No._____

IN THE SUPREME COURT OF THE UNITED STATES

PHOSAVAN KHAMNIVONG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Jones*, 574 U.S. 948 (2014), three justices urged the Court to grant certiorari to answer the question left open in *Rita v. United States*, 551 U.S. 338, 353 (2007): "whether the Sixth Amendment is violated when courts impose sentences that, but for a judge-found fact, would be reversed for substantive unreasonableness." *Id.* at 949 (J., Scalia, J., Thomas, J., Ginsburg, dissenting from the denial of certiorari).

The question presented here is whether petitioner's Fifth and Sixth Amendment rights were violated when the district court imposed a 720-month sentence that relied on guideline enhancements for bodily injury and use of a firearm that were based on facts that were not found by the jury beyond a reasonable doubt.

LIST OF PARTIES

The parties to the proceedings below are Petitioner, Phosavan Khamnivong, and Respondent, United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Phosavan Khamnivong respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in case number 21-30067.

OPINIONS BELOW

The unpublished memorandum decision of the court of appeals is at App. 1-2 and the court's order denying rehearing en banc is at App. 3. The transcript of the sentencing hearing in the district court is at App. 4-48.

JURISDICTION

The court of appeals affirmed the judgment on August 12, 2022, and the court denied rehearing en banc on October 6, 2022. This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall be held to answer for a capital, or other infamous crime, . . . nor be deprived of life, liberty, or property, without due process of law; . . . .

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ...

STATEMENT OF THE CASE

A. Procedural History

In an amended First Superseding Indictment filed November 4, 2014, the government charged defendant Phosavan Khamnivong and five other defendants with various offenses, including a drug conspiracy, kidnapping, and firearm charges. App. 57-68. Count 1 charged Khamnivong with participating in a drug conspiracy between December 2010 and May 2013 in violation of 21 U.S.C. §§ 841 & 846. App. 58-62. Counts 2 and 3 charged Khamnivong and three other defendants with kidnapping Courtney Guy and Isaac Sample, respectively, in violation of 18 U.S.C. § 1201(a)(1). App. 62-63. Counts 4 and 5 charged these same four defendants with possessing and brandishing firearms in furtherance of a drug trafficking crime (count 4) and a crime of violence (count 5) in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) & (ii). App. 63-64.

In February 2015, a jury convicted Khamnivong on all counts. ECF No. 625. The district court sentenced Khamnivong to a total term of 924 months imprisonment. ECF No. 737.

On appeal, the court of appeals reversed Khamnivong's conviction for violating 18 U.S.C. § 924(c) in count 5, affirmed his convictions on all remaining counts, and remanded for resentencing. *United States v. Khamnivong,* 779 Fed. Appx. 482 (9th Cir. Oct. 4, 2019). Count 5 was reversed because it was based on a predicate offense—kidnapping—that no longer qualified as a "crime of violence" in light of *United States v. Davis,* 139 S. Ct. 2319, 2336 (2019) (invalidating residual clause in § 924(c)(2)(B) as unconstitutionally vague) and *Delgado v. Holder,* 697 F.3d 1125, 1130 (9th Cir. 2012) (per curium) ("The federal kidnapping statute has no force requirement . . . ."). 779 Fed. Appx. at 483-84.

On remand, Khamnivong requested a 27-year sentence (ECF No. 959; App. 25) and the government sought a life sentence. ECF No. 960.

At the resentencing hearing, the district court resentenced Khamnivong to 220 months on count 1, 636 months on counts 2 and 3, all to run concurrently with each other, and 84 months on count 4 to

run consecutively to counts 1, 2, and 3, for a total term of 720 months. App. 43.

On appeal, the Ninth Circuit Court of Appeals affirmed the judgment. App. 1-2. The court held that "the district court did not violate Khamnivong's right to a jury trial by applying sentencing guideline enhancements based on judge-found facts" because that practice "'does not violate the Sixth Amendment right to jury trial' so long as the facts do not increase the defendant's statutory maximum sentence.'" App. 2, quoting *United States v. Treadwell*, 593 F.3d 990, 1017 (9th Cir. 2010).

B. Sentencing Hearing and Guideline Calculations

Before sentencing, Khamnivong filed a Sentencing Memorandum in which he renewed his previous objections to the district court's guideline calculations and made additional objections. ECF No. 959. Among other things, Khamnivong argued that the application of enhancements--such as bodily injury or use of a dangerous weapon--that were based on facts that were not found by the jury beyond a reasonable doubt violated the Fifth and Sixth Amendments. ECF No. 959, at 3; App. 9.

At the resentencing hearing, the district court overruled Khamnivong's objections and found the enhancements proven by at least a preponderance of the evidence. App. 8-18. The court then adopted the guideline calculations set forth in the fourth amended presentence report as follows:

Group 1: Drug Conspiracy (count 1)	
Base Offense Level (§ 2D1.1(c)):	36
Possession Dangerous Weapon (§ 2D1.1(b)(1)):	+2
Use of Violence or Threats of Violence (§ 2D1.1(b)(2)):	+2
Obstruction of Justice (§ 2D1.1(b)(15)(D)):	+2
Aggravating Role (§ 3B1.1):	+4
Reckless Endangerment During Flight (§ 3C1.2):	+2
Adjusted Offense Level:	**48**

Group 2: Kidnapping (count 2)	
Base Offense Level (§ 2A4.1(a)):	32
Permanent or Life-Threatening Bodily Injury (§ 2A4.1(b)(3)):	+4
Use of Dangerous Weapon (§ 2A4.1(b)(3)):	+2
Sexual Exploitation of Victim (§ 2A4.1(b)(5)):	+6
Obstruction of Justice (§ 3C1.1):	+2
Adjusted Offense Level:	**46**

Group 3: Kidnapping (count 3)	
Base Offense Level (§ 2A4.1(a)):	32
Use of Dangerous Weapon (§ 2A4.1(b)(3)):	+2
Sexual Exploitation of Victim (§ 2A4.1(b)(5)):	+6
Obstruction of Justice (§ 3C1.1):	+2
Adjusted Offense Level:	**42**

Multiple Count Adjustment

Group #	Adjusted Offense Level	Units
Group 1	48	1.0
Group 2	46	1.0
Group 3	42	0.5

Total Number of Units:	**2.5**
Greatest Adjusted Offense Level:	**48**
Unit Increase in Offense Level:	**+3**
Combined Adjusted Offense Level:	**51**

App. 12-17.

Because the adjusted offense level was calculated as greater than 43, the total offense level became 43. U.S.S.G. Chap. 5, Part A, comment. (n.2). With a criminal history category III and an offense level of 43, the guideline range was calculated as life for counts 1-3. App. 17. With respect to Khamnivong's conviction in count 4 for brandishing a firearm in violation of 18 U.S.C. § 924(c), the guideline sentence is the 84-month statutory minimum, which is required to run consecutively to all other counts. App. 17; *see* U.S.S.G. § 2K2.4(b).

After the court determined the guideline range, the government argued the facts of the offense and the defendant's criminal history warranted a life sentence. App. 19-20. The defense requested a 27-year sentence, emphasizing Khamnivong's good prison conduct, his

tumultuous childhood, and the sentences his codefendants received. App. 20-25. Khamnivong was born in Laos. He witnessed and experienced extreme violence and physical and emotional trauma from an early age in Laos and in the refugee camps in Thailand. App. 22-23; Fourth Revised Presentence Report (PSR), ECF No. 995, ¶¶ 136-38. In prison, Khamnivong completed numerous educational programs and had only a single discipline violation for swallowing a sugar packet in over five years since he was initially sentenced. App. 21; ECF No. 959, at 5-8; PSR, ¶¶ 11(a)-(d). Khamnivong also exercised his right of allocution in speaking to the court about his background and expressing remorse for his past conduct. App. 25-31.

After weighing the various factors, the Court then imposed a total sentence of 720 months imprisonment. App. 32-43. The Court stated that it was imposing a lower sentence than it had at the initial sentencing (924 months) to give effect to Khamnivong's good prison conduct and to reflect that his conduct was less severe than his codefendant Seugasala who received a life sentence. App. 40-42.

REASONS FOR GRANTING THE PETITION

The district court's 720-month sentence violated petitioner's Fifth and Sixth Amendments rights because it relied on guideline enhancements that were based on facts that were not found by the jury beyond a reasonable doubt.

The Sixth Amendment guarantees every person accused of a crime the right to a trial by an impartial jury. Combined with the Fifth Amendment's Due Process Clause, this command requires that "each element of a crime [must] be proved to the jury beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 104 (2013).

In his concurring opinion in *Rita v. United States*, 551 U.S. 338, 374 (2007), Justice Scalia opined that Sixth Amendment review of sentences for substantive reasonableness using even advisory Guidelines "will inevitably [produce] some constitutional violations . . . because there will be some sentences that will be upheld as reasonable only because of the existence of judge-found facts." *Id.* at 374 (Scalia, J., concurring). In one example, Justice Scalia referred to "the common case in which the district court imposes a sentence within an advisory Guidelines range that has been substantially enhanced by certain judge-found facts." *Id.* at 371.

> For example, the base offense level for robbery under the Guidelines is 20, United States Sentencing Commission, Guidelines Manual § 2B3.1(a) (Nov. 2006), which, if the defendant has a criminal history category of I, corresponds to an advisory range of 33-41 months, *id.*, ch. 5, pt. A, Sentencing Table. If, however, a judge finds that a firearm was discharged, that a victim incurred serious bodily injury, and that more than $5 million was stolen, then the base level jumps by 18, §§ 2B3.1(b)(2), (3), (7), producing an advisory range of 235-293 months, *id.*, ch.5, pt. A, Sentencing Table. When a judge finds all of those facts to be true and then imposes a within-Guidelines sentence of 293 months, those judge-found facts, or some combination of them, are not merely facts that the judge finds relevant in exercising his discretion; they are the legally essential predicate for his imposition of the 293-month sentence. His failure to find them would render the 293-month sentence unlawful. That is evident because, were the district judge explicitly to find *none* of those facts true and nevertheless to impose a 293-month sentence (simply because he thinks robbery merits seven times the sentence that the Guidelines provide) the sentence would surely be reversed as unreasonably excessive.

Id. at 371-72.

In response, the majority in *Rita* stated that "the *Sixth Amendment* concerns [Justice Scalia] foresees are not presented by this case." *Id.* at 353. Thus, as Justice Scalia emphasized, the majority opinion "does not rule out as-applied *Sixth Amendment* challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea." *Id.* at 375; *id.* at 365 (Stevens, J., concurring)); *see also Gall v. United States,* 552 U.S. 38, 60

(2007) (Scalia, J., concurring) ("the Court has not foreclosed as-applied constitutional challenges to sentences" and that "[t]he 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 rather than the jury.

This case squarely presents the Sixth Amendment violation foreseen by Justice Scalia in *Rita*. The jury found Khamnivong guilty of four charged offenses but it did not make any special sentencing findings beyond its verdict that the drug conspiracy involved at least 500 grams of a mixture or substance of methamphetamine. The jury's verdict would have resulted in a base offense level of 30 for the drug conspiracy group based on an offense involving at least 500 grams of methamphetamine (§ 2D1.1(c)(5)) and a base offense level of 32 for the two kidnapping offenses. Under U.S.S.G. § 3D1.4, a total of three levels is added to the highest adjusted offense level (32) for a total offense level of 35. With a criminal history category III and total offense level of 35, the guideline range would be 210-262 months.

Rather than sentencing Khamnivong for the base offenses found by the jury, however, the district court found various enhancements—such as for bodily injury and use of a firearm--that increased the guideline range to life before ultimately imposing a 720-month sentence. In this way, the court violated the Fifth and Sixth Amendments by sentencing Khamnivong based on findings that he committed different, more serious offenses than the ones found by the jury. The court's 720-month sentence cannot be upheld as substantively reasonable under the Sixth Amendment based solely on the jury's verdict without the judge's additional factual findings.

In rejecting Khamnivong's sentencing claim, the Ninth Circuit's decision relied on its prior opinion in *United States v. Treadwell,* 593 F.3d 990 (9th Cir. 2010). *Treadwell* discussed but declined to follow Justice Scalia's concurrence in *Rita* because it is not "the law as it stands." *Id.* at 1017 (*quoting United States v. Benkahla,* 530 F.3d 300, 312 (4th Cir. 2008)). Rather, *Treadwell* held "that 'judicial consideration of facts and circumstances beyond those found by a jury or admitted by the defendant does not violate the Sixth Amendment right to a jury trial' so long as the facts do not increase the defendant's statutory

maximum." App. 2, Memorandum Decision, at 2 (*quoting Treadwell*, 593 F.3d at 1017).

In dissenting from the denial of certiorari in *United States v. Jones,* 574 U.S. 948 (2014), three justices criticized appellate decisions, including *Treadwell,* that have failed to take up the serious Sixth Amendment question "whether the Sixth Amendment is violated when courts impose sentences that, but for a judge-found fact, would be reversed for substantive unreasonableness." *Id.* at 949; *see also id.* ("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. . . ."); *United States v. Briggs*, 820 F.3d 917, 921 (8th Cir. 2016) (noting that "all eight circuits to address the issue have declined to extend *Apprendi* in" the way proposed in the *Jones* dissent"); *United States v. Ross,* 29 F.4th 1003 (2022) (concurring "reluctantly" in decision affirming sentence that was increased significantly based on an uncharged crime found by the judge by a preponderance of the evidence) (Erickson, J., concurring).

The Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016), provides further support for a rule that sentences based on facts a judge is required to find in increasing a defendant's guideline range violate the Sixth Amendment if those facts were not found by the jury. In *Hurst,* the Court struck down Florida's capital sentencing scheme as violating the Sixth Amendment because it conditioned imposition of the death penalty based on findings made by a judge rather than a jury. "Florida employs [] a 'hybrid' proceeding 'in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determination." *Hurst,* 577 U.S. at 95 (quoting *Ring v. Arizona,* 536 U.S. 584, 608 n.6 (2002)). The Florida jury found beyond a reasonable doubt an aggravating factor that was necessary to make the defendant eligible for a death sentence for murdering a co-worker and then made an advisory recommendation for the death penalty. *Id.* at 95-96. To impose a death sentence under Florida law, the judge was then required to independently determine that an aggravating factor existed. *Id.* at 96. The judge did so and then imposed a death sentence after weighing the aggravating and mitigating factors. *Id.*

The *Hurst* Court found a Sixth Amendment violation even though the jury had already made all the necessary factual findings to authorize the maximum sentence, that is, it found at least one aggravating factor and recommended a death sentence. The Court emphasized that the sentence was constitutionally infirm because under Florida law, "[t]he trial court *alone* must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 577 U.S. at 100.

As set forth in a law review article on *Hurst*,

> After *Booker,* federal judges must still make the factual findings specified in the guidelines, and they must "consider" those findings. But because the guidelines are advisory, rather than mandatory, judges may—at least in theory—impose heightened guidelines sentences without factual findings. It was this idea that judges had the authority to impose a sentence within the full statutory range, even if they had to engage in factual finding before actually selecting a sentence, that the remedial *Booker* majority said satisfied the Sixth Amendment.
>
> But *Hurst* seriously undercuts this analysis. *Hurst* demonstrates that the mere presence of a jury finding is not enough to satisfy the Sixth Amendment; . . . . When systems . . . *require* judges to consider the existence of other aggravating sentencing factors found by judges, not juries, it is difficult to argue that the jury has found all of the facts "which the law makes essential to the punishment."

Hessick and Berry, *Sixth Amendment* Sentencing after *Hurst,* 66 UCLA L. Rev. 448, 486 (2019) (citations omitted).

"[T]he only sensible way to read *Hurst* is as an expansion of the Sixth Amendment's scope from factual findings that authorize sentencing increases to *all* factual findings required to impose a higher sentence." *Id.* at 452; *see also United States v. Bell,* 808 F.3d 926, 927 (D.C. Cir. 2015) ("Taken to its logical conclusion, the *Blakely [v. Washington*, 542 U.S. 296 (2004)] approach would require a jury to find beyond a reasonable doubt the conduct used to set or increase a defendant's sentence, at least in structured or guided-discretion regimes.") (Kavanaugh, J., concurring in denial of rehearing en banc); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (questioning whether the Constitution permits a sentencing judge to increase a sentence "based on facts the judge finds without the aid of a jury or the defendant's consent"). "This reading of *Hurst* changes the Sixth Amendment sentencing doctrine because it eliminates any constitutional distinction between findings that 'authorize' a sentence and findings required to impose a sentence." 66 UCLA L. Rev. 448 at 464.

Because Khamnivong's 720-month sentence cannot be upheld without the judge's additional factual findings that supported various enhancements to increase the guideline range from 210-262 to life imprisonment, the sentence violates Khamnivong's Fifth and Sixth Amendment's rights to be sentenced only on facts found by a jury beyond a reasonable doubt and is substantively unreasonable. The unanswered constitutional questions at issue here have "gone on long enough." *Jones*, 574 U.S. at 949.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari. Khamnivong's Fifth and Sixth Amendment rights were violated by the district court's 720-month sentence where various guideline enhancements based on facts not found by the jury increased the guideline range from 210-262 months to life imprisonment.

Respectfully submitted,

Dated: December 12, 2022

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