No.

In the
Supreme Court of the United States

MARIA VARGAS-LUNA,
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 a controlled substance. She admitted to the district court that approximately 10 kilograms of cocaine were found in the search of her house. Based on her criminal history, her acceptance of responsibility, and safety valve adjustment, this conduct would subject her to an advisory federal Sentencing Guidelines range of 57 to 71 months. Regardless, the court, based on its own fact-finding, held the Petitioner responsible for an additional 140 kilograms of cocaine. This judge-found fact subjected the Petitioner to an advisory Guidelines range of 108 to 135 months, and ultimately resulted in her sentence of 108 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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OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit, *United States v. Maria Vargas-Luna*, No. 21-40057 (5th Cir. July 23, 2021) is attached to this petition as an appendix.

JURISDICTION

The court of appeals entered judgment in this case on July 23, 2021. 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.

Maria Vargas-Luna was charged along with her husband in a two-count indictment with both conspiracy to possess with intent to distribute a controlled substance and possession with intent to distribute a controlled substance. She pleaded guilty to the conspiracy count. 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.

Vargas-Luna admitted then that she had conspired with her husband and others to possess cocaine. Petitioner admitted that the house she lived in with her husband in McAllen, Texas "was used to store cocaine, as well as large amounts of United States currency." She also admitted that when her home was searched on October 4, 2019, agents found approximately 10 kilograms of cocaine. Vargas-Luna admitted that she "furthered the conspiracy by storing the cocaine for further distribution at [her] residence."

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

Homeland Security Investigation (HSI), in conjunction with Customs and Border Protection (CBP), and the McAllen, Texas, Police Department."

Most relevantly, the probation officer reported in addition to the approximately 10 kilograms of cocaine that Vargas-Luna admitted that were found at her home by agents on October 4, 2019 at her re-arraignment hearing, she was responsible for an additional 640 kilograms of cocaine.

Specifically, the probation officer noted that a HSI Special Agent interrogated Vargas-Luna after her arrest and claimed that she told the agent that she "believes that she received approximately 20 to 25 kilograms of cocaine, during her time at the residence." Later in the same "Offense Conduct" section of the report, the probation officer stated that the defendants' roles were assessed after the probation officer's "interview with the case agent" and by "conducting an independent investigation." In discussing the co-defendant husband's role, the officer stated, "[i]t should be noted that Maria Vargas estimated receiving 20 to 25 kilograms of cocaine per week." In discussing Vargas-Luna's role, the officer stated that "Maria Vargas estimated receiving 20 to 25 kilograms of cocaine per week, since her arrival into the United States in February 2019."

Based on this investigation, the probation officer determined that "Maria Vargas will be held responsible for approximately 649.98 kilograms (20 kgs of unseized cocaine x 32 weeks = 640 kgs + 9.98 kgs of seized cocaine = 649.98 kgs)."

The officer calculated that under the Sentencing Guidelines Vargas-Luna's total offense level should be a 38. This amount included a base offense level of 38 for the quantity of cocaine that she was held responsible for in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(A), and 846 pursuant to U.S.S.G. § 2D1.1(c)(1). Two levels were added to this base level because of the officer's finding that the defendant maintained a premises for the purpose of distributing the cocaine pursuant to § 2D1.1(b)(12). The officer adjusted the total offense level down by two levels for Vargas-Luna's acceptance of responsibility pursuant to § 3.E1.1(a). The officer also found Vargas-Luna had a criminal history score of zero and a criminal history category of I.

Having found a criminal history category of I and a total offense level of 38, the officer stated in his PSR that the Guidelines range for imprisonment was 235 to 293 months under the Sentencing Guidelines. The officer further stated that if the Government later moved for an additional one-level reduction pursuant to § 3.E1.1(b), then the total offense level would become a 37 and the Guidelines imprisonment range would be 210 to 262 months.

The Petitioner's trial attorney filed objections to the PSR with the district court. Among these objections was a specific challenge to the quantity of the cocaine attributed to Vargas-Luna: "Defendant respectfully objects to including the estimated amount of 617 kilos of unseized cocaine as relevant conduct. Only approximately 10 kilos were actually seized." The

basis for the objection was that "the evidence of such additional unseized kilos is not proven by a preponderance of credible evidence." The objection further argued that "due process should not permit the inclusion of such unseized kilos unless the proof [sic] by clear and convincing evidence."

In response to this objection, the Probation Officer wrote to the court that the base offense level was correct and that "where there is no drug seizure or the amount seized does not reflect the scale of the offense, the Court may approximate the quantity of the controlled substance."

At the sentencing hearing, Vargas-Luna's attorney reiterated the objection to the amount of cocaine attributed to her by the probation officer in the PSR. The attorney argued "that the actual kilos that were confiscated were approximately the amount that was stated in the indictment, Judge. And I do not believe that based on the evidence that was presented, Judge, that there was any confirmation as to the amount of kilos they[, the agent and Vargas-Luna,] talked about."

The court adopted the PSR's factual findings, but attributed only 150 kilograms of cocaine to Vargas-Luna. The court stated that it found this attribution by "proof by a preponderance of the evidence." It referred to its reasoning given during the prior sentencing hearing of Vargas-Luna's husband as the basis for this finding.

At that sentencing hearing, where her husband's PSR also held him accountable for almost 650 kilograms of cocaine, the court stated that it was

skeptical the two had received 20 kilograms of the drug every week for 32 weeks: "That they didn't miss a single week for 32 weeks, I find that, also, not likely, given the Court's awareness of how drug transactions occur and the supply chain being frequently interrupted for numbers of reasons, not the least of which is law enforcement pressures." Instead, the court reasoned that "I'm going to find though that somewhere in the 150 kilo range would be appropriate relevant conduct based on this evidence," concluding, "I think that 150 kilos is probably a fair estimate."

Given this amount of cocaine, the court found a base offense level of 34. The court granted two points off for safety valve and three points off for acceptance of responsibility, added two-levels for maintaining a premises for narcotics distribution, resulting in a total offense level of 31. This level combined with a criminal history of I resulted in a Guidelines sentencing range of 108 to 135 months. The court sentenced Vargas-Luna to 108 months of imprisonment.

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 emphatic on this point: "courts can engage in judicial factfinding where the

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[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. 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.'").

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 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.

Vargas-Luna pleaded guilty to conspiracy to possess with intent to distribute a controlled substance. The only factual basis to support her plea was the oral one she agreed to at her re-arraignment hearing.

Vargas-Luna admitted to the court to conspiring with her husband and others to possess cocaine. At her plea hearing, she admitted her house was used to store cocaine and large amounts of currency and that when it was searched agents found approximately 10 kilograms of cocaine.

Vargas-Luna specifically objected to the additional 617 kilos of unseized cocaine attributed to her by the probation officer, claiming that she should only be held responsible for the 10 kilograms seized by the agents.

The judge disregarded the limited facts that Vargas-Luna admitted to during her re-arraignment hearing. The sentencing court's fact-finding ultimately held her responsible for 150 kilograms of cocaine.

This was the "necessary" fact to support the reasonableness of the sentence. This judge-found fact added 6 levels to Vargas-Luna's base offense level under the Sentencing Guidelines, raising her total offense level from a 25 to a 31. The judge's findings changed her Guidelines range for imprisonment from 57 to 71 months to 108 to 135 months. This judge-found fact ultimately produced a sentence of 120 months. This is the reason for the sentence and consequently its "reasonableness."

Vargas-Luna's sentence should not be increased based on a fact found by a probation officer in the notes of an agent's post-arrest interrogation

contained in "investigative reports submitted to the United States Attorney's Office by Homeland Security Investigation (HSI), in conjunction with Customs and Border Protection (CBP), and the McAllen, Texas, Police Department." Nor should her sentence be based upon the judge's factfinding that "I think that 150 kilos is probably a fair estimate." 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 Vargas-Luna'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.

The error here, the sentencing court's fact-finding which held Vargas-Luna responsible for 150 kilograms of cocaine—140 kilograms more than she had admitted at her re-arraignment hearing—plainly violated her Sixth Amendment rights. And, the effect of this violation of her rights was substantial: This finding changed her Guidelines range for imprisonment from 57 to 71 months to 108 to 135 months. It essentially doubled her sentence.

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: October 20, 2021

APPENDIX

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED
July 23, 2021

Lyle W. Cayce
Clerk

No. 21-40057
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MARIA VARGAS-LUNA,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:19-CR-2111-2

Before DAVIS, STEWART, and DENNIS, *Circuit Judges*.

PER CURIAM:*

Appealing the judgment in a criminal case, Maria Vargas-Luna challenges her within-guidelines sentence of 108 months of imprisonment for conspiring to possess with intent to distribute five kilograms or more of cocaine. As the sole issue on appeal, Vargas-Luna contends that the sentence

* 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.

violates her Sixth Amendment rights because its reasonableness depends upon facts found by the district court that were not admitted by her or proven to a jury beyond a reasonable doubt. She concedes that her argument is foreclosed and moves for summary disposition.

Vargas-Luna is correct that the issue is foreclosed. *See United States v. Hernandez*, 633 F.3d 370, 373-74 (5th Cir. 2011). Thus, summary disposition is appropriate. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

Accordingly, the motion for summary disposition is GRANTED, and the judgment of the district court is AFFIRMED.