No. 06-999

In the Supreme Court of the United States

CELESTINE FAULKS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The Government does not dispute that Judge Rebecca Beach Smith "could not have sentenced" Faulks to three years' confinement "without finding the additional fact" that Faulks had committed a state crime, *Cunningham* v. *California*, 127 S. Ct. 856, 865 (2007), or that the Fourth Circuit rejected on the merits Faulks's claim that the imposition of that punishment violated her right to trial by jury. Instead, the Government continues to press arguments that this Court repeatedly has rejected in holding that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely* v. *Washington*, 542 U.S. 296, 313 (2004). The Government's analysis demonstrates that this Court's intervention is necessary to prevent the continued imposition of lengthy punishments solely on the basis of judicial factfinding.

I. FAULKS'S CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED.

The Government, perhaps recognizing that its position on the merits is untenable, asserts at the close of its brief that this case is "an inappropriate vehicle" for resolving the questions presented because Faulks has "forfeited" her claim. Opp. 16. This assertion is inconsistent with the proceedings in the district court, the Government's submission in the Court of Appeals, and the Fourth Circuit's decision on the merits.

1. ***The claim was preserved in the district court.*** At the outset of the revocation proceeding, Faulks's counsel requested that a jury resolve the

allegations against her. C.A. App. 31-33. Judge Smith responded that the "burden of proof on federal violations is by a preponderance of the evidence," and "in a criminal trial is beyond a reasonable doubt," and that revocation and a "criminal trial . . . are separate matters." *Id.* at 34. This colloquy demonstrates that Judge Smith considered and rejected the claim raised here.[1] See *Cool* v. *United States*, 409 U.S. 100, 102 n.2 (1972) (claim preserved because trial judge's "colloquy with the defense attorney" demonstrated that the court "understood" the objection). Insofar as Judge Smith's responses to the objection are identical to the Government's arguments in this Court, Opp. 11, the Government's belated assertion that the claim is unpreserved is particularly puzzling.

2. ***The Government has waived its forfeiture claim.*** Before the Fourth Circuit, and in response to Faulks's *pro se* and counseled briefs urging that her sentence violated the Sixth Amendment, the Government did not contest that Faulks's objection had preserved the issue.[2] The Government has therefore waived that contention. See, *e.g.*, *United States* v. *Quiroz*, 22 F.3d 489, 491 (2d Cir. 1994)

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[1] Judge Smith added, "I frankly am not going to hold [the proceeding] up any further"; counsel again noted his "exception for the record." C.A. App. 34, 35. In case any doubt remained that the court was apprised of the objection, Faulks *personally* asserted that she was entitled to, and had been denied, a "fair trial," *id.* at 188; see *United States* v. *Sanders*, 247 F.3d 139, 147 (4th Cir. 2001) (*Apprendi* "dictates what fact-finding procedure must be employed to ensure a fair trial").

[2] As the Fourth Circuit had not yet decided the Sixth Amendment issue raised here, the Government had every incentive to argue that Faulks had not preserved her claim.

("[The waiver] principle is also applicable to the Government when it has neglected to argue on appeal that a defendant has failed to preserve a given argument in the district court"; in that situation, "courts have consistently held that the Government has 'waived waiver'") (collecting cases).[3] The Government's attempt to revisit the adequacy of Faulks's objection is especially ironic because it contradicts the Government's analysis at the certiorari stage in *United States* v. *Booker*, 543 U.S. 220 (2005). Reply Brief for the United States in Support of Pet. for Cert. in *United States* v. *Booker*, No. 04-104 (assuring the Court that Booker's case was an appropriate vehicle for certiorari review, notwithstanding that Booker had not raised his claim in the district court, because the Government had waived forfeiture by failing to raise it in the Seventh Circuit).[4]

3. ***The Fourth Circuit ruled on the merits.*** The Court of Appeals rejected Faulks's claim as a

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[3] Because the Government failed completely to brief the issue below, the Fourth Circuit would have refused to consider the Government's waiver argument even if it had been proffered at oral argument in that court. See, *e.g.*, *United States* v. *Metzger*, 3 F.3d 756, 757 (4th Cir. 1993). The Government's reliance in this Court on an argument that would have been held waived *below* is particularly inappropriate.

[4] The Court properly accepted the Government's analysis, engaging in plenary review of claims Booker did not raise in the district court. Compare *United States* v. *Booker*, 357 F.3d 508, 515 (7th Cir. 2004) ("Because the Government does not argue that Booker's Sixth Amendment challenge to the Guidelines was forfeited by not being made in the district court, we need not consider the application of the doctrine of plain error") with *Booker*, 543 U.S. at 220 (exercising plenary review of Booker's claims).

matter of law, nowhere suggesting that her objection was insufficient to preserve her claims for purposes of appeal. Pet. App. 2a; see *Sabbath* v. *United States*, 391 U.S. 585, 588 n.1 (1968) (rejecting the Government's contention that petitioner "failed to adequately raise" an objection; when "the Court of Appeals [has] decided the issue on the merits . . . we are justified in likewise doing so"). As this Court has long recognized, "[i]t suffices for our purposes that the court below passed on the issue presented." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 (1991).

II. THE GOVERNMENT'S ANALYSIS, LIKE THAT OF THE COURTS OF APPEALS, IS IRRECONCILABLE WITH *APPRENDI* AND *BLAKELY*.

In urging that "the Sixth Amendment [does] not apply to supervised release revocation" proceedings, Opp. 11, the Government, like the courts of appeals, advances positions this Court has squarely rejected in favor of a "'bright-line rule'" that "facts essential to punishment [may not be] reserved for determination by the judge." *Cunningham*, 127 S. Ct. at 869.[5] The parties agree that Faulks's sentence was authorized solely by judicial factfinding. "'[T]hat should be the end of the matter.'" *Id.* at 873 (quoting *Blakely*, 530 U.S. at 490).

1. ***Legislative labeling.*** The Government contends that *Blakely* applies only to "initial sentencing proceedings," Opp. 8, reminiscent of its assertion in *Apprendi* v. *New Jersey*, 530 U.S. 466

[5] Tellingly, the Government fails even to cite *Cunningham*.

(2000), that the jury-trial guarantee had "never been applied at sentencing." Brief for the United States as *Amicus Curiae* in *Apprendi* v. *New Jersey*, No. 99-478. But it is the punishment imposed—not the label given to the proceeding at which judicial factfinding occurs—that is constitutionally relevant. *Blakely*, 542 U.S. at 303; *Ring* v. *Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("[T]he fundamental meaning of the jury-trial guarantee" "is that all facts essential to the imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt").

2. *Attributing new punishment to old proceedings.* The Government contends that imprisonment for violations of supervised release is "already authorized by the jury verdict on the underlying offense." Opp. 8; contra 18 U.S.C. § 3583(e)(3) (requiring additional judicial factfinding). The Government previously has asked the Court to allow a "jury's finding of guilt" to "open[] the door to a long prison sentence." Brief for the United States as *Amicus Curiae* in *Apprendi* v. *New Jersey*, No. 99-478. The Court instead has held that the jury cannot be "relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 306.

The Government relies on *Johnson* v. *United States*, 529 U.S. 694 (2000), for the similarly irrelevant proposition that punishment imposed upon revocation is "'attributed'" to the original conviction or "'part of the penalty for the initial

offense.'"[6] Opp. 9. The jury-trial right was not raised, implicated, or addressed by *Johnson*, Pet. 24-26, and the Government does not contend otherwise. In any event, *Johnson* did not suggest that the facts found by the jury are alone sufficient to authorize punishment at a revocation proceeding years later, and that contention is belied by plain statutory text. See 18 U.S.C. § 3583(e)(3) (making additional judicial factfinding prerequisite to the imposition of punishment). "Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge," "is the very inquiry *Apprendi*'s 'bright-line rule' was designed to exclude." *Cunningham*, 127 S. Ct. at 869.

3. *Administrative crisis.* The Government asserts that applying *Blakely* here "would seriously undermine [its] interest in effectively supervising prisoners." Opp. 12. The Government repeatedly has failed to dissuade the Court from enforcing the jury-trial guarantee on such grounds. *Blakely*, 542 U.S. at 313 ("Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency . . . of criminal justice."). And, as in *Blakely*, the Government's efficiency concerns are

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[6] The Government's characterization of Faulks's punishment as a "modifi[cation]" of her original sentence, Opp. 8, is similarly irrelevant: Judge Smith, acting alone, "modified" Faulks's freedom into a three-year prison term. And the Government's supposed "established understanding" that a defendant's conviction results in a "'surrender'" of the right to trial by jury in subsequent proceedings, Opp. 12, is irreconcilable with both this Court's settled approach to Sixth Amendment waiver and the outcomes in *Apprendi* and *Blakely* themselves. Pet. 14.

entirely speculative.[7]

4. ***Unanimity in the lower federal courts.*** The Government asks the Court to disregard a clear violation of the Sixth Amendment because eight circuits have rejected this challenge under flawed and conflicting rationales. The unanimity of results in the courts of appeals, however, is a reason to grant rather than oppose certiorari here.

Review is warranted where a federal "court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The Fourth Circuit's decision and those of its sister circuits contradict both *Apprendi* and *Blakely*.[8]

The courts of appeals have hesitated before to apply *Apprendi* to modern sentencing reforms, and their opinions in this context leave no doubt that the circuits are similarly disinclined to apply *Blakely* to supervised release. The courts of appeals' unanimity is not indicative of the power of the Government's arguments but the lower courts' shared aversion to the imagined consequences of "implement[ing]"

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[7] Congress originally required violations to be proved to a jury, Pet. 8-9, and there is no evidence that this had any effect on the Government's ability to supervise former offenders.

[8] The Government attempts to obscure that Judge Smith found disputed facts, asserting that the "only fact in dispute . . . was whether the person depicted in [the] bank surveillance photos . . . was petitioner" and that this was not a "serious dispute." Opp. 18. Identity was the *critical* fact prerequisite to Faulks's three-year prison term; she disputed it, and her guilt, vigorously. Indeed, Faulks's counsel stated, "I would just say to the court that—and as an officer of the court, I mean this absolutely—I have looked, Your Honor, at [the Government's photographic evidence] . . . I mean, it is just—it does not bear any resemblance to [Faulks]. It really doesn't." C.A. App. 174.

Blakely "in a principled way." *Ring*, 536 U.S. at 613 (Kennedy, J., concurring). Further deliberation among the few remaining circuits is unlikely to enlighten this Court's analysis.

"This Court has repeatedly held that . . . any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge." *Cunningham*, 127 S. Ct. at 863-64. That rule is regularly violated in revocation proceedings throughout the Nation. Only this Court's intervention will redress the routine abrogation of "a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 306.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition should be granted.

Respectfully submitted.

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