

No. _____

In the
Supreme Court of the United States

Shawn Travis Paschal,

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 A WRIT OF CERTIORARI

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_page@fd.org

QUESTIONS PRESENTED

- I. Whether facts that affect the minimum or maximum reasonable federal sentence must be treated as elements of the defendant's offense for constitutional purposes?

PARTIES TO THE PROCEEDING

Petitioner is Shawn Travis Paschal, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shawn Travis Paschal seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported at *United States v. Paschal*, 844 Fed. Appx. 752 (5th Cir. April 19, 2021)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The unpublished panel opinion and judgment of the Fifth Circuit were entered on April 19, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 3553(a) of Title 18 provides:

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1)

the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A)

to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B)

to afford adequate deterrence to criminal conduct;

(C)

to protect the public from further crimes of the defendant; and

(D)

to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3)

the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i)

issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii)

that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B)

in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or

policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A)

issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B)

that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6)

the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7)

the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

A. Trial Proceedings

Shawn Travis Paschal pleaded guilty to one count arising from 18 U.S.C. §2252A. (Record in the Court of Appeals, 125-131). The indictment did not state the number of images possessed on the defendant's computer, nor that they involved depictions involving sadistic conduct or an infant or toddler. (Record in the Court of Appeals, 8). This charge carried no minimum penalty, save for the court's duty to impose a reasonable sentence under 18 U.S.C. §3553. *See* 18 U.S.C. §§ 2252A(a)(5)(B) and (b)(2)

A Presentence Report (PSR), which the court adopted, determined that the defendant possessed more than ten images and that these images involved either sadistic conduct or very young victims. (Record in the Court of Appeals, 144). This resulted in a higher Guideline range. (Record in the Court of Appeals, 144). The district court expressly found both the number of images, and that they involved infants, toddlers, or sadistic or masochistic conduct, which fact it emphasized in its selection of sentence. (Record in the Court of Appeals, 119). It imposed a sentence of 78 months imprisonment. (Record in the Court of Appeals, 120).

B. Court of Appeals

Petitioner appealed, contending on plain error review that the constitution requires all facts affecting the maximum or minimum reasonable punishment by a preponderance of the evidence be treated as elements of the offense. The court of appeals rejected the claim. *See* [Appendix A].

REASONS FOR GRANTING THE PETITION

This Court should rectify the widespread deprivation of constitutional rights occasioned by non-elemental treatment of facts that affect the maximum or minimum reasonable sentence.

Other than the fact of a prior conviction, any fact that increases the defendant's maximum punishment must be found by a jury beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The same rule applies to facts that increase the minimum punishment. *See Alleyne v. United States*, 570 U.S. 99, 102 (2013). Such facts must also be pleaded in the indictment in federal cases. *See United States v. Cotton*, 525 U.S. 625, 627 (2002). In *United States v. Booker*, 543 U.S. 220 (2005), this Court found that any federal sentence must be a reasonable application of 18 U.S.C. §3553(a) in light of the facts proven to the sentencing court. A sentence that is not reasonable in light of these factors must be reversed. *See Booker*, 543 U.S. at 259-264. Further, a sentencing court may be reversed if its findings of facts are clearly erroneous. *See Gall v. United States*, 552 U.S. 38, 50 (2007).

It follows from this that any fact affecting the maximum or minimum reasonable punishment in a case must be treated as an element of the offense, placed in the indictment, and proven to a jury beyond a reasonable doubt. The court below, however, has held that only those facts altering a mandatory range of punishment established by statute constitute elements of the offense. *See United States v. Bazemore*, 839 F.3d 379, 393 (5th Cir. 2016). That is wrong. *Booker* rejects any limitation of *Apprendi* to statutory maximums – the maximums at issue in *Booker*

arose from Guidelines promulgated by an independent agency, not statutes. *See Booker*, 543 U.S. 237-238 (“In our judgment the fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, lacks constitutional significance. In order to impose the defendants' sentences under the Guidelines, the judges in these cases were required to find an additional fact...”). As such, it is now clear that any maximum or minimum punishment triggers the *Apprendi* guarantee.

This Court should accept certiorari to rectify the deprivation of constitutional rights flowing from this misunderstanding of *Apprendi*. The present case does not involve preserved error, and accordingly may not be an ideal vehicle. In the event that it does grant certiorari to resolve this issue, however, it should hold the instant case, and grant certiorari, vacate the judgment below, and remand for further proceedings in light of the outcome. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

The present case likely involves constitutional error. Here, the trial judge found at least two facts that altered the maximum and minimum reasonable sentence even though it had not been placed in the indictment: that the defendant possessed more than ten images, and that they involved sadism, masochism, or an especially young victim. (Record in the Court of Appeals, 119). Because that finding affects the extent of punishment and deterrence necessary in the case, it is essential to any reasonable application of 18 U.S.C. § 3553(a). It should have been placed in the indictment.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 14th day of September, 2021.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner