NO.

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

PETITION FOR WRIT OF CERTIORARI

Matthew R. Segal
Counsel of Record
Nashwa Gewaily
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS
211 Congress Street, 3d Floor
Boston, MA 02110
(617) 482-3170
MSegal@aclum.org
NGewaily@aclum.org

Daniel N. Marx
Daniel McFadden
Alice Yu
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02110
(617) 832-1000
DMarx@foleyhoag.com
DMcFadden@foleyhoag.com
AYu@foleyhoag.com

August 5, 2015

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

This Court has held that the Sixth Amendment generally requires that any fact used to increase a defendant's mandatory minimum sentence must be found beyond a reasonable doubt by a jury or admitted by the defendant in connection with a guilty plea. *Alleyne v. United States*, 133 S. Ct. 2151 (2013). The question presented here is:

> Whether the First Circuit erroneously held—in conflict with the Fourth, Sixth, Eighth, and Ninth Circuits, but consistent with the Seventh and Eleventh Circuits—that a mandatory minimum sentence imposed in violation of *Alleyne*, based on a fact found by a judge by a preponderance of the evidence at sentencing, can be deemed not to have affected the defendant's substantial rights, if an appellate court concludes that the fact was supported by "overwhelming evidence" offered only at sentencing, but never presented to a jury or admitted by the defendant in connection with a guilty plea.

[This page is intentionally left blank.]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

FEDERAL CIRCUIT COURT CASES:

CONSTITUTIONAL PROVISIONS:

STATUTES:

RULES:

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ryan Morris respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 784 F.3d 870. App. 1a–12a. The district court's sentencing pronouncements are unreported. App. 13a–27a.

JURISDICTION

The court of appeals affirmed the judgment of the district court on May 7, 2015. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS, AND RULE INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, * * * nor be deprived of life, liberty, or property, without due process of law * * * ."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to * * * trial, by an impartial jury."

In relevant part, 21 U.S.C. § 841 provides:

> (a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; * * *
>
> (b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> > (1) (A) In the case of a violation of subsection (a) of this section involving— * * *
> >
> > (iii) 280 grams or more of [crack cocaine] * * *
> >
> > such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life * * * .
> >
> > (B) In the case of a violation of subsection (a) of this section involving—
> >
> > (iii) 28 grams or more of [crack cocaine] * * *

> such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years * * * .

In relevant part, 21 U.S.C. § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Rule 52 of the Federal Rules of Criminal Procedure provides:

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT

The Sixth Amendment generally requires that any fact used to increase a defendant's mandatory minimum sentence must be found beyond a reasonable doubt by a jury or admitted by the defendant in connection with a guilty plea. *Alleyne v. United States*, 133 S. Ct. 2151 (2013). In this case, arising from a guilty plea to a drug offense, the

district court violated the Sixth Amendment by imposing a 10-year mandatory minimum sentence based on a fact—*i.e.*, drug weight—that the judge found by a preponderance of the evidence at sentencing. The sentence was imposed before *Alleyne*, which issued while Morris's direct appeal was pending. It is undisputed that the district court would have imposed a lower sentence if it had known that imposing the 10-year mandatory sentence was unconstitutional.

The First Circuit nevertheless held—in conflict with the Fourth, Sixth, Eighth, and Ninth Circuits, but consistent with the Seventh and Eleventh Circuits—that this unconstitutional sentence did not affect Morris's substantial rights because, in the appellate court's view, the district court's factual finding as to drug weight was overwhelmingly supported by evidence adduced only at sentencing. This evidence was neither presented to a jury nor admitted by Morris at his plea colloquy.

A. Proceedings in the District Court

While investigating a cocaine enterprise, the Drug Enforcement Agency ("DEA") intercepted phone calls in which Morris discussed drug activity. On December 2, 2010, DEA agents searched Morris's apartment and found 5.5 grams of powder cocaine, 123.5 grams of cocaine base ("crack cocaine"), 28 grams of marijuana, as well as scales, pans, and strainers. On December 23, 2010, the government charged Morris with conspiracy to distribute more than 500 grams of powder cocaine, which carries a mandatory minimum of five years' imprisonment, and more than 280 grams of crack cocaine, which

carries a mandatory minimum of 10 years' imprisonment. App. 3a.

Morris pled guilty to a drug conspiracy on October 4, 2012. He did not, however, admit responsibility for a particular quantity of either powder or crack cocaine. App. 3a. In fact, during the plea colloquy, the district court did not mention the quantities charged in the conspiracy count. Thus, at the conclusion of his plea, Morris was convicted of a conspiracy, but not a conspiracy carrying a 10-year mandatory minimum sentence, which constitutes a separate, aggravated offense under *Alleyne*.[1] Yet the district court subsequently imposed a 10-year mandatory minimum sentence based on a fact—Morris's responsibility for at least 280 grams of crack cocaine—that the district court found by a preponderance of the evidence at sentencing on March 12, 2013.

Although the indictment had alleged 280 grams of crack, the government did not mention that allegation at the plea and had no apparent intention to prove that quantity at sentencing. A presentence report ("PSR"), which the probation office wrote "based on the government's investigation," concluded that Morris was responsible for only 123.5 grams of crack. App. 3a. Because the PSR also concluded that Morris was responsible for 10 kilograms of powder cocaine, and because 5 kilograms of cocaine triggers a 10-year mandatory minimum under 21 U.S.C.

[1] Morris also pled guilty to one count of possessing more than 28 grams of crack with the intent to distribute. That conviction, for which Morris was sentenced to a mandatory minimum of five years' imprisonment, is not at issue here. *See* App. 3a n.1.

§ 841(b)(1)(A)(ii), the PSR recommended a 10-year mandatory minimum sentence. *Id.* Likewise, a DEA detective testified at sentencing that Morris was responsible for powder cocaine, rather than crack cocaine, sufficient to trigger a 10-year mandatory minimum. *Cf.* App. 14a, 23a–24a.

Morris disputed the government's allegation at sentencing that he had dealt in kilograms of powder cocaine. He testified that, on several occasions, he purchased powder cocaine for the purpose of cooking it into crack cocaine. Emphasizing that he was only estimating and was "not that good with dates," Morris posited that he engaged in nine of these transactions involving 62 grams each, and another three transactions involving 28 grams each. App. 5a, 15a–20a. But Morris's counsel argued that only four specifically identified crack cocaine purchases—totaling 248 grams—could be attributed to Morris under a preponderance-of-the-evidence standard. App. 5a; 21a–24a.

The district court rejected the government's claim that Morris was responsible for 5 kilograms of powder cocaine, but it nevertheless applied a 10-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A)(iii) because it found that he was responsible for more than 280 grams of crack cocaine. The judge put Morris's responsibility at 765.5 grams of crack, which he said was "conservative," App. 5a, while also noting that he was "dealing with proof by a preponderance." App. 20a. The district court nowhere asserted that the evidence of drug weight was "overwhelming."

The district judge imposed a 10-year sentence, while repeatedly stating that he would have imposed a "significantly" lower sentence if he had thought himself free to do so. App. 5a, 24a–26a. In other words, in the district court's judgment, Morris is serving an unjust and unwarranted mandatory minimum sentence.

B. Proceedings in the Court of Appeals

Morris appealed to the First Circuit. While his appeal was pending, this Court decided *Alleyne*, which held that the Sixth Amendment generally requires that any fact that increases a mandatory minimum sentence be submitted to a jury. Because Morris's trial counsel had not preserved a Sixth Amendment objection to his sentence, the First Circuit reviewed it for plain error. App. 6a; Fed. R. Crim. P. 52(b). There is plain error warranting reversal if the defendant shows (1) an error (2) that is clear and obvious, (3) affecting his substantial rights, and (4) seriously impairing the integrity of judicial proceedings. *United States v. Olano*, 507 U.S. 725 (1993).

The First Circuit acknowledged that the district court had, in fact, been free to impose a sentence below 10 years. By applying a 10-year mandatory minimum based on a finding at sentencing that Morris was responsible for more than 280 grams of crack cocaine, the district court had committed a Sixth Amendment error that was clear and obvious under the first two prongs of plain error review. App. 5a. But the court of appeals held that this error did not affect Morris's substantial

rights, for the purposes of the third prong, and it affirmed his sentence solely on that basis. App. 12a.

The court of appeals' substantial-rights analysis centered on an "overwhelming evidence test." App. 6a–12a. In the First Circuit, this test uses "'overwhelming evidence of the requisite drug types and quantities' * * * as a proxy for determining whether the *Alleyne* error contributed to the result," thereby affecting the defendant's substantial rights. App. 7a (quoting *United States v. Harakaly*, 734 F.3d 88, 95 (1st Cir. 2013)). The First Circuit held that using this "proxy" in Morris's case, which arose from a plea, required imagining a trial that never occurred and evidence that was never presented to a jury that was never empaneled. The court, therefore, relied on an "assumption" about what may have happened if Morris had gone to trial (which he did not); if the same evidence adduced at sentencing had been elicited at that trial (which is unlikely, given that Morris probably would not have testified at trial); and if the question of Morris's responsibility for 280 grams of cocaine had then been "entrusted to a properly instructed, rational jury" (which it was not). App. 6a–12a.

Inserting Morris's own sentencing testimony into that string of hypotheticals about a non-existent jury trial, the First Circuit concluded that there was "overwhelming evidence that Morris was responsible for at least 280 grams of crack." App. 12a. It did not matter, under this appellate approach to Sixth Amendment error, that a jury would have heard this evidence only if Morris had not pled guilty and had not exercised his right against self-incrimination at trial.

Nor did it matter, in the First Circuit's view, that the sentencing judge "said that he would impose a lower [sentence] if that were open to him." App. 8a (quoting Morris C.A. Reply Br. at 2). Although the First Circuit's prior Sixth Amendment cases had focused on what sentence district courts would have imposed if they had correctly understood Sixth Amendment law, the court of appeals concluded that those precedents had been rendered inapplicable to *Alleyne* errors by virtue of its decision in *Harakaly*. App. 8a. Thus, relying on plain error's third prong, the First Circuit concluded that the district court's Sixth Amendment error had not affected Morris's substantial rights even though the district court unquestionably would have imposed a lower sentence if it had sentenced Morris after *Alleyne* was decided. The First Circuit did not address plain error's fourth prong: whether this result seriously impairs the integrity of judicial proceedings, and it is not at issue in this petition. App. 6a–12a.

REASONS FOR GRANTING THE PETITION

This Court should resolve the acknowledged split among the circuits concerning how to assess whether a violation of the Sixth Amendment's jury trial guarantee has affected a defendant's substantial rights.

The Court should grant certiorari to resolve a circuit split regarding whether or when sentences imposed in violation of the right to a jury trial can be affirmed on the ground that they did not impair the defendant's substantial rights. Together, the Fifth and Sixth Amendments "require criminal convictions to rest upon a jury determination that the defendant

is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). In *Apprendi v. New Jersey*, this Court held that facts that increase the *maximum* potential sentence are elements of the crime and must be so proved. 530 U.S. 466, 490 (2000). The Court has since extended that rule to facts that increase a defendant's statutory *minimum* sentence. *Alleyne*, 133 S. Ct. at 2161, overruling *Harris v. United States*, 536 U.S. 545 (2002). Under *Alleyne*, "the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." *Id.*

While this Court has clarified the substantive jury trial right, lower courts have sharply disagreed about when violations of that right require resentencing. This conflict means that, for defendants sentenced in violation of the Sixth Amendment, like Morris, the length of time they spend in prison will depend on accidents of geography. The conflict also imperils the jury trial right that this Court has so painstakingly articulated. After all, if undisputed violations of that right can be deemed harmless based on an *appellate court's* assessment of facts never presented to a jury—as several courts of appeals have held—then the right to a jury trial is illusory. This Court should, therefore, grant review to ensure that meaningful Sixth Amendment protections do not vary based on geography, and to ensure that defendants are, in fact, sentenced only for crimes admitted in a plea colloquy or actually found by a jury.

I. The circuits are split at least three ways on the question of whether an appellate court can deem a Sixth Amendment error harmless based on evidence that was not presented to a jury.

The courts of appeals are openly divided on the question presented here. In the Eighth Circuit, resentencing is nearly automatic if a district court violates the Sixth Amendment by imposing a sentence based on facts found at sentencing. *United States v. Lara-Ruiz*, 721 F.3d 554, 558–59 (8th Cir. 2013). Five circuits—the First, Fourth, Sixth, Seventh, and Eleventh—instead review Sixth Amendment error for harmlessness and, consequently, will affirm an unconstitutional sentence that is deemed not to have impaired a defendant's substantial rights. *See, e.g.*, *United States v. McCloud*, 730 F.3d 600, 605 (6th Cir. 2013) ("[I]t would appear, with respect, that the Eighth Circuit should have affirmed" in *Lara-Ruiz*). But, as shown below, these five courts do not agree on whether the government can show harmlessness by pointing to evidence that was neither admitted by the defendant at the plea hearing nor presented to a jury at trial. Finally, the Ninth Circuit follows a different rule, which excludes the defendant's post-conviction admissions from any harmless-error analysis. Thus, not surprisingly, both the First and Sixth Circuits have "noted the circuit split" at the heart of this petition. *United States v. Crowe*, No. 13-1892, 2015 U.S. App. LEXIS 9760, at *20 n.5 (6th Cir. June 8, 2015); *McCloud*, 730 F.3d at 605 (criticizing the Eighth Circuit); *Harakaly*, 734 F.3d at 95 n.5 (criticizing the Sixth and Ninth Circuits).

A. Eighth Circuit precedent categorically "compels" remand when a judge violates the Sixth Amendment by imposing a mandatory minimum sentence based on a fact found at sentencing. *United States v. Shaw*, 751 F.3d 918, 923 (8th Cir. 2014) (citing *Lara-Ruiz*, 721 F.3d at 558–59). In *Lara-Ruiz*, the Eighth Circuit held that the district court's application of a seven-year mandatory minimum sentence for brandishing a firearm, based on a finding by the district court at sentencing, was a plain error requiring remand. The court of appeals reached this holding even though the district court imposed a 25-year sentence—well above the mandatory minimum—and expressly stated that it would have imposed *the same sentence* if the defendant had been subject only to the five-year mandatory minimum supported by the jury's verdict. *Lara-Ruiz*, 721 F.3d at 558; *see also Shaw*, 751 F.3d at 920, 923 (remanding for resentencing based on district court's application of seven-year mandatory minimum sentence for brandishing a firearm, because that finding was "not made specifically by the jury").

B. In conflict with the Eighth Circuit, at least five courts of appeals apply a harmless-error test to determine whether a Sixth Amendment error affected a defendant's substantial rights for the purpose of the third prong of the plain error test: the First, Fourth, Sixth, Seventh, and Eleventh Circuits. These courts generally agree that a district court's unconstitutional imposition of a mandatory minimum sentence based on judge-found facts is susceptible to the traditional rule that a constitutional error is harmless if a court of appeals is convinced "beyond a reasonable doubt that the error complained of did not contribute to the [result]

obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967); *see* App. 7a; *United States v. DeLeon*, 539 Fed. Appx. 219 (4th Cir. Sept. 12, 2013) (citing *United States v. Robinson*, 460 F.3d 550, 558 (4th Cir. 2006)); *United States v. Mack*, 729 F.3d 594, 609 (6th Cir. 2013) (citing *United States v. Kuehne*, 547 F.3d 667, 681–82 (6th Cir. 2008)); *United States v. Long*, 748 F.3d 322, 331 (7th Cir. 2014), *cert. denied sub nom. Coprich v. United States*, 134 S. Ct. 2832 (2014); *United States v. Payne*, 763 F.3d 1301, 1303–04 (11th Cir. 2014).

Yet, despite this apparent agreement, these circuits are deeply divided about how the traditional *Chapman* rule applies to *Alleyne* error. In the First, Seventh, and Eleventh Circuits, a district court's erroneous application of a mandatory minimum sentence based on a judge-found fact will be deemed harmless if the court of appeals is persuaded that a *hypothetical jury* would have found that crucial fact beyond a reasonable doubt. It simply does not matter to these courts if the defendant "never actually faced a jury." *Long*, 748 F.3d at 331.

For example, the First Circuit below acknowledged that Morris received a 10-year mandatory minimum sentence despite pleading guilty to a drug crime that did not carry that mandatory minimum. App. 6a. Moreover, in advance of sentencing, the government's investigation had not turned up even a preponderance of evidence that Morris was responsible for 280 grams of crack cocaine. App. 3a. But the court of appeals held that the mandatory minimum sentence did not violate Morris's substantial rights because it was persuaded that, if presented with Morris's *sentencing* testimony, a hypothetical jury would have made a

280-gram finding capable of supporting a 10-year mandatory minimum sentence. App. 6a-12a.

Similarly, in *Long*, defendant Ahmad Williams received a 10-year mandatory minimum sentence despite pleading guilty to a drug weight that was insufficient to trigger it. 748 F.3d at 330–31. But the Seventh Circuit held that Williams's substantial rights were not violated because it was persuaded that, if presented with testimony from the trial of his co-defendants, "there [was] no real possibility that a jury would have found Williams responsible for less than 280 grams of crack cocaine." *Id.* at 331-32. Finally, in *Payne*, defendant Brandon Payne received a seven-year mandatory minimum sentence for brandishing a firearm even though he "never admitted at his plea hearing that a firearm was brandished." 763 F.3d at 1303. But the Eleventh Circuit held that this unconstitutional sentence was harmless beyond a reasonable doubt because it was persuaded that a hypothetical jury presented with the *sentencing record* "'would have found' that a firearm was brandished." 763 F.3d at 1303, 1304 (quoting *United States v. Nealy*, 232 F.3d 825, 829 (11th Cir. 2000)).

In each of these cases, people were sentenced for crimes carrying mandatory minimum sentences even though they had pled guilty to other, lesser crimes. And in each case, Sixth Amendment violations were deemed harmless based on an appellate court's guess about what a hypothetical jury would have found at a hypothetical trial with a hypothetical record.

What is more, the First and Seventh Circuits reached these holdings despite evidence that the defendants would have received lower sentences if the district courts had not violated the Sixth Amendment at sentencing. In the decision below, it was undisputed that the district court would have imposed a significantly lower sentence if it had understood that imposing a 10-year mandatory minimum was unconstitutional. App. 5a. In *Long*, the error was deemed harmless even though the district court said that it might have imposed a lower sentence "if it weren't for the mandatory minimum." 748 F.3d at 331.

In contrast, the Fourth and Sixth Circuits focus their harmless-error inquiry on precisely that question: whether the district court might have imposed a different sentence if it had understood that the mandatory minimum did not apply. In *DeLeon*, a jury convicted the defendant of second-degree murder, and the district court unconstitutionally imposed a 30-year mandatory minimum sentence based on a finding at sentencing that the victim was under the age of 18. 539 Fed. Appx. at 221. Even though the evidence supporting this finding had been presented to a jury, and even though its accuracy was not in doubt—the victim was eight—the Fourth Circuit remanded for resentencing because it "[could not] say beyond a reasonable doubt that the error did not affect the sentence imposed." *Id.* at 222. The appeals court reasoned that the district court might have imposed a lower sentence if it had understood that it was supposed to sentence DeLeon "via the guidelines" instead of a 30-year mandatory minimum. *Id.* Although *DeLeon* is unpublished, the court of appeals was "constrained" by circuit precedent

holding that Sixth Amendment error at sentencing affects a defendant's substantial rights unless it is "beyond a reasonable doubt that "'the [district] court would have imposed the same sentence in the absence of the constitutional error.'"" *Id.* at 221 (quoting *Robinson*, 460 F.3d at 558, and *United States v. Shatley*, 448 F.3d 264, 267 (4th Cir. 2006)).[2]

The Sixth Circuit has also clarified that its prior Sixth Amendment precedent, which focuses on the district court's decision-making process, controls the determination whether *Alleyne* errors are harmless. Under this precedent, a Sixth Amendment error is harmless if "undisputed trial evidence" actually presented to a jury persuades the Sixth Circuit that the jury would have found the judge-found fact beyond a reasonable doubt. *Mack*, 729 F.3d at 609 (citing *United States v. Kuehne*, 547 F.3d 667, 681–82 (6th Cir. 2008)). If the defendant pled guilty, Sixth Circuit precedent "permits a harmless error finding" if there is "a clear enough statement" by the district court that it would have imposed the same sentence "if it was wrong in its Sixth Amendment analysis." *McCloud*, 730 F.3d at 605 (citing *United States v. Katzopoulos*, 437 F.3d

[2] Similarly, in *United States v. Mubdi*, 539 Fed. Appx. 75 (4th Cir. 2013) (per curiam; unpublished), the defendant pled guilty and was sentenced to a mandatory minimum based on facts found at sentencing, in violation of *Alleyne*. Yet, unlike the decision below, the Fourth Circuit held that there was plain error requiring remand due to *Apprendi*-era precedent focusing on whether the defendant's "'sentence was longer than that to which he would otherwise be subject'" if the district court had known that the mandatory minimum did not apply. *Id.* at 77 (quoting *United States v. Angle*, 254 F.3d 514, 518 (4th Cir. 2001) (en banc)).

569, 577 (6th Cir. 2006)). But if the district court made no such statement, then a Sixth Amendment violation following a guilty plea will be deemed to have affected the defendant's substantial rights and require remand. *Katzopoulos*, 437 F.3d at 577.[3]

C. Finally, the Ninth Circuit follows a categorical rule with respect to the type of evidence the appellate court will consider. In at least one case, the Ninth Circuit appeared to remand automatically where, following a jury trial, the defendant was sentenced to an enhanced mandatory minimum based on a fact found by the judge at sentencing. *United States v. Lira*, 725 F.3d 1043, 1044–45 (9th Cir. 2013). Although there is also a strain of Ninth Circuit cases that review Sixth Amendment errors for harmlessness, *e.g.*, *United States v. Guerrero-Jasso*, 752 F.3d 1186 (9th Cir. 2014), these cases retain a categorical component: they disregard any post-conviction admissions by the defendant, which is contrary to the First Circuit's reliance on Morris's post-conviction testimony as its sole reason to affirm his sentence.

The Ninth Circuit's "long-standing rule" is that "admissions at sentencing are not relevant to an *Apprendi* harmless error analysis." *Butler v. Curry*, 528 F.3d 624, 648 n.16 (9th Cir. 2008); *see United States v. Salazar–Lopez*, 506 F.3d 748, 755 (9th Cir. 2007); *United States v. Jordan*, 291 F.3d 1091, 1097 (9th Cir. 2002). This rule dates to the Ninth Circuit's *Apprendi* cases, and its reasoning is straightforward:

---

[3] Notwithstanding *McCloud* and *Katzopoulos*, an unpublished Sixth Circuit case tracks the First, Seventh, and Eleventh Circuits. *United States v. Climer*, 591 Fed. Appx. 403 (6th Cir. 2014).

"Any new admissions by [the defendant] at sentencing," which are necessarily post-conviction, do not establish what would have happened at a jury trial or plea colloquy. *United States v. Nordby*, 225 F.3d 1053, 1061 n.6 (9th Cir. 2000), *overruled in part by United States v. Buckland*, 277 F.3d 1173, 1182 (9th Cir. 2002) (en banc). Moreover, the Ninth Circuit has held that *Alleyne* "extend[s] the reasoning of *Apprendi* * * * to mandatory minimum sentences." *United States v. Carr*, 761 F.3d 1068, 1082–83 (9th Cir. 2014) (finding an *Alleyne* error harmless based on overwhelming and uncontroverted evidence adduced at trial). Accordingly, the Ninth Circuit's exclusion of a defendant's post-conviction admissions contradicts the First Circuit's near-total reliance on Morris's testimony at the sentencing hearing in this case.

II. The question presented is important, and the First Circuit's rule is wrong.

The clear split among the circuits is untenable. In some circuits, but not others, defendants will serve extra prison time for crimes of which they were never convicted, based on evidence that no jury ever heard and that the defendants did not admit at their plea colloquies. *See Alleyne*, 133 S. Ct. at 2163 (a mandatory minimum creates "a distinct and aggravated crime"). More fundamentally, "harmless-error review based on post-conviction factual submissions"—permitted in whole by the First, Seventh, and Eleventh Circuits, and in part by the Ninth Circuit—"could swallow up the rule of *Apprendi*." *Guerrero-Jasso*, 752 F.3d at 1204 (Berzon, J., concurring).

This swallowing-up happens in two ways. First, a rule hinging on post-conviction evidence blinds appellate courts to the actual sentences that defendants would have received if their sentencing judges had complied with the Sixth Amendment. These courts affirm even where, as here, a sentencing judge has stated that the defendant deserved a reduced sentence and would have received one, absent the erroneously-applied mandatory minimum. *See United States v. Vazquez*, 271 F.3d 93, 120 (3d Cir. 2001) (Sloviter, J., dissenting). Second, instead of remedying the problem of judicial fact-finding that yields an increased mandatory minimum or maximum sentence, the circuits that rely on post-conviction evidence exacerbate that problem. Worse than permitting unconstitutional fact-finding by sentencing courts, these courts of appeals sanction unconstitutional sentences after the fact based on their own fact-dependent guesses—the First Circuit called it an "assumption" (App. 8a)—"about what would have occurred at a trial." *Guerrero-Jasso*, 752 F.3d at 1204 (Berzon, J. concurring).

This appellate maneuver is nothing less than "directing a verdict for the prosecution," which "is never permissible." *United States v. Ienco*, 92 F.3d 564, 570 (7th Cir. 1996) (Posner, C.J.). To be sure, this Court has held that a reviewing court does not violate the bar against directing verdicts for the prosecution if it draws certain inferences about what a jury would have concluded about evidence that was *actually* presented at trial. *See Washington v. Recuenco*, 548 U.S. 212, 222 (2006); *Neder v. United States*, 527 U.S. 1, 8–21 (1999). But there is no support in this Court's cases for a rule that would permit an appellate court to speculate about what a

hypothetical jury would have found in a trial that never happened.[4]

This practice is problematic enough for defendants who are serving mandatory minimum sentences based on judge-found facts. But it also invites government mischief in future cases. So long as appellate courts are willing to consider post-conviction evidence when deciding whether a Sixth Amendment error affected a defendant's substantial rights, the government can get the benefit of a mandatory minimum or maximum sentence even if it declines to prove the triggering fact to a jury or require the defendant to admit that fact as part of a plea. It can simply wait until sentencing and then introduce evidence that a court of appeals might deem overwhelming. *See, e.g.*, *Guerrero-Jasso*, 752 F.3d at 1196 (Berzon, J., concurring) (noting that the government had invited the district court to impose a sentence that would violate *Apprendi*, and that the government sought to reassure the court that this

---

[4] The Seventh Circuit in *Long* acknowledged that, unlike the cases on which it purported to rely, "Williams never actually faced a jury." 748 F.3d at 331. In contrast, the First Circuit below purported to rely on a "legion" of similar cases. App. 7a. But, on closer inspection, it cited only two cases discussing post-conviction evidentiary submissions: *United States v. Morgan*, 384 F.3d 1, 8 (1st Cir. 2004), which addressed such submissions in dicta, and *Harakaly*, 734 F.3d 88, which departed from the First Circuit's prior emphasis on "evidence adduced at trial." *United States v. Perez-Ruiz*, 353 F.3d 1, 18 (1st Cir. 2003)). Taken together, *Harakaly* and the decision below disclaim many of the First Circuit's prior Sixth Amendment cases. *See* App. 8a (rejecting case law under *United States v. Booker*, 543 U.S. 220 (2005); *United States v. Herrarra Pena*, 742 F.3d 508, 518 (1st Cir. 2014) ("The remedy for an *Apprendi* error was usually a simple remand to the district court for resentencing").

Apprendi error would be "reviewed for harmlessness").

Evaluating harmless error based upon post-plea evidentiary submissions "is entirely different from the usual harmless-error analysis, which reviews the record of an actual trial to determine what the actual jury in that case would have decided *on the record before it*." *Id.* at 1197. Thus, to allow the First Circuit's approach to stand "is to allow the protections accorded by *Apprendi* entirely to atrophy." *Id.* at 1203. The Court's intervention is, therefore, essential.

III. This case is an ideal vehicle for resolving the circuit split.

Morris's case is well suited to this Court's review. Because the district court said it would have imposed a lower sentence if that were an option, and because the First Circuit's substantial-rights analysis hinged entirely on post-conviction statements by Morris himself, Morris's sentence would have been vacated by different courts for different reasons. This fact means that, if this Court grants review, it will be able to provide maximal guidance to the lower courts.

The mere fact that Morris was sentenced in violation of *Alleyne* would have required reversal in the Eighth Circuit. *Lara-Ruiz*, 721 F.3d at 558. Morris also would have prevailed in the Fourth and Sixth Circuits, but for a different reason: he could have established a violation of his substantial rights by pointing to undisputed evidence "that the district court would have imposed a lower sentence" if it had

understood that it was free to do so. *McCloud*, 730 F.3d at 602; *see DeLeon* 539 Fed. Appx. at 221–22; *Mubdi*, 539 Fed. Appx. at 77. And, in the Ninth Circuit, Morris would have prevailed for yet another reason. There, the rule excluding a defendant's post-conviction admissions from the substantial-rights inquiry would have wiped out the First Circuit's reliance on Morris's sentencing testimony as the basis to conclude that a jury would have found him responsible for over 280 grams of crack cocaine. *See Nordby*, 225 F.3d at 1061 n.6.

This case is also an appropriate vehicle for this Court's review because the First Circuit relied exclusively on the third prong of plain error review, concluding that the unconstitutional sentence did not affect Morris's substantial rights, *see* App. 6a-12a, and did not advance any alternative ground for affirming Morris's sentence. *Compare Henderson v. United States*, 133 S. Ct. 1121 (2013) (addressing the second prong of plain error and remanding for further proceedings as to the third and fourth prongs), *with Long*, 748 F.3d at 331–32 (affirming Williams's sentence based on both the third and fourth prongs of plain error). This case is, therefore, a suitable vehicle for this Court to resolve the open and entrenched split among the circuits, and to give the lower courts much-needed guidance on the proper standard for determining when a Sixth Amendment error is harmless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Matthew R. Segal
Counsel of Record
Nashwa Gewaily
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MASSACHUSETTS
211 Congress Street, 3d Floor
Boston, MA 02110
(617) 482-3170
MSegal@aclum.org
NGewaily@aclum.org

Daniel N. Marx
Daniel McFadden
Alice Yu
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02110
(617) 832-1000
DMarx@foleyhoag.com
DMcFadden@foleyhoag.com
AYu@foleyhoag.com

Dated: August 5, 2015

APPENDIX

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 13-1369

UNITED STATES OF AMERICA,

Appellee,

v.

RYAN MORRIS,

Defendant, Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

[Hon. Douglas P. Woodlock, U.S. District Judge]

Before
Lynch, Chief Judge,
Souter,[*] Associate Justice, and Stahl, Circuit Judge.

Matthew R. Segal, with whom Nashwa Gewaily, Courtney M. Hostetler, Miriam I. Mack, and American Civil Liberties Union, were on the brief, for appellant.

Jennifer Hay Zacks, Assistant United States Attorney, with whom Carmen M. Ortiz, United States Attorney, was on brief, for appellee.

---

[*] Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

May 7, 2015

SOUTER, Associate Justice. Federal law mandates a minimum ten-year prison sentence for a convicted member of a drug conspiracy responsible for more than 280 grams of crack. 21 U.S.C. §§ 841(b)(1)(A)(iii); 846. So far as it matters to this appeal, the district court made a finding of drug quantity, by a preponderance of the evidence: that the admitted conspirator Ryan Morris was personally responsible for 765.5 grams of crack. The court consequently imposed the mandatory ten-year sentence. While judicial fact-finding of drug quantities sufficient by statute to trigger mandatory minimum sentences was permissible at the time of the sentencing hearing, during the pendency of Morris's appeal the Supreme Court held that the Sixth Amendment guarantees that such qualifying fact issues are subject to jury findings beyond a reasonable doubt. Alleyne v. United States, 133 S. Ct. 2151, 2160 (2013).

The question here is whether the minimum sentence imposed under the district court's judgment may nevertheless be affirmed as resting on harmless constitutional error falling short of affecting the defendant's substantial rights. We conclude that the error is ultimately harmless, in light of concessions made by Morris's counsel and overwhelming evidence that Morris was responsible for at least 280 grams of crack, and thus affirm.

I.

In December 2010, after investigating the activities of a drug ring operating in Dorchester,

Massachusetts, the government charged nineteen individuals, including Ryan Morris, with conspiracy to distribute more than 500 grams of cocaine and more than 280 grams of crack, as well as offenses stated in fifteen additional counts. Shortly before the indictment was returned, investigators legally searched Morris's apartment, which yielded up 123.5 grams of crack. In October 2012, Morris pleaded guilty to the conspiracy count,[1] but he did not admit that the conspiracy collectively or he individually was responsible for a particular quantity of either form of drug, the questions of quantity being expressly left for later determination by the sentencing judge.

In advance of Morris's sentencing hearing, the probation office prepared a presentence report concluding, based on the government's investigation, that Morris himself was responsible for 10 kilograms of cocaine, and 123.5 grams of crack. Because responsibility for 5 kilograms of cocaine triggers a mandatory minimum ten-year sentence, see 21 U.S.C. §§ 841(b)(1)(A)(ii), 846, the report recommended that Morris be sentenced accordingly. He objected to the conclusion about the cocaine quantity and the ensuing recommendation.

At the hearing, Morris took the stand and disputed that he had ever dealt in kilograms of cocaine. He said that he bought cocaine in quantities never greater than 62 grams, which he would cook into crack and then sell. Between direct and crossexamination, Morris admitted to four specific transactions between May and July 2010

[1] Morris also pleaded guilty to one count of possession of more than 28 grams of crack with intent to distribute. But this count and its sentence are not pertinent to this appeal.

involving 62 grams of cocaine each, for a total of 248 grams. When pressed on cross-examination to state the total number of transactions, he acknowledged more, albeit less exactly:

> Q: About how many times do you think you purchased cocaine from Michael Williams [another member of the conspiracy]?
> A: Probably twelve times.
> Q: Twelve times?
> A: Tops, probably twelve.
> Q: Starting in 2010 at some point . . . "twelve times"?
> A: Twelve times from when I started dealing with Mike. I can't remember when I first started dealing with Mike, but I know it was about twelve times total.
> Q: Okay. Well, you said you first started dealing with Mike in 2010, so we'll say in 2010 you dealt with Michael Williams twelve times; is that your testimony? That's what you're telling the Court?
> A: Precisely, I guess, yeah, about twelve.
> Q: And it was always 62 grams?
> A: No. Sometimes it would be smaller than that.
> Q: What was the smallest amount you ever purchased from Michael Williams?
> A: Twenty-eight.
> Q: An ounce?
> A: Yes.
> Q: How many times did you purchase an ounce from Michael Williams?
> A: I can't remember.
> Q: Well, why don't you give it your best guess?
> A: Probably like three times.

> Q: So, three times you purchased an ounce, and the other times was a 62?
> A: Yeah.

The district court found that Morris was not responsible for any kilogram transactions of cocaine, but because he had disputed being a cocaine dealer by admitting to being a crack dealer, the judge proceeded to consider what crack quantity he should be found responsible for.

Morris argued that he should be responsible only for the amounts converted from four specifically identified cocaine purchases, that is, a total of 248 grams of crack. He argued that the details of the remaining transactions were speculative guesses, and he suggested that the 123.5 grams of crack found in the search might be a leftover portion of the 248 grams.

The district court rejected Morris's position, and found by a preponderance of the evidence that he was responsible for crack cooked from the quantities of cocaine procured in at least twelve transactions, nine of 62 grams and three of 28. To this, the court added the stash of 123.5 grams of crack, which the district court found was not derived from the admitted transactions, given the "time frame between" between the purchases (May-July 2010) and the seizure (December 2010). The court thus calculated that Morris was responsible for 765.5 grams of crack, calling that conclusion "conservative." Because this exceeded the 280 gram threshold, the judge imposed a ten-year mandatory minimum sentence, although he said that he would impose a lower one if that were open to him.

While Morris's appeal was pending, the Supreme Court handed down Alleyne, which held

that the Sixth Amendment requires any fact mandating the imposition (or an increase) of a particular minimum sentence to be treated as an element of the crime. 133 S. Ct. at 2160-63. Accordingly, under the principle of Apprendi v. New Jersey, 530 U.S. 466, 484 (2000), "the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt," in the absence of a defendant's admission. Alleyne, 133 S. Ct. at 2160.

II.

Because Morris preserved no Sixth Amendment claim in the trial court, we review for plain error, the burden being on Morris to show (1) an error (2) that is clear and obvious, (3) affecting his substantial rights, and (4) seriously impairing the integrity of judicial proceedings. United States v. Santiago, 775 F.3d 104, 106 (1st Cir. 2014). The government concedes the first two prongs of plain error in imposing the mandatory minimum based on the judge's finding of crack quantity by a preponderance, rather than a jury's finding beyond a reasonable doubt or Morris's specific admission.[2]

As for the third prong of plain error review, in substance it is harmless error analysis, except that the defendant bears the burden of persuasion. Ramirez-Burgos v. United States, 313 F.3d 23, 29 (1st Cir. 2002). An Alleyne error is harmless when

[2] The government equates the requirement of United States v. Colon-Solis, 354 F.3d 101 (1st Cir. 2004), to limit the sentencing level to a defendant's specific responsibility rather than that of a conspiracy collectively, id. at 103, with the Sixth Amendment requirement recognized in Alleyne, see United States v. Pizarro, 772 F.3d 284, 290-94 (1st Cir. 2014), though in this case neither fact was found or admitted.

"it can fairly be said beyond any reasonable doubt that the assigned error did not contribute to the result of which the appellant complains." United States v. Harakaly, 734 F.3d 88, 95 (1st Cir. 2013) (quoting United States v. Pérez–Ruiz, 353 F.3d 1, 17 (1st Cir. 2003)). In drug cases, "overwhelming evidence of the requisite drug types and quantities" generally serves as a proxy for determining whether the Alleyne error contributed to the result. Harakaly, 734 F.3d at 95 (quoting Pérez–Ruiz, 353 F.3d at 18) (preserved Alleyne error); see also United States v. Razo, No. 13-2176, 2015 WL 1455076, at *8 (1st Cir. Apr. 1, 2015) (same); United States v. Paladin, 748 F.3d 438, 453 (1st Cir. 2014) (third prong of plain error, substantial rights-harmlessness); United States v. Delgado-Marrero, 744 F.3d 167, 189 (1st Cir. 2014) (fourth prong of plain error, integrity of proceedings). By "overwhelming evidence," we mean here a corpus of evidence such that no reasonable jury could find, based on the record, that the crack quantity was less than that required for the mandatory minimum to apply.

Much of Morris's brief is devoted to disputing the pertinence of the "overwhelming evidence" standard, but he cites no persuasive authority to support his position.[3] To begin with, the cases applying the overwhelming evidence standard to address the harmlessness of Alleyne and Apprendi errors are legion. E.g., Razo, 2015 WL 1455076, at *8; Paladin, 748 F.3d at 453; Delgado-Marrero, 744 F.3d at 189; United States v. Correy, 570 F.3d 373, 377 (1st Cir. 2009); United States v. Casas, 425 F.3d

[3] Indeed, Morris concedes that one of his arguments, that Alleyne error is structural, is expressly foreclosed by circuit precedent. Harakaly, 734 F.3d at 74-75.

23, 6566 (1st Cir. 2005); United States v. Morgan, 384 F.3d 1, 8 (1st Cir. 2004); United States v. Soto-Beníquez, 356 F.3d 1, 46 (1st Cir. 2003); United States v. Nelson-Rodriguez, 319 F.3d 12, 45-46 (1st Cir. 2003).

Morris nonetheless contends that this court should apply a "causal-connection" test, which "asks whether the district court might have imposed a lower sentence if it had complied with the Sixth Amendment's restrictions on judicial factfinding." Appellant's Reply Br. 2. But Morris presents a false choice. On the assumption that this issue had been entrusted to a properly instructed, rational jury, the district court could not have imposed a lower sentence, given overwhelming evidence that Morris was responsible for at least 280 grams of crack. Thus it comes as no surprise that the principal cases Morris cites in support of his causal-connection test are fully consistent with the overwhelming evidence test. See United States v. Barnes, 769 F.3d 94, 99 n.5 (1st Cir. 2014) (challenge to a sentence above the mandatory minimum; citing Harakaly); United States v. Pena, 742 F.3d 508, 514 (1st Cir. 2014) (government concedes Alleyne error not harmless; same); United States v. Delgado-Marrero, 744 F.3d 167, 189-90 (1st Cir. 2014) ("scant evidence" of fact mandating minimum sentence; same).

At oral argument, Morris sought to invoke a different standard for harmlessness that this court has applied in the context of error under United States v. Booker, 543 U.S. 220 (2005). See, e.g., United States v. Vázquez-Rivera, 407 F.3d 476, 490 (1st Cir. 2005). But the applicability of such precedents to Alleyne errors is foreclosed by Harakaly and its progeny, as cited earlier.

In a supplemental filing, Morris seeks to benefit from United States v. Pizarro, 772 F.3d 284, 294-95 (1st Cir. 2014), which distinguished between two forms of Alleyne error, at "trial" versus at "sentencing." The former is subject to harmless or plain error review, whereas the latter requires automatic reversal. Id. at 296. Morris contends that this case involves Alleyne "sentencing" error.

But he misreads Pizarro, which calls for reversal as "sentencing" error when the quantity issue had been submitted to a jury that rejected a finding in the government's favor. Id. "Trial" error in Pizarro, on the other hand, was simply a failure to instruct the jury on the quantity issue. Id. at 294-296. The Alleyne error in this case, determining a mandatory sentence on the basis of a fact not admitted in connection with a guilty plea (which here was expressly reserved, without objection, for the judge at sentencing), is akin to that of failing to instruct the jury on an element of the crime; in each circumstance, a crucial but unadmitted fact has escaped the required opportunity for a jury's determination. Thus, plain error review is in order, and we apply the overwhelming evidence test under the third prong.

III.

Under this test, we have no hesitation in concluding that the evidence is overwhelming that Morris is responsible for at least 280 grams of crack. Morris made a critical concession in the district court. His lawyer said to the judge, "[I]f you are going to find any grams of cocaine base or attribute to Mr. Morris, I would ask that you find that the four transactions between May 30th and July 5th of 2010 . . . ." Soon thereafter, the attorney added, "I would

just ask the Court to just attribute four transactions of 62 grams each." We think these statements are most reasonably read as an admission on Morris's part that not only should he be held responsible for four transactions of 62 grams of cocaine but also that the court could attribute "cocaine base" (i.e., crack) quantities to him based on a 1:1 ratio with cocaine.[4] Morris thus conceded responsibility for 248 grams of crack. See United States v. Etienne, 772 F.3d 907, 923 (1st Cir. 2014) (where the defendant agrees to having conducted certain drug transactions, this "clearly establishe[s]" drug quantity sufficient to trigger a mandatory minimum sentence). The only question remaining, then, is whether the evidence is overwhelming that Morris is responsible for at least another 32 grams.

We believe that it is. The district court found that Morris was responsible for another 517.5 grams

---

[4] The plausibility of our reading of Morris as having conceded as unremarkable a 1:1 cocaine/crack conversion ratio is bolstered by the many (albeit not unanimous) legal authorities citing that same ratio as a properly found fact. See, e.g., United States v. Fox, 189 F.3d 1115, 1120 (9th Cir. 1999) ("[Officer] Bryant testified that in a laboratory there is typically a ten percent weight loss when cooking cocaine power into crack, but that on the street one gram of powder cocaine typically converts into one gram of crack cocaine, because street cookers use baking soda and tap water to increase the weight."); United States v. Taylor, 116 F.3d 269, 272 (7th Cir. 1997) ("Powder cocaine normally converts to crack cocaine in a one to one ratio . . . ."); United States v. Lucas, 193 Fed. App'x 844, 846 (11th Cir. 2006) ("Special Agent Todd Hixson testified that a quantity of powder cocaine converts approximately to the same amount of crack cocaine."); United States v. McMurray, 833 F. Supp. 1454, 1473 & n.29 (D. Neb. 1993) (applying a 1:1 ratio and citing M. Khalsa et al., Smoked Cocaine: Patterns of Use and Pulmonary Consequences, 24 J. Psychoactive Drugs 265, 267 (1992)).

of crack,[5] well above the additional 32 grams necessary to trigger the mandatory minimum sentence. While that finding was based on a preponderance standard, the evidence underlying the district court's calculations was Morris's own testimony, as quoted earlier, and obviously a defendant's admissions can support an inference of drug quantity beyond a reasonable doubt. See Harakaly, 734 F.3d at 96-97. Although not all testimony offered by a defendant should be treated as a reliable admission, there is good reason to treat Morris's testimony that way. He took the stand to dispute the government's cocaine quantity recommendations, and so had every incentive to minimize (and very likely did minimize) the degree to which he was involved in purchasing drugs. He testified that he was involved in about eight other drug transactions of at least 28 grams each (the twelve to which he testified, less the four conceded). Accordingly, his own testimony, despite its imprecise aspects, establishes beyond any doubt that he is responsible for far more than another 32 grams of crack.

Morris raises various questions about the district court's calculations of the drug quantity, noting that there was no direct evidence, only circumstantial evidence; suggesting that his own testimony was potentially unreliable; contending that the district court made possibly suspect inferences about quantity loss in the cocaine/crack conversion and the temporal gap between the cocaine transactions and the residence search; and observing that the district court acknowledged its

[5] 517.5 grams is the district court's finding of 765.5 grams, less the 248 grams admitted.

own lack of certainty and cited the preponderance standard in reaching its conclusions. These criticisms would have some force and could be persuasive if we were asked whether the evidence overwhelmingly establishes that Morris was responsible for another 517.5 grams of crack above the 248 grams admitted. But, as mentioned earlier, the question is only whether Morris is responsible for another 32 grams. As to that, Morris's criticisms do not raise doubt in our mind.[6]

In sum, we conclude there is overwhelming evidence that Morris is responsible for at least 280 grams of crack, and has thus failed to meet his burden of persuasion under the third prong of plain error review.

IV.

The judgment of the district court is affirmed.

[6] Even using the more conservative cocaine/crack conversion ratio of 1:0.5, see, e.g., United States v. Booker, 334 F.3d 406, 413–14 & n.3 (5th Cir. 2003), the quantity of crack (321 grams based on 642 grams of cocaine purchased from the twelve transactions) surpasses the threshold triggering the mandatory minimum, without counting the crack seized from Morris's residence.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)
	)
vs.	) No. 1:10-cr-
	) 10440-DPW-10
RYAN MORRIS,	)
	)
Defendant.	)

BEFORE: THE HONORABLE
DOUGLAS P. WOODLOCK

SENTENCING HEARING

John Joseph Moakley United States Courthouse
Courtroom No. 1
One Courthouse Way
Boston, MA 02210
March 12, 2013
9:10 a.m.

Brenda K. Hancock, RMR, CRR
Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way
Boston, MA 02210
(617) 439-3214

APPEARANCES:

UNITED STATES ATTORNEY'S OFFICE
By: Emily O. Cummings, AUSA
1 Courthouse Way
Boston, MA 02210
On behalf of the United States of America.

GORDON W. SPENCER, ESQ.
945 Concord Street
Framingham, MA 01701
On behalf of the Defendant Ryan Morris.

I N D E X

E X H I B I T S

A. Yes.

Q. When in 2010?

A. I don't remember. I can't recall.

Q. Well, let's think about it. If you were first intercepted in May of 2010, did you start buying -- was that your first transaction with Mr. Williams?

A. It could have been. Most likely, I guess.

Q. Most likely May 30th was your first time you ever bought drugs from Michael Williams?

A. I really can't recall. I'm not that good with dates.

Q. Well, we are going to try, Mr. Morris. We're going to try.

A. All right.

Q. May 30th you purchased a 62. That was your testimony, correct?

A. Yes.

Q. And it's your testimony it was 62 grams of cocaine?

A. Yes.

Q. You purchased it from Michael Williams?

A. Yes.

Q. You took it back to 1320 Dorchester Avenue, and you cooked it into crack cocaine. That's your testimony?

A. Yes.

Q. And then what did you do, sell it to various customers?

A. Yes.

[126]

Q. Did you use it?

A. No.

Q. No, you sold it. How many people did you sell it to?

A. I can't recall.

Q. Was that your first time buying powder cocaine and cooking it into crack cocaine and selling it to customers?

A. No.

Q. No? How many times had you done it before May 30th?

A. I don't know.

Q. Guess.

A. Guess what?

MR. SPENCER: No. Guess.

MS. CUMMINGS: Mr. Spencer, I don't need your help.

A. Oh, okay. I can't recall.

BY MS. CUMMINGS:

Q. Well, it wasn't your first time, was it?

A. It wasn't my first time.

Q. It wasn't your second time.

A. No.

Q. No. And, in fact, it wasn't your first time dealing with Michael Williams, was it?

A. Back in May?

Q. Yes.

A. Yes.

Q. No, it wasn't. You didn't have to say, "I need a 62," did

[127]

you?

A. That was around the first time I was dealing with him.

Q. Mr. Morris, that's not what I asked. You didn't specify you wanted 62 grams, correct?

A. Yes.

Q. You didn't specify, "I want powder cocaine or crack cocaine," to Mr. Williams, right?

A. When I communicated with him?

Q. On May 30th.

A. I don't remember. I really don't remember.

Q. Well, you looked at the calls. Do you want to look at the calls again?

A. No. I know them by heart now.

Q. Oh, okay, then you do remember. Did you ask for powder cocaine or crack cocaine?

A. No. I never asked for crack cocaine.

Q. You never asked for crack cocaine from Michael Williams?

A. No.

Q. You didn't ask for crack cocaine on May 30th?

A. No.

Q. What about the time before that you dealt with Michael Williams, before that May 30th time you bought a 62? Did you ask for 62 grams the time before you dealt with Mr. Williams?

A. I usually don't even got to ask for what I want over the phone.

[133]

A. Probably twelve times.

Q. Twelve times?

A. Tops, probably twelve.

Q. Starting in 2010 at some point twelve times?

A. No, no.

Q. Well, you just said "twelve times"?

A. Twelve times from when I started dealing with Mike. I can't remember when I first started dealing with Mike, but I know it was about twelve times total.

Q. Okay. Well, you said you first started dealing with Mike in 2010, so we'll say in 2010 you dealt with Michael Williams twelve times; is that your testimony? That's what you're telling the Court?

A. Precisely, I guess, yeah, about twelve.

Q. And was it always 62 grams?

A. No. Sometimes it would be smaller than that.

Q. What was the smallest amount you ever purchased from Michael Williams?

A. Twenty-eight.

Q. An ounce?

A. Yes.

Q. How many times did you purchase an ounce from Michael Williams?

A. I can't remember.

Q. Well, why don't you give it your best guess.

[134]

A. Probably like three times.

Q. So, three times you purchased an ounce, and the other nine times was a 62?

A. Yeah.

Q. Okay. And you don't remember when you and Mr. Williams first talked about you buying cocaine from him; is that right?

A. No.

Q. But at some point you became a pretty regular doobie or 62-gram of powder cocaine customer of Michael Williams; is that correct?

A. Yes.

Q. So regular, in fact, that when you called you didn't even have to specify what you were asking for; is that right?

A. Yes.

Q. It certainly wasn't kilograms of powder cocaine; it was just 62s?

A. Yes.

Q. And it wasn't even ounces, because you only did that three times; is that right? And I'm assuming that was in the very beginning?

A. Excuse me?

Q. That was in the very beginning?

A. Yes.

Q. And is that when you were messing it up; when you would try and cook it into crack cocaine, you would just mess it all

[158]

each time he purchased it he converted it to crack. He didn't testify to that. I don't believe that the Government specifically made that -- obviously, we are dealing with kilos.

THE COURT: Let me just say this as a response – you can address it or think about it -- which is, isn't it the fair inference for me here? I am dealing with proof by a preponderance. I have, as I have indicated, some resistance to each encounter leading to one kilogram. The Government, of course, didn't argue that the kilogram then led to crack cocaine, which would have goosed it up even further.

But it seems to me that a way of reading this evidence, and it is more or less in the light most favorable to Mr. Morris, is to say he dealt with nine doobies, three ounces, and he cooked that or made it into crack cocaine, and then that there is this 500.5 grams of powder that I am not ascribing cooking to. But I would be inclined to think of him as a powder dealer if he were a big dealer, as a crack dealer, as he testified, for the smaller amounts.

But, in any event, I do not know what this leads to, I have no idea where this leads in these

terms, and I do want to have further discussion about it, and I do not want to be doing this wondering if I have gotten the decimal point in the right place.

MR. SPENCER: Sure.

THE COURT: Mr. Orze is far better than I am in

[163]

would ask that you find that the four transactions between May 30th and July 5th of 2010, there was five actually that the Government submitted were kilos. Mr. Morris got up on the stand and testified that he actually did five out of the five, but four out of the five -- one of them, it wasn't drugs, and so I would ask that the Court just attribute --

THE COURT: It was not very good drugs, I think.

MR. SPENCER: He said they were bad. I think that's -- just to quote him. Whether they were not very good or not drugs at all, he said they were bad.

THE COURT: I think the standard, maybe I am wrong about that, is it is actual amount, isn't it?

MR. SPENCER: Right. It's hard to say whether or not there was -- I mean, bad can take on a variety of definitions.

THE COURT: If you use that as a dilutant for the next --

MR. SPENCER: Well, he tried to fix it. Well, he said he tried to fix it --

THE COURT: One man's dilutant is another man's fixing it.

MR. SPENCER: Right. But he tried to fix it by combining it with something else.

But that being said, that would be the defendant's contention, along with the fact that the eight speculative times that he dealt with Michael Williams, that the Court not

[164]

consider that, because, again, it's just speculative at this point. It could be off. We just don't know what the exact number is. So, I would just ask the Court to just attribute four transactions of 62 grams each.

THE COURT: Well, but if I do that -- let me just be sure that I have not -- if I do it to 672 grams each, that comes to 200 --

MR. SPENCER: 48.

THE COURT: -- 48. It still takes us right up into the thousand-kilogram equivalency.

MR. SPENCER: If that's the case, then that is. Just, the 765.5 grams of cocaine based upon --

THE COURT: Well, maybe you can crosscheck it.

THE PROBATION OFFICER: I have 885.6.

THE COURT: That still takes us into the range.

MR. SPENCER: 885.6?

THE COURT: Correct.

MR. SPENCER: And then the 165 added to that. How do we get 885?

THE COURT: If we multiply 62.5 times four times 3,571.

MR. SPENCER: I see.

MS. CUMMINGS: You still have to add in 123 seized grams of crack cocaine.

THE COURT: Oh, yes. Well, unless there is some

[165]

further --

MR. SPENCER: Well, just one last point. The defendant did want to mention that there just isn't any evidence. He wasn't specifically asked whether or not the 123 grams that was seized could not be part of the actual sales with --

THE COURT: I deal with the evidence as it exists.

MR. SPENCER: Right, but -

THE COURT: The evidence as it exists seems to me to be clearly not one of the Michael Williams transactions or the Dwayne Persons transactions that were part of the calculations that we were going through earlier.

But, in any event, I think I understand all of this enough to make a determination about this.

You can be seated, unless there is something else you wanted to add to it.

MR. SPENCER: No, I'm all set. Thank you.

THE COURT: Well, let me start with the basic proposition that this all illustrates; that frequently in even heavily investigated cases like this we have to deal with questions of circumstantial evidence.

The Government has a plausible but not persuasive theory with respect to Mr. Morris being a

kilogram dealer in powder cocaine. I say "plausible" but not ultimately persuasive, because it does not meet, from my perspective,

[188]

earlier, known better before, but he did not. Does he know better now? I think so.

In the process of imposing sentences in the 19-or-so defendants in this case, I have tried to think through as best I can this question of individual deterrence, and those sentences have reflected I think my view that for some people -- perhaps because of the passage of time -- but, in any event, for some people it is clear that a severe sentence would take away the progress that someone has made, and so I think I have imposed sentences that have not necessarily been guideline sentences when I am free to do that.

My own view is that in the case of Mr. Morris, left to my own devices, I probably would impose a sentence significantly below the *Guidelines*, but I am not left to my own devices.

I then turn to the question of the impact of prison, not, as I repeatedly say, because the Supreme Court has instructed me that that is the case, that I am going to send somebody to prison because it will be good for them, but I do consider the question of rehabilitation.

It is apparent that Mr. Morris is a person of real capacity, articulate, attempting to make his way in the world, put to one side the drug dealing, but attempting to make his way in the world with various kinds of businesses, all of which should be to his credit, and it is. But there is something to

[190]

is a mistake in making a choice about where you are going to take your life in terms of supporting yourself and your family.

To some degree I can say that I have contributed to the disparity in the sense of setting a bar which can be distorted, at least in terms of what I would like to do, by the mandatory minimum sentences, and, as I said, if I had the choice I would significantly reduce the sentence that I must impose, which brings me, finally, to what were we doing here today?

What we are doing here today, I think, is trying as best we can from separate perspectives to get to the bottom of what you were doing. I do not know if I was the most surprised person, but I was very surprised when I learned that the guideline by this reconfiguration that we went through ended up in the same place. But I have an obligation to make the determinations irrespective of the results, to try as best I can to calculate the base Offense Level according to the standards that the Sentencing Commission provides and then let the chips fall where they may. They have fallen much more harshly than I would have expected, and the effect of that is that there is a certain, from my perspective, unwarranted disparity between the sentence I am imposing on you and other sentences I have imposed in this case.

But I am back to where I started. I am imposing the sentence I have to impose, which is a 10-year minimum

[193]

have a right of appeal, and you will want to discuss with Mr. Spencer whether or not it makes any sense to exercise that.

I hope you realize, I suspect you do, that people have worked very hard in trying to calculate what the proper price is that you should pay for what you did. I know that you disagree with that, you disagree with the perspectives that people have provided, but I think -- I hope you will understand that everything here, *everybody* here, the Prosecution, Mr. Spencer, me, Probation, all of us were trying to work our way through a very complex set of circumstances involving a person's life, yours, to find a just way of assessing what the consequences should be for what you have done.

As I said, if I had a choice I would do it differently. I do not have the choice. Do I think this is an unreasonable sentence? No, I do not. I am not the only person who gets to speak on sentencing. The Congress does too, and the Congress is so animated about crack cocaine that we find ourselves with this sentence.

So, for all of those reasons, which I have tried to explain to you, that is the sentence that I impose here. My hope and expectation is that you take what you can from the sentence to use it as an occasion to fully turn your life around so that you can be a productive citizen when you emerge from prison.

If there is nothing further, then I think I would like

[194]

to take a, say, 15-minute recess.

THE CLERK: All rise.

(The Honorable Court exited the courtroom at 1:50 p.m.)

(WHEREUPON, the proceedings adjourned at 1:50 p.m.)

C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of *United States v. Ryan Morris*, No. 1:10-cr-10440-DPW-10.

Date: February 7, 2014

/s/ *Brenda K. Hancock*
Brenda K. Hancock, RMR, CRR
Official Court Reporter

APPENDIX C

UNITED STATES DISTRICT COURT

District of Massachusetts

UNITED STATES OF AMERICA

v.

RYAN MORRIS

JUDGMENT IN A CRIMINAL CASE

Case Number 10-CR-10440-DPW-010
USM Number: 93675-038
Gordon W. Spencer/Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) 1 and 15 of the Indictment on 10/4/12

☐ pleaded nolo contendere to count(s) _____

☐ was found guilty on count(s)_____ after a plea of not guilty.

The Defendant is adjudicated guilty of these offenses:

Title & Section
21 U.S.C. § 846(a) and
Nature of Offense
Conspiracy to Distribute Cocaine and Cocaine Base.
Offense Ended
12/2/2010
Count
1
Title & Section
21 U.S.C. § 841(b)(1)(A)

Title & Section
21 U.S.C. § 841(a)(1)
Nature of Offense
Possession of Cocaine Base with Intent to Distribute
Offense Ended
12/2/2010
Count
15

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

3/12/2013
Date of Imposition of Judgment

/s/ Douglas P. Woodlock
Signature of Judge

Douglas P. Woodlock Judge, U.S. District Court
Name and Title of Judge

March 13, 2013
Date

DEFENDANT: RYAN MORRIS
CASE NUMBER: 10-CR-10440-DPW-010

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

120 months on each count to be served concurrently.

Defendant shall receive credit for time served.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the custody of the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____
☐ before 2 p.m. on _____
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 5 years on each count to be served concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed 104 tests per year, as directed.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (*Check if applicable.*)

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (*Check if applicable.*)

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (*Check if applicable.*)

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides,

works, is a student, or was convicted of a qualifying offense. (*Check if applicable.*)

☐ The defendant shall participate in an approved problem for domestic violence. (*Check if applicable.*)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, posses, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation

officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

DEFENDANT IS TO PARTICIPATE IN A PROGRAM FOR SUBSTANCE ABUSE AS DIRECTED BY THE US PROBATION OFFICE, WHICH PROGRAM MAY INCLUDE TESTING, NOT TO EXCEED 104 DRUG TESTS PER YEAR. TO DETERMINE WHETHER THE DEFENDANT HAS REVERTED TO THE USE OF ALCOHOL OR DRUGS. THE DEFENDANT SHALL BE REQUIRED TO CONTRIBUTE TO THE COSTS OF SERVICES FOR SUCH TREATMENT BASED ON THE ABILITY TO PAY OR AVAILABILITY OF THIRD PARTY PAYMENT.

DEFENDANT IS TO PARTICIPATE IN A MENTAL HEALTH TREATMENT PROGRAM AS DIRECTED BY THE US PROBATION OFFICE. THE DEFENDANT SHALL BE REQUIRED TO CONTRIBUTE TO THE COSTS OF SERVICES FOR SUCH TREATMENT BASED ON THE ABILITY TO PAY OR AVAILABILITY OF THIRD PARTY PAYMENT.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$200.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss *	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $200.00 due immediately, balance due

☐ Not later than _____, or

☑ In accordance ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ E, or ☐ F below; or

C ☐ Payment in equal ____ (*e.g. weekly, monthly, quarterly*) installments of $ ____ over a period of ____ (*e.g. months or years*), to

commence ____ (*e.g. 30 or 60 days*) after the date of this judgment; or

D ☐ Payment in equal ____ (*e.g. weekly, monthly, quarterly*) installments of $ ____ over a period of ____ (*e.g. months or years*), to commence ____ (*e.g. 30 or 60 days*) after release from imprisonment to a term of supervisions; or

E ☐ Payment during the term of supervised release will commence within ____ (*e.g. 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

DEFENDANT SHALL PAY THE SPECIAL ASSESSMENT OF $200.00. IMMEDIATELY OR ACCORDING TO A PAYMENT PLAN ESTABLISHED BY THE COURT IN CONSULTATION WITH THE PROBATION OFFICER, IF NOT PAID IN FULL BEFORE RELEASE FROM PRISON THROUGH A BUREAU OF PRISONS FINANCIAL RESPONSIBILITY PROGRAM.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*). Total Amount, Joint and Several Amount and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

STATEMENT OF REASONS

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A ☑ The court adopts the presentence investigation report without change.

B. ☐ The court adopts the presentence investigation report with the following changes. (Check all that apply and specify court determination, findings, or comments, referencing paragraph

numbers in the presentence report, if applicable) (*Use page 4 if necessary.*)

1 ☐ **Chapter Two of the U.S.S.G. Manual** determinations by court (including changes to base offense level, or specific offense characteristics)

2 ☐ **Chapter Three of the U.S.S.G. Manual** determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility);

3 ☐ **Chapter Four of the U.S.S.G. Manual** determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations);

4 ☐ **Additional Comments or Findings** (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classifications, designation, or programming decisions):

C. ☐ **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**

II **COURT FINDING ON MANDATORY MINIMUM SENTENCE** (*Check all that apply.*)

A ☐ No count of conviction carries a mandatory minimum sentence.

B ☑ Mandatory minimum sentence imposed.

C ☐ One or more counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply based on

- ☐ findings of fact in this case
- ☐ substantial assistance (18 U.S.C. § 3553(e))
- ☐ the statutory safety valve (18 U.S.C. § 3553(f))

III **COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (*BEFORE DEPARTURES*):**

Total Offense Level: 29
Criminal History Category: 1
Imprisonment Range: 120 to 120 months
Supervised Release Range: 5 to 5 years
Fine Range: $15,000 to $15,000,000

☑ Fine waived or below the guideline range because of inability to pay.

IV ADVISORY GUIDELINE SENTENCING DETERMINATION (*Check only one.*)

A ☑ The sentence is within an advisory guideline range that is not greater than 24 months, and the court finds no reason to depart

B. ☐ The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons. (*Use page 4 if necessary.*)

C ☐ The court departs from the advisory guideline range for reasons authorize by the sentencing guidelines manual. (*Also complete Section V.*)

D ☐ The court imposed a sentence outside the advisory sentencing guideline system. (*Also complete Section VI.*)

V DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES (*If applicable.*)

A **The sentence imposed departs** (*Check only one*):

☐ below the advisory guideline range

☐ above the advisory guideline range

B **Departure based on** (*Check all that apply*):

1 **Plea Agreement** (*Check all that apply and check reason(s) below.*):

- ☐ 5K1.1 plea agreement based on the defendant's substantial assistance
- ☐ 5K3.1 plea agreement based on Early Disposition or "Fast-track" program
- ☐ binding plea agreement for departure accepted by the court
- ☐ plea agreement for departure, which the court finds to be reasonable
- ☐ plea agreement that states that the government will not oppose a defense departure motion.

2 **Motion Not Addressed in a Plea Agreement** (*Check all that apply and check reason(s) below.*):

- ☐ 5K1.1 government motion based on the defendant's substantial assistance
- ☐ 5K3.1 government motion based on Early Disposition or "Fast-track" program
- ☐ government motion for departure

☐ defense motion for departure to which the government did not object

☐ defense motion for departure to which the government objected

3 Other

☐ Other than a plea agreement or motion by the parties for departure (*Check reason(s) below.*):

C Reason(s) for Departure (*Check reason(s) below.*):

☐4A1.3 Criminal History Inadequacy; ☐5H1.1 Age; ☐5H1.2 Education and Vocational Skills; ☐5H.13 Mental and Emotional Condition; ☐5H1.4 Physical Conditions; ☐5H1.5 Employment Record; ☐5H1.6 Family Ties and Responsibilities; ☐5H1.11 Military Record, Charitable Service, Good Works; ☐5K2.0 Aggravating or Mitigating Circumstances; ☐5K2.1 Death; ☐5K2.2 Physical Injury; ☐5K2.3 Extreme Psychological Injury; ☐5K2.4 Abduction or Unlawful Restraint; ☐5K2.5 Property Damage or Loss; ☐5K2.6 Weapon or Dangerous Weapon; ☐5K2.7 Disruption of Government Function; ☐5K2.8 Extreme Conduct; ☐5K2.9 Criminal Purpose; ☐5K2.10 Victim's Conduct; ☐5K2.11 Lesser Harm; ☐5K2.12 Coercion and Duress; ☐5K2.13 Diminished Capacity; ☐5K2.14 Public Welfare; ☐5K2.16 Voluntary Disclosure of Offense; ☐5K.17 High- Capacity,

Semiautomatic Weapon; ☐5K2.18 Violent Street Gang; ☐5K2.20 Aberrant Behavior; ☐5K2.21 Dismissed and Uncharged Conduct; ☐5K.22 Age or Health of Sex Offenders; ☐5K2.23 Discharged Terms of Imprisonment; ☐ Other guideline basis (*e.g.* 2B1 1 commentary)

D **Explain the facts justifying the departure.** (*Use page 4 if necessary.*)

VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM (*Check all that apply.*)

A **The sentence imposed is** (*Check only one.*):

☐ below the advisory guideline range

☐ above the advisory guideline range

B **Sentence imposed pursuant to** (*Check all that apply.*):

1 **Plea Agreement** (*Check all that apply and check reason(s) below.*):

☐ binding plea agreement for a sentence outside the advisory guideline system accepted by the court

☐ plea agreement for a sentence outside the advisory guideline system,

which the court finds to be reasonable

☐ plea agreement that states that the government will not oppose a defense motion to the court to sentence outside the advisory guideline system

2 **Motion Not Addressed to a Plea Agreement**

☐ government motion for a sentence outside of the advisory guideline system

☐ defense motion for a sentence outside of the advisory guideline system to which the government did not object

☐ defense motion for a sentence outside of the advisory guideline system to which the government objected

3 **Other**

☐ Other than a plea agreement or motion by the parties for a sentence outside of the advisory

guideline system (*Check reason(s) below.*):

C **Reason(s) for Sentence Outside the Advisory Guideline Systems** (*Check all that apply.*)

- ☐ the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(a)
- ☐ to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
- ☐ to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
- ☐ to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
- ☐ to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))
- ☐ to avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6))

☐ to provide restitution to any victims of the offence (18 U.S.C. § 3553(a)(7))

D **Explain the facts justifying a sentence outside the advisory guideline system.** (*Use page 4 if necessary.*)

VII COURT DETERMINATIONS OF RESTITUTION

A ☑ Restitution Not Applicable.

B Total Amount of Restitution: _____

C Restitution not order (*Check only one.*):

1 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

2 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on

the sentencing process under 18 U.S.C. § 3663A(c)(3)(B)

3 ☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).

4 ☐ Restitution is not ordered for other reasons. (*Explain.*)

D ☐ Partial restitution is ordered for these reasons (*18 U.S.C. § 3553(c)*):

VIII. ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (*If applicable.*)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony cases.

Defendant's Soc. Sec. No.: XXX-XX-3784

Defendant's Date of Birth: 1973

Defendant's Residence Address:
Brockton, MA

Defendant's Mailing Address:
Unknown.

Date of Imposition of Judgment
3/12/2012

/s/ Douglas P. Woodlock
Signature of Judge

Douglas P. Woodlock U.S.D.J.
Name and Title of Judge

Date Signed March 13, 2013