No. 22 - 7826

IN THE

SUPREME COURT OF THE UNITED STATES

Ronell Watson — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Second Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ronell Watson, Reg. No. 83703-053
(Your Name)

FCI Butner Medium - Federal
Correctional Institution P.O. Box 1500
(Address)

Butner, NC 27509
(City, State, Zip Code)

919-575-8000
(Phone Number)

Questions Presented

I. Is premeditation an element of attempted murder under the federal system, such that the Government violated Petitioner's Fifth and Sixth Amendments rights by not instructing the jury to find premeditation beyond a reasonable doubt?

II. Did the district court violate Petitioner's Fifth and Sixth Amendment rights by sentencing him above the statutory maximum?

III. Did the district court violate Petitioner's Fifth and Sixth Amendment rights by finding premeditation by a preponderance of the evidence and raising Petitioner's base offense level by six levels, or did the remedial holding in Booker entirely moot the constitutional holding?

IV. Did the district court violate Petitioner's constitutional rights and procedurally err by exceeding the statutory maximum?

V. In sentencing Petitioner, a first-time offender, to 382 months, the district court praised the victim's "honor," "heroism," and "courage under fire"—virtues unknown to Petitioner and irrelevant to his legal culpability—then said: "Agent Harper has our back, and this Court promises to always have his." Do those errors necessitate summary vacatur and resentencing?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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TABLE OF AUTHORITIES CITED

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Other Authorities

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 2022 WL 17660546; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B, C to the petition and is

[X] reported at 2021 WL 2474430; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was December 14, 2022.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 16, 2023, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides:

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

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S.S.G. § 2A2.1 ("Assault with Intent to Commit Murder; Attempted Murder") provides:

(a) Base Offense Level:

(1) 33, if the object of the offense would have constituted first degree murder; or

(2) 27, otherwise.

. . .

Application Notes:

1. Definitions.—For purposes of this guideline: 'First degree murder' means conduct that, if committed within the special maritime and territorial jurisdiction of the United States, would constitute first degree murder under 18 U.S.C. § 1111.

18 U.S.C. § 1111 ("Murder") provides:

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait,

or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

STATEMENT OF THE CASE

Petitioner was convicted following a jury trial in the United States District Court for the Eastern District of New York of three offenses arising from the shooting of undercover FBI Special Agent Christopher Harper in Brooklyn. It was undisputed that Petitioner did not know that Harper—who was in plainclothes and sitting in an unmarked car parked in front of Petitioner's house—was a law enforcement officer. Petitioner was convicted of (1) attempted murder of a federal officer, in violation of 18 U.S.C. § 1114(3) and 1113; (2) assault of a federal officer through the use of a weapon and the infliction of bodily injury, in violation of 18 U.S.C. § 111(a), (b); and (3) possession and discharge of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(i), (iii). Pet. App. 2a.

At sentencing, the defense argued that the correct base offense level under the Guidelines was 27, pursuant to U.S.S.G. § 2A2.1(a)(2), for attempted second-degree murder. Instead, the district court (Kuntz, J.) made a factual finding, not made by the jury, that the attempted murder offense involved premeditation, and thus calculated a base offense level of 33 for attempted first-degree murder pursuant to U.S.S.G. § 2A2.1(a)(1). Pet. App. 64a-73a, 91a-97a.

The district court asserted that malice aforethought was "proved beyond a reasonable doubt,,; an element of the offense. Pet. App. 91a.

The district court asserted that "whether Defendant committed attempted first degree murder for purposes of the Guidelines calculation depends on" premeditation, which can be found by the
preponderance of the evidence standard. Pet. App. 92a.

The district court found that premeditation existed by preponderance of the evidence. See Pet. App. 65a-69a.

The district court asserted that it had the discretion to determine the six-level increase for premeditation because it would not "increase the statutory maximum ... term of imprisonment." Pet. App. 92a.

The district court asserted that the Probation Department calculated the Guideline range for Counts one and two as 210 to 262 months, adding the mandatory consecutive 120-month sentence

for Count three, producing a range of 330 to 382 months. Pet. App. 97a.

Defense counsel, Ms. Gelernt, stated: "I would note from the outset that using the first degree murder guideline has the effect of increasing the guidelines range for Counts one and two by between 8 2/3 to 10 1/2 years. And this for conduct that was, which was unproven which the jury was asked not to consider." Pet. App. 30a.

In explaining his sentence, the district court addressed the victim, Special Agent Harper, at length. Drawing a baseball analogy, Judge Kuntz praised Harper as a "five-tool" police officer who "patrolled under our constitution," "patrolled with honor," "strategically withdrew from ... danger to secure public safety," "heroically return[ed] fire and prevent[ed] this defendant from harming others[,] marking his vehicle as the one used in his cowardly and unjustified attempted to murder you," and "came to this courthouse, ... looked your assailant in the eye[,] ... and told the jury precisely what he had done." Pet. App. 76a, 102a. Judge Kuntz contrasted Harper with Derek Chauvin ("a certain murderous former police officer" from "a Midwestern state" who "violated his sacred oath and disgraced his badge"), lauding Harper as "the steadfast embodiment of your fellow police officers who day after day make our streets safer, our homes more secure[,] and our constitution stronger." Pet. App. 76a-77a, 102a.

At the oral sentencing, the court concluded:

> This court salutes your heroism and your courage under fire. You are the real deal, the policemen who personifies the essence of the law, the essence of those wise restraints that make us free. You have our back and this court promises you the law will always have your back and that of your wife and that of your children.
>
> For all the reasons above, this court now sentences the defendant Ronell Watson to 382 months of incarceration.

Pet. App. 77a-78a.

In a written sentencing memorandum and order filed the next day, the court used different language:

> This Court salutes [Harper's] heroism and his courage under fire. He is the real deal. The policeman who personifies

> the essence of the law, the essence of those wise restraints that make us free. Agent Harper has our back, and this Court promises to always have his.
>
> For all the above reasons, the Court now sentences Defendant Ronell Watson to 382 months of incarceration.

Pet. App. 103a.

Watson appealed, arguing, as relevant, that Judge Kuntz's written "promise[] to always have" Special Agent Harper's "back"—independent of any comments made during the oral sentencing proceeding—amounted to plain procedural error and violated Watson's due process right to an impartial judge. C.A. Dkt. No. 31, at 64-66; C.A. Dkt. No. 53, at 33-36.

The Second Circuit affirmed by summary order. At the threshold, the summary order described Watson's sentencing claim in limited terms that do not encompass his challenge to Judge Kuntz's written statement. E.g., Pet. App. 3a (referring to "the district court's statements at sentencing extolling Special Agent Harper"); Pet. App. 15a ("Watson ... asserts that the district court committed procedural error and violated due process by relying upon Special Agent Harper's personal virtues in determining the appropriate sentence."). Indeed, in identifying the comments that Watson challenged, the summary order listed only the district court's oral remarks. E.g., Pet. App. 15a ("'the law will always have your back'" (quoting Pet. App. 77a-78a); Pet. App. 18a (same). Judge Kuntz's written promise went unmentioned.

In any case, the summary order found "no basis to conclude that the district court erred by relying upon any improper considerations in determining Watson's sentence." Pet. App. 16a. In the Second Circuit's view, "[t]he district court's decision to address Special Agent Harper at sentencing as the victim of Watson's crimes [was] consistent with the guidance of [Fed. R. Crim. P. 32.1(i)(4)(B)], which provides that 'the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard' before imposing the sentence." Pet. App. 16a. Moreover, "the mere fact that the district court praised the courage, heroism, and dedicated public service of the victim, and compared those virtues to the defendant's violent conduct, does not reflect reliance on any improper consideration at sentencing or a judicial bias." Pet. App. 16a (citing United States v. Mangone, 652 F. App'x 15, 18 (2d Cir. 2016)).

Likewise, the summary order said, the 18 U.S.C. § 3553(a) factors "allow for consideration of the impact of the criminal conduct on the victim, including 'the need for the sentence imposed ... to reflect the seriousness of the offense ... and to provide just punishment for the offense.'" Pet. App. 17a (quoting 18 U.S.C. § 3553(a)(2)(A)). See id. ("[T]he sentencing judge may consider the need for the sentence 'to afford adequate deterrence to criminal conduct' and 'to protect the public from further crimes of the defendant,' which would include protecting law enforcement officers who are seriously injured by violent conduct in the performance of their official duties." (quoting 18 U.S.C. § 3553(a)(2)(B)-(C)).

Thus, "the district court meticulously discussed each of the Section 3553(a) factors in explaining the reasons for its sentence." Pet. App.17a. The Second Circuit accepted that "it may have been unnecessary and unhelpful for the district court to then stray from the language of Section 3553(a) in a rhetorical way during its closing remarks after carefully analyzing the statutory factors, such as by noting the 'the law will always have [the victim's] back.'" Pet. App. 17a-18a (quoting Pet. App. 103a). However, the summary order "conclude[d] on this record that the comments do not reflect a plain procedural error nor a judicial bias." Pet. App. 18a (citing United States v. Bermudez-Melendez, 827 F.3d 160, 165 (1st Cir. 2016)).

Petitioner sought panel rehearing. In a pro se submission, he argued: (1) premeditation is an element of assault with intent to commit murder under the federal system and the jury should have been instructed on it; (2) the district court violated his constitutional rights by exceeding the statutory maximum without justifying it; and (3) the district court violated his constitutional rights by finding premeditation by a preponderance of the evidence. C.A. Dkt. Nos. 88, 89. In a counseled submission, he renewed his claim, not addressed in the Second Circuit's summary order, that the district court's promise to "have" Harper's "back" required vacatur and resentencing. C.A. Dkt. No. 81.

The Second Circuit denied rehearing. Pet. App. 104a.

REASONS FOR GRANTING THE PETITION

PREAMBLE

While the judges of this Honorable Court are undoubtedly aware of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and its progeny, Defendant-Appellant Watson must ask this Court to bear a partial--partial but imperative--trip down Apprendi Lane.

In Apprendi, the Supreme Court held that the Sixth Amendment demands that any facts, other than a prior conviction, that increase a statutory maximum must be considered elements of the offense, and must be submitted to a jury and proved beyond a reasonable doubt--or admitted by the defendant. Id. at U.S. 490.

Five years later, as a result of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the Supreme Court applied Apprendi to the U.S. Sentencing Guidelines in United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), which spawned two majority opinions. The first is termed the "constitutional holding," which held that because the Guidelines were mandatory, any facts found and used by a judge to enhance a sentence essentially made each "sentencing factor" an element of the offense; therefore, by the rule of Apprendi, those facts had to be either found by a jury or admitted by the defendant. Id. at U.S. 244 (Stevens, J.). In other words, any facts found by a judge under the mandatory Guidelines violated the Sixth Amendment.

The second majority opinion is termed the "remedial holding," which held that because the mandatory nature of the Guidelines violated the Sixth Amendment, they must be deemed merely "advisory." Id. at U.S. 245 (Beyer, J.). The majority of courts interpreted

the "remedial holding" as entirely smothering the "constitutional holding." Since the Guidelines were no longer mandatory, the majority reasoned, any facts found by judge did not run contrary to the Fifth or Sixth Amendments as long as the facts sufficed the preponderance of evidence standard.

Some courts, however, refused to altogether dispense with the "constitutional holding" because the Guidelines remain central to sentencing. See, e.g., U.S. v. Pimental, 367 F.Supp.2d 143, 154 (D.Mass.2005) (Gertner, N.):

> We cannot say that facts found by the judge are only advisory, that as a result, few procedural protections are necessary and also say that the Guidelines are critically important. If the Guidelines continue to be important, if facts the Guidelines make significant continue to be extremely relevant, then Due Process requires procedural safeguards and a heightened standard of proof, namely, proof beyond a reasonable doubt.

Despite the "constitutional holding," in regard to judge-found facts at sentencing, federal courts are essentially still conducting sentencing hearings under the pre-Booker system:

> [T]he bottom line, at least as a descriptive matter, is that the Guidelines determine the final sentence in most cases. And notwithstanding the Booker constitutional opinion, many key facts used to calculate the sentence are still being determined by a judge under preponderance of the evidence standard, not by a jury beyond a reasonable doubt [. . .--] notwithstanding that five Justices in the Booker constitutional opinion stated that the Constitution requires that facts used to increase a sentence beyond what the defendant otherwise could have received be be proved to a jury beyond a reasonable doubt. In short, we appear to be almost where we were pre-Booker. U.S. v. Henry, 472 F.3d 910, 919-20, 374 U.S. App. D.C. 149 (D.C. Cir.2007) (Kavanaugh, J., concurring) (emphasis in original).

As then Circuit Court Judge--now Supreme Court Justice--Kavanaugh evinced in his concurring opinion in Henry, the rift that exists in Booker, Apprendi, and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), "represents the collision of two starkly different conceptions of how the Fifth

and Sixth Amendments apply to criminal sentencing." Henry at F.3d 920. Honorable Kavanaugh terms the first interpretation as a "deference-to-legislatures" model. Id.

> Under this interpretation, the Fifth and Sixth Amendments generally require that a jury find the elements of the crime (as defined by the legislature) beyond a reasonable doubt. As to sentencing, this approach gives legislatures wide discretion in crafting a mandatory or structured sentencing system; or adopting an unstructured system in which each sentencing judge possesses broad authority to assess a sentence based on the individual background, facts, and circumstances of the offense and offender; or choosing some approach in between. (citations omitted).

Honorable Kavanaugh terms the second interpretation as the "real-elements-of-the-offense" model. Id.

> This approach begins with the idea that no logical distinction exists between the elements of a crime and so-called sentencing facts that are used to increase a sentence. Because the Constitution requires that the Government prove the elements of a crime to a jury beyond a reasonable doubt, the Constitution also requires that the Government prove substantively similar sentencing facts [. . .] to a jury beyond a reasonable doubt. Id.

To conduct sentencing otherwise, the proponents of this model stress, raises "form over substance" and permits the legislatures to re-label the elements of a "crime as sentencing factors," thereby avoiding the constitutional mandate that the Government prove those elements beyond a reasonable doubt to a jury. Id. at 920-21. In other words, "courts do not defer to a legislative choice to label a fact as a sentencing factor rather than an element of the crime." Id. at 921 (citations omitted).

The proponents of this approach "allow purely discretionary sentencing schemes whereby judges exercise broad discretion in imposing a sentence within a statutory range." Id. (quotation marks and citation omitted). These systems, however, create a bigger concern, that is, that judges are permitted to find essential facts that increase a sentence by a preponderance of the evidence. Id. (citation omitted).

If the "deference-to-legislatures" approach--an approach that is undoubtedly identical "to pre-Booker practices"--is sound, "then current federal sentencing practices" both suffice the Constitution's safeguards and render Booker's "constitutional holding" incorrect. And if that is so, then "the Sentencing Guidelines should apply as promulgated and made mandatory by Congress." Id.

If the "real-elements-of-the-offense approach" is sound, then current "sentencing practices may be in tension with the Constitution" because the current system reflects the pre-Booker system. Id.

ARGUMENTS

I. Premeditation is an Element of Assault with Intent to Commit Murder Under the Federal System and the Jury Should Have Been Instructed on it

As can easily be adduced, "[t]he conviction for murder with malice aforethought require[s] findings of (i) premeditation and (ii) a nexus between the firearm used," as defined in 18 U.S.C. § 1111. U.S. v. Velez, 170 Fed. Appx. 146, 148 (2d Cir.2006). Premeditation, after all, has always been an essential element of first degree murder. Black's Law Dictionary (Sixth Edition) by West defines premeditation as "[c]onscious consideration and planning that precedes an act (such as committing a crime); the pondering of an action before carrying it out."

The "U.S. Sentencing Guidelines Manual § 2A1.1 is designed to apply to federal first degree murder, which is defined by [. . . §] 1111(a) to include premeditated murder." U.S. v. Workman, 80 F.3d 688, 700 (2d Cir.1996).

The attempted murder statute (§1113) does not particularly provide elements of the crime; howver, Section 2A2.1 essentially does: "[I]f the object of the offense would have constituted first degree murder," the base offense level is 33. Id. at (a)(1). Otherwise, the base offense level is 27.[1] Essentially, then, the six-level increase in the base-offense level depends on § 1111(a), which requires premeditaion. "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense." Alleyne v. United States, 570 U.S. 99 (2013).

Here, "the jury was asked not to consider premeditation." Counsel at page 12 of Sentencing Transcripts.

As Ms. Gelernt pointed out at sentencing, the two cases, U.S. v. Brown, 518 F.2d 821 (7th Cir.1975) and U.S. v. Catalan-Roman, 585 F.3d 453 (1st Cir.2009), cited by the Government, adduce the importance of the premeditation element. See Sen. Trans., pages 12-13. In Brown, "the indictment itself [. . .] charged premeditated murder." Id. In Catalan-Roman, the Government "alleged premeditated murder but also the juries were instructed" on premeditation. Id. Premeditation should have been decided by the jury.

II. The District Court Violated Watson's Constitutional Rights by Exceeding the Statutory Maximum without Justifying it

The district court erred by imposing an enhanced statutory maximum penalty based on a finding not listed in the indictment nor found by the jury. See Apprendi, supra, at U.S. 490. Moreover, it did so without clarifying why.

Again, in adding up the enhancements on Count one--Count one is the count that ended up exceeding the statutory maximum--both the court and the Probation Department came to "210 to 262 months." Adding the consecutive 120 months for Count three, both the court and the Probation Department came to a range of "330 to 382 months." See MEMORANDUM & ORDER, supra, at PageID 3396 and Sentencing Transcripts, pages 54-55.

The statutory maximum for Count one is 240 months; therefore, the calculation should have been 210 to 240 months with 120 months added for Count three, coming to 330 to 360 months. Certainly the § 924(c) maximum of life cannot serve to save this, for the

"statutory alternatives" within § 924(c) "carry different [maximum or minimum] punishments" because of elements that must be met. U.S. v. Requena, 980 F.3d 29, 49 (2d Cir.2020) ("if 'statutory alternatives' carry different [maximum or minimum] punishments, then they must be elements."); see e.g., Bailey v. United States, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).

In Kassir v. U.S., 3 F.4th 556 (2d Cir.2021), the court states that "a sentencing error is not prejudicial where, in the absence of the error, the defendant would have received the same aggregate term of imprisonment on multiple counts." Id. at LEXIS 10. The court then cites both U.S. v. Blount, 291 F.3d 201, 214 (2d Cir. 2002) and U.S. v. McLean, 287 F.3d 127, 137 (2d Cir.2002). Both cases, however, are pre-Booker cases, when the Guidelines were mandatory.

As McLean adduces, "[Section] 5G1.2(d) requires the imposition of consecutive terms on each count of conviction until the Guideline punishment is achieved." Id. at 136 (brackets in original) (cleaned up). The Guidelines are no longer mandatory, and any sentence that exceeded the statutory maximum should have been delineated as to how and why. This is not harmless error.

III. The District Court Violated Watson's Constitutional Rights by Finding Premeditation by the Preponderance of the Evidence

Watson elected to proceed to trial and have the facts of his case found beyond a reasonable doubt by a jury of his peers, not by a judge under the civil standard of preponderance of the evidence. Again, this judicial-finding increased Watson's sentence by "8 2/3 to 10 1/2 years." This finding was made by a judge who praised the "heroism" of the agent who "has our back, promising "to always

have his" back--"in contrast to the cowardly and unjustified Watson." See Watson's Brief at pages 3-4. This six-level enhancement had an extremely disproportionate effect and stands in direct contradiction to Booker and Apprendi.

"A judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct." United States v. Haymond, 139 S.Ct. 2369, 2376, 204 L.Ed.2d 897 (2019). Premeditation should have been found by the jury. According to Justice Thomas--who concurred with the "constitutional holding" in Booker and dissented from the "remedial holding"--the Court's holding in Booker corrected the U.S. Sentencing Commission's "mistaken belief" that a preponderance of the evidence standard is appropriate to meet due process requirements:

> The Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant. Booker at U.S. 319 n.6 (Thomas, J., concurring in part, dissenting in part).

As explained in the PREAMBLE, supra, the "constitutional holding" in Booker has all been washed away. Booker should "have been the simple, logical extension of [. . .] Apprendi jurisprudence." U.S. v. Kandirakis, 441 F.Supp.2d 282, 286 (D.Mass 2006) (Young, W.). However, "the court produced a fractured, 124-page decision with two majority opinions and four dissents," id., that "taken in tandem, do not get high marks for consistency or coherence . . . . The most striking feature of the Booker decision is that the remedy bears no logical relation to the constitutional violation." Michael W. McConnell, The Booker Mess, 83 Denver U.L. Rev. 665, 677 (2006); see also Frank D. Bowman, Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing

After Booker, 2005 U. Chi. Legal F. 149, 182 ("[One] mystery about Booker remedial opinion is how it can possibly be squared with either the announced black-letter rule or the underlying theory of the Blakely opinion it purports to apply.").

Blakely says that "the '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." Id. at U.S. 303-04. The U.S. Guidelines were in trouble after Blakely, and only the remedial holding in Booker could have saved them--and it did, even in spite of the "constitutional holding." "How these two majority opinions fit together remains a puzzle, in part because of an inherent contradiction in Justice Breyer's remedial opinion." David J. D'Addio, Sentencing After Booker: The Impact of Appellate Review on Defendants' rights, 24 Yale L. & Pol'y 173, 174 (2006).

Shortly after the Booker holdings, some courts were also already showing concern about the paths district courts were taking. See, e.g., U.S. v. Navedo-Concepcion, 450 F.3d 54, 60 (1st Cir.2006) (Turruello, J., dissenting) ("I am concerned that we are, like a glacier in the ice age, inch by slow inch, regressing to the same sentencing posture we assumed before the Supreme Court decided Booker . . . . [I do not] believe this is what the Supreme Court had in mind when it struck down the mandatory regime."). Honorable Kavanaugh stressed it in Henry, supra, at 920. What he presumed then is a fact now: "The lower courts' effort to harmonize the competing goals of the Booker opinions has become the jurisprudential equivalent of a dog chasing its tail . . . ." See also U.S. v. Chandler, 2018 U.S.

Dist. LEXIS 14213, at LEXIS 3 (E.D.Mich) (recognizing the fact that courts are back to pre-Booker sentencing).

And if the courts are back to pre-Booker sentencing, where facts like premeditation can be found by the judge and used to enhance a sentence by 8 2/3 to 10 1/2 years, then Blakely, to name one, should again apply. "A jury must find beyond a reasonable doubt every fact 'which the law makes essential to [a] punishment' that a judge might later seek to impose." U.S. v. Haymond at S.Ct. 2371-72 (quoting Blakley at U.S. 304).

So the question is: which approach is correct? the "deference-to-legislatures" model or the "real-element-of-the-offense" model? Watson contends that any fact decided by a judge by a preponderance of the evidence that increases a sentence by 8 2/3 to 10 1/2 years should be decided by a jury beyond a reasonable doubt or admitted to by the defendant--whether it exceeds the statutory maximum or not. After all, "[a] sentencing error that leads to a violation of the Sixth Amendment by imposing a more severe sentence than is supported by the jury verdict would diminish the integrity and public reputation of the judicial system and also would diminish the fairness of the criminal system." U.S. v. Oliver, 397 F.3d 369, 377-81 (6th Cir.2005) (cleaned up).

As of now, once again, "[real offense sentencing] reflects a radical rejection of basic ideas of fairness" and "exists in the federal sentencing guidelines and [. . .] no where else in the United States or in any other western country." Michael Tonry, Rethinking Unthinkable Punishment Policies in America, 46 UCLA L. Rev. 1751, 1757 n.1.

The "sentencing disparities and inequities" that exist--from one courtroom to the courtroom next door to it--are based on nothing more "than the identities of the sentencing judges" and their approaches. U.S. v. Gardellini, 545 F.3d 1089, 1096 (D.C. Cir.2008) (Kavanaugh). Yet, "[t]he Guidelines were enacted to eliminate unwarranted disparities nationwide." U.S. v. Contreras, 108 F.3d 1255, 1271 (10th Cir.1997) (cleaned up); see also 18 U.S.C. § 3553(a)(6) ("the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.").

"Unpredictability and uncertainty" has ensued since the Booker rulings. Gardellini at 1096. The call for Congress to make changes has fallen on deaf ears. See, e.g., Booker at U.S. 265 and Gall v. United States, 552 U.S. 38, 128 S.Ct. 586, 608, 169 L.Ed.2d 445 (2007) (Scouter, J., concurring). So after 17 years of the Booker mess, many would disagree with some of the words of Honorable Kavanaugh:

> And it is not our role to fight a rear-guard action to preserve quasi-mandatory Guidelines. To the extent the the post-Booker federal sentencing is unwise or inequitable--or becomes a roll of the dice that depends too much on the sentencing judge--those concerns must be addressed by the Congress and the President, who have the authority to produce new legislation. Gardellini at 1096.

One Justice, Justice Thomas, remains on the bench since the Booker holdings. With a conservative majority now on the bench, one would think, pray, the time is ripe for correcting the Booker mess and establishing some uniformity and constitutional safeguards to the Guidelines.

> Of course, Congress has the power; but if Congress fails to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the question, is it not the duty of the court, if it possesses the power, to decide it

in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past? Textile Workers Union v. Amazon Cotton Mill Co., 76 F. Supp. 159, 163 (M.D.N.C.1947) (Hayes).

IV. The District Court Violated Watson's Constitutional Rights and Procedurally Erred by Exceeding the Statutory Maximum

The district court erred by imposing an enhanced statutory maximum penalty based on a finding not listed in the indictment nor found by the jury. See Apprendi, supra, at U.S. 490. In doing so, the district court no only violated Watson's constitutional rights but also imposed a procedurally unreasonable sentence.

After the grouping and the applying of enhancements, both the district court and the Probation Department used Count One, which has a statutory maximum of 240 months. Both the district court and the Probation Department came to "210 to 262 months." After adding the 120 months consecutive sentence for Count Three, they came to "330 months to 382 months." See MEMORANDUM & ORDER, supra, at PageID 3396 and Sentencing Transcripts at pages 54-55.

Watson contends that the statutory maximum was 240 months; therefore, the calculation should have been 210 to 240 months with 120 months consecutive for Count Three, to be applied independently. The district court procedurally erred when sentencing Watson.

Section 3D1.1(b) states that "any count for which the statute mandates imposition of a consecutive sentence is excluded from the operation of §§ 3D1.2-3D1.5." "The multiple count rules set ot under this Part do no apply to a count of conviction covered by Subsection (b)," which lists § 924(c). See App. Note 2. Rather, "sentences for such counts are governed by the provisions of § 5G1.2(a)." Section 5G1.2(a) mandates that a "consecutive sentence shall be determined by that statute and imposed independently."

Excluding the § 924(c) count, the district court made no determination as to why it exceeded the statutory maximum sentence.

In Kassir v. U.S., 3 F.4th 556 (2d Cir.2021), the court states that "a sentencing error is not prejudicial where, in the absence of the error, the defendant would have received the same aggregate term of imprisonment on multiple counts." Id. at LEXIS 10. The court then cites both U.S. v. Blount, 291 F.3d 201, 214 (2d Cir. 2002) and U.S. v. McLean, 287 F.3d 127, 137 (2d Cir.2002). Both cases, however, are pre-Booker cases, when the Guidelines were mandatory.

As McLean adduces, "[Section] 5G1.2(d) requires the imposition of consecutive terms on each count of conviction until the Guidelines punishment is achieved." Id. at 136. (brackets in original) (cleaned up). The Guidelines are no longer mandatory, and any sentence that exceeded the statutory maximum should have been explained. Both Blount and McLean give the impression of mandatory Guidelines.

Watson contends that the district court procedurally erred by both failing to calculate and improperly calculating the Guidelines and by treating the Guidelines as mandatory. See, e.g., U.S. v. Cavera, 550 F.3d 180, 190 (2d Cir.2008) (en banc).

V. In Sentencing Petitioner, A First-Time Offender, To 382 Months, The District Court Improperly Relied On Harper's Personal Virtues And Inappropriately Promised "To Always Have" Harper's "Back."

The district court committed plain error in sentencing Petitioner, a first-time offender, to 382 months' imprisonment, the top of the Guideline range. First, Judge Kuntz relied on Harper's "honor," "heroism," and "courage under fire," praising him for "mak[ing] our streets safer" and "our homes more secure." No § 3553(a) factor authorizes a court to consider a crime victim's personal and professional virtues—especially not where, as here, those virtues are unknown to the defendant and immaterial to his legal culpability. Second, Judge Kuntz said: "Agent Harper has our back, and this Court promises to always have his." A judge may not "have the back" of someone who appears before him. And a judge may not impose three decades of incarceration to fulfill such a "promise" to a victim, let alone a victim employed, as Harper was, by one of the litigants before the court. These comments "reveal[ed] such a high degree of favoritism" toward Harper "as to make fair judgment impossible." Liteky v. United States, 510 U.S. 540, 555 (1994). This Court should notice these flagrant departures from judicial norms by summarily vacating and remanding for resentencing.

The district court erred in relying on Harper's personal virtues. Section 3553(a) sets forth the factors a district court

"shall consider" "in determining the particular sentence to be imposed." See also 18 U.S.C. § 3582(a). Courts are "reluctant" "to expand relevant sentencing considerations beyond those enumerated in § 3553(a), insofar as the purpose of the 'statutory mandate of § 3553' was to 'necessarily channel district courts' sentencing discretion.'" United States v. Park, 758 F.3d 193, 198-99 (2d Cir. 2014). By their plain terms, none of the § 3553(a) factors permit a sentencing judge to consider a victim's worth. Judge Kuntz's own explanation of Petitioner's sentence proves the point. The court addressed each of the § 3553(a) factors seriatim, and only then turned to Harper's personal qualities, which he addressed under a separate heading—"Conclusion." Pet. App. 102a-103a.

The statutory sentencing framework does direct courts to consider some personal qualities, but only those of the defendant. See 18 U.S.C. § 3553(a)(1) ("the history and characteristics of the defendant"); 18 U.S.C. § 3661 ("the background, character, and conduct of a person convicted of an offense"). These provisions demonstrate that Congress knows how to direct sentencing courts to consider personal attributes and chose to do so with respect to one statutory class (defendants), but not another (victims). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress

acts intentionally and purposely in the disparate inclusion or exclusion." INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987).

Likewise, the Guideline provisions concerning a victim's status confirm that attributes unknown or unknowable to the defendant "lack significance" to the sentencing calculus. Park, 758 F.3d at 198 n.19; see id. ("The absence of cost as a prevalent, or even occasional, justification for a departure under the Guidelines thus reaffirms our conclusion that it is not an appropriate sentencing factor."). U.S.S.G. ch. 3, pt. A, entitled "Victim-Related Adjustments," contains no provision reflecting the considerations that Judge Kuntz took into account. Each of that Part's offense-level enhancements requires actual or constructive knowledge of the relevant status. For example, U.S.S.G. § 3A1.2(a) provides an enhancement if the offense was "motivated by" the victim's government-employee status, and U.S.S.G. § 3A1.2(c) does so if the defendant committed an assault "knowing or having reasonable cause to believe" that the victim was a law enforcement officer or prison official. (Here, the government conceded that § 3A1.2 did not apply because "there was no evidence that [Petitioner] knew (or should have known) that [Harper] was an FBI agent." D. Ct. Dkt. No. 177, at 3.) See also, e.g., U.S.S.G. § 3A1.1(a)(1) (defendant "intentionally" selected victim based on race, sex, etc.); U.S.S.G. § 3A1.1(b) (defendant "knew or should have

known" that victim was vulnerable). The only victim-related departure concerns the victim's "wrongful conduct" that "contributed significantly to provoking the offense behavior." U.S.S.G. § 5K2.10.

Harper's bona fides as an FBI agent had no bearing on Petitioner's legal or moral blameworthiness. Indeed, Petitioner did not even know that Harper was an FBI agent, and he did not have to for purposes of §§ 111 and 1114. Feola v. United States, 420 U.S. 671, 684 (1975); see 4A.964, 966. It would not have mitigated Petitioner's offenses if, unbeknownst to Petitioner, Harper had been an incompetent FBI agent, or craven, or corrupt. By the same token, Judge Kuntz erred in treating Harper's merits as aggravating.

Judge Kuntz stepped farther over the line when he "promise[d]" to "always have" Harper's "back" in sentencing Petitioner to 382 months. Having a victim's "back" is not a valid reason for imposing a term of imprisonment. Rather, the federal sentencing framework redresses a victim's injuries through restitution. "[T]he primary and overarching purpose" of the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, "'is to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being.'" United States v. Boccagna, 450 F.3d 107, 115 (2d Cir. 2006). See also 18 U.S.C. § 3553(a)(7).

Here, Harper asserted no compensable losses, so the district court imposed no restitution. PSR ¶ 105; SPA.49. But § 3553(a) did not otherwise permit Judge Kuntz to recompense Harper by jailing Petitioner.

More important, the district court's comments display bias, in violation of the Fifth Amendment's Due Process Clause. "Due process guarantees 'an absence of actual bias' on the part of a judge." Williams v. Pennsylvania, 579 U.S. 1, 8 (2016) (quoting In re Murchison, 349 U.S. 133, 136 (1955)). Judge Kuntz was required to "hold the balance nice, clear and true" between the parties. Tumey v. Ohio, 273 U.S. 510, 532 (1927). His promise to "always" have Harper's "back" violated that bedrock requirement, in particular because Harper was not just a victim, but an employee of the United States, one of the litigants before the court. Indeed, Harper's status as an "employee of the United States" was an element of two of the offenses of conviction. See 18 U.S.C. § 111(a)(1) and § 1114; C.A. App. 4A.963-64; 966.

In aligning himself with Harper, Judge Kuntz used language that conveyed allegiance not to neutral adjudicatory principles but to a particular individual with interests adverse to those of the defendant being sentenced. His promise was personal—because Harper "has our back," the court "promise[d] to always have his." That is, Petitioner's sentence was Judge Kuntz's way of expressing gratitude. Furthermore, "[t]he Due Process Clause

'may sometimes bar trial by judges who have no actual bias'" because "'justice must satisfy the appearance of justice.'" Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) (quoting Murchison, 349 U.S. at 136). At a minimum, the appearance of justice necessitates resentencing before a judge who has not picked one side to champion.

In rejecting this claim, the Second Circuit's summary order overlooked the district court's written statement: "Agent Harper has our back, and this Court promises to always have his." Pet. App. 103a. The summary order did not acknowledge this statement or address Petitioner's sentencing claim based thereon. Instead, the summary order discussed the court's oral remark: "You have our back and this court promises you the law will always have your back and that of your wife and that of your children." Pet. App. 77a-78a.

These two statements are not interchangeable. Judge Kuntz's written promise to Harper reflects a personal investment in this case incompatible with the judicial duty of impartiality. The statutory and ethical rules applicable to judges draw bright lines that require recusal when a judge has a personal stake in a matter. See, e.g., 28 U.S.C. § 455(b)(1) (judge "shall disqualify himself ... [w]here he has a personal bias or prejudice concerning a party"); Jud. Conf. of the U.S., Guide to Judiciary Pol'y, vol. 2A, ch. 2, Code of Conduct for U.S. Judges

Canon 3(C)(1)(a) (2019) (same); see also e.g., C.A. OB.66 (explaining that Harper's status as an employee of the United States—the party that brought this federal criminal prosecution—was an element of two of the offenses of conviction). "Recusal is appropriate when a judge has a personal interest at stake, such as ... some personal bias in favor of or against a party to the action." United States v. Occhipinti, 851 F. Supp. 523, 527 (S.D.N.Y. 1993).

It is one thing to say, as the district court did during the oral sentencing proceeding, that "the law" has a victim's back. The objectives of federal sentencing law include redressing the harm done to victims and protecting the public (including victims) from future crimes. See Pet. App. 17a. But it is quite another thing to personalize that commitment, as Judge Kuntz did, in the form of an express quid pro quo: because Harper "has our back," Judge Kuntz—the judge himself, not "the law" in the abstract—"promise[d] to always have his." SPA.51. As between two people appearing before him, Judge Kuntz "promise[d]" to champion the interests of one. That powerful evidence of personal favoritism renders this sentence infirm. See, e.g., Williams, 579 U.S. at 8; Aetna Life Ins. Co., 475 U.S. at 825; Tumey, 273 U.S. at 532.

By evaluating only the district court's oral remarks, the summary order failed to resolve Petitioner's challenge to Judge

Kuntz's written promise. For example, the summary order saw no "judicial bias" in Judge Kuntz's decision to "praise[]" Harper's "courage, heroism, and dedicated public service" in contrast to Petitioner's "violent conduct." Pet. App. 16a. But the court's written statement was not about comparing Petitioner and Harper. It was about promising the latter, man to man, that he could count on Judge Kuntz's protection going forward.

For similar reasons, the summary order's effort to justify the district court's comments with reference to the goal of "protecting law enforcement officers" (Pet. App. 17a) missed the mark. True, that is a valid sentencing objective, but Judge Kuntz's written statement was directed not to "law enforcement officers" writ large, but to one particular law enforcement officer—Harper. Again, what makes the statement objectionable is the tight, one-to-one relationship invoked between the judge and the victim. Finally, the summary order wrote off Judge Kuntz's oral comments as "'gratuitous rhetorical flourishes.'" Pet. App. 18a (quoting United States v. Bermudez-Melendez, 827 F.3d 160, 165 (1st Cir. 2016)). Extemporaneous spoken comments like those analyzed in the summary order (and those at issue in Bermudez-Melendez) may merit a reviewing court's "latitude," but deliberate written statements require closer scrutiny.

Petitioner, a first-time offender, was sentenced to three decades in prison by a judge who "promise[d] to always have" the

"back" of a person with interests adverse to Petitioner's. This Court cannot affirm that severe punishment without answering the question begged by this record: If Judge Kuntz had Harper's back, who had Petitioner's?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ronell Watson

Date: June 14, 2023