-6483); Lessner v. United States, 138 S. Ct. 1176 (2018) (No. 17-7558); Molnar v. United States, 138 S. Ct. 233 (2017) (No. 17-5249); Hebert v. United States, 137 S. Ct. 37 (2016) (No. 15-1190). The same result is warranted here, particularly because this case would be a poor vehicle to consider the question presented.

1. a. In Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court addressed the application of the Sixth Amendment jury-trial right to sentencing proceedings. The Court held that "[o]ther than the fact of a prior conviction, 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." Id. at 490. In United States v. Booker, 543 U.S. 220 (2005), the Court held that the principle announced in Apprendi required invalidation of the "mandatory and binding" aspects of the federal Sentencing Guidelines, which required courts to impose higher sentences based on certain judicially found facts. Id. at 233; accord Blakely v. Washington, 542 U.S. 296, 305 (2004).

To remedy that constitutional violation, the Court in Booker rendered the "mandatory" aspects of the Sentencing Guidelines "effectively advisory." 543 U.S. at 245. The Court did so by severing the statutory provisions that made the Sentencing Guidelines mandatory, see 18 U.S.C. 3553(b)(1) and 3742(e) (2000 & Supp. IV), while leaving the rest of the statute in place, see Booker, 543 U.S. at 245, 258-265. Under the resulting scheme, federal sentencing judges (1) apply the Sentencing Guidelines by making findings about the "real conduct that underlies the crime of conviction," id. at 250 (emphasis omitted); (2) consider the advisory sentencing recommendations produced by the Guidelines, id. at 259; and (3) select a sentence within the statutorily prescribed range that reflects the objectives set forth in 18 U.S.C. 3553(a), see Booker, 543 U.S. at 260. The sentence is reviewed on appeal for reasonableness -- i.e., to ensure that the

sentencing judge acted within his or her discretion. Id. at 260-262; see, e.g., Rita v. United States, 551 U.S. 338, 351 (2007).

Booker made clear that the framework it adopted complies with the Sixth Amendment. The Court stated that, "without" the severed statutory provisions that made the Guidelines mandatory, the sentencing scheme prescribed by "the statute falls outside the scope of [the] requirement" set forth in Apprendi. Booker, 543 U.S. at 259; see id. at 233 ("[E]veryone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted * * * the [severed] provisions that make the Guidelines binding on district judges."). The Court explained that the framework resulting from its decision resembled traditional sentencing schemes that have long been recognized as constitutionally permissible. See ibid. ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.") (citing, inter alia, Williams v. New York, 337 U.S. 241, 246 (1949)).

The courts below correctly applied Booker's framework in imposing petitioner's sentence. The statute under which petitioner was convicted provided for a statutory maximum sentence of life imprisonment. See 21 U.S.C. 841(b)(1)(A); PSR ¶ 55. The

court applied the Guidelines to calculate an advisory sentencing range based on petitioner's conduct and selected a sentence at the bottom that range based on consideration of the "factors set forth in" Section 3553(a). Sent. Tr. 34. On appeal, petitioner did not challenge the accuracy of the district court's findings or its application of the Guidelines. Nor did he contend that the court had abused its discretion in selecting his bottom-of-guidelines-range sentence. The court of appeals thus correctly affirmed. Pet. App. 1-2.

b. Petitioner's argument in the court of appeals, which he renews in this Court (Pet. 6-13), is instead that the Sixth Amendment prohibited the district court from imposing a prison sentence beyond some unspecified term that would, in petitioner's view, have been reasonable if the court had not considered the drug quantity for which he denied responsibility (in addition to the quantity for which he admitted responsibility). In other words, petitioner proposes that the court should have calculated a hypothetical maximum prison term that would have been reasonable considering only the drug quantity for which he admitted responsibility, and then imposed a sentence below that maximum. Petitioner does not specify what that hypothetical maximum would have been, but he contends that his sentence of 324 months exceeds it and therefore violates his Sixth Amendment rights.

Petitioner's proposal cannot be reconciled with the Court's holding in Booker and subsequent cases. As explained above, the Court in Booker addressed the Sixth Amendment violation that it found in the prior federal sentencing scheme by severing the statutory provisions that made the Sentencing Guidelines mandatory. See 543 U.S. at 245. The Court then made clear that the resulting framework, under which district courts find facts governing their application of the advisory Guidelines and then exercise discretion to impose a sentence within the statutorily prescribed range, does not present a constitutional problem. Id. at 259; see, e.g., Alleyne v. United States, 570 U.S. 99, 116 (2013) (reiterating that "broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."). Because the district court followed that approach in this case, the resulting sentence cannot be regarded as violating the Sixth Amendment.

Contrary to petitioner's position, Booker recognized that judicial assessments of a defendant's actual conduct would often be critical to calculation of the recommended sentence under the Guidelines -- and to the ultimate sentence. For example, the Court discussed at length how factfinding about offense characteristics would be critical on matters such as a defendant's use of weapons, the injuries resulting from his offense, and his leadership role

in a criminal enterprise. See Booker, 543 U.S. at 252-254. The Court recognized that findings about such offense characteristics can substantially increase the recommended sentence under the Sentencing Guidelines that judges must consider and that appellate courts may presume reasonable. See Rita, 551 U.S. at 347-356. Indeed, offense characteristics such as drug quantity and leadership role -- the same factors at issue in petitioner's case -- increased the recommended imprisonment range from about five years to about 15 years for one defendant in Booker itself. 543 U.S. at 226-228. Booker also recognized that courts had long applied reasonableness review on appeal of sentences with "no applicable Guideline," id. at 262, and petitioner acknowledges (Pet. 10-11) that a fully discretionary regime -- which would itself allow for sentence enhancements of any size within the statutory maximum based on judge-found facts -- would be constitutional.

This Court's decision in Rita v. United States, supra, confirms that sentencing judges may make findings about the defendant's real conduct -- beyond the facts admitted by the defendant or found by the jury -- and may rely on those findings in imposing sentences without violating the Sixth Amendment. The Court rejected an argument that an appellate presumption of reasonableness for within-Guidelines sentences would "raise[]

Sixth Amendment 'concerns'" because it would increase the likelihood that district courts would impose sentences that rely on "special facts," made relevant under the Guidelines, that were found by "the sentencing judge, not the jury." Rita, 551 U.S. at 352; cf. id. at 374 (Scalia, J., concurring in part and concurring in the judgment). The Court stated that its "Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." Id. at 352. The limit on a court's exercise of such discretion, this Court explained, is the reasonableness of the sentence ultimately imposed. Id. at 354.

2. As petitioner acknowledges throughout his petition, no conflict in the lower courts exists on the question presented. See Pet. 1 ("The courts of appeals * * * have uniformly refused to recognize this constitutional violation."); Pet. 8 ("The courts of appeals * * * 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.").

To the contrary, as petitioner acknowledges, the courts of appeals have uniformly rejected constitutional challenges such as petitioner's, recognizing that, under the Booker framework, district courts may consider conduct relevant to an offense of

conviction that they themselves find in exercising their discretion to select a sentence within the statutorily prescribed range, even if that conduct was not found by a jury or admitted by the defendant. See, e.g., United States v. Ulbricht, 858 F.3d 71, 134 n.72 (2d Cir. 2017), cert. denied, 138 S. Ct. 2708 (2018); United States v. Grier, 475 F.3d 556, 566 (3d Cir.) (en banc), cert. denied, 552 U.S. 848 (2007); United States v. Benkahla, 530 F.3d 300, 312 (4th Cir. 2008), cert. denied, 555 U.S. 1120 (2009); United States v. Hernandez, 633 F.3d 370, 373-374 (5th Cir.), cert. denied, 564 U.S. 1010 (2011); United States v. McCormick, 401 Fed. Appx. 29, 33-34 (6th Cir. 2010); United States v. Ashqar, 582 F.3d 819, 825 (7th Cir. 2009), cert. denied, 559 U.S. 974 (2010); United States v. Treadwell, 593 F.3d 990, 1017-1018 (9th Cir.), cert. denied, 562 U.S. 916 and 562 U.S. 973 (2010); United States v. Redcorn, 528 F.3d 727, 745-746 (10th Cir. 2008); United States v. Smith, 741 F.3d 1211, 1226-1227 & n.5 (11th Cir. 2013), cert. denied, 574 U.S. 1026 (2014); United States v. Jones, 744 F.3d 1362, 1370 (D.C. Cir.), cert. denied, 574 U.S. 948 (2014).

This Court has recently and repeatedly denied petitions seeking review of decisions rejecting as-applied constitutional challenges of the kind petitioner presses here. See p. 9, supra. Petitioner identifies no legal development since those repeated denials that would warrant review of the question presented.

In addition, this case presents a poor vehicle to consider the question presented. Although petitioner asserts that his sentence was made reasonable only by the district court's consideration of drug quantities as to which he denied responsibility, he does not indicate what the maximum reasonable sentence would be if the district court had not considered those drug quantities, and he provides no reason to conclude that his 324-month sentence would exceed that hypothetical maximum.

Petitioner observes (Pet. 15) that the Guidelines would have recommended a sentence of 210 to 262 months if the district court had not considered the drug quantities to which he objects, but he does not identify any reason why the district court could not have exercised its discretion to vary upward and impose the 324-month sentence that it imposed here based on the Section 3553(a) factors. See Gall v. United States, 552 U.S. 38, 51 (2007) (explaining that a non-Guidelines sentence is reviewed for abuse of discretion, is not presumed unreasonable, and must be reviewed with "due deference to the district court's" weighing of the Section 3553(a) factors). The court here acknowledged that petitioner's criminal history was of particular concern. Sent. Tr. 28; see 18 U.S.C. 3553(a). And other aspects of the offense aside from the drug quantity involved could have supported the sentence the court imposed. For example, the government identified information about petitioner's

leadership role that could have justified an additional two offense levels under Sentencing Guidelines § 3B1.1(a), see Sent. Tr. 20-21, which would have produced a recommended imprisonment range of 262 to 327 months and thereby placed petitioner's 324-month sentence within the guidelines range.

At a minimum, if this Court were ever to consider the question presented, it should do so in a case where it is clear the district court's reliance on offense conduct not found by the jury led the court to impose a sentence that it otherwise could not have lawfully imposed. Cf. Rita, 551 U.S. at 353-354 (declining to consider the question raised by Justice Scalia's concurrence because it was only hypothetical). This case does not fall within that category.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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