No. 20-6837

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

REPLY BRIEF FOR PETITIONER

ERIN GLENN BUSBY
LISA R. ESKOW
MICHAEL F. STURLEY
UNIVERSITY OF TEXAS SCHOOL OF LAW SUPREME COURT CLINIC
727 East Dean Keeton St.
Austin, TX 78705
(713) 966-0409
ebusby@law.utexas.edu

TARIK S. ADLAI
LAW OFFICES OF TARIK S. ADLAI
65 No. Raymond Ave., Suite 320
Pasadena, CA 91103
(626) 578-7294
tadlai@adlailaw.com

MARK G. PARENTI
Counsel of Record
MEREDITH B. PARENTI
PARENTI LAW PLLC
P.O. Box 19152
10497 Town & Country Way, Suite 700
Houston, TX 77224
(281) 224-8589
mark@parentilaw.com

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ARGUMENT

I. THIS CASE PROVIDES AN EXCELLENT VEHICLE TO ANSWER AN IMPORTANT AND UNRESOLVED QUESTION POST-*BOOKER*: WHETHER AN INCREASE IN PUNISHMENT BASED SOLELY ON JUDGE-FOUND FACTS VIOLATES THE SIXTH AMENDMENT.

The petition presents a recurring issue in the post-*Booker* landscape: Does the Sixth Amendment permit a district court to increase a sentence based on facts neither found by a jury nor admitted by the defendant? Because the district judge in this case found that petitioner was responsible for nearly 9 times the quantity of drugs he admitted in connection with his guilty plea, petitioner's sentence greatly exceeded what would have been a reasonable sentence without the judge-found additional quantity. This Court should determine whether sentences that are based—like this one—on judge-found facts violate "every defendant['s] . . . *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely v. Washington*, 542 U.S. 296, 313 (2004). This question is cleanly presented by the facts of this case, is not foreclosed by this Court's precedent, and is important to preserve all defendants' Sixth Amendment rights.

A. This Case Cleanly Presents An Important Sixth Amendment Issue.

Petitioner's sentence depended on judge-found facts that increased the quantity of drugs for which petitioner was held responsible. Petitioner admitted to

possessing 10.6 ounces of methamphetamine. Sent'g Tr. 10; PSR add. ¶ 1. But, based on the PSR, the judge instead attributed to petitioner 90.6 ounces (5.6 pounds)—nearly 9 times the admitted quantity. PSR ¶ 11 & n.2; Statement of Reasons 1. The difference between the 2 quantities raised petitioner's base offense level from 32 to 36, resulting in a total offense level of 37 instead of 33. *See* PSR ¶¶ 16, 25; U.S. SENT'G COMM'N, GUIDELINES MANUAL § 2D1.1(c) (Nov. 2018) (USSG). The judge-found quantity also increased petitioner's Guidelines range from 210-262 to 324-405 months, forming the factual basis for the "offense conduct" underlying his actual sentence of 324 months. *See* Statement of Reasons 1; Judgment 2; USSG ch. 2, introductory cmt. Thus, the judge's factual finding regarding the drug quantity increased petitioner's punishment by at least 62 months.

Under *Rita v. United States*, without the additional drug-quantity facts found by the judge, a sentence of up to 262 months would have been presumptively reasonable, *see* 551 U.S. 338, 347 (2007); and the record reflects nothing that would support the reasonableness of a much longer sentence. This petition thus raises the concern animating Justice Scalia's *Rita* concurrence as to cases in which judge-found facts "are the legally essential predicate" for increased punishment. *Id.* at 372 (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment) (contemplating a scenario in which a judge applying the Guidelines finds facts that increase a defendant's base offense level by 18, leading to a sentence that, if imposed without those

judge-found facts, "would surely be reversed as unreasonably excessive"). The majority and Justice Stevens's concurrence dismissed that concern as only "hypothetical" in *Rita*, *id.* at 353-54; *id.* at 366 (Stevens, J., joined by Ginsburg, J., concurring), but petitioner provides a real-life case in point: Petitioner was sentenced to an additional 5 years solely because the judge found him responsible for 5 additional pounds of methamphetamine—a quantitative fact never submitted to a jury and repeatedly denied by petitioner. This case therefore presents the danger warned of in *Blakely*: A jury-found fact or guilty-plea allocution becomes "a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *See* 542 U.S. at 306-07.

There is no indication in this case that anything other than the increased drug quantity would have supported a finding that petitioner's ultimate sentence was reasonable. Indeed, the record contradicts respondent's suggestion (at 17-18) that the judge might have increased petitioner's sentence based on other factors. Everything respondent notes was before the sentencing judge, who adopted a Guidelines calculation that considered and incorporated some factors (e.g., petitioner's criminal history, which placed him in category V) and rejected others (e.g., a leadership-role enhancement beyond 2 levels). *See* Statement of Reasons at 1; PSR ¶¶ 19, 33. And, after considering all the information presented, the judge chose to sentence petitioner to the bottom of the resulting range. Had the judge determined that the factors respondent points to merited greater

punishment, the judge could have imposed a longer sentence within the Guidelines range or varied upward. But he did neither.

The jury-trial right "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 305-06. And a procedure that protected petitioner's Sixth Amendment rights would have differed in important ways. For example, here the sentencing judge—"a lone employee of the State," *see id.* at 313-14—perfunctorily accepted a co-defendant's statements that were relayed in the PSR and formed the basis for attributing 5 extra pounds of methamphetamine to petitioner. Petitioner repeatedly objected to that additional quantity. *See, e.g.*, PSR add. ¶ 1; Sent'g Tr. 13 (protesting that the extra "80 [ounces] never happened. I never had anything to do with that"). But the judge merely asked the probation officer whether reliable information supported the PSR's factual allegations. Sent'g Tr. 13. And the judge simply accepted the answer despite the government's acknowledgment that the co-defendant was "given some consideration" for his statement. *Id.* at 16.

By contrast, had "twelve of [petitioner's] equals and neighbours," *see Blakely*, 542 U.S. at 313-14 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *350), been tasked with finding the additional quantity of drugs, the co-defendant would have had to testify in person, subject to cross-examination. *See* U.S. CONST. amend.

VI. Petitioner could have challenged the sufficiency of the evidence, the reliability of the co-defendant, and the motivation behind the co-defendant's testimony. *See, e.g.*, FED. R. EVID. 608 (a witness's character for truthfulness or untruthfulness); *id.* r. 609 (impeachment by evidence of a criminal conviction). But instead of being able to question the co-defendant in front of a jury, petitioner was left to challenge second-hand statements in a written report by a probation officer.

B. This Court's Guidance Is Essential To Resolve This Recurring Question.

This case presents the same basic problem as *Apprendi*, *Blakely*, and *Booker*: Petitioner received a sentence that depended on a judge-found fact—drug quantity—that increased petitioner's punishment but was neither found by a jury nor admitted. Once that quantity was set, it controlled petitioner's base offense level, *see* USSG § 2D1.1(c), ensuring that whatever total offense calculation resulted would be 4 levels higher than it would have been based on the drug quantity petitioner admitted in connection with his guilty plea. Following *Rita*, petitioner's sentence is presumed reasonable because it falls within a Guidelines range. 551 U.S. at 347. Presumed reasonableness may not give pause when a Guidelines sentence rests on admitted facts or jury findings. But in at least some cases, such as petitioner's, the legally essential predicate for the

sentence is a judge-found fact. As in *Blakely*, where judge-made findings were required to increase punishment within a statutory maximum, this framework violates the Sixth Amendment. *See* 542 U.S. at 303-04.

Allowing sentences to be justified by only judge-found facts guts *Apprendi*'s core principles and deprives defendants of the "grand bulwark" of liberty the Sixth Amendment jury right is supposed to afford. *See* 4 BLACKSTONE, *supra*, at *349; *infra* Part II. As this Court warned in *Blakely*, "[t]his would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it . . . . Not even *Apprendi*'s critics would advocate this absurd result." 542 U.S. at 306; *see also United States v. Hebert*, 813 F.3d 551, 564 (5th Cir. 2015) (upholding sentence based on the judge-found fact that defendant had committed murder despite defendant's pleading guilty only to fraud-related charges), *cert. denied*, 137 S. Ct. 37 (2016).

The tension between the Sixth Amendment's jury-trial guarantee and the *Booker* framework's tolerance of judicial factfinding that increases punishment has not gone unnoticed and is far from resolved. Members of this Court have pointed out this incongruity and acknowledged that "the door . . . remains open" for defendants to bring "as-applied constitutional challenges" to their sentences. *Gall v. United States*, 552 U.S. 38, 60 (2007) (Scalia, J., concurring); *see*

also, e.g., *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) ("It is far from certain whether the Constitution allows" a sentencing 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 also* Pet. 8-12 (collecting observations from members of this Court regarding this open and enduring Sixth Amendment question).

In particular, this Court has never "rule[d] out as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the . . . guilty plea"—precisely the question petitioner presents. *See Rita*, 551 U.S. at 375 (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment); *see also Jones v. United States*, 574 U.S. 948, 949 (2014) (Scalia, J., joined by Thomas and Ginsburg, J.J.) (dissenting from denial of cert.) (objecting that the question of as-applied Sixth Amendment violations once again has been "left for another day").

Despite uniformity in holdings among the courts of appeals, circuit judges continue to express similar concerns. Judge Millett has urged that "the time is ripe for the Supreme Court to resolve the contradictions in Sixth Amendment and sentencing precedent." *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in denial of rehearing en banc) (disagreeing with judicial use of acquitted conduct at sentencing). Similarly, Judge Sloviter has noted the contradiction between allowing increased punishment based on judge-found facts

and this Court's recognition that "under the Sixth Amendment it is not the trial judge but the jury that must make the relevant finding of fact." *United States v. Grier*, 475 F.3d 556, 588 (3d Cir. 2007) (en banc) (Sloviter, J., dissenting). And Judge Merrit has criticized the "widespread problem of using judge-found facts to calculate the applicable sentencing range under the Guidelines," contending that his own court distorts this Court's precedent by "erroneously asserting that judicial factfinding poses no Sixth Amendment problems whatsoever so long as the sentence is within the statutory range authorized by the jury verdict." *United States v. White*, 551 F.3d 381, 387 (6th Cir. 2008) (Merrit, J., dissenting).

Judges keep penning dissents and defendants keep filing petitions. Indeed, respondent identifies at least 11 petitions filed in less than 4 years. Opp. 9. As of this filing, there also are at least 2 other petitions before this Court with Sixth Amendment issues similar to the question petitioner presents. *See* Petition for Writ of Certiorari at (I), *Gilbertson v. United States*, No. 20-860 (filed Dec. 23, 2020) ("Whether the Sixth Amendment prohibits a court from imposing criminal restitution on a defendant based on facts not found by the jury beyond a reasonable doubt"); Petition for Writ of Certiorari at i, *Flynn v. United States*, No. 20-1129 (filed Feb. 11, 2021) (raising same issue, among others, citing both Sixth and Seventh Amendments). Uncertainty over these Sixth Amendment questions will persist absent this Court's intervention.

II. THE SIXTH AMENDMENT PROHIBITS THE TYPE OF JUDICIAL FACTFINDING ON DRUG QUANTITY THAT INCREASED PETITIONER'S SENTENCE.

Petitioner's Sixth Amendment rights were violated when the district court based its sentence on drug-quantity facts that were neither admitted by the defendant nor proven to a jury. Respondent emphasizes that *Booker* allows judicial factfinding at sentencing, *e.g.*, Opp. 11, 13, but *Booker* did not confront whether that practice is consistent with the Sixth Amendment when judge-found facts are "legally essential predicate[s]" for increasing punishment. *Rita*, 551 U.S. at 372 (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment). And while respondent contends that *Booker*'s framework "resemble[s] traditional sentencing schemes that have long been recognized as constitutionally permissible," Opp. 11, history tells a different story.

The Sixth Amendment codified an important common-law right: Every element of an offense had to be admitted or proven beyond a reasonable doubt to a jury. *See Alleyne v. United States*, 570 U.S. 99, 109-10 (2013). Inherent in the definition of a crime and its elements is every fact "essential to the punishment sought to be inflicted." 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 76 (2d ed. 1872). And "the original understanding of which facts are elements was even broader" than what modern American jurisprudence recognizes. *Apprendi v. New Jersey*, 530 U.S. 466, 501 (2000) (Thomas, J., concurring). At common law,

if the finding of a certain fact increased punishment, that fact had to be found by the jury. *Id.* at 502-04.

At the time of ratification, the American jury operated as a "de facto and, to a degree, a de jure sentencer." Nancy Gertner, *Juries and Originalism: Giving "Intelligible Content" to the Right to a Jury Trial*, 71 OHIO ST. L.J. 935, 939 (2010); *see also* 3 BLACKSTONE, *supra*, at *396. Given the relatively deterministic relationship between a defendant's conviction and a statutorily prescribed sentence, juries could often significantly shape practical outcomes. *See Apprendi*, 530 U.S. at 479 ("[T]he substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense." (citation omitted)). Indeed, juries were known to engage in a nullification-like practice Blackstone labeled "pious perjury"—deliberately convicting a defendant of an offense with a lower sentence as a gesture towards rehabilitation or mercy. *See* 4 BLACKSTONE, *supra*, at *238.

The jury's sentence-influencing role had special salience due to popular dissatisfaction with royalist judges. Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1790-91 (1999). The jury was an institution of interposition between the operation of law and its real-world application in the citizenry's lives—something this Court has previously acknowledged. *See S. Union Co. v. United States*, 567 U.S. 343, 350 (2012) (noting that the "animating principle" of *Apprendi* is the "preservation of the

jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense" (quoting *Oregon v. Ice*, 555 U.S. 160, 168 (2009))).

Although common-law practice allowed for some judicial sentencing discretion consistent with the Sixth Amendment, *Williams v. New York*, 337 U.S. 241, 246 (1949),[1] that discretion did not extend to judge-found facts that are "by law the basis for imposing or increasing punishment." *Apprendi*, 530 U.S. at 502 (Thomas, J., concurring). For example, early American courts found that when punishment correlated with quantifiable facts intrinsic to an offense, such as the value of stolen goods, the quantified fact had to be set forth in the indictment. *See, e.g.*, *Commonwealth v. Smith*, 1 Mass. (1 Will.) 239, 245 (1804) (holding, when the law tied punishment to the value of stolen goods, that the goods' value must be formally charged); *Apprendi*, 530 U.S. at 502-05 (Thomas, J., concurring) (discussing *Smith* and similar cases in which punishment varied based on a quantitative factor that had to be charged in the indictment); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 235 (1816) (explaining that it was "frequently necessary . . . to

[1] Some offenses permitted juries and judges to exercise discretion regarding aspects that "aggravate an offence in morals" in a "particular instance," consistent with "justice and sound policy." 1 JOEL PRENTISS BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW 371 (8th ed. 1892). "But any aggravation which as a legal rule varies the punishment must be set out in the indictment." *Id.*

state the quantity, number, and value of goods which are essential to the constitution of the offence").

The drug amount that drove petitioner's advisory Guidelines range and ultimate sentence is precisely the type of quantifiable fact that was reserved for a jury at common law. Under § 2D1.1(c), the quantity of drugs for which any defendant is found responsible is the "offense conduct" that definitively controls the base offense level for that defendant's drug-related offense. USSG § 2D1.1(c); *see id.* ch. 2, introductory cmt. There may be upward or downward adjustments that depend on unquantifiable "Special Offense Characteristics" like leadership role or a defendant's acceptance of responsibility, *see id.* §§ 3B1.1, 3E1.1, but the base on which any defendant's drug-offense sentence is built is determined solely by one fact: drug quantity. *See id.* § 2D1.1(c); *see also* Part I.A, *supra* (discussing the Guidelines calculation's outsized role in reasonableness review under the *Booker* framework). When that quantifiable, legally essential fact is neither admitted by the defendant nor found by a jury—and instead is determined by a judge over the defendant's objection—that sentencing process violates the Sixth Amendment and deprives the defendant of the "right to have the jury find the existence of 'any particular fact' that the law makes essential to his punishment." *United States v. Booker*, 543 U.S. 220, 232 (2005) (quoting *Blakely*, 542 U.S. at 301-02).

Petitioner admitted responsibility for 10.6 ounces of methamphetamine. Because the district judge instead found him responsible for nearly 9 times that

amount, his sentence was at least 5 years longer than he could have received based on the admitted quantity. The judge-found fact dramatically increased petitioner's punishment and is precisely the type of quantifiable offense conduct that would have been reserved for a jury at common law and should be today as well. Review is warranted to reaffirm the original meaning of the Sixth Amendment and return the jury-trial right to its place as the "grand bulwark" of liberty. 4 BLACKSTONE, *supra*, at *349.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIN GLENN BUSBY
LISA R. ESKOW
MICHAEL F. STURLEY
UNIVERSITY OF TEXAS
SCHOOL OF LAW
SUPREME COURT CLINIC
727 East Dean Keeton St.
Austin, TX 78705
(713) 966-0409
ebusby@law.utexas.edu

MARK G. PARENTI
Counsel of Record
MEREDITH B. PARENTI
PARENTI LAW PLLC
P.O. Box 19152
10497 Town & Country Way,
Suite 700
Houston, TX 77224
(281) 224-8589
mark@parentilaw.com

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TARIK S. ADLAI
LAW OFFICES OF
TARIK S. ADLAI
65 No. Raymond Ave.,
Suite 320
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tadlai@adlailaw.com