NO. 15-170

IN THE

Supreme Court of the United States

RYAN MORRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government concedes that the question presented—whether *post-conviction* evidence can establish that a Sixth Amendment violation did not infringe upon a defendant's substantial rights—has split the circuits. Br. in Opp. 12, 19-20. It also concedes that the question arises in this case because the district court improperly imposed a 10-year mandatory minimum sentence based largely on Morris's sentencing testimony, *see Alleyne v. United States*, 133 S. Ct. 2151 (2013), and because the First Circuit affirmed that unconstitutional sentence based on its view that post-conviction evidence of the minimum-enhancing fact (i.e., drug weight) was "overwhelming." Br. in Opp. at 3-5, 10. And the government does not dispute that Morris would have prevailed under a rule requiring automatic reversal, *see United States v. Lara-Ruiz*, 721 F.3d 554, 559 (8th Cir. 2013), a rule hinging on the district court's clear preference for a "significantly" shorter sentence, *compare* Pet. 7, *with United States v. McCloud*, 730 F.3d 600, 605-06 (6th Cir. 2013), or one barring consideration of a defendant's post-conviction admissions, *see United States v. Nordby*, 225 F.3d 1053, 1061 n.6 (9th Cir. 2000).

Rather, the government argues only that the split is too narrow, and the issue too transient, to warrant resolution. Br. in Opp. 12. Meanwhile, it takes aim primarily at the merits, arguing that this Court has *already* authorized appellate courts to use *post-conviction* evidence to determine whether a Sixth Amendment error affected a defendant's substantial rights. *Id.* at 8-12, 18. And, although the First Circuit relied on only the third prong of plain-

error review, the government contends that the First Circuit would be *required* to affirm Morris's sentence under the fourth prong, making this case a poor vehicle to resolve the acknowledged circuit split. *Id.* at 21-23.

The government's arguments are mistaken. The split is deep and important; this Court has yet to resolve the merits, and review is warranted in this case.

I. There is a Profound and Irreconcilable Conflict in the Lower Courts.

The existence of a circuit split is beyond dispute. Br. in Opp. 12 (referencing a "majority position"); *id.* at 19-20 (noting the split between the Sixth and Eighth Circuits). Contrary to the government's arguments, this split is neither transient nor insignificant. If left alone, it will yield enduring and stark geographic differences in the review of sentences for defendants, like Morris, whose Sixth Amendment rights have been violated.

A. The First Circuit's use of post-conviction evidence to analyze substantial rights is not narrowly confined to the "unusual situation" of *Alleyne* error. *See* Br. in Opp. 23. Instead, the appeals court applied a rule—now defended by the government—that *any* Sixth Amendment error may be deemed harmless based on "*evidence not submitted to a jury or established by a guilty plea*." *Id.* at 10 (emphasis added); *see* Pet. App. 6a-12a.

This rule is remarkably broad, especially because it is not limited to evidence that would likely

have been elicited at a trial. Here, although the First Circuit's substantial-rights analysis focused on Morris's sentencing testimony, Br. in Opp. 6, the court did not assert, and the government does not argue, that Morris likely would have waived his Fifth Amendment rights and testified if his case had gone to trial. Thus, his sentence was affirmed based on an appellate panel's "assumption" about what a *hypothetical* jury would have found if presented with testimony from the defendant that an *actual* jury almost certainly would not have heard. *See* Pet. App. 8a. Moreover, the government supposes that this sweeping rule is limited to cases where the indictment actually charged the minimum-enhancing fact, Br. in Opp. 14-15, 17-18, 22, but the First Circuit has explained that its rule "[does] not turn in any way on the presence or absence in the indictment of an allegation of a specific quantity of drugs." *United States v. McIvery*, 806 F.3d 645, 649 (1st Cir. 2015).

If permitted to stand, this novel expansion of plain-error review will subject all future defendants to grave risk: no matter the crime for which a defendant is actually convicted, an appellate court might affirm an enhanced sentence for a different, aggravated offense, so long as the reviewing court is satisfied that overwhelming evidence of that offense arose, from any source, any time after conviction.

Regardless, even if this petition implicated only defendants who have already been sentenced in violation of the Sixth Amendment, it would still warrant this Court's review. For these defendants, years of either freedom or imprisonment will be

determined not by any uniform rule of appellate review, but by the particular precedents of the circuit where their appeals are heard.

B. The petition identified three rules under which Morris could establish an impairment of his substantial rights: (1) the Eighth Circuit's rule of automatic reversal; (2) the Fourth and Sixth Circuit's rule focusing on whether the district court would have imposed a lower sentence absent the mandatory minimum; and (3) the Ninth Circuit's rule excluding post-conviction admissions by the defendant from its substantial-rights analysis. The government's attempts to downplay this conflict are unsuccessful.

1. The government concedes the decision below is incompatible with the Eighth Circuit's decision in *Lara-Ruiz*, which held on plain-error review that an *Alleyne* error required resentencing "without consideration of the strength of the evidence supporting" the minimum-enhancing fact. Br. in Opp. 17 (citing *Lara-Ruiz*, 721 F.3d at 559). Faced with this split, the government argues it is "not clear" whether the Eighth Circuit would follow *Lara-Ruiz* if the indictment charged the minimum-enhancing fact, as it did in Morris's case. *Id.* at 18. It is clear, however, because the Eighth Circuit has done just that.

In *United States v. Shaw*, 751 F.3d 918 (8th Cir. 2014), after a jury convicted the defendant of possessing a firearm during a drug-trafficking crime, the district court applied a seven-year mandatory minimum based on its finding at sentencing that the

firearm had been brandished. 18 U.S.C. § 924(c)(1)(A)(ii). Although the indictment alleged the defendant "did knowingly possess and/or brandish" the firearm, Br. of Appellee at 40, *United States v. Shaw*, 2014 WL 284304 (8th Cir. Jan. 14, 2014) (No. 13-2015), the government conceded *Lara-Ruiz* applied, *id.* at 20 & n.5, and the Eighth Circuit automatically reversed, even though the district court had imposed a sentence *above* the erroneously-applied minimum, *Shaw*, 751 F.3d at 923.

2. The petition identified five circuits—the First, Fourth, Sixth, Seventh, and Eleventh—that apply harmless-error tests to determine whether a Sixth Amendment error affected a defendant's substantial rights. Pet. 12-17. The government disputes that Morris would have prevailed in the Fourth and the Sixth Circuits, while also arguing that Morris would not have prevailed under the test just announced by the Third Circuit in *United States v. Lewis*, 802 F.3d 449, 457 (3d Cir. 2015) (en banc). Br. in Opp. 18-21 & n.7.

The government is correct that the Fourth and Sixth Circuits consider whether there is overwhelming evidence of the fact triggering the mandatory minimum, but it overlooks an important caveat: in these circuits, a clear showing that the district court favored a lower sentence trumps the overwhelming-evidence test and requires reversal. In *United States v. McCloud*, 730 F.3d 600 (6th Cir. 2013), the Sixth Circuit reaffirmed its rule that "a clear enough statement of what the district court would have done if it was wrong in its Sixth Amendment analysis permits a harmless error

finding." 730 F.3d at 605 (citing *United States v. Katzopoulos*, 437 F.3d 569, 577 (6th Cir. 2006)). Because the district court made such a clear statement here, *see* Pet. 7, Morris could have established a violation of his substantial rights under the what-would-the-district-court-have-done rule. *See also United States v. Robinson*, 460 F.3d 550, 558 (4th Cir. 2006) (applying a similar rule), *cited in United States v. DeLeon*, 539 Fed. Appx. 219 (4th Cir. Sept. 12, 2013).

The Third Circuit also focuses on the sentencing court's decision-making, and the First Circuit has acknowledged a conflict with that court. *McIvery*, 806 F.3d at 651 n.3. In particular, the Third Circuit "ask[s] whether [the defendant's] sentence would have been different" if the district court had imposed a sentence only on the crime of conviction, without applying the impermissible mandatory minimum. *Lewis*, 802 F.3d at 458. Morris could show a violation of his substantial rights under that test because the district court clearly stated that it would have imposed a "significantly" lower sentence, if it had sentenced Morris only on the crimes to which he pled guilty. Pet. 7.[1]

3. Most puzzlingly, the government sees "no reason"—none—that Morris would have

[1] The Third Circuit recognized that, in the case of an unpreserved *Alleyne* error, a defendant would also have to meet the fourth prong of plain-error review. But, contrary to the government's argument here (Br. in Opp. 20 n.7), the Third Circuit recognized that this analysis focuses on the quantum of "evidence at trial" concerning the minimum-enhancing fact. *Lewis*, 802 F.3d at 457 (citing *United States v. Cotton*, 535 U.S. 625, 632-33 (2002)); *see infra*, Part III.

prevailed in the Ninth Circuit. Br. in Opp. 16. But Morris would have prevailed under the rule that "new admissions at sentencing" are excluded from its substantial-rights inquiry, which is well-established and routinely applied. *See, e.g.*, *Butler v. Curry*, 528 F.3d 624, 648 n.16 (9th Cir. 2008); *United States v. Jordan*, 291 F.3d 1091, 1097 (9th Cir. 2002); *Morris v. Garcia*, No. 10-CV-2486-BRO(JC), 2015 WL 1788724, at *4 (C.D. Cal. Apr. 17, 2015) (citing rule); *Coffin v. Cate*, No. 2:10-CV-00026-JAM, 2013 WL 6230452, at *5 (E.D. Cal. Dec. 2, 2013) (same).

Nevertheless, the government guesses that the Ninth Circuit "might be willing to consider [a defendant's] under-oath [sentencing] testimony in evaluating the substantial-rights issue," Br. in Opp. 15, because the Ninth Circuit has said it is willing "to consider sentencing proceedings to 'help [it] adduce what other evidence might have been produced at trial.'" *Id.* at 14 (quoting *United States v. Salazar-Lopez*, 506 F.3d 748, 755 (9th Cir. 2007)). That speculation is refuted by the *very same sentence* quoted by the government. In adducing this "other evidence," the Ninth Circuit explained, it "do[es] not consider *new admissions* made at sentencing." *Salazar-Lopez*, 506 F.3d at 755 (emphasis added).

Nor is there reason to surmise, as the government has, that the Ninth Circuit might abandon its rule in the plain-error context. This rule *began* in a plain-error case where the Ninth Circuit declined to "consider any admissions made by [the defendant] at sentencing." *Nordby*, 225 F.3d at 1061 n.6. The government dismisses the language in

Nordby as dicta, Br. in Opp. 15 n.3, but that label does not make it so, and no Ninth Circuit panel has deemed *Nordby*'s pronouncements to be non-binding. *See, e.g.*, *Butler*, 528 F.3d at 648 (citing *Nordby*, 225 F.3d at 1061 n.6).

II. The Government is Wrong on the Merits.

The government's merits argument is mistaken: *Neder*, *Cotton* and *Recuenco*—cases involving jury trials—did *not* hold that substantial-rights analysis "may consider evidence *not submitted to a jury or established by a guilty plea* when determining whether an omitted offense element was supported by overwhelming evidence." Br. in Opp. 10 (emphasis added).

In *Neder v. United States*, 527 U.S. 1 (1999), the defendant was convicted of fraud after a trial in which the court refused to instruct the jury on materiality. Based on the evidence "at trial," this Court affirmed, concluding the instructional error was harmless. 527 U.S. at 16-17. In *United States v. Cotton,* 535 U.S. 625 (2002), the Court concluded the indictment's omission of a fact (i.e., drug quantity) that enhanced the statutory maximum sentence was harmless based, again, on its review of the trial evidence. 535 U.S. at 633. Finally, in *Washington v. Recuenco*, 548 U.S. 212 (2006), the jury found the defendant guilty of assault with a "deadly weapon," which carried a one-year minimum mandatory sentence, but the sentencing judge imposed a three-year sentence for assault with a "firearm." The basis for that judicial finding was—as in *Neder* and *Cotton*—the evidence that the government had actually presented at trial (i.e., that the defendant

had threatened his girlfriend with a gun). There is no indication, or even any hint, in these cases that appellate courts may deem a constitutional error harmless based on "evidence not submitted to a jury or established by a guilty plea." Br. in Opp. 10.

Nor does "it follow[]" from these cases that "a reviewing court may evaluate *the record as a whole*," including a defendant's admissions at sentencing, "to determine whether it was reversible error where the defendant's conviction failed to establish an element of the offense." Br. in Opp. 12 (emphasis added). Although the defendants in *Neder*, *Cotton*, and *Recuenco* had, of course, been sentenced before their cases reached this Court, the sentencing record nowhere figured into this Court's analyses.

Construing these three cases to support an expansive rule encompassing *post-conviction* evidence would make a mockery of this Court's Sixth Amendment jurisprudence. "The motivating principle behind [*Apprendi v. New Jersey*, 530 U.S. 466 (2000),] and *Alleyne* is that judges must not decide facts that change the mandatory maximum or minimum; juries must do so." *Lewis*, 802 F.3d at 456. When an appellate court affirms an unconstitutional sentence based on its own fact-finding, especially if based on evidence that no jury ever heard, it "perform[s] the very task that *Apprendi* and *Alleyne* instruct judges not to perform." *Id.; see United States v. Guerrero-Jasso*, 752 F.3d 1186, 1197 (9th Cir. 2014) (Berzon, J., concurring) (noting reliance on "post-conviction evidentiary submissions" contradicts Sixth Amendment "protection designed to assure that

juries rather than judges decide facts essential to determining the potential maximum sentence").

III. Morris's Case is an Appropriate Vehicle for this Court's Review.

The government has conceded all of the points necessary to conclude that certiorari should be granted not only on this issue but in this case. It is undisputed that the First Circuit relied solely on the substantial-rights prong of plain-error review; that the district court would have imposed a lower sentence if it had understood it was free to do so; and that the First Circuit relied on Morris's sentencing testimony without having any assurance that such evidence would have been presented at a jury trial (if had there been one). On this record, the Court can, and should, decide whether the substantial-rights inquiry should be automatic (Eighth Circuit); responsive to the district court's sentencing preferences (Third, Fourth, and Sixth Circuits); independent of new admissions at sentencing (Ninth Circuit); or instead focused on post-conviction evidence from the defendant (First, Seventh, and Eleventh Circuits).

The government's contrary argument is that, even if this Court were to conclude that Morris's substantial rights were violated, the First Circuit would be required to affirm on the fourth prong of plain-error review, which asks whether the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 735-37 (1993). *See* Br. in Opp. 21-23. This claim merely reprises the mistaken view that this Court has already authorized courts to

consider post-conviction evidence when conducting harmless- or plain-error review.

This Court has not looked beyond the record *at trial* when applying the fourth prong of the plain error test. *Lewis*, 802 F.3d at 457 (citing *Cotton*, 535 U.S. at 632-33); *see also Johnson v. United States*, 520 U.S. 461, 469-70 & n.2 (1997) (examining the trial record in evaluating the fourth prong of plain error).[2] And despite the government's suggestion, this Court has not carved out an exception for post-conviction "*admi*[*ssions*] *by the defendant*." Br. in Opp. 23 (quoting *Blakely v. Washington*, 542 U.S. 296, 303 (2004)). The very next page of *Blakely* makes clear that the relevant admissions must be "admitted in the guilty plea." *Blakeley*, 542 U.S. at 303-304. Here, Morris's plea did not admit any fact triggering a 10-year minimum sentence.

In other plain-error cases involving sentencing challenges, the Court has remanded for consideration of the next step of the four-part analysis. *See, e.g.*, *Henderson v. United States*, 133 S. Ct. 1121, 1130-31 (2013) (holding the appeals court erred in analyzing the second prong and remanding for consideration of the third and fourth prongs). It should do the same here. After all, it is difficult to understand how the First Circuit would be *required* to affirm based on the fourth prong of

[2] Unlike Morris, the defendants in *Cotton* and *Johnson* leap-frogged the third prong by contending their trials had been marred by "structural" errors not subject to harmless-error analysis. *Cotton*, 535 U.S. at 623; *Johnson*, 520 U.S. at 469.

plain-error review even if this Court were to endorse one or more of the rules in conflict with the decision below.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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