

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARWAN LAMB Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does nearly doubling a defendant's Guidelines sentence range based on a judge's finding by a preponderance of the evidence that the defendant committed another crime violate the defendant's Constitutional rights to due process of law and trial by jury?

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit:

- United States of America v. Marwan Lamb, N.D. Ohio Case No.3:21-cr-124, Judgment of Sentence entered December 9, 2022
- United States of America v. Marwan Lamb, Case No. 22-4031, 2023 U.S. App. LEXIS 33144 (6th Cir. December 13, 2023)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Marwan Lamb respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The United States Court of Appeals for the Sixth Circuit affirmed Lamb's sentence in an opinion not recommended for publication filed on December 13, 2023. United States v. Marwan Lamb, Case No. 22-4031, 2023 U.S. App. LEXIS 33144 (6th Cir. December 13, 2023). (Pet. App. 1a).

JURISDICTION

The Sixth Circuit's unpublished opinion was filed on December 13, 2023. There was no petition for rehearing. The mandate issued on January 4, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right to have a jury determine facts that affect a defendant's sentence beyond a reasonable doubt—a right secured by the Fifth and Sixth Amendments to the Constitution. It also involves the due process right to be sentenced based on accurate information.

The Fifth Amendment says that “No person shall . . . be deprived of life, liberty, or property, without due process of law . . .” U.S. Const. amend. V. The Sixth Amendment says that “In all criminal prosecutions, the accused

shall enjoy the right to . . . trial by an impartial jury . . . “ U.S. Const. amend VI.

STATEMENT OF THE CASE

Marwan Lamb pled guilty to possessing a firearm after a felony conviction, contrary to 18 U.S.C. § 922(g)(1). At sentencing the district court, over his objection, applied section 2K2.1(b)(6), of the United States Sentencing Guidelines to enhance his offense level score by four levels for possessing a firearm in connection with another felony offense.

The enhancement increased Lamb’s Guidelines sentence range from 27–33 months to 41–51 months. The district court sentenced him to serve 51 months in prison.

The enhancement was based on the out-of-court statements of L.W. that Lamb struck her with the firearm during a sexual encounter. Later, L.W. recanted her accusations, at least twice, saying that Lamb had helped her in the past when she was suicidal and that on the night in question he had “saved [her] life,” not beaten her with the firearm. L.W. refused to appear for the sentencing hearing, even though she was subpoenaed. In addition to her statements, the district court considered L.W.’s recorded 911 call, body camera footage taken by officers who responded to the call, and two recorded jail calls between L.W. and Lamb made on the same day, a few days after the

incident. See *United States v. Marwan Lamb*, 2023 U.S. App. LEXIS 33144 at *4–7.

Lamb appealed.

The Sixth Circuit rejected Lamb’s argument that his sentence was substantively unreasonable because the district court should not have used the preponderance-of-the-evidence standard to find that he used the firearm to assault L.W.

In making its ruling, the Sixth Circuit relied on its existing precedent that judicial fact-finding by a preponderance of the evidence at sentencing does not violate either the Fifth Amendment’s right to due process of law or the Sixth Amendment’s right to trial by a jury. *United States v. Marwan Lamb*, 2023 U.S. App. LEXIS 33144 at *16–17.

REASONS FOR GRANTING THE WRIT

This case involves important questions of law that should be decided by the Court concerning the use of judge-found facts that a defendant committed another offense to enhance his sentence under the Sentencing Guidelines.

Here, the district court used the preponderance of the evidence standard to accept the out-of-court accusation of L.W. that Lamb assaulted her. The court’s finding nearly doubled Lamb’s sentence range from 27–33 months to 41–51 months. Then the court sentenced him to serve 51 months

in prison. Without the judge's finding that Lamb assaulted L.W. the 51-month sentence is not reasonable for a mine-run felon-in-possession case. *Gall v. United States*, 552 U.S. 38, 60 (2007) (Scalia, J., concurring) (noting that under a system of substantive reasonableness review some sentences based on judge-found-facts will violate the constitutional right to trial by jury).

Yet, at present, the circuit courts permit proof by a preponderance of the evidence of other crimes to support increasing a sentence, even when a jury acquitted a defendant of the conduct. See *United States v. White*, 551 F.3d 381 (6th Cir. 2008) (en banc).

This Court should stop this practice.

It is not possible to reconcile permitting a judge to increase a defendant's sentence based on the judge's fact-finding by a preponderance of the evidence with the rights to trial by jury and proof beyond a reasonable doubt. The Court has held that judges may consider acquitted conduct at sentencing, but has also held that the appeals courts may review sentences for reasonableness, meaning that some sentences will violate the right to trial by jury because they can withstand review only because they are based on facts the judge found, not the jury. Compare *United States v. Watts*, 519 U.S. 148, 155 (1997) (holding that considering acquitted conduct does not violate

the Double Jeopardy Clause) with *Rita v. United States*, 551 U.S. 338, 370–71, 380–81 (2007) (Scalia, J., concurring in part and concurring in the judgment) (stating that “the notion of excessive sentences within the statutory range, and the ability of appellate courts to reverse such sentences, inexorably produces, in violation of the Sixth Amendment, sentences whose legality is premised on a judge’s finding of some fact (or combination of facts) by a preponderance of the evidence.”).¹

When a judge increases a sentence based on other offenses not admitted by the defendant or found by a jury beyond reasonable doubt the court erodes the constitutional rights to trial by jury and due process of law. The practice is inconsistent with historical practice which required all offense-related facts

¹ Three other justices agreed that substantive reasonableness review makes a Sixth Amendment violation possible and that an as-applied challenge could be raised in such a case. *Id.*, at 365–66, 368.

A majority of the justices dismissed Scalia’s argument because they said it relied on a hypothetical not presented in the case. *Id.*, at 353, 366. But when a case arose when the district court relied on facts about another offense to significantly increase sentences, the Court declined to grant certiorari. *Jones, et al. v. United States*, 574 U.S. 948 (2014).

In *Jones*, a jury convicted the petitioners of distributing crack cocaine and acquitted them of conspiring to distribute drugs. The court found by a preponderance of the evidence that the petitioners had engaged in the conspiracy, which meant that the quantity of drugs and the resulting sentence range under the Guidelines was much greater than it otherwise would have been. *Jones, et al. v. United States*, 574 U.S. at 948.

underlying a sentence to be stated in the indictment and be proven beyond a reasonable doubt. *United States v. White*, 551 F.3d at 393 (Merritt., J., dissenting). See *Jones v. United States*, 574 U.S. at 948–49 (Scalia, J., joined by Thomas & Ginsberg, J.J., dissenting from denial of certiorari) (arguing that permitting the imposition of “sentences that, but for a judge-found fact, would be reversed for substantive reasonableness” had “gone on long enough.”). See also *United States v. Magee*, 834 F.3d 30, 38 (1st Cir. 2016) (Torruella, J., concurring) (“[I]t is constitutionally suspect to drastically increase a defendant’s sentence based on conduct that was neither proven beyond a reasonable doubt nor to which the defendant pled guilty.”).

This issue is one that recurs and one that this Court should resolve. “Only a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty. That promise stands as one of the Constitution’s most vital protections against arbitrary government.” *United States v. Haymond*, 139 S.Ct. 2369, 2373 (2019) (plurality op.).²

Haymond did not involve the standard of proof for judicial fact finding at sentencing when the fact finding did not change a mandatory minimum or maximum sentence. But because the sentencing ranges determined under the

²Proof beyond a reasonable doubt is a fundamental due process right guaranteed by the Fifth Amendment. *In re Winship*, 397 U.S. 358, 363–64 (1970)

Sentencing Guidelines so powerfully influence sentences, its reasoning should extend to proof of facts about other offenses that affect the sentence range calculated under the Guidelines.

The Sentencing Guidelines are advisory, but they play an essential role at sentencing. They are the sentencing court’s “starting point and initial benchmark.” *Molina Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016) (quoting *Gall v. United States*, 552 U.S. at 49. The Guidelines are “the framework for sentencing” and “anchor . . . the district court’s discretion.” *Peugh v. United States*, 569 U.S. 530, 542, 549 (2013).

Because courts must accurately calculate the guidelines at sentencing, the Sixth Amendment right to a jury’s determination of facts involving other uncharged offenses should apply.

In theory, the Sentencing Commission could change the Guidelines to require that a jury find beyond a reasonable doubt that a defendant committed other crimes, but the Court should not wait for the Sentencing Commission to act. There is no guarantee that the Commission will act, nor that it will act in a timely fashion. Cf. *McClinton v. United States*, 143 S. Ct. 2400, 2403 (2023), (Sotomayor J., statement respecting denial of certiorari in a case challenging the use of acquitted conduct at sentencing) (“If the Commission does not act expeditiously or chooses not to act, . . . This Court

may need to take up the constitutional issues presented.”).

In addition, the use of L.W.’s accusation to increase Lamb’s sentence deprived him of his due process right to be sentenced based on accurate information. *Townsend v. Burke*, 334 U.S. 736 (1948).

Here, the district court found by a preponderance of the evidence that L.W.’s initial statements to police and on the jail calls proved that Lamb assaulted her with a gun. The court disregarded her recantations and her refusal to come to court when subpoenaed. The Sixth Circuit deferred to the district court’s credibility determination. The result was a significant increase in Lamb’s sentence, based on an uncorroborated out-of-court accusation.

Due process of law should demand more, at least when the information accuses the defendant of committing another crime. The best way to assure that a sentence is based on accurate and reliable information is to require proof beyond a reasonable doubt and to test the veracity of the witness through cross-examination in court. “[T]esting in the crucible of cross-examination” is the best way to assess reliability and thus to ensure that the court uses accurate information at sentencing. Cf. *Crawford v. Washington*, 124 S.Ct. 1354, 1370 (2004).

CONCLUSION

The Court should grant the petition for writ of certiorari.

Dated: January 2024

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