No. 21-7665

IN THE SUPREME COURT OF THE UNITED STATES

IZELL DELOREAN GRISSETT, Jr.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Whether the Sixth Amendment requires the fact of a first-degree murder cross reference under § 2A1.1-to be treated as an element-when that finding is relied upon to support an enhanced Guideline sentence the jury's verdict does not allow? If so,

2. Whether the court of appeals erred in denying Petitioner a certificate of appealability-based on the district court's merits determination-rather than considering the debatability of the Sixth Amendment claim in question?

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Petitioner, Izell Delorean Grissett Jr., proceeding pro-se, respectfully petitions the Supreme Court for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals is unpublished but appears at Appendix A to this petition. Id. at 1a-3a, The prior opinion of the Court of Appeals is also unpublished but is available in the Federal Supplement. See United States v. Grissett, 606 Fed. Appx. 717 (4th Cir. 2019). The opinion of the United States District Court in the instant matter appears at Appendix B to this petition. Id. at 4a-14a.

JURISDICTION

The judgement of the court of appeals (App. infra. 1a-3a) was entered on July 23, 2020. A timely filed petition for rehearing (App. infra. 15a) was denied on October 13, 2020. A petition for a writ of certiorari is timely when filed with the Clerk of this Court within 90 days after entry of the judgement. See Rule 13. Due to Covid-19 that time period has been extended by an additional 60 days. See S. Ct. order list (589 U.S.). Pursuant to that order this motion is timely file

if submitted on or before March 12, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(d)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part: "No person shall be *** deprived of life, liberty, or property, without due process of law." Amend. V.

The Sixth Amendment to the Constitution provides, in relevant part: "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." Amend. VI.

The Federal Sentencing Reform Act (SRA) of 1984, as amended, and commonly known as the United States Sentencing Guidelines (Guidelines) 18 U.S.C. §3553(a)(Nov. 2012 ed.) is fully reprinted in the appendix to this petition. Appendix F, 19a-21a.

STATEMENT OF THE CASE

In 2012, following a jury-trial in the United States District Court for the Dist. of South Carolina, Petitioner was convicted of a number of offenses related to an overarching conspiracy to possess cocaine with intent to distribute it in violation of 21 U.S.C. §§846, and 841(a)(1). Based upon Petitioner's criminal history and the threshold quantity of drugs found by the jury, the Guidelines authorized a maximum sentence of 210 months in prison. At sentencing, however, the trial judge found by a preponderance of the evidence that Petitioner was involved in the first-degree murder of a drug supplier during the course of this conspiracy,[1] and on the basis of that finding subjected Petitioner to an enhanced sentence of Life imprisonment under 18 U.S.C. §3553(a). The Court of Appeals affirmed. 606 Fed. Appx. 717.

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1. Throughout this motion Petitioner's arguments focus on the "conspiracy" offense because under the sentencing package doctrine it controls the other relevant sentences. See e.g., United States v. Ventura, 864 F.3d 309 (4th Cir. 2017)(sentencing package doctrine).

In 2016, Petioner filed the motion in controversy, a timely motion to vacate, set aside or correct his sentence under 28 U.S.C. §2255. Due to an unrelated issue, Petitioner's case was held in abeyance for three years while cases concerning that issue made their way through the Fourth Circuit. In 2019, the district court denied Petitioner's §2255 motion and also denied him a certificate of appealibilty (App., infra, 4a-14a). Petitioner then filed a motion for reconsideration, and shortly thereafter a notice of appeal (Dkt. No. 213). The district court forwarded the case to the court of appeals without answering the motion for reconsideration under Rule 59(e) (Dkt. No. 213). The court of appeals remanded the case back to the district court for resolution of the Rule 59(e)(App., infra, 15a), which the court denied without opinion (App., infra, 16a-17a). The court of appeals denied Petitioner's application for a COA (App., infra, 1a-3a), and also denied his motion for rehearing (App., infra, 18a).

STATEMENT OF FACTS

1. On June 23, 2010, officers with the Columbia Police Department (CPD) responded to a shooting incident at a home in Columbia, South Carolina. There, officers located four hispanic males, later indentified as Joel Trejo, Jose Trejo, Hector Carrion, and Jose Ortiz inside the residence. Carrion and Ortiz had both sustained gunshot injuries and were transported to the hospital, where Carrion died several days later. The homeowner, informed officers that his associates were in the middle of a drug transaction involving one kilogram of cocaine when a shootout occurred as two black males attempted to rob Carrion and Ortiz.

Wayne Mobley, a frequent customer of these suppliers was identified as one of the assailants and subsequently arrested in possession of a large quantity of crack cocaine. In exchange for a lesser sentence, Mobley gave statements to CPD implicating Petitioner as the person who shot and killed the victim. The resulting CPD investigation, however, found no physical evidence linking the Petitioner to this shooting and none of the hispanic males identified him from a photo lineup as the person accompanying Mobley. When later questioned by CPD, Petitioner vehemently denied any participation in this shooting asserting he had an alibi for his whereabouts at the time of the incident. Based on insufficiency of the evidence, CPD never charged Petitioner with either the shooting or the murder of Carrion.

On February 19, 2013, a federal grand jury in the District of Columbia, South Carolina, returned a seven count indictment against Mobley and Grissett which, as relevant here, charged Petitioner as follows: Count One, conspiracy to possess with intent to distribute in excess of 5 kilograms of cocaine and/or 280 grams of crack in violation of crack in violation of 21 U.S.C. §§846, and 841(a)(1), 841(b)(1)(A); Count Four, aiding and abetting Hobbs Act robbery in violation of 18 U.S.C. §1951(a), and §2; and Count Seven aiding and abetting distribution of 500 grams of cocaine in violation of 21 U.S.C. §§841(a)(1), 841(b)(1)(B), and 2. Criminal Case No. 3:13-cr-000134-JFA (Dkt. No.'s 1-10)

2. On February 3, 2014, a five day jury trial commenced (Dkt. No. 111). The government successfully presented evidence in the form of jailhouse informants, who testified to ghost-dope transactions between themselves and Petitioner. Mobley was the the government's star witness, who pursuant to a plea agreement, implicated Petitioner in a number of small to moderate drug transactions and also in the robbery at the Trejo's residence. None of the witnesses testified that Petitioner shot and killed Mr. Carrion during this conspiracy and no evidence to that effect was presented to the jury. The jury convicted Petitioner on each count. In so doing, the verdict form indicates a finding that he was guilty of bare elements of each crime (including the special verdict questions concerning the threshold quantity of of drugs charged in counts One and Seven) but made no other relevant finding of fact. (Dkt. No. 112)(jury verdict forms).

a. The case then proceeded to sentencing. Under federal law, conspiracy to possess with intent to distribute at least 5 kilograms of cocaine or 280 grams of crack is a class A offense, and prescribes a minimum sentence of 10 years in prison and a maximum sentence of life for that offense. §841(b)(1)(A). Other provisions of federal law, however, further limit the range of sentence a judge may impose. The Federal Sentencing Guidelines advise a judge to select a base offense level of 32, and an "applicable range" of 168 to 210 months in prison for Petitioner's class A drug offense. See §2D1.1(c)(4)(which sets the offense level for 5 kilograms or 280 grams of crack at 32); and §4A1.1 (which sets the criminal history category at IV, for an offender with 8 criminal history points). A judge may impose an enhanced sentence outside of the applicable range if he determines the Guidelines do not support a sentence within that range. The Guidelines lists a host of aggravating factors that might be used to justify such departure. See 28 U.S.C. §994(a). When a judge imposes

an enhanced sentence outside of the applicable range, he must articulate why the Guidelines support the sentence imposed. See Rita v. United States, 551 U.S. 338, 356-57 (2007). A reviewing court will set aside the sentence if it finds the penalty is substantively unreasonable. See Gall v. United States, 552 U.S. 38, 51 (2007).

As required by federal law, the United States Probation Office prepared a pre-sentence report (PSR) related to Petitioner's convictions and the district court's available sentencing options (Doc. No. 114). Based upon the unproven statements of jailhouse informants, the government recommended an enhanced Guideline sentence of life imprisonment, which under §2D1.1(d)(1)[2] reflects a probation officers' determination that Petitioner's relevant conduct included first degree murder (PSR ¶¶, 78, 87). Furthermore, under §§3D1.1(c) the PSR also concluded that count four and seven should be grouped with count one, the offense of greatest severity, the offense level of 43, and a Guideline range of life on all counts (PSR ¶, 96). As noted above, the PSR also concluded that Petitioner's criminal history category was IV (PSR ¶, 98).

Faced with an unexpected but possible increase of more than 20, 30, or more years in his sentence, Petitioner submitted a written objection to the PSR's recommended murder enhancement denying any involvement in the killing of Hector Carrion and asserting there was insufficient evidence to support this suggestion (Dkt. No. 119).

b. On July 8, 2004, the district court held a two day evidentiary hearing to resolve Petitioner's objection to this murder enhancement (Dkt. No. 120). Wayne Mobley, who lodged the murder allegations against Petitioner refused to testify at this evidentiary hearing. Instead, the government produced two jailhouse informants who testified to alleged inculpatory statements made by Petitioner, and CPD officers who testified about the crime scene. At the conclusion of this two day hearing, the

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2. Section 2D1.1(d)(1) the cross-reference for murder states that if a victim was killed under circumstances that would constitute murder under 18 U.S.C. §1111, then the Guidelines direct the sentencing court to apply §2A1.1, which sets the offense level for first degree murder at 43.

trial judge overruled Petitioner's objections finding by a preponderance of evidence that "[t]he government had carried its burden of proof of showing the murder cross-reference, specifically the defendant's involvement in the murder of the defendant --Mr. Carrion." Id. at p.26. After adopting the PSR's other recommendations the judge concluded Petitioner's group offense level was 43, and under the Sentencing Guidelines sentenced him to life on count one, 240 months on count four, and 480 months months on count seven. Id. at p.47 (sentencing transcripts).

On appeal, appointed counsel submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1986), which asserted that, in counsel's opinion, Petitioner had no non-frivolous grounds for appeal. In response, Petitioner filed a pro-se brief arguing that the district court's murder finding increased his 10 year mandatory minimum on count one, in violation of his Sixth Amendment rights as construed in Alleyne v. United States, 570 U.S. 99 (2013). The court of appeals held that Alleyne did not apply to the Sentencing Guidelines and affirmed. 606 Fed. App'x. 717 (4th Cir. 2015).

3. In 2016, Petitoner filed the instant motion to vacate, set aside or correct his sentence under 28 U.S.C. §2255 (Dkt. No. 173). Under the Sixth Amendment, as construed in Apprendi, and its progeny, Petitioner argued that the disitrict court's application of the Sentencing Guidelines violated his right to have each "element" federal law makes essential to his enhanced sentences on count one, four, and seven, proved to a jury beyond a reasonable doubt. Id. at 13-21.

In response, the government filed both a motion in opposition (App. infra, 15a-26a), and also a motion to dismiss Petitioner's §2255 (App. infra, 27a-28a). On the merits, the government asserted:

> "Grissett misapprehends the holdings in Apprendi, Booker, and progeny. Apprendi was concerned with judge found factors that increased the statutory maximum, not factors which increase the guidelines range within the statutory maximum. As the Supreme Court in Apprendi made clear, it remains permissible 'for **judges to exercise discretion** - taking into account various factors relating both to offense and offender - in opposing judgement within the range prescribed by statute.'"

Id. at 19a (quoting Apprendi, 530 U.S. at 481). In the government's view, following United States v. Booker, 543 U.S. 220 (2005), the discretionary nature of the SRA is an exception to Apprendi, which allows "sentencing judges [to] 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." Id. at 20a (quoting United States v. Benkahla, 530 F.3d 300, 312 (4th cir. 2009). From this the government concludes that "because Grissett's statutory maximum on the Count 1 drug conspiracy was LIFE; applying the murder cross-reference did not increase his statutory maximum, and therefore did not violate Apprendi." Id.

Procedurally, the government urged the court to dismiss Petitioner's Sixth Amendment claims as barred because "the law of the case doctrine forecloses relitigation of issues expressly or impliedly decided by the appellate court," Id. at 21a (quoting United States v. Bell, 5 Fed. 64, 66 (4th Cir. 1993); and are also defaulted because "claims not raised on direct appeal may not be raised on collateral review." Id. (quoting Massero v. United States, 538 U.S. 500, 504 (2003).

Petitioner filed a traverse to those motions, arguing the government's contentions cannot be reconciled with this Court's substantive or procedural precedent (Dkt. No. 204).

On October 11, 2019, the district court issued an 11 page order denying Petitioner's §2255, and also denied him a COA (App. infra, 4a-14a). The first 10 pages are dedicated to an unrelated due process claim. But at the end of this order, the court held in a single sentence and without opinion, that "the claims made by the defendant regarding Apprendi are procedurally barred and without merit." Id. at 13a. In support thereof, the court said "the government motion to dismiss is granted (Dkt. No. 179)[3] and the defendant's §2255 motions and amendments (Dkt. No.'s 173, 204) are dismissed with prejudice." Id. at 14a. Without opinion, the court "further ordered that a certificate of appealability is denied because the Petitioner has failed to make "a substantial showing of the denial of a constitutional right." Id. (citing 28 U.S.C. §2253(c)(2).

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3. The Court's reliance on the government's motion to dismiss (Dkt. No. 179) does not contain any legal arguments but rather refers us to the government's motion in opposition (Dkt. No. 178), which is apparently the basis for the court's conclusion.

Petitioner then filed a timely motion for reconsideration under Rule 59(e)(Dkt. No. 211), arguing that (1) contrary to the Court's conclusion, this Court's Sixth Amendment precedent makes clear that Apprendi's definition of "elements" applies to judge found guideline facts resulting in a sentence below the statutory maximum of the crime defining offense. Id. at 13-17. Shortly thereafter, Petitioner filed a notice of appeal concerning his §2255 and all related filings(Dkt. No. 212). The district court forwarded Petitioner's appeal to the Fourth Circuit, who remanded it back because the district court failed to rule on the motion for reconsideration (Dkt. No. 214, 215). On January 15, 2020, the district court denied Petitioner's motion under Rule 59(e) without opinion (App. infra, 16a-17a).

While awaiting the prior ruling Petitioner prepared and subsequently submitted an application for a certificate of appealability to the court of appeals concerning, inter alia, his Apprendi claims. See USCA4 No. 20-6089. On July 23, 2020, a panel issued an unpublished opinion denying Petitioner a COA (App., infra, 1a-3a), on the ground that "Grissett has not made the requisite showing" of a denial of a constitutional right. Id. at 3a (per curiam). A subsequent motion rehearing was also denied (App. infra, at 32a).

REASONS FOR GRANTING THIS PETITION

In the post-Booker era, the Fourth Circuit (and other circuit court) hold that the discretionary nature of the current Federal Sentencing Guidelines is an exception to the Sixth Amendment, because Apprendi does not apply to a judge's exercise of discretion in imposing a sentence within a statutory range. In the lower court's view, this discretion is extremely significant, because any advisory Guideline facts resulting in a sentence within the statutory range of the underlying crime defining offense are not essential to the punishment. Under this statutory analysis, sentencing judges may impose enhanced sentences above the legally prescribed Guideline range if they find by preponderance of the evidence aggravating facts the jury's verdict alone does not allow. But this application of the Sentencing Guidelines cannot be reconciled with this Court's Sixth Amendment precedent requiring that such factual determinations must be made according to the procedure mandated by Apprendi v. New Jersey, 530 U.S. 466 (2000).

This case presents an ideal vehicle to put an end to the circuit court's practice of disregarding federal defendants jury trial guarantee in the Sentencing Guideline context. The trial court here imposed an enhanced sentence of life imprisonment based

on the judge's factual determination--that Petitioner murdered a drug supplier in the course of this conspiracy--a discretionary fact indisputably essential to his punishment. This Court should grant certiorari and make clear that the discretionary nature of the advisory Guideline scheme is not an exception to the Sixth Amendment, because Apprendi requires factual findings under these circumstances to be submitted to a jury and proved beyond a reasonable doubt. Alternatively, this Court should grant certiorari, vacate the judgement of the court of appeaals and remand for further proceedings (GVR) because the lower courts erred in denying Petitioner relief or at the very least a COA.

LEGAL STANDARD

This case comes before the Court in the unusual posture of a collateral review proceeding under 28 U.S.C. §2255. Under the Antiterrorism and Effective Death Penalty Act of 1996, there can be no appeal from a final order in a §2255 proceeding unless a circuit justice or judge issues a certificate of appealability (COA) 28 U.S.C. §2255(c)(1). A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." §2255(c)(2). That standard is met when "reasonable jurist could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Notably, obtaining a COA "does not require a showing that the appeal will succeed," and therefore "a court of appeals should not decline the application... merely because it believes the applicant will not show entitlement to relief." Id. at 337.

The decision under review here is the unpublished per curiam order in which the Court of appeals denied Petitioner's application for a COA. Under the standard described above, that order determined not only that Petitioner had failed to show any entitlement to relief, but also that reasonable jurists would consider the district court's conclusion to be beyond debate. While a central question presented here is whether the court of appeals erred in making that determination, it also implicates a broader constitutional question: Whether the Sixth Amendment required the finding of murder cross reference -- a fact the jury verdict alone does not allow but is unquestionably essential to the punishment -- to be treated as an "element" that must be submitted to the jury and proved beyond a reasonable doubt. If so, then reasonable jurist could debate whether Petitioner should have obtained relief on collateral review of his sentence or conclude he was entitled to a COA.

A. The Court Of Appeals Erred In Denying Petitioner's A COA To Appeal The Dismissal Of His Motion To Vacate His Enhanced Sentence Under 28 U.S.C. §2255.

Petitioner's request for a COA raised two seperate questions for the Fourth Circuit, one substantive and one procedural: first, whether reasonable jurists could debate the district court's conclusion that Petitioner was not denied the Sixth Amendment's jury-trial guarantee as construed by Apprendi; and second, whether reasonable jurists could debate the district court's procedural rulings that these Sixth Amendment claims are barred by the law of the case and for failure to raise on direct appeal.

1. A Reasonable Jurists Could Debate The District Court's Determination That Petitioner's Constitutional Claim Failed On The Merits.

a. The Sixth Amendment provides that those "accused" of a "crime" have the right to a trial "by an impartial jury." Const. Amend. VI. This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt. United States v. Gaudin, 515 U.S. 506, 510 (1970) (same).

The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether a fact constitutes an "element" or "ingredient" of the charged offense. United States v. O'Brien, 560 U.S. 218, 224 (2010). In Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court held that a fact is by definition an "element" of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. Id. at 483, n.10.

In the post-Booker era, the lower courts have declined to extend this principle to advisory Guideline facts increasing the discretionary range of punishment beyond the maximum sentence authorized by the jury verdict alone. But Apprendi definition of "elements" necessarily includes not only mandatory facts that **require** a sentence enhancement, but also to discretionary facts that **allow** it, because either way "[t]he jury verdict alone does not authorize the sentence." Blakely, supra, at 305, n.8. Indeed, both kinds of facts alter the prescribed range of sentence to which a defendant is exposed and do so in a manner that aggravates the punishment. Apprendi, 550 U.S. at 483. n.10. Facts necessary to increase the discretionary range of Guideline sentences beyond the maximum sentence authorized solely by the facts reflected in

the jury's verdict are therefore "elements" that must be submitted to the jury.

b. As noted above, Apprendi concluded that any "facts that increase the prescribed range sentence to which a criminal defendant is exposed" are elements of the crime. 530 U.S. at 490. And under the Sixth Amendment, the Constitution provides defendants with the right to have a jury find those facts beyond a "reasonable doubt". Apprendi, supra, at 484 (quoting Winship, 397 U.S. at 358). The rule of Apprendi carries out the objectives of the Fifth and Sixth Amendment by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. It is therefore "implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant." Booker, 543 U.S. at 232 (quoting Blakely, supra, at 303). Petitioner's sentence violates this principle.

In this case, Petitioner Grissett was convicted of conspiracy to possess with intent to distribute crack cocaine and was sentenced under the Federal Sentencing Guidelines. The facts found by the jury yielded a base offense level of 32, which given his criminal history category advised the trial judge to select an applicable range of 168 to 210 months imprisonment, a range the judge could not exceed without undertaking additional factfinding. See USSG §§2D1.1(c)(4), 4A1.1 (Nov. 2012). The judge did so, however, finding by a preponderance of the evidence that Petitioner committed first-degree murder during the course of this drug conspiracy. See USSG §§2d1.1(d)(1), 2A1.1 (Nov. 2012). That finding boosted Petitioner into a higher offense level of 43, which produced an enhanced range of nothing less than life imprisonment. See USSG, ch.5, pt.A, Sentencing Table (2012). Subsequently, instead of a sentence of 17 years and 5 months, the maximum the judge could have imposes on the basis of the facts reflected in the jury verdict, Petitioner received a life sentence.

As such, it cannot be disputed that the fact Petitioner allegedly committed the first degree murder of a drug supplier during this conspiracy increased the prescribed range of Guidelines sentences to which he was otherwise exposed. Apprendi, supra, at 490. Without a finding of the murder cross-reference, the penalty for Petitioner's offense of conviction was 168 to 210 months in prison; but with a finding of murder cross-reference, the penalty became nothing less than life imprisonment. And because the legally prescribed range of 168 to 210 months is the penalty affixed to the crime, it follows that the fact of murder increasing the high-end of this range subjected Petitioner to a greater punishment and constitute an "element" of a seperate aggravated crime. Apprendi, 530 U.S. at 483, n.10 ("[f]acts that exposed

a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a seperate legal offense.").

b. Defining facts necessary to support a Guideline sentence beyond the maximum sentence the jury verdict allows to be part of the substantive offense enables the the defendant to predict the legally applicable penalty from the face of the indictment. See Apprendi, 530 U.S. at 478-79. It also preserves the holistic role of the jury as an intermediary between the state and criminal defendants. See Apprendi, supra, at 547-548 (O'Connor, J.. dissenting)("One important purpose of the Sixth Amendment jury-trial guarantee is to protect the criminal defendant against potentially arbitrary judges. It effectuates this promise by preserving, as a constitutional matter, certain fundamental decisions for a jury of one's peers, as opposed to a judge.).

As this Court has previously explained, the jury trial guarantee was understood to provide "[a]n inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgement of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Clearly then, this Court's precedent suggest that the concerns animating the jury-trial guarantee apply with greater strength to a discretionary scheme such as the advisory Sentencing Guidelines, than it did to the former mandatory regime. Under the advisory nature of the Guidelines the potential for mischief by an arbitrary judge is even greater, given that the judge's decision of where to set the defendant's sentence within the crime-defining statutory range is left almost entirely to his/her discretion. Therefore, to safeguard this ancient guarantee, under a discretionary sentencing scheme a defendant has a qualified right to have a jury decide each fact the Federal Sentencing Guidelines make essential to his punishment.

2. A Jurist Of Reason Could Disagree With The District Court's Merit Ruling.

In denying Petitioner's Sixth Amendment claim, the district court relied on the Fourth Circuit's conclusion that following Booker's modification from mandatory to advisory, the discretionary nature of this scheme allows "sentencing judges [to] find facts relevant to determining a Guideline 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." App. infra, at 19a (quoting Benkahla, 530 F.3d at 317). Assuming its discretionary nature renders the Sentencing Guidelines constitutionally irrelevant, the district court held that "because Grissett's statutory maximum on the Count 1 drug conspiracy was life: applying the murder cross-reference did not increase the statutory maximum, and therefore did not violate Apprendi." App.,infra, at 20a.

The Fourth Circuit's denial of a COA, and conclusion that this application of the Guidelines did not implicate Petitioner's Sixth Amendment rights rests on three considerations, none of which provide a basis in principle or logic to exclude this legislative scheme from the jury-trial guarantee.

a. Any distintion between the discretionary nature of the advisory Guidelines and the former mandatory regime is immaterial.

To be sure, the Sixth Amendment does not prohibit sentencing judges from ever finding any facts. This Court has repeatedly affirmed the proposition that judges can find facts that help guide their discretion within the relevant sentencing range that is authorized by the facts found by the jury or admitted by the defendant. See e.g., Booker, 543 U.S. at 233; Apprendi, supra, at 481. But "establishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." Apprendi, 530 U.S., at 519 (Thomas, J., concurring). So even when judges enjoy the discretion to adjust a sentence based on his/her finding of aggravating or mitigating facts, they could not "'swell the penalty above what the law ha[d] provided for the acts charged'" and found by the jury. Id. (quoting 1 J. Bishop, Criminal Law §85, at 54 (2nd ed. 1872)).

Therefore, it does not matter that the judge may, after finding an aggravating fact such as first-degree murder, exercise his/her discretion to make a judgement that this fact presents a compelling ground for departure. For the judge cannot make that judgement without finding some facts to support it beyond the bare elements of the offense. For that reason, "whether the judicially determined facts **require** a sentence enhancement or merely **allow** it, the verdict alone does not authorize the sentence.") Blakely, 542 U.S. at 305, n.8. In applying the Sixth Amendment to the Federal Sentencing Guidelines, this Court subsequently made clear, that "the availability of departure in specified circumstances does not avoid the constitutional issue, just as it did not in Blakely itself." Booker, 543 U.S. at 234, Analyzing the judge's find-

ing of facts and imposition of an almost 9 year enhancement, this Court held that Booker's Sixth Amendment rights were violated, not by the use of mandatory facts, but because "'[t]he jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.'" 543 U.S. at 235 (quoting Blakely, supra, at 305).

Following Booker, this Court rejected an argument similar in substance and scope to the one at issue here. See Cunningham v. California, 549 U.S. 270 (2007). There, the state argued, inter alia, that "[g]iven the ample discretion afforded trial judges to identify aggravating facts warranting an upper term sentence, the DSL...does not diminish the traditional power of the jury." Id. at 289-290. As noted above, this Court rejected that contention holding "[t]hat broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment is not satisfied." Id. at 290 (citing Blakely, supra, at 305, and n.8).

Thus, the discretionary nature of the advisory Guideline scheme, is not, as the Fourth Circuit would have it an exception to a defendant's Sixth Amendment rights. The discretionary requirement Booker anticipated for the advisory Guidelines scheme **must** operate within the Sixth Amendment constraints delineated in this Court's Apprendi-line of cases, not as a substitute for those constraints. For "asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry Apprendi's "'bright-line rule'" was designated to exclude." Cunningham, 549 U.S. at 291 (quoting Blakely, supra, at 307-308).

b. For Apprendi purposes the high-end of the legally prescribed Guideline range is the relevant statutory maximum.

Second, the Fourth Circuit's holding that Petitioner's Sixth Amendment right were were not implicated by this application of the Sentencing Guidelines, rests in substantial part on the conclusion that discretionary facts are not essential to the punishment, and therefore, the "statutory maximum" for Apprendi purposes is defined by the underlying statutory range of the crime-defining offense. That conclusion is demonstrably incorrect, because under federal law the length of a defendant's sent-

ence within the statutory range turns on specific factual determinations made under the Federal Sentencing Guidelines. For Apprendi purposes then, the Guidelines, and not the underlying crime-defining offense, provides the relevant statutory maximum. Petitioner's case illustrates this point.

In this case, Petitioner was sentenced to 20, 30, or more years above the 210 month statutory maximum of the legally prescribed Guideline range because he allegedly committed the "first-degree murder" of a drug supplier. The facts supporting that finding were neither found by the jury nor admitted by Petitioner. The lower courts nevertheless contend that there was no Apprendi violation because the relevant "statutory maximum" is not 210 months, but the maximum of life for a class A drug conspiracy under §841(b)(1)(A). In the lower court's view then, any punishment Petitioner receives less than life imprisonment for a run-of-the-mill violation of §841(b)(1)(A), is within the range of punishment authorized by the jury's verdict. That view demonstrates either a misunderstanding or rejection of the principles animating Apprendi.

This Court's precedents makes clear, however, that "[t]he 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose **solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.**" Blakely, 542 U.S. at 303. See also Apprendi, supra, at 483 ("the maximum he would receive if punished according to the facts reflected in the jury's verdict alone.'"). In other, "'[t]he relevant 'statutory maximum' is not the maximum sentence a judge may impose **after** finding additional facts, but the maximum he may impose **without** any additional finding." Blakely, supra, at 303-304. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all of the facts "which the law makes essential to the punishment,'" and the judge exceeds his proper authority. Id. at 304 (quoting Bishop, supra, §87, at 55).

The judge in this case could not have imposed the enhanced sentence of life imprisonment solely on the basis of the facts proved to the jury beyond a reasonable doubt. Those facts alone were insufficient because based on the quantity of drugs found by the jury, the Guidelines advised the judge to select an offense level of 32, which, given his criminal history category, prescribed a sentencing range of 168 to 210 months. USSG §§2D1.1(c)(4), 4A1.1 (Nov. 2012). But if (as the case is here) the judge finds that in the course of this drug trafficking offense Petitioner committed the first-degree murder of a drug supplier, then the base offense level

jumps to 43 (§2A1.1) producing an enhanced Guideline range of nothing less than life imprisonment. USSG, ch.5, pt.A, Sentencing Table (Nov. 2012). The judge's failure to find the fact of murder would render Petitioner's sentence unlawful. This is evident because, were the trial judge explicitly to find the fact of murder to be invalid and nevertheless subject Petitioner to a life sentence simply because he thinks drug trafficking merits four or five times the sentence that the Guidelines otherwise prescribe, that sentence would surely be reversed as substantively unreasonable. See Gall, 552 U.S., at 51 (holding that a substantively unreasonable penalty is illegal and must be set aside.).

Thus, because the judge in Petitioner's case could not have imposed a sentence beyond the Guidelines range authorized solely by the jury's verdict without finding the additional fact of first-degree murder, the top of that discretionary range -- 210 months, and not life imprisonment -- was the relevant statutory maximum for Apprendi purposes. Blakely, supra, at 304.

c. Apprendi's definition of elements applies to guideline facts increasing the penalty for a crime within the underlying statutory range.

Third, in holding that Petitioner's Sixth Amendment rights were not implicated by this application of the Guidelines, the Fourth Circuit relied on the fact that murder could be treated as a sentencing factor, because the jury's verdict authorized the imposition of any sentence between 10 years to life imprisonment under §841-(b)(1)(A). See e.g. Benkahla, supra, at 312. Again, because under this federal determinate sentencing scheme the Guidelines (and not the underlying crime-defining offense) are relied upon to determine the maximum sentence imposed, that type of statutory analysis is misplaced or beside the point.

Instead, "[t]he essential Sixth Amendment inquiry is whether a fact is an element of the crime." Alleyne v. United States, 570 U.S. 99, 114 (2013). The Alleyne Court made clear that "when a finding of fact alters the legally prescribed punishment so as to aggravate it, th[at] fact necessarily forms a constituent part of a new offense and must be submitted to the jury." Id. at 115. cf., Apprendi, 530 U.S. at 483, n.10 ("[F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a seperate legal offense."). Because under Apprendi facts found in aggravation of the legally prescribed punishment must be

treated and found as an "element" of the crime, it is not only wrong but unconstitutional to say that the facts of murder increasing Petitioner's penalty for this crime may be treated as a sentencing factor merely because the resulting sentence falls within the underlying statutory range.

In truth, each crime has different elements and Petitioner can be convicted and legally sentenced to life imprisonment for first degree murder, only if the jury has found each element of the crime of conviction. See e.g., Winship, 397 U.S., at 364 ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime upon which he is charged"). The crime of murder is substantively different from that of drug trafficking. To prove a defendant committed first degree murder, the prosecution must prove, inter alia, either premeditation or malicious intent, both of which are seperate and distinct elements from the elements needed to prove the crime of drug trafficking. See 18 U.S.C. §1111 (federal first degree murder)[4]; 21 U.S.C. §841(a)(1). Thus, in applying the murder cross reference in this case, the judge implicitly made the finding that the prosecution had proved the elements of first degree murder, and in doing so, the Court denied Petitioner the Sixth Amendment right to have each "elements" of crime proved to a jury beyond a reasonable doubt. Winship, supra, at 364; Guadin, 515 U.S., at 510.

As a Constitutional matter, because the fact of murder aggravates the legally prescribed range of discretionary Guideline sentences, it constitutes an element of a seperate, aggravated offense that must be found by the jury, regardless of the statutory maximum for the crime defining offense. Apprendi, 530 U.S., at 483. n.10. Indeed, as noted in Alleyne, "[i]f a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, **even if the defendant ultimately received a sentence falling within the original sentencing range** (i.e., the range applicable without that aggravated fact)." 570 U.S. at 115. And that is precisely what happened here.

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4. As noted above, the murder cross reference §2D1.1(d)(1) explicitly refers to a victim killed under circumstances that would constitute murder under 18 U.S.C. §1111.

Here, the Guideline range supported by the jury's verdict alone was 168 to 210 in prison. The district court imposed an enhanced sentence of life imprionment based on its finding by a preponderance of the evidence that Petitioner committed first degree murder. Because the finding of murder increased the penalty to which Petitioner was otherwise subjected, it was an element, which had to be found by the jury beyond a reasonable doubt. As the judge, rather than the jury, found the fact of murder, Petitioner's Sixth Amendment rights were violated.

B. A Jurists Of Reason Could Also Disagree With District Court's Procedural Rulings.

We now turn to the lower court's procedural holding: that Petitioner's Sixth Amendment claim is (1) procedurally barred by "the law of the case," App., infra, at 21a; and (2) is procedurally defaulted because it was "not raised on direct appeal." Id. This Court has held that a litigant seeking a COA must demonstrate that a procedural ruling barring relief is itself debatable among jurists of reason; otherwise the appeal would not "deserve encouragement to proceed further." Slack, 529 U.S. at 484.

1. The law of case does not preclude consideration and resolution of a seperate and distinct claim on collateral review.

In deny ing Petitoner's Sixth Amendment claim the district court concluded, among other things, that he was not entitled to relief because his Apprendi claim is procedurally barred by the law of the case deny ing his Alleyne claim on direct appeal. App., infra, at 21a. The Court of Appeals affirmed, albeit without opinion, for the reasons stated by the district court. Id. at 3a. In the lower courts' view then, because Petitioner was afforded an opportunity to present an uncounseled and unbriefed Sixth Amendment claim on direct appeal, he is precluded from raising a seperate and distinct Sixth Amendment claim on collateral review §2255. That view is incorrect.

As an initial matter, the Fourth Circuit's decision on direct appeal did not consider, as the case here, whether the district court's reliance on the judge's murder finding subjected Petitioner to enhanced maximum punishment the jury verdict alone does not allow. To the contrary, Alleyne v. United States, 570 U.S. 99 (2013), extended the holding of Apprendi to include facts increasing the mandatory minimum sentence. In that context, the Fourth Circuit has repeatedly held that a district court's Guideline enhancement does not violate Alleyne, because "[t]hey do not implicate a mandatory minimum sentence." United States v. Johnson, 593 Fed. Appx. 186, 188 (4th Cir.2014).

therefore, the Panel on direct appeal had no occasion to consider whether the district court's application of the murder cross reference violated the rule of Apprendi and not merely the facts at issue in the case of Alleyne. The lower court's therefore erred in interpreting that decision to bar consideration of this Apprendi claim on collateral review. See Illinois v. Lidster, 540 U.S. 419, 424 (2004)("[G]eneral language in judicial opinions [should be read] as refering in context to circumstances then before the court and not referring to quite different circumstances that the court was not then considering.").

In actuality, the Fourth Circuit has never (neither in Petitioner's case or any other) squarely addressed whether discretionary facts increasing a maximum authorized sentence under the advisory Guideline scheme must be treated as "elements" within the meaning of Apprendi. While the lower court is bound by the decree as to law of the case, it is free to "[c]onsider and decide any matters left open by the mandate." In Re Sanford v. Fork & Tool Co. 160 U.S. 247, 255 (1895). Because the claim presented in this §2255 is substantively different from the claim considered and rejected on direct appeal, the law of the case did not bar Petitioner from raising his Apprendi claims on collateral review.

2. Petitioner's life sentence constitutes a fundamental miscarriage of justice exempt from procedural default.

While a claim is generally defaulted if it is not raised on direct appeal, default can be overcome if the petitioner can demonstrate cause for the default and actual prejudice resulting from the violation of federal law. Bousley v. United States, 523 U.S. 614, 622-23 (1998), or that failure to consider the defaulted claim will result in a fundamental miscarriage of justice. A life sentence beyond the district court's authority to impose is a fundamental miscarriage of justice exempt from procedural default.

As its holding and the history upon which it is based suggest, Apprendi's understanding of the Constitution makes clear that facts extending the sentence beyond the maximum authorized by the law had traditionally been charged in the indictment and submitted to the jury. 530 U.S. at 490. Apprendi held, that because the function of the indictment and jury had been to authorized the State to impose punishment:

> "The evidence...that punishment was, by law, tied to the offense... and the evidence that American judges have exercised sentencing discretion within a legally prescribed range...point to a single, consistent conclusion: The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a seperate legal offense." 530 U.S. at 483, n.10.

The grand and petit juries thus form a "'strong and two fold barrier...between the liberties of the people and the progative of the [government].'" Duncan v. Louisiana, 391 U.S. at 151 (qouting W. Blackstone, Commentaries on the Laws of England 349 (T. Cooley ed. 1899)). Absent authorization from the trial jury -- in the form of a finding, by proof beyond a reasonable doubt, of the fact of "murder" warranting this enhanced life sentence under the Federal Sentencing Guidelines --- the district court had no power to sentence Petitioner to more than 210 months, the maximum "authorized by the jury's verdict." Apprendi, 530 U.S. at 494.

As noted above, "when a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all of the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." Blakely, 542 U.S. at 304 (quoting Bishop, supra, §87 at 55). There can be no doubt that a life sentence beyond the district court's authority to impose "inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral review under §2255." Davis v. United States, 417 U.S. 333, 346-47 (1974). Thus, a fundamental miscarriage of justice resulting from a violation of the jury-trial guarantee excuses Petitioner's procedural default.

C. The Issue Presented Is Of Great Importance To All Federal Defendants.

The Sentencing Guidelines provide the framework for the tens of thousands of federal sentencing proceedings that occur each year. Following this Court's decision in United States v. Booker, 543 U.S. 220 (2005), the federal circuit courts across the country hold that the discretionary nature of the advisory Guidelines scheme is an exception to the Sixth Amendment's jury trial guarantee. Under this scheme, the lower courts contend that the jury need only find whatever facts the legislature chooses to label as elements of the crime defining offense, but that guideline facts operating

within that underlying statutory range may be treated as sentencing factors -- no matter how much they increase the punishment -- may be found by a judge.

As the case is here, this means that a judge can permissibly sentence a defendant for committing first-degree murder even though the jury only convicted him of a basic drug trafficking offense. That is an unacceptable and absurd result for a country that prides itself for being known as the land of the free. It is unexceptable because injustices be fall the guilty as well as the innocent, for justice consist not only of convicting those guilty of a crime, but also of assigning them a lawful and just punishment. Petitioner did not receive a just punishment. Based on the facts found by the jury, the maximum sentence Petitioner could receive was 210 months. But the district court sentenced him to life imprisonment after the judge found him guilty of the additional fact of murder which Petitioner hotly disputed.

Under Apprendi, this Court held that "[e]very defendant has the right to insist that the prosecutor prove to a jury all facts essential to the punishment." Blakely, 542 U.S. at 420. Under the lower courts application of the Sentencing Guidelines, Petitioner was denied that right. This Court should grant certiorari to put an end to the lower courts' aberrant practice of disregarding federal defendants' jury-trial guarantee in the Sentencing Guidelines context.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari. Alternatively, this Court should grant certiorari, vacate the court of appeals' decision, and remand for further proceeding (GVR) because the lower court erred in denying Petitioner relief under Section 2255, or at least a COA to proceed further. Amen...

Executed on this 11th day of March 2021. Respectfully Submitted,

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