

No.

IN THE
SUPREME COURT OF THE UNITED STATES

AMANDA LYNN WALKER,

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a criminal statute with a sentencing range of not exceeding one year imprisonment in a county jail *or* not exceeding life imprisonment at the Department of Corrections *or* a fine of not less than five hundred dollars *nor* more than five thousand dollars, for all acts of enabling child abuse, is unconstitutionally vague.
2. Whether the Tenth Circuit's statutory interpretation of an Oklahoma statute, declaring all acts of enabling child abuse as felony offenses punishable by life imprisonment, in disregard of the principle of disproportionality, intrudes upon the legislature's role and violates the Constitution's ban on cruel and unusual punishments.
3. Whether the Constitution allows a district judge to increase a defendant's sentence based on facts the judge finds without the aid of a jury or the defendant's consent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Amanda Lynn Walker, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on July 24, 2023.

OPINIONS BELOW

The published Tenth Circuit decision in *United States v. Walker*, 74 F.4th 1163 (10th Cir. 2023) is in Appendix A. The district court's statement of reasons at sentencing is in Appendix B.

JURISDICTION

The United States District Court for the District of Northern Oklahoma had jurisdiction in this criminal case under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742 and entered judgment on July 24, 2023. The Court granted Ms. Walker's motion for an extension of time to file this petition by November 21, 2023 and has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clauses of the Fifth and Fourteenth Amendments and the Sixth and Eighth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The state of Oklahoma, in March 2020, charged Amanda Walker with enabling her boyfriend, Craig Morrison, to abuse her son, R.T., who is an Indian child, in Tulsa, within the boundaries of the Muscogee (Creek) Reservation. *Walker*, 74 F.4th at 1174. Following this Court's May 2020 decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (holding that the

state of Oklahoma “lack[ed] jurisdiction to prosecute” cases involving Indian defendants accused of crimes occurring in Indian Country),¹ Oklahoma dismissed the charges for lack of jurisdiction and the federal government indicted Ms. Walker under the Assimilated Crimes Act, 18 U.S.C. § 13. *Id.* Pursuant to Section 843.5(B) of Title 21 of the Oklahoma Statutes, Ms. Walker was charged with two counts of enabling child abuse, one based on a report of a handprint-shaped bruise in December 2019 and one based on injuries that resulted in R.T.’s hospitalization in February 2021. *Id.*

Section 843.5(B) states:

Any person responsible for the health, safety or welfare of a child who shall willfully or maliciously engage in enabling child abuse, as defined in this section, shall, upon conviction, be punished by imprisonment in the custody of the *Department of Corrections not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not less than Five Hundred Dollars (\$500.00) nor more than Five Thousand Dollars (\$5,000.00) or both such fine and imprisonment.*

Okla. Stat. tit. 21, § 843.5(B) (emphasis added).

Section 9 defines punishment of felonies:

Except in cases where a different punishment is prescribed by this title, or by some existing provision of law, every offense declared to be felony is punishable by a fine not exceeding One Thousand Dollars (\$1,000.00), or by imprisonment in the State Penitentiary not exceeding two (2) years, or by both such fine and imprisonment.

Id., § 9. Section 10 defines the punishment of misdemeanors, *in general*:

Except in cases where a different punishment is prescribed by this chapter or by some existing provisions of law, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding one year or by a fine not exceeding five hundred dollars, or both such fine and imprisonment.

Id., § 10.

¹ After sentencing in this case, the Court, in *Oklahoma v. Castro-Huerta*, held that both the federal government and the state of Oklahoma have concurrent jurisdiction to try non-Indians who commit crimes against Indians in Indian Country. 142 S. Ct. 2486 (2022).

Section 843.5(O)(1) defines “child abuse” as:

the willful or malicious harm or threatened harm or failure to protect from harm or threatened harm to the health, safety or welfare of a child under eighteen (18) years of age by a person responsible for a child’s health, safety or welfare, or
b. the act of willfully or maliciously injuring, torturing or maiming a child under eighteen (18) years of age by any person[.]

Id. § 843.5(O)(1). Section 843.5(O)(5) defines “enabling child abuse” as: “the causing, procuring or permitting of child abuse by a person responsible for a child’s health, safety or welfare[.]” *Id.* § 843.5(O)(5). Finally, Section 843.5(O)(11) defines “permit” as: “to authorize or allow for the care of a child by an individual when the person authorizing or allowing such care *knows or reasonably should know that the child will be placed at risk of the conduct or harm proscribed by this section.*” *Id.* § 843.5(O)(11) (emphasis added).

The district court instructed the jury as follows.

To find [Ms.] Walker guilty of this crime you must be convinced that the Government has proven each of the following beyond a reasonable doubt:

First: [Ms.] Walker was responsible for R.T.’s health, safety or welfare;

Second: [Ms.] Walker willfully or maliciously permitted;

Third: a willful or malicious act of harm by another person;

Fourth: to the health, safety or welfare of R.T., a child under the age of eighteen; .

..

Permit means: to authorize or allow for the care of a child by an individual when the person authorizing or allowing such care knows or reasonably should know that the child will be placed at risk of abuse.

Walker, 74 F.4th at 1188 (quoting *Walker ROA Vol. I* at 215). A jury found Ms. Walker guilty of both counts. *Id.* At sentencing, the district court applied the federal Sentencing Guidelines and granted the Government’s motions, pursuant to 18 U.S.C. Section 3559(f)(3), for upward variances from Guidelines sentences.

Pursuant to Section 3559(f)(3):

[I]f the crime of violence results in serious bodily injury (as defined in section

1365 [18 USCS § 1365]), or if a dangerous weapon was used during and in relation to the crime of violence, be imprisoned for life or for any term of years not less than 10.

18 U.S.C. § 3559(f)(3). And pursuant to Section § 1365(h)(3):

[T]he term “serious bodily injury” means bodily injury which involves—
(A) a substantial risk of death;
(B) extreme physical pain;
(C) protracted and obvious disfigurement; or
(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty[.]

18 U.S.C. § 1365(h)(3).

The district court sentenced Ms. Walker to 120 months in prison, *63 months over the high end of the Guidelines range*. *Walker*, 74 F.4th at 1174. The district court based its decision on its own finding that Ms. Walker enabled Mr. Morrison to cause “serious bodily injury” to her child—an *element* (of a crime not charged) *that was not admitted by Ms. Walker nor submitted or proved beyond a reasonable doubt to the jury*. Appendix B (district court’s statement of reasons), at 4; *see also supra* (the relevant jury instruction).

Ms. Walker appealed, arguing, among other things, that (1) Section 843.5(B)—a standardless statute that grants unfettered discretion for its arbitrary enforcement—is unconstitutionally vague, and (2) the Constitution requires that the trial court submit to the jury the question whether Ms. Walker enabled Mr. Morrison to cause “serious bodily injury” to her child and hold the prosecution to its burden to prove it beyond a reasonable doubt.

The Tenth Circuit rejected Ms. Walker’s arguments and affirmed the district court’s decisions. In doing so, it held: “[w]hen read in context, § 843.5(A) and (B) plainly describe only felony offenses and are not rendered unconstitutionally vague by giving district courts wide

discretion in sentencing.” *Walker*, 74 F.4th at 1183.²

This petition follows.

REASONS FOR GRANTING THE PETITION

The Court has yet to squarely address the following important and reoccurring issues.

I. STANDARDLESS STATUTES WITH WILDLY DIFFERENT SENTENCING RANGES INVITE ARBITRARY ENFORCEMENT IN VIOLATION OF THE CONSTITUTION

The Government violates the due process guarantee of the Fifth and Fourteenth Amendments by taking away someone’s liberty under a criminal law so vague or so standardless that it invites arbitrary enforcement. *Johnson v. United States*, 576 U.S. 591, 595–96 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–358 (1983)). This guarantee applies to statutes defining elements of crimes as well as those fixing sentences. *Id.* (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)).

As noted above, pursuant to Section 843.5(B), Oklahoma punishes enabling child abuse by:

[I]mprisonment in the custody of the *Department of Corrections not exceeding life imprisonment*, **or** by imprisonment *in a county jail not exceeding one (1) year*, **or** by a fine of not less than *Five Hundred Dollars (\$500.00) nor more than Five Thousand Dollars (\$5,000.00)* **or** both such fine and imprisonment.

² The Tenth Circuit acknowledged the agreement among the parties as to the statutory interpretation:

All parties seem to assume that a charge under § 843.5(A) or (B) could be brought as a felony or a misdemeanor because the statute states . . . enabling child abuse shall “be punished by imprisonment in the custody of the Department of Corrections not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year,” Okla. Stat. tit. 21, § 843.5(B). This assumption is not warranted by the text of the statute or by Oklahoma precedent.

Walker, 74 F.4th at 1185.

Okla. Stat. tit. 21, § 843.5(B) (emphasis added). On the one hand, the life imprisonment and five thousand dollar fine maximum in the first part is well beyond the general two year imprisonment or one thousand dollars fine maximum for punishment of felonies under Section 9 of Title 21. On the other hand, the one year in county jail and five hundred dollars maximum in the second part is consistent with the general punishment for misdemeanors under Section 10 of Title 21.

The statute does not provide any guidance on the applicability of these wildly different sentencing ranges. Nor does it even attempt to tie the severity of punishment to the nature and severity of the criminal conduct and defendant's *mens rea*.³

³ Compare Oklahoma enabling child abuse statute, Okla. Stat. tit. 21, § 843.5(B), with Colorado's:

(1)(a) A person commits child abuse if such person causes an injury to a child's life or health, or permits a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health, or engages in a continued pattern of conduct that results in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately results in the death of a child or serious bodily injury to a child.

...

(7)(a) Where death or injury results, the following shall apply:

(I) When a person acts knowingly or recklessly and the child abuse results in death to the child, it is a class 2 felony except as provided in paragraph (c) of this subsection (7).

(II) When a person acts with criminal negligence and the child abuse results in death to the child, it is a class 3 felony.

(III) When a person acts knowingly or recklessly and the child abuse results in serious bodily injury to the child, it is a class 3 felony.

(IV) When a person acts with criminal negligence and the child abuse results in serious bodily injury to the child, it is a class 4 felony.

(V) When a person acts knowingly or recklessly and the child abuse results in any injury other than serious bodily injury, it is a class 1 misdemeanor; except that, if it is committed under the circumstances described in paragraph (e) of this subsection (7), then it is a class 5 felony.

(VI) When a person acts with criminal negligence and the child abuse results in any injury other than serious bodily injury to the child, it is a class 2 misdemeanor; except that, if it is committed under the circumstances

For the statute to be constitutional it must have some minimum standards to differentiate between conduct punishable by a maximum of one year in a county jail or a five hundred dollar fine versus conduct punishable by a maximum of life-time imprisonment in the Department of Correction. Proportionality of sentence based on seriousness of the crime is one of those “certain factors” under “principles of due process jurisprudence” that “are so fundamental that a State could not, as a substantive matter, refrain from recognizing them so long as it chooses to punish given conduct as a crime.” *Patterson v. New York*, 432 U.S. 197, 228-229, n. 13 (1977) (Powell, J., Brennan J., Marshall J., dissenting) (citing *Bailey v. Alabama*, 219 U.S. 219 (1911)).

“[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Section 843.5(B) is devoid of any such standards. It, thus, authorizes and encourages arbitrary and discriminatory enforcement, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments.

described in paragraph (e) of this subsection (7), then it is a class 5 felony.

(b) Where no death or injury results, the following shall apply:

(I) An act of child abuse when a person acts knowingly or recklessly is a class 2 misdemeanor; except that, if it is committed under the circumstances described in paragraph (e) of this subsection (7), then it is a class 5 felony.

(II) An act of child abuse when a person acts with criminal negligence is a class 2 misdemeanor; except that, if it is committed under the circumstances described in subsection (7)(e) of this section, then it is a class 5 felony.

Colo. Rev. Stat. § 18-6-401.

II. CIRCUIT COURTS DO NOT HAVE THE AUTHORITY TO INTRUDE UPON THE LEGISLATURE’S ROLE OR TO ALLOW PUNISHMENT GROSSLY DISPROPORTIONATE TO THE NATURE AND SEVERITY OF THE CRIMES IN VIOLATION OF THE CONSTITUTION

The Tenth Circuit responded to Ms. Walker’s challenge to the constitutionality of the Oklahoma statute with the astonishing announcement that Section 843.5(B) “only” and “plainly” describes “felony offenses” and therefore is “not rendered unconstitutionally vague by giving district courts wide discretion in sentencing.” *Walker*, 74 F.4th at 1183. This does not eliminate 843.5(B)’s unconstitutionality. It magnifies and adds to it.

The Tenth Circuit’s statutory interpretation completely disregards Section 843.5(B)’s embedded definition of misdemeanor offenses, which is consistent with Section 9 (under the same title). Eliminating misdemeanor enabling child abuse offenses, the Tenth Circuit declares that any act of enabling child abuse in Oklahoma, regardless of how minor the harm it has caused, is a felony offense punishable by life imprisonment at the judge’s discretion.

In its statutory interpretation the Tenth Circuit intrudes upon the Oklahoma legislature’s role by re-writing Section 843.5(B), which clearly identifies two ranges of punishment (and by implication offenses), and by categorically eliminating the possibility of a proportionate misdemeanor offense for minor acts of enabling child abuse in Oklahoma. This interpretation not only fails to remove the statute’s ambiguity it also violates the Eighth Amendment to the United States Constitution.

For more than a century, this Court in its Eighth Amendment analysis has scrutinized the nature of the crime and the relationship between the crime committed and the punishment imposed. *See, e.g., Weems v. United States*, 217 U.S. 349 (1910). Observing this relationship, in *Weems* the Court held:

Such penalties for such offenses amaze those who have formed their conception

of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that *it is a precept of justice that punishment for crime should be graduated and proportioned to offense.*

Id., at 366-367 (emphasis added). The Court has since “recognized that the decision in *Weems v. United States* ‘proscribes punishment grossly disproportionate to the severity of the crime.’” *Rummel v. Estelle*, 445 U.S. 263, 290 (1980) (quoting *Ingraham v. Wright*, 430 U.S. 651, 667 (1977)).

The Tenth Circuit’s analysis undermines structural democratic constraints designed to discourage legislatures from enacting penal statutes that expose every defendant convicted of a crime to a maximum sentence—as opposed to sentences proportional to the seriousness of the crime. *See Apprendi v. New Jersey*, 530 U. S. 466, 490, n. 16 (2000) (citing *Patterson*, 432 U.S. at 228-229, n. 13). Allowing such grossly disproportionate punishment (e.g., life imprisonment for a handprint-shaped bruise) violates both the Due Process Clauses of the Fifth and Fourteenth Amendment and the Cruel and Unusual Punishments Clauses of the Eighth and Fourteenth Amendments. *See Robinson v. California*, 370 U.S. 660, 667 (1962).

III. DISTRICT JUDGES’ INCREASE OF DEFENDANTS’ SENTENCES BASED ON JUDGE-FOUND FACTS WITHOUT THE AID OF A JURY OR THE DEFENDANTS’ CONSENT VIOLATES DEFENDANTS’ CONSTITUTIONAL RIGHT TO A JURY TRIAL

Pursuant to the Due Process Clauses of the Fifth and Fourteenth Amendments and the Sixth Amendment “each element of a crime” must be either admitted by the defendant or “proved to the jury beyond a reasonable doubt.” *Alleyne v. United States*, 570 U.S. 99, 104 (2013). Each and every fact that increases the sentence constitutes an element of a crime, *Apprendi*, 530 U.S. at 483, n. 10; *Alleyne*, 570 U.S. at 114, 116, and “must be found by a jury, not a judge,” *Cunningham v. California*, 549 U.S. 270, 281 (2007), “beyond a reasonable doubt.” *Alleyne*, 570 U.S. at 116.

For the district court to base its decision on a finding of “serious bodily injury,” the Constitution requires that the question—whether Ms. Walker knew or reasonably should have known that her child would be placed at a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty—be submitted to the jury and proven beyond a reasonable doubt. It was not.

As Justice Gorsuch pointed out in *United States v. Sabillon-Umana*, “[i]t is far from certain whether the Constitution allows” a district judge to “increase a defendant’s sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant’s consent.” 772 F.3d 1328, 1331 (10th Cir. 2014) (citing *Jones v. United States*, 135 S. Ct. 8 (2014) (Scalia, J., Thomas, J., Ginsburg J., dissenting from denial of certiorari)); *see also United States v. Watts*, 519 U.S. 148, 166 (1997) (defining and denouncing judge-found facts at sentencing phase that exposes a defendant to greater punishment than his actual conviction); *Blakely v. Washington*, 542 U.S. 296, 305 (2004) (holding that a judge-found fact at sentencing phase that enhances a defendant’s sentence without authorization from a jury verdict violates the Sixth Amendment).

Here, the Tenth Circuit held that the district court judge had the authority and discretion to determine whether Ms. Walker’s conduct constituted enabling a “serious bodily injury” for the purpose of 18 U.S.C.S. §§ 3559(f)(3) and 1365(h)(3), in order to impose the sentence of 120 months—63 months over the high end of the Guidelines range and twice the maximum for aggravated assault and battery in Oklahoma⁴—without submitting it to the jury (let alone the jury

⁴ “Aggravated assault and battery shall be punished by imprisonment in the State Penitentiary not exceeding five (5) years, or by imprisonment in a county jail not exceeding one (1) year.” Okla. Stat. tit. 21, § 647.

finding the fact beyond a reasonable doubt). *See United States v. Mejia-Luna*, 562 F.3d 1215, 1222 (9th Cir. 2009) (holding that “the jury must use its own judgment to assess the severity of the injuries” under 18 USCS § 1365(h)(3) and that “the existence and definition of serious bodily injury in a given case is primarily a jury question dependent upon an evaluation of all the circumstances of the injury or injuries.” (citations omitted)). This violated Ms. Walker’s Sixth Amendment right to trial by jury.

CONCLUSION

This case provides an appropriate vehicle to address (1) the constitutionality of standardless zero-to-life criminal statutes, (2) the Tenth Circuit’s intrusion upon the legislature’s role by pronouncing all acts of enabling child abuse felonies punishable by life imprisonment, without regard to the relationship between the crime committed and the punishment imposed, and (3) the long-percolating question whether the Sixth Amendment allows a district judge to increase a defendant’s sentence based on facts the judge finds without the aid of a jury.

Petitioner respectfully urges the Court to grant this writ of certiorari.

Respectfully submitted,

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