No. 17-950

In the Supreme Court of the United States

ROSS WILLIAM ULBRICHT, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

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In its memorandum, the government concedes that this petition should be held pending the Court's decision in *Carpenter* v. *United States*, cert. granted, No. 16-402 (argued Nov. 29, 2017), which presents a closely related question to the first question here. As to the second question, the government raises a series of brief objections, including that the question was not adequately preserved below. But the court of appeals squarely addressed and resolved that question, and there is therefore no impediment to the Court's review. The Court should grant the petition on both questions.

1. With respect to the first question presented, the government concedes that the petition should be held pending the Court's decision in *Carpenter*. See Mem. 1. For the reasons stated in the petition, the Court should grant review on that question, either before or after the Court decides *Carpenter*. See Pet. 11-24. At a minimum, however, petitioner agrees that a hold for *Carpenter* would be appropriate.

2. With respect to the second question presented, the government urges the Court to deny review, arguing primarily that this case is an "unsuitable vehicle." Mem. 3. The government's arguments lack merit.

a. The government contends that petitioner "did not raise his Sixth Amendment claim until his reply brief" in the court of appeals. Mem. 4. As a preliminary matter, the court of appeals actually passed on the question, rejecting it as "ha[ving] no support in existing law." Pet. App. 107a n.72. It is a familiar principle that an issue is preserved for this Court's review when it was pressed *or* "passed upon" below. *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation omitted); see *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

In any event, petitioner did press the Sixth Amendment claim below, and the government errs in suggesting that the question is subject only to plain-error review. As this Court has made clear, a party is free to shift and expand theories on appeal as long as the theory is "a new argument to support what has been his consistent claim." *Lebron*, 513 U.S. at 379. That is precisely what happened here, as the court of appeals recognized.

Contrary to the government's contention, the Sixth Amendment question would not be subject to plain-error review. In the district court, petitioner claimed that the sentencing judge should not consider conduct that was

"not charged" and "not encompassed within the jury's verdict," arguing not only that the preponderance-of-the-evidence standard was constitutionally insufficient but also that "Due Process and the Sixth Amendment" limit the information the court can consider in "increasing the length of a sentence"; in making that argument, petitioner relied heavily on this Court's Sixth Amendment precedents, including *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000); *United States* v. *Booker*, 543 U.S. 220 (2005); and *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013). C.A. App. 1007-1009. Indeed, given Second Circuit precedent allowing judicial factfinding at sentencing, see, *e.g.*, *United States* v. *Gomez*, 580 F.3d 94, 105 (2d Cir. 2009), more detailed argument on that issue would have been futile. See, *e.g.*, *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007).

Contrary to the government's suggestion, the Sixth Amendment question was also properly raised before the court of appeals. In his opening brief before the court of appeals, petitioner argued that his life sentence was substantively unreasonable "for several reasons," including the sentencing court's consideration of overdose deaths that were "not part of the charges." Pet. C.A. Br. 135-136. Petitioner's amici fleshed out that point, urging the Second Circuit to agree with petitioner that "a court should not base sentencing on uncharged conduct that has not been proved to a jury" and specifically citing the Sixth Amendment. Drug Policy Alliance C.A. Br. 14-15. The government addressed that argument in its brief, relying on Second Circuit precedent for its contention that uncharged conduct did not "need[] to be proven to a jury beyond a reasonable doubt [in order] to be considered at sentencing." U.S. C.A. Br. 152 n.39 (citing *Gomez*, 580 F.3d at 105). Petitioner addressed it further in reply, relying on Justice Scalia's dissent in *Jones* v. *United States*,

135 S. Ct. 8 (2014), and other authority. Pet. C.A. Reply Br. 60-62.

Critically, the court of appeals itself did not view the Sixth Amendment question as either forfeited or subject to plain-error review, identifying it as a "distinct but related argument" and proceeding to address it on the merits. See Pet. App. 106a-107a n.72. Accordingly, there is no preservation issue that would interfere with the Court's consideration of the Sixth Amendment question.

b. The government further notes that the Court has previously denied review as to the permissibility of judicial factfinding to justify an otherwise unreasonable sentence. See Mem. 5-6. That is true, but it is all the more reason to review the question here. Absent this Court's intervention, Justice Scalia's prediction continues to prove true: in case after case, lower courts are taking the Court's "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." *Jones*, 135 S. Ct. at 9 (opinion dissenting from the denial of certiorari). Multiple Justices and judges have recognized the need for the Court's intervention. See Pet. 25-27. The Court should make clear that this has "gone on long enough" and grant long-overdue review on the question. *Jones*, 135 S. Ct. at 9.

Indeed, this case is a particularly suitable vehicle for review because it involves an especially egregious example of judicial factfinding, with the district court imposing a life sentence with no possibility of parole on a young first-time offender for drug crimes that plainly could not support the sentence standing alone. See Pet. 30-31. The court of appeals acknowledged that the sentence would "give [it] pause," but found the sentence substantively reasonable because of the district court's findings. Pet. App. 100a-101a & n.68.

The government's only response is to note that this case does not involve acquitted conduct. If anything, however, that makes this case all the more egregious. In cases involving acquitted conduct, the charges have at least been vetted by the government and normally been subject to an indictment; in cases involving uncharged conduct, by contrast, the government is relying on conduct that the government itself may not believe is provable beyond a reasonable doubt. Lower courts have repeatedly recognized potential constitutional concerns with judicial factfinding in uncharged-conduct cases. See, *e.g.*, *United States* v. *Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.); *United States* v. *Briggs*, 820 F.3d 917, 922 (8th Cir. 2016), cert. denied, 137 S. Ct. 617 (2017); *United States* v. *Cassius*, 777 F.3d 1093, 1099 n.4 (10th Cir.), cert. denied, 135 S. Ct. 2909 (2015). This case is thus an excellent vehicle in which finally to resolve the propriety of sustaining an otherwise unreasonable sentence through judicial factfinding.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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