

NO. _____

OCTOBER TERM, 2021

IN THE SUPREME COURT OF THE UNITED STATES

NATHAN R. ROLLINS, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(a) The Question Presented for Review Expressed in the Terms and Circumstances of the Case.

Mr. Rollins plead guilty to single charge of possessing a firearm after conviction of a felony. The offense of conviction resulted in an advisory sentencing guidelines range of imprisonment of 57 to 71 months. The district court used criminal conduct for which Mr. Rollins was not charged and which was determined by a preponderance of the evidence to impose a sentence nearly double that recommended by the advisory sentencing guidelines.

The Tenth Circuit Court of Appeals held it was not a violation of the Fifth and Sixth Amendments for the district court to base its sentence on criminal conduct for which Mr. Rollins was neither charged nor convicted and which was proved only by a preponderance of the evidence. Does the Tenth Circuit's holding perpetuate the error this Court sought to address in *United States v. Booker*, 543 U.S. 220 (2005)?

(b) List of all Parties to the Proceeding

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) Table of Contents and Table of Authorities

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(d) Reference to the Official and Unofficial Reports of any Opinions

United States v. Rollins, No. 20-6166, 861 Fed.Appx. 257, 2021 WL 3556770 (10th Cir. filed Aug. 12, 2021).

(e) Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.

(i) Date of judgment sought to be reviewed.
The Order and Judgment of which review is sought was filed August 12, 2021.

(ii) Date of any order respecting rehearing.
Rehearing was not sought;

(iii) Cross Petition.
Not applicable;

(iv) Statutory Provision Believed to Confer Jurisdiction.
Pursuant Title 28, United States Code, §1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

(v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

(f) The Constitutional Provisions, Statutes and Rules which the Case Involves.

(1) Constitutional Provisions:
United States Constitution, Amendment V
No person shall be . . . deprived of life, liberty, or property, without due process of law

United States Constitution, Amendment VI
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.

(2) Statutes Involved:

None.

(3) Rules Involved:

None.

(g) Concise Statement of the Case.

Basis of Jurisdiction in Court of First Instance

This Petition seeks review of a judgment entered by a United States Court of Appeals. The jurisdiction of the district court below was based originally on an alleged violation of the laws of the United States. The United States District Court for the Western District of Oklahoma has original jurisdiction over offenses against the laws of the United States which occur in that district. 18 U.S.C. §3231.

Facts Material to Consideration of Question Presented

During the morning of December 11, 2019, the Oklahoma Highway Patrol's Communication Center notified State Troopers of an ongoing "road rage" incident during which shots were fired. A motorist on the H.E. Bailey Turnpike reported that a black male in the front passenger seat of a Dodge Charger fired a handgun as the vehicle traveled beside his vehicle. About 30 minutes after the call, State Troopers located the suspect vehicle and stopped it.

Three male suspects inside the Dodge Charger were detained: Mr. Rollins (the driver), his co-defendant Martavious Gross (the front seat passenger), and Gross's brother (the rear passenger). Troopers reported they smelled an odor of marijuana coming from inside the vehicle and commenced a search, including the trunk of the vehicle. In the trunk Troopers discovered a Stag Arms AR-15 with a fully loaded 45 capacity magazine, a Smith & Wesson M&P 40 cal. handgun with a fully-loaded magazine, a multi-colored pipe for smoking, two black face masks, and a black backpack containing three cell phones, clear baggies, digital scales, user amounts of marijuana, and a 40 round AR15 magazine fully loaded.

Gross admitted he fired the handgun at the other vehicle and admitted to owning that handgun. Gross said he got mad because the SUV driver cut them off and almost hit them. Gross said he was not trying to kill the other driver when he shot at him. He further stated that prior to the traffic stop he handed the handgun to his brother in the rear seat and told him to hide it in the trunk. He said his brother was just riding along and was not involved in the shooting. Gross also admitted knowledge of the assault rifle in the trunk, but did not claim ownership.

Mr. Rollins advised the backpack in the trunk belonged to him. Concerning Gross's discharge of the handgun, Rollins advised the incident "happened the way the Trooper said it did." Gross's brother, who was not charged, told Troopers that an

SUV was driving beside their vehicle and almost knocked them off the road. He stated Mr. Rollins sped up and Gross rolled down the window. He did not hear a gun go off. Later, Gross handed him a handgun to put in the trunk.

The individual in the SUV stated that he passed and cutoff the Dodge Charger. The Dodge Charger then sped up to him and the person sitting in the passenger seat rolled down his window and started giving him the middle finger and seemed to be yelling. He passed the Dodge Charger again; the Dodge Charger caught up again. When the Charger was right next to him he heard what sounded like a gun shot. The passenger was staring at him and was hanging out the front passenger window holding a black handgun in his right hand. The Dodge Charger then sped off and he called 911. Troopers examined the SUV and did not find any bullet holes.

Mr. Rollins and Gross were both charged with firearms violations. Mr. Rollins was charged with a violation of 18 U.S.C. §922(g)(1), being a convicted felon in possession of a firearm. Gross was charged with a violation of 18 U.S.C. §922(g)(8), being in possession of a firearm while under a protective order. The Indictment charged each of the defendants with possessing both the Smith and Wesson handgun and the Stag Arms AR-15. Mr. Rollins plead guilty to and admitted only to possessing the Stag Arms AR-15. The district court ordered a Presentence Report.

In calculating the advisory sentencing guidelines' offense level, the Presentence Report added a four level increase to the offense level calculation based on Mr. Rollins having constructive possession of the handgun Gross discharged from the vehicle. The Presentence Report indicated Gross's handgun was used in the "felony offense of Use of Vehicle to Facilitate the Intentional Discharge of a Firearm." The Presentence Report calculated an advisory guideline range of imprisonment of 84 to 105 months based on a total offense level of 25 and a criminal history category of IV.

Mr. Rollins objected to the possession of a firearm "in connection with another felony offense" enhancement. Mr. Rollins argued he did not constructively or otherwise possess the firearm Gross discharged, he did not know Gross was going to commit a crime, and the conduct Gross engaged in was not a felony. In addition, Mr. Rollins argued calculating the advisory sentencing guidelines based on his participation in a felony offense for which he was neither charged nor convicted violated his Fifth and Sixth Amendment rights. Increasing his advisory sentencing guideline range under these circumstances required a finding by the sentencing judge that Mr. Rollins engaged in a criminal act without the procedural guarantees of fair notice, reasonable doubt, and a jury trial. Instead, Mr. Rollins was "convicted" on the basis of a sentencing hearing in which the Federal Rules of Evidence did not apply,

the standard of proof was a preponderance of the evidence, and the determination was made by the sentencing judge.

Mr. Rollins' advisory guidelines total offense level would have been 21 if the four level increase was not applied. The advisory sentencing guidelines range for an offense level of 21 and a criminal history category of IV would have been 57 to 71 months' imprisonment.

The district court overruled Mr. Rollins' objection to the four level increase. On the issue of Mr. Rollins' possession of Gross's firearm, the district court held the adjustment could not be applied based on Mr. Rollins having constructive possession of Gross's firearm as the evidence did not suggest anything more than Mr. Rollins having joint control of the vehicle. The district court overruled Mr. Rollins' objection to the four level increase on the basis of "relevant conduct."

I think that whether viewed as a matter of relevant conduct or of aiding and abetting, it does seem to me that the use of the handgun by the co-defendant is attributable to Mr. Rollins. And it's essentially, I think, a matter of the reasonable inferences to be drawn from the circumstances and what the circumstantial evidence shows. And I think, as Mr. McGarry has pointed out, the particular way this played out in terms of an initial, you know, road rage, screaming-out-the-window incident followed by the car dropping back, and then a second episode where the car catches up with a high rate of speed and so on, it seems to me that the circumstances here establish that the defendant did know that there was something more than another shouting match that was about to take place.

I think the evidence would support an inference that -- I mean, the evidence is that Mr. Gross knew that Mr. Rollins had a firearm. I think Mr. Rollins knew Mr. Gross had one. I don't think it was any surprise to anybody when they pull up next to the car and it's discharged.

So it seems to me that the circumstantial evidence is sufficient to support both an inference that Mr. Rollins knew what Mr. Gross was getting ready to do and he drove the car in such a fashion that he helped him do it. So I think that is sufficient to support the attribution of Mr. Gross' actions to Mr. Rollins here for purposes of the adjustment, whether viewed as aiding and abetting or, as I say, as relevant conduct. I think the -- the particular way it played out also supports an inference that they were jointly undertaking to either intimidate, or something worse, the driver of the other car, and that the actions of Mr. Gross were in the course of that and were foreseeable to the defendant.

Concerning the Fifth and Sixth Amendment arguments, the district court held:

Well, it doesn't seem to me that we have got a Fifth or Sixth Amendment problem here. I mean, I think, as Mr. Earley has correctly pointed out, there are different views from some of the justices of the Supreme Court about how the Fifth and Sixth Amendment might apply in various situations, but particularly in situations where there's some increase in the statutory penalty that's available. That, of course, is not what we're dealing with here. And it seems to me that the discussion that we're having here essentially has to do with the nature of the course of conduct and the event that was the basis for the offense of conviction. So I don't think there's a Fifth or Sixth Amendment issue here that would prevent the application of the adjustment, or make the application of the adjustment unconstitutional.

Mr. Rollins appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit determined there was no procedural error in the district court's application of the Sentencing Guidelines. Citing the district court's findings, the Tenth Circuit held "[t]he reasonable inferences, in turn, fully support the court's

determination that Rollins was accountable for Gross's acts under §1B1.3(a)(1)(A) and (B) [relevant conduct].” *Rollins*, 861 Fed.Appx. 257, 2021 WL 3556770 at *4.

The Tenth Circuit cited precedent to dispose of Mr. Rollins’ Fifth and Sixth Amendment arguments.

We agree that our precedents foreclose his arguments. *See United States v. Robertson*, 946 F.3d 1168, 1171-72 (10th Cir.) (collecting cases and noting the Fifth Amendment does not require a higher standard of proof than a preponderance of the evidence for contested facts at sentencing), *cert. denied*, 141 S. Ct. 398 (2020); *United States v. Cassius*, 777 F.3d 1093, 1097-98 (10th Cir. 2015) (collecting cases and noting the Sixth Amendment does not require a jury to find facts that result in advisory guidelines enhancements or influence judicial discretion but do not otherwise increase the statutory sentencing range). And “this panel cannot overturn the decision of another panel of this court barring en banc reconsideration, a superseding contrary Supreme Court decision, or authorization of all currently active judges on the court.” *United States v. Edward J.*, 224 F.3d 1216, 1220 (10th Cir. 2000) (internal quotation marks omitted). Accordingly, we find no constitutional error in Rollins’s sentencing proceeding.

Rollins, 861 Fed.Appx. 257, 2021 WL 3556770 at *4.

(h) Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.

USING UNCHARGED CONDUCT, DETERMINED BY THE SENTENCING JUDGE UNDER A PREPONDERANCE OF THE EVIDENCE STANDARD, PERPETUATES THE ERROR THAT FORMED THE BASIS FOR THIS COURT’S DETERMINATION THE SENTENCING GUIDELINES WERE UNCONSTITUTIONAL.

Reasons for allowance of the writ

The rights guaranteed to defendants under the Fifth and Sixth Amendments to the United States Constitution continue to be violated by sentencing on the basis of uncharged conduct found by a preponderance of the evidence. The facts of this case show that Mr. Rollins' sentence, well above the advisory guidelines, can not be upheld but for the existence of facts found by the sentencing judge and not by a jury. This case presents an important question of federal law that should be settled by this Court: does the Constitution allow a sentencing court to use uncharged, unadjudicated conduct found by a preponderance of the evidence, to increase the sentence beyond that prescribed by the advisory sentencing guidelines?

Fifth Amendment violation

The district court's determination Mr. Rollins aided and abetted or engaged in jointly undertaken criminal activity with his codefendant violated his Fifth Amendment right to due process. The district court made its finding Mr. Rollins committed the crime of using a vehicle to facilitate the intentional discharge of a firearm based on a "preponderance of the evidence" as opposed to a "beyond a reasonable doubt" standard.

The due process clause of the Fifth Amendment does not specifically refer to the beyond a reasonable doubt standard as it pertains to the quantum of proof

necessary to convict an individual of a criminal offense. However, this Court explicitly held this standard is incorporated in the Due Process Clause.

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In re Winship, 397 U.S. 358, 364 (1970).

The advisory sentencing guidelines were calculated based on a finding by the sentencing judge that Mr. Rollins participated in or aided and abetted the commission of the crime of using a vehicle to facilitate the intentional discharge of a firearm. This finding was not the result of procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. Instead, Mr. Rollins was “convicted” on the basis of a sentencing hearing in which the Federal Rules of Evidence did not apply, the standard of proof was a preponderance of the evidence, and the determination was made by the sentencing judge.

Mr. Rollins submits that if the advisory sentencing guidelines are construed to allow sentencing courts to make these determinations, at a minimum the sentencing court should be required to make the requisite finding beyond a reasonable doubt. At least one Circuit has recognized the necessity of a heightened burden of proof when the circumstances relied on to increase the sentence have “an extremely

disproportionate impact on the sentence.” *United States v. Jordan*, 256 F.3d 922, 930 (9th Cir. 2001). Mr. Rollins further submits requiring a beyond a reasonable doubt standard to findings of additional criminal conduct used to enhance the sentence will ensure, at least minimally, procedural safeguards provided by the Fifth Amendment.

Sixth Amendment violation

The Sixth Amendment secures Mr. Rollins’ right to have a jury determine the facts governing an increase of his sentence. The district court’s finding Mr. Rollins committed an additional crime was the basis for both an increase in the advisory sentencing guideline range of imprisonment and the upward variance.

This Court has addressed the sentencing guidelines and similar sentencing schemes in the context of a defendant’s Sixth Amendment right to have facts that expose him to more severe punishment determined by a jury. In *United States v. Booker*, 543 U.S. 220, 258-265 (2005), the Court held an eight year increase in Booker’s sentence based on facts found by the district court deprived him of his Sixth Amendment rights. *Id.* at 233. The Court held the Sentencing Guidelines violated the Sixth Amendment if applied in a mandatory fashion.

In 2007, the Court overturned California’s determinate sentencing law on Sixth Amendment grounds. *Cunningham v. California*, 549 U.S. 270 (2007). The determinate sentencing law assigned “to the trial judge, not to the jury, authority to

find the facts that expose a defendant to an elevated ‘upper term’ sentence.” *Id.* at 274. The Court held:

Because the [determinate sentencing law] authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent.

Id. at 293.

That same term, in *Gall v. United States*, 552 U.S. 38, 60 (2007), Justice Scalia noted “the Court has not foreclosed as-applied constitutional challenges,” to sentences imposed under the advisory guidelines system based on findings of facts by a judge rather than a jury. “The door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.” *Id.* (Scalia, J., concurring).

In 2012, this Court applied Sixth Amendment protections as they related to imposition of a fine calculated under the advisory sentencing guidelines. *Southern Union Co. v. United States*, 567 U.S. 343 (2012). Southern Union was convicted of an environmental violation punishable by a fine of not more than \$50,000.00 for each day of violation. The probation office calculated a maximum fine of \$38.1 million, on the basis of a single conviction that encompassed an allegation the company violated the statute from September 19, 2002, through October 19, 2004. Southern

Union argued, based on the instructions to the jury and the verdict, only a one day penalty of \$50,000.00 was authorized, citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court agreed with Southern Union:

The rule that juries must determine facts that set a fine's maximum amount is an application of the "two longstanding tenets of common-law criminal jurisprudence" on which *Apprendi* is based: First, "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.'" *Blakely v. Washington*, 542 U.S. [296], at 301, 124 S.Ct. 2531 [(2004)] (quoting 4 Blackstone 343). And second, "'an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason.'" 542 U.S., at 301–302, 124 S.Ct. 2531 (quoting 1 J. Bishop, *Criminal Procedure**2355 § 87, p. 55 (2d ed. 1872)). Indeed, Bishop's leading treatise on criminal procedure specifically identified cases involving fines as evidence of the proposition that "the indictment must, in order to inform the court what punishment to inflict, contain an averment of every particular thing which enters into the punishment." *Id.*, § 540, at 330 (discussing [*Clark v. People*, 2 Ill. 117 (1833)] and [*State v. Garner*, 8 Port. 447 (Ala. 1839)]). This principle, Bishop explained, "pervades the entire system of the adjudged law of criminal procedure. It is not made apparent to our understandings by a single case only, but by all the cases." *Criminal Procedure* § 81, at 51. See also *Apprendi*, 530 U.S., at 510–511, 120 S.Ct. 2348 (THOMAS, J., concurring) (explaining that Bishop grounded this principle in "well-established common-law practice ... and in the provisions of Federal and State Constitutions guaranteeing notice of an accusation in all criminal cases, indictment by a grand jury for serious crimes, and trial by jury").

Southern Union, 567 U.S. at 356.

More recently, in a dissent from the denial of a petition for writ of certiorari, three Justices lamented the Court's decision not to address a violation of the Sixth

Amendment when acquitted conduct was used to substantially increase the defendants' sentences for drug distribution offenses. *Jones v. United States*, 547 U.S. 948 (2014) (Scalia, J., joined by Justice Thomas and Justice Ginsburg dissenting from denial of certiorari). Justice Scalia remarked “[w]e should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment—or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable.” *Id.*

The Sentencing Guidelines, although “advisory” only, still have a significant impact on sentencing decisions nationwide. According to the latest statistics from the United States Sentencing Commission, 73.7 percent of sentences imposed in federal courts in Fiscal Year 2020 were within the guideline range.¹ The continued significance of the Sentencing Guidelines is evident from this Court’s prior decisions. In *Rita v. United States*, 551 U.S. 338 (2007), this Court recognized that the “Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill [its] statutory mandate.” *Id.* at 349. In *Gall v. United States*, 552 U.S. 38, 49 (2007), this Court has made it clear the guidelines are the “starting point and initial . . . benchmark” for

¹ U.S. Sentencing Commission, 2020 Datafile, USSCFY20, Table 29.

sentencing. *Id.* at 49. In *Molina-Martinez v. United States*, 136 S.Ct. 1338 (2016), this Court described the Guidelines as “the lodestar” for most federal sentencing proceedings. *Id.* at 1346. And in *Peugh v. United States*, this Court described the Guidelines as “the framework for sentencing” and “anchor both the district court’s discretion and the appellate review process” 569 U.S. 530, 542, 549 (2013).

Two current Justices on this Court have expressed concerns about the constitutionality of a sentencing scheme that allows a defendant’s sentence to be based on facts found by a judge without the defendant’s consent. In *United States v. Sabillon-Umana*, 772 F.3d 1328 (10th Cir. 2014), then-Circuit Judge Neil Gorsuch stated, “[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.” *Id.* at 1331. In *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015), then-Circuit Judge Brett Kavanaugh stated that “[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial.” *Id.*

The principles enunciated in these cases fully support granting Mr. Rollins relief from a sentence that was determined in contravention of Sixth Amendment protections. Mr. Rollins was neither charged with nor convicted of using a vehicle to

facilitate the intentional discharge of a firearm. Nevertheless, his sentence was imposed as if he were.

(i) Appendix.

(i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Rollins, No. 20-6166, 861 Fed.Appx. 257 (10th Cir. filed Aug. 12, 2021).

(ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

(iii) Any order on rehearing:

None;

(iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

None;

(v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

(vi) Other appended materials:

None.

CONCLUSION

For the foregoing reasons, Mr. Nathan R. Rollins, Jr., respectfully requests a Writ of Certiorari issue to review the Order and Judgment filed August 12, 2021, of the United States Court of Appeals for the Tenth Circuit in Case Number 20-6166.

Respectfully submitted,

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