No.

In the
Supreme Court of the United States

BRENDA YADIRA GAMEZ-CASTANEDA,
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

Mark G. Parenti
Counsel of Record
Parenti Law PLLC
P.O. Box 19152
10497 Town & Country Way
Suite 700
Houston, Texas 77224
mark@parentilaw.com
Tel: (281) 224-8589

QUESTION PRESENTED

Petitioner pleaded guilty to conspiracy to transport aliens within the United States and being found in the United States after a previous deportation. She admitted to the district court to transporting aliens on one occasion, providing an alien she harbored at hotel with food and money, and her reentry. Based on her criminal history, this conduct would subject her to an advisory federal Sentencing Guidelines range of 24 to 30 months. Regardless, the court, based on its own fact-finding, held the Petitioner responsible for (1) involving 25 to 99 aliens in the offense, (2) transporting unaccompanied minors, (3) recklessly endangering aliens, (4) detaining them against their will, (5) being a primary organizer of the smuggling ring, and (6) obstructing justice by deleting her cell phone data. These judge-found facts subjected the Petitioner to an advisory Guidelines range of 168 to 210 months, and ultimately resulted in her sentence of 120 months.

> The question presented is whether Petitioner's sentence violates the Sixth Amendment because its reasonableness depends upon facts 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions

Statutes

United States Sentencing Guidelines

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit, *United States v. Brenda Yadira Gamez-Castaneda*, No. 20-40125 (5th Cir. Sept. 4, 2020) is attached to this petition as an appendix.

JURISDICTION

The court of appeals entered judgment in this case on September 4, 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 Southern District of Texas.

Brenda Yadira Gamez-Castaneda was charged in eight counts of a twelve-count indictment. She pleaded guilty to two counts: conspiracy to transport aliens within the United States and being found in the United States after a previous deportation. Petitioner did so with a plea agreement that did not contain an appeal waiver. The only factual basis to support her plea was the oral one she agreed to at her re-arraignment hearing.

As to the conspiracy to transport aliens count, Gamez-Castaneda admitted that from May 17, 2019 to August 27, 2019, she conspired with her co-defendants to transport aliens by motor vehicle within the United States, from locations near Donna, Texas to other locations near Donna and McAllen, Texas. Gamez-Castaneda specifically admitted to (1) on May 17, 2019, agreeing to transport aliens with her co-defendants from a property near Donna, to her home in McAllen; and (2) on June 18, 2019, serving as "a caretaker of illegal aliens," by driving to Pharr, Texas and "provid[ing] the illegal alien she was harboring at [a hotel there] with food and money for food, while they awaited further transportation."

For the reentry count, she admitted reentering the United States without prior approval after being removed on May 16, 2011.

Based on these admitted facts, the court accepted her 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, the "details of the offense were obtained from the investigative reports submitted to the United States Attorney's Office by U.S[.] Department of Homeland Security (HSI) and Customs and Border Protection (CBP) in McAllen, Texas."

Most relevantly, the probation officer reported that on March 26, 2019, government agents found an undocumented alien who said he had been held against his will by an individual who later told the agents he was working for Gamez-Castaneda and her co-defendants. The officer reported that on May 17, 2019, in a search of her home, agents found Gamez-Castaneda with two adult undocumented aliens whom a co-defendant claimed she had transported there. The officer reported that agents searched the cell phone of one of these aliens and discovered text messages from another alien who described being transported from the Rio Grande Valley to San Antonio "underneath [a] trailer in a small, confined compartment." The officer reported that on June 18, 2019, agents observed an undocumented alien leave his hotel room and approach a vehicle driven by Gamez-Castaneda and then meet a 10-year-old who exited the vehicle and gave him what appeared to be money. The officer reported that on August 21, 2019, during a jail visit, one of her co-defendants "told her to get new phones, because 'they' would be

able to retrieve all of her pictures. He added that she needed to take care of it because all of her old photographs and text message could be retrieved even if they were deleted."

The officer also determined that "[b]etween October 14, 2017 and July 12, 2019, 190 undocumented aliens have been apprehended at or near the [Donna property]. Of those 190 undocumented aliens, 10 have been identified as minors ranging in ages from 2 to 17 years old."

The officer also stated, "[b]ased on a review of the case material, an interview with the case agent . . . and an independent investigation, the following roles have been assessed." The officer then determined that "Brenda Gamez, an admitted undocumented alien, was identified as a primary coordinator and organizer of this alien smuggling organization with the capacity to smuggle large number [sic] of undocumented aliens from the Rio Grande Valley, Texas, area to various parts of the United States, via hazardous methods including tractor trailers and vehicles."

In a section entitled, "Adjustment for Obstruction of Justice," the officer determined that "[t]he defendant attempted to obstruct or impede her apprehension by deleting photographs and text messages from her telephone."

The officer calculated that under the Sentencing Guidelines Gamez-Castaneda's total offense level should be a 37. This amount included a base offense level of 12 for conspiracy to transport aliens within the United States

pursuant to U.S.S.G. § 2L1.1(a)(3). Nine levels were added to this base level because of the officer's finding that the offense involved one hundred or more undocumented aliens pursuant to U.S.S.G. § 2L1.1(b)(2)(C). Four levels were added because of the finding that the offense involved unaccompanied minors pursuant to U.S.S.G. § 2L1.1(b)(4). Two levels were added because of the finding that the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person pursuant to U.S.S.G. § 2L1.1(b)(6). Two levels were added because of the finding that an undocumented alien was involuntarily detained pursuant to U.S.S.G. § 2L1.1(b)(8)(A). Four levels were added because of the finding that Gamez-Castaneda was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive pursuant to U.S.S.G. § 3B1.1(a). Two levels were added because of the finding that she used a minor to commit the offense pursuant to U.S.S.G. § 3B1.4. The officer also added two levels because of her finding that Gamez-Castaneda had obstructed justice pursuant to U.S.S.G. § 3C1.1. No additional levels were added as a result of count twelve, being found in the United States after a previous deportation, pursuant to U.S.S.G. § 3D1.4(a).

The officer determined Gamez-Castaneda had a criminal history score of two and a criminal history category of II.

Having found a criminal history category of II and a total offense level of 37, the officer determined that Gamez-Castaneda's Guidelines range for

imprisonment was 235 to 293 months under the Sentencing Guidelines. The officer, however, noted that the statutory maximum sentence for count one is 120 months and the statutory maximum for count two is 24 months.

Petitioner's trial attorney filed objections to the PSR. The attorney objected to the officer's offense-conduct findings, claiming that they were based on the self-serving statements of coconspirators and that particular findings were simply inaccurate. He objected to the officer's adjusted increases for Gamez-Castaneda's role in the offense, arguing that (1) these determinations lacked evidence linking her to smuggling 190 undocumented aliens and 10 unaccompanied minors; (2) the adjustment for creating a substantial risk of death or serious bodily injury was based on an uncorroborated, self-serving hearsay statement; (3) there was no corroborating evidence linking her to holding aliens by force; and (4) no physical evidence, only unsworn statements, supported the determination that Gamez-Castaneda was a manager or supervisor of the offense.

In response to these objections, the probation officer stated to the court that her report was based on interviews with government agents and investigative material they supplied.

At Gamez-Castaneda's sentencing hearing, her attorney argued that she should receive a reduction for acceptance of responsibility, which the court denied, finding that she had obstructed justice by destroying evidence

in her cell phone. The attorney also re-urged his written objections, and specifically argued that

> [S]he claims that she's not a ring-leader, but was made to sound like a ring-leader . . . because everyone is giving self-serving statements with respect to that and everyone wants less time, of course, I don't blame them. . . . She did not transport illegal aliens. She helped water them, she helped feed them, she helped house them, but it was only of the seven at the hotel.

The court noted that the government believed that Gamez-Castaneda should only be held accountable for 25 to 99 aliens, not 190, and reduced her increased offense level based on the number of aliens smuggled to a level six from a level nine. The court did not grant any of her other objections and calculated that with a criminal history category of II and a total offense level of 34, the Guidelines range for imprisonment was 168 to 210 months.

Gamez-Castaneda personally said to the court, after apologizing for her conduct, "I know that I'm sworn to tell the truth here, and I'm not supposed to lie. And for that reason, I want to say that I did not have 25 or 50 undocumented persons, or illegals, under my control. I wasn't the ringleader or the organizer. It's just that these other people said many things that now can't be confronted."

Before pronouncing its sentence, the court stated that it "is entitled to rely to the extent that it is reliable on information contained within the presentence investigative report" and "the mere fact that [statements] are self-serving doesn't mean that they can't be considered."

It sentenced Gamez-Castaneda to the statutory maximum on both counts, 120 months of imprisonment on count one and 24 months on count twelve, to run concurrently.

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 her 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." She 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 FOR 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

---

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.

Gamez-Castaneda pleaded guilty to conspiracy to transport aliens within the United States and being found in the United States after a previous deportation. The only factual basis to support her plea was the oral one she agreed to at her re-arraignment hearing.

Gamez-Castaneda admitted to conspiring to transport aliens from locations near Donna and McAllen from May 17 to August 27, 2019. She specifically admitted to transporting aliens to her home on May 17, 2019 and on June 18, 2019 serving as "a caretaker of illegal aliens," "provid[ing] the illegal alien she was harboring [at a hotel]. . . with food and money for food."

Gamez-Castaneda also admitted reentering the United States without prior approval after being deported.

Gamez-Castaneda specifically denied participating in smuggling more than seven undocumented aliens. She denied dangerously transporting aliens in a compartment under the bed of a tractor trailer from the Rio Grande Valley to San Antonio. She denied holding aliens by force in a hotel—an incident that occurred outside of the time period of her admitted conduct. She denied that she was a manager or supervisor of the smuggling operation: "I wasn't the ringleader or the organizer."

The judge disregarded the limited facts that Gamez-Castaneda admitted to during her re-arraignment hearing. The sentencing court's fact-finding held Gamez-Castaneda responsible for (1) involving 25 to 99 aliens in the offense, (2) transporting unaccompanied minors, (3) recklessly endangering aliens, (4) detaining them against their will, (5) being a primary organizer of the smuggling ring, and (6) obstructing justice by deleting her cell phone data.

These were the "necessary" facts to support the reasonableness of the sentence. These judge-found facts added 18 levels to Gamez-Castaneda's base offense level under the Sentencing Guidelines, raising her total offense level from a 16 to a 34. The judge's findings changed her Guidelines range for imprisonment from 24 to 30 months to 168 to 210 months. These judge-

found facts ultimately produced a sentence of 120 months. They are the reason for the sentence and consequently its "reasonableness."

Gamez-Castaneda's sentence should not be increased based on facts found by a probation officer in her review of "investigative reports submitted to the United States Attorney's Office by U.S[.] Department of Homeland Security (HSI) and Customs and Border Protection (CBP) in McAllen, Texas." These are not "facts encompassed by the jury verdict or guilty plea." *Rita*, 551 U.S. at 375 (Scalia, J., concurring). These are judge-found facts.

Because the reasonableness of Gamez-Castaneda's sentence depends on facts 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,

s/ Mark G. Parenti
Mark G. Parenti
Parenti Law PLLC
P.O. Box 19152
10497 Town & Country Way
Suite 700
Houston, Texas 77224
mark@parentilaw.com
Tel: (281) 224-8589

Counsel of Record for Petitioner

DATED: January 20, 2021

APPENDIX

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 4, 2020
Lyle W. Cayce
Clerk

No. 20-40125
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

BRENDA YADIRA GAMEZ-CASTANEDA,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:19-CR-997-4

Before JOLLY, ELROD, and GRAVES, *Circuit Judges*.

PER CURIAM:*

Brenda Yadira Gamez-Castaneda appeals her sentences for conspiracy to transport aliens within the United States and illegal reentry. As Gamez-Castaneda acknowledges, her as-applied Sixth Amendment sentencing challenge is foreclosed by circuit precedent. *See United States v.*

* 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.

Hernandez, 633 F.3d 370, 374 (5th Cir. 2011); *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Accordingly, we GRANT her motion for summary disposition and AFFIRM the judgment of the district court.