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

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends (Pet. 11-24) that the government violated his Fourth Amendment rights by acquiring, pursuant to a court order issued under 18 U.S.C. 3123, certain information associated with his Internet communications, not including the contents of those communications. Petitioner further contends (Pet. 24-31) that the district court violated his Sixth Amendment rights through judicial factfinding in the determination of his sentence within the statutory range. For the reasons set forth below, the petition for a writ of certiorari should be held pending the Court's decision in *Carpenter* v. *United States*, No. 16-402 (argued Nov. 29, 2017), and then disposed of as appropriate in light of that decision. Further review of petitioner's Sixth Amendment claim is not warranted.

1. Petitioner argues (Pet. 11-24) that the government violated his Fourth Amendment rights by acquiring, pursuant to a court order issued under 18 U.S.C.

3123, information relating to electronic communications sent to or from various devices, including petitioner's home wireless router and laptop. The collected information included the source and destination Internet-protocol (IP) addresses and ports of transmission associated with those communications, but it did not include the contents of any communications. Pet. App. 30a-31a. The court of appeals correctly held that the principles set forth in *Smith* v. *Maryland*, 442 U.S. 735 (1979), establish that petitioner had no reasonable expectation of privacy in such Internet routing information. See Pet. App. 32a-35a. The other courts of appeals that have considered the issue have reached the same conclusion. See, *e.g.*, *United States* v. *Caira*, 833 F.3d 803, 806-809 (7th Cir. 2016), petition for cert. pending, No. 16-6761 (filed Sept. 11, 2016); *United States* v. *Christie*, 624 F.3d 558, 573-574 (3d Cir. 2010), cert. denied, 562 U.S. 1236 (2011); *United States* v. *Beckett*, 369 Fed. Appx. 52, 56 (11th Cir. 2010) (per curiam); *United States* v. *Perrine*, 518 F.3d 1196, 1204-1205 (10th Cir. 2008); *United States* v. *Forrester*, 512 F.3d 500, 510 (9th Cir.), cert. denied, 555 U.S. 908 (2008).

Petitioner contends (Pet. 14) that his Fourth Amendment challenge is "closely related" to the issue currently pending before this Court in *Carpenter* v. *United States*, No. 16-402 (argued Nov. 29, 2017). This Court granted review in *Carpenter* to decide whether the government's acquisition, pursuant to a court order issued under 18 U.S.C. 2703(d), of historical cell-site records created and maintained by a cell-service provider violates the Fourth Amendment rights of the individual customer to whom the records pertain. The cell-site records at issue in *Carpenter* are distinct from the Internet routing information at issue here, and petitioner

acknowledges that the Court's decision in *Carpenter* may not resolve the Fourth Amendment question in his case. See Pet. 14-16. Nevertheless, since granting certiorari in *Carpenter*, the Court has been holding a petition for a writ of certiorari in *Caira* v. *United States*, No. 16-6761 (filed Sept. 11, 2016), that asks the Court to consider the Fourth Amendment's application to certain IP address information. Because petitioner's case presents a similar Fourth Amendment question and the Court appears to be holding *Caira* for *Carpenter*, the Court may wish to also hold this petition pending the decision in *Carpenter* and then dispose of this petition as appropriate in light of that decision.

2. Petitioner also contends (Pet. 24-31) that the district court violated his Sixth Amendment rights through judicial factfinding in the determination of his sentence within the statutory range. The court of appeals correctly rejected that contention. The court's decision does not conflict with any decision of this Court or any other court of appeals. And this case would be an unsuitable vehicle to consider the question in any event.

This Court has consistently held that district courts may find facts that are relevant in selecting a sentence within the statutory range for an offense of conviction. See, *e.g.*, *Alleyne* v. *United States*, 570 U.S. 99, 116-117 (2013); *Rita* v. *United States*, 551 U.S. 338, 352 (2007); *Cunningham* v. *California*, 549 U.S. 270, 285 (2007); *United States* v. *Booker*, 543 U.S. 220, 233 (2005). Petitioner nevertheless argues (Pet. 27-29) that, without the district court's factual findings, his sentence would have been substantively unreasonable and thus, even if judicial factfinding that does not alter the statutory sentencing range is generally permitted, the judicial factfinding in this case violates the Sixth Amendment. But

no decision of this Court has embraced such an as-applied challenge to judicial factfinding, and the courts of appeals have uniformly rejected similar claims. See *United States* v. *Crosby*, 397 F.3d 103, 109 n.6 (2d Cir. 2005), abrogated on other grounds by *United States* v. *Fagans*, 406 F.3d 138, 140-142 (2d Cir. 2005); *United States* v. *Grier*, 475 F.3d 556, 565-568 (3d Cir.) (en banc), cert. denied, 552 U.S. 848 (2007); *United States* v. *Benkahla*, 530 F.3d 300, 312 (4th Cir. 2008), cert. denied, 555 U.S. 1120 (2009); *United States* v. *Hernandez*, 633 F.3d 370, 373-374 (5th Cir.), cert. denied, 564 U.S. 1010 (2011); *United States* v. *White*, 551 F.3d 381, 383-385 (6th Cir. 2008) (en banc), cert. denied, 556 U.S. 1215 (2009); *United States* v. *Ashqar*, 582 F.3d 819, 824-825 (7th Cir. 2009), cert. denied, 559 U.S. 974 (2010); *United States* v. *Treadwell*, 593 F.3d 990, 1017-1018 (9th Cir.), cert. denied, 562 U.S. 916 and 562 U.S. 973 (2010); *United States* v. *Redcorn*, 528 F.3d 727, 745-746 (10th Cir. 2008); *United States* v. *Smith*, 741 F.3d 1211, 1226-1227 & n.5 (11th Cir. 2013), cert. denied, 135 S. Ct. 704 (2014); *United States* v. *Jones*, 744 F.3d 1362, 1369-1370 (D.C. Cir.), cert. denied, 135 S. Ct. 8 (2014).

In any event, this case would be an unsuitable vehicle for considering whether judicial factfinding that informs a district court's selection of a sentence within the statutory sentencing range can violate the Sixth Amendment in particular cases. Petitioner did not raise his Sixth Amendment claim until his reply brief in the court of appeals. See Pet. App. 106a n.72. For that reason, the court of appeals discussed the claim only in a footnote, see *ibid.*; the government did not brief the issue; and the claim would be reviewable in this Court only for plain error, see Fed. R. Crim. P. 52(b); *Puckett* v. *United States*, 556 U.S. 129, 135 (2009). Petitioner

would thus be entitled to relief only if he could show (1) an error (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (citation omitted). In light of the courts of appeals' unanimous rejection of his Sixth Amendment argument, petitioner cannot demonstrate error that is "clear or obvious, rather than subject to reasonable dispute." *Ibid.*; see Pet. App. 107a n.72 ("[Petitioner's] argument * * * has no support in existing law.").[1]

Since *Booker* and *Rita*, this Court has repeatedly denied petitions presenting as-applied Sixth Amendment challenges to judicial factfinding at sentencing. See, *e.g.*, *Estrada* v. *United States*, 137 S. Ct. 1063 (2017) (No. 16-5631); *Hebert* v. *United States*, 137 S. Ct. 37 (2016) (No. 15-1190); *Smith* v. *United States*, 135 S. Ct. 704 (2014) (No. 13-10424); *Jones* v. *United States*, 135 S. Ct. 8 (2014) (No. 13-10026); *Garcia* v. *United States*, 565 U.S. 1160 (2012) (No. 11-6626); *Culberson* v. *United States*, 562 U.S. 1289 (2011) (No. 10-7097); *Taylor* v. *United States*, 562 U.S. 1181 (2011) (No. 10-5031); *Gibson* v. *United States*, 559 U.S. 906 (2010) (No. 09-6907); *Magluta* v. *United States*, 556 U.S. 1207 (2009) (No. 08-731); *Bradford* v. *United States*, 552 U.S. 1232 (2008)

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[1] This case does not involve the consideration of acquitted conduct, which is the subject of various individual circuit-judge opinions cited by petitioner. See, *e.g.*, *United States* v. *Bell*, 808 F.3d 926, 927-928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc) (suggesting that, although not constitutionally required, district courts possess the authority to disregard acquitted conduct when selecting a sentence within the statutory range and should do so "in appropriate cases").

(No. 07-7829); *Alexander* v. *United States*, 552 U.S. 1188 (2008) (No. 07-6606). Further review of petitioner's Sixth Amendment claim is likewise not warranted here.[2]

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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[2] The government waives any further response to the petition unless this Court requests otherwise.