No. 15-170

In the Supreme Court of the United States

RYAN MORRIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether imposition of a ten-year mandatory minimum sentence under 21 U.S.C. 841(a)(1) and (b)(1)(A) was reversible plain error where petitioner was charged with an offense carrying that mandatory minimum term, pleaded guilty without admitting the threshold drug quantities requiring that sentence, and provided sworn testimony at sentencing that established the applicable threshold drug quantities by overwhelming evidence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 784 F.3d 870.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2015. The petition for a writ of certiorari was filed on August 5, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiring to distribute more than 500 grams of cocaine and more than 280 grams of cocaine base, in violation of 21 U.S.C. 841(b)(1)(A)(iii) and (B)(ii), and 846 (Count 1), and possessing with intent to distribute more than 28 grams of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(iii) (Count 15). Pet. App. 28a-29a; Presen-

tence Investigation Report (PSR) ¶ 2. He was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. Pet. App. 30a-31a. The court of appeals affirmed. *Id.* at 1a-12a.

1. Beginning in April 2010, the Drug Enforcement Administration conducted a wiretap investigation of members of a large-scale drug-distribution organization in Dorchester, Massachusetts, including petitioner. PSR ¶¶ 9-12. On December 2, 2010, during a search of petitioner's residence, officers found 123.5 grams of cocaine base (crack cocaine) and 5.5 grams of powder cocaine. PSR ¶ 15.

In December 2010, a federal grand jury in the District of Massachusetts charged petitioner with conspiracy to distribute more than 500 grams of cocaine, in violation of 21 U.S.C. 841(b)(1)(B)(ii) and more than 280 grams of cocaine base, in violation of 21 U.S.C. 841(b)(1)(A)(iii), all in violation of 21 U.S.C. 846 (Count 1); and with possession of more than 28 grams of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(iii) (Count 15). Indictment 2-3, 18.

On October 4, 2012, petitioner pleaded guilty to Counts 1 and 15 without a plea agreement. 10/4/12 Tr. 3, 20-21. At the plea hearing, the government advised petitioner that the sentencing range on Count 1 involved a ten-year mandatory minimum sentence and a maximum sentence of up to life imprisonment. *Id.* at 8. During the hearing, petitioner admitted that he had an agreement with two co-conspirators to distribute cocaine, but he denied that he was their supplier. *Id.* at 17-20. Petitioner also admitted to possessing with intent to distribute the 123.5 grams of crack cocaine found in his home. *Id.* at 19-20. The district court accepted petitioner's guilty plea, finding it "sup-

ported by substantial evidence from which a finder of fact could find [him] guilty." *Id.* at 21. The determination of the quantity of drug attributable to petitioner was expressly left for sentencing. 10/4/12 Tr. 12; Pet. App. 3a.

2. Based on the contents of the wiretaps, the Probation Office attributed to petitioner a drug weight of ten kilograms of cocaine. PSR ¶ 55. Petitioner, however, disputed that he was responsible for five or more kilograms of cocaine. See 3/12/13 Tr. 4-5; Addendum to PSR 34-35.

At the sentencing hearing, the government presented testimony by the case agent and introduced recorded phone calls in which petitioner discussed cocaine purchases from his co-conspirators. See 3/12/13 Tr. 8-59. Testifying under oath in his defense, petitioner admitted in his direct testimony that he purchased 62 grams of cocaine on four specific occasions and cooked the cocaine into crack cocaine for resale. *Id.* at 112-117. On cross-examination, petitioner agreed that he had engaged in 12 transactions in 2010—nine purchases of 62 grams of cocaine and three purchases of 28 grams of cocaine—totaling 642 grams. *Id.* at 131-134. He also testified that he split the purchase of a kilogram of powder cocaine with another co-conspirator for resale in powder cocaine form, *id.* at 121, and acknowledged responsibility for the 123 grams of crack cocaine found in his apartment in December 2010, *id.* at 121-122.[1]

Based on petitioner's own admissions and evidence seized from petitioner's home, the district court found

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[1] A five-year mandatory minimum applies to petitioner's conviction on Count 15, which he does not challenge. 21 U.S.C. 841(b)(1)(B).

petitioner responsible for 500 grams of powder cocaine and 765 grams of crack cocaine (642 grams of powder cocaine purchased from a co-conspirator and cooked by petitioner into crack cocaine in the spring of 2010 plus 123 grams seized from his home in December 2010). 3/12/13 Tr. 154-159. In arguing for a lower sentence, petitioner asked the court to limit the quantity finding to the four specific instances in May and June, totaling 248 grams. *Id.* at 162-163. Petitioner's counsel acknowledged, however, that petitioner's sentencing testimony established a quantity of crack cocaine that triggered the ten-year mandatory minimum sentence under 21 U.S.C. 841(b)(1)(A). See 3/12/13 Tr. 169-170. The court imposed the mandatory minimum sentence. *Id.* at 190-191.

While petitioner's case was pending on appeal, this Court decided *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013), which overruled *Harris* v. *United States*, 536 U.S. 545 (2002), and extended the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), to cover facts that increased mandatory minimum sentences. *Alleyne*, 133 S. Ct. at 2155.

3. The court of appeals, in an opinion by Justice Souter, unanimously affirmed. Pet. App. 1a-12a. Because petitioner raised his *Alleyne* claim for the first time on appeal, the court applied plain-error review. *Id.* at 6a.

The government conceded that, in light of *Alleyne*, the first two prongs of the plain-error test were satisfied: petitioner had not expressly admitted responsibility for the threshold drug quantity of 280 grams or more of crack cocaine at his plea hearing, and *Alleyne* made clear that the court erred in imposing a mandatory minimum sentence based on its own finding of

drug quantity by a preponderance of the evidence. Pet. App. 6a; see Gov't C.A. Br. 13-14, 17.

Turning to the third prong of the plain-error analysis—whether the error affected petitioner's substantial rights—the court of appeals observed that "overwhelming evidence of the requisite drug types and quantities generally serves as a proxy for determining whether the *Alleyne* error contributed to the result" and thus affected petitioner's substantial rights. Pet. App. 7a (citations and internal quotation marks omitted). The court specified that "overwhelming evidence means "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." *Ibid.*

The court of appeals declined to apply the " 'causal-connection' test" advanced by petitioner in which it would have asked "whether the district court might have imposed a lower sentence if it had complied with the Sixth Amendment's restrictions on judicial fact-finding." Pet. App. 8a (quoting Pet. C.A. Reply Br. 2). The court of appeals found that the decisions cited by petitioner that applied the "causal-connection test" each involved a sentence *above* the mandatory minimum, thereby leaving open the possibility that the sentencing court may have imposed a lower sentence absent the *Alleyne* error. *Ibid.* By contrast, in this case, "the district court could not have imposed a lower sentence, given overwhelming evidence that [petitioner] was responsible for at least 280 grams of crack." *Ibid.* The court therefore found those "casual connection" cases to be "fully consistent with the overwhelming evidence test." *Ibid.*

Applying the overwhelming evidence test, the court of appeals had "no hesitation in concluding that the evidence [wa]s overwhelming that [petitioner] [wa]s responsible for at least 280 grams of crack." Pet. App. 9a. The court started with the four specific transactions, totaling 248 grams, admitted by petitioner in his direct testimony and conceded by petitioner in his sentencing position. *Id.* at 9a-10a. The court then found the evidence—including the 123 grams of crack cocaine seized from petitioner's home six months later and the remainder of petitioner's testimony—"establishes beyond any doubt" that petitioner was responsible "for far more than another 32 grams of crack" necessary to bring him over the 280 gram threshold for a ten-year mandatory minimum sentence.[2] *Id.* at 11a; see *id.* at 10a-12a. Petitioner therefore "failed to meet his burden of persuasion under the third prong" of plain-error review. *Id.* at 12a.

ARGUMENT

Petitioner challenges (Pet. 9-22) the court of appeals' holding that the violation of *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013), at his sentencing was not reversible plain error because petitioner's sworn sentencing testimony provided overwhelming evidence of the drug quantity sufficient to trigger a ten-year

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[2] The court of appeals noted that petitioner's "criticisms" of the district court's calculation of drug quantity "would have some force and could be persuasive" if the court were evaluating whether petitioner was responsible for the full 765.5 grams of crack found by the district court, but that such criticisms were not sufficient to "raise doubt in our mind" about petitioner's responsibility for the additional 32 grams of crack cocaine, beyond the quantities expressly admitted by petitioner in his direct testimony, necessary to trigger the mandatory minimum sentence. Pet. App. 12a.

mandatory minimum sentence under 21 U.S.C. 841(b)(1)(A). He contends that the circuits are divided on the proper mode of conducting plain-error review of *Alleyne* errors. The court of appeals correctly held that the sentence in this case did not involve reversible plain error and further review is not warranted.

1. Section 841(b)(1) of Title 21 of the United States Code provides a graduated sentencing scheme for, as relevant here, the offense of conspiring to possess with intent to distribute various controlled substances. See 21 U.S.C. 846 (conspiracies to violate Section 841(a) are subject to punishment under Section 841(b)). For an offense involving 28 grams or more of cocaine base or 500 grams or more of cocaine, the mandatory minimum sentence is five years of imprisonment. 21 U.S.C. 841(b)(1)(B)(ii)-(iii). For an offense involving 280 grams or more of cocaine base or five kilograms or more of cocaine, the mandatory minimum sentence is ten years. 21 U.S.C. 841(b)(1)(A)(ii)-(iii). Accordingly, if petitioner's offense involved at least 280 grams of cocaine base, a mandatory minimum sentence of ten years was required.

The court of appeals accepted the government's concession that *Alleyne* was violated because petitioner did not expressly admit to the threshold drug weight at his guilty plea hearing and his sentence was based on the district court's finding by a preponderance of the evidence. Pet. App. 2a-3a. Nevertheless, petitioner did not raise a Sixth Amendment objection to the district court's use of its factual findings to increase his mandatory minimum sentence. The court of appeals therefore correctly applied plain-error review and correctly held that petitioner cannot meet

his burden of showing that application of the mandatory minimum sentence constituted reversible plain error. See *United States* v. *Cotton*, 535 U.S. 625, 631-632 (2002) (errors involving failure to prove beyond a reasonable doubt an element that increases maximum sentence are subject to plain-error review).

a. Under the plain-error standard of Federal Rule of Criminal Procedure 52(b), the defendant must show (1) an error, (2) that is plain or obvious at the time of appeal, and (3) that affected his substantial rights. *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993) (citing Fed. R. Crim. P. 52(b)); see *Henderson* v. *United States*, 133 S. Ct. 1121, 1126 (2013). If he satisfies all three of these criteria, the reviewing court may exercise discretion to correct the error only where it concludes that the error "seriously affects the fairness, integrity or public reputation of judicial proceedings" or results in a miscarriage of justice. *Olano*, 507 U.S. at 736 (brackets omitted).

To demonstrate that an error affected his substantial rights, a defendant must show that "the error [was] prejudicial: It must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734. That is, "but for the error claimed, the result of the proceeding would have been different." *United States* v. *Dominguez-Benitez*, 542 U.S. 74, 82 (2004) (brackets and citation omitted) (synthesizing the standard for showing prejudice in various settings, including plain error).

A court's failure to instruct a jury on an element of a crime, and the jury's resulting failure to make a factual finding on that element, is subject to both plain- and harmless-error analysis. *Neder* v. *United States*, 527 U.S. 1, 7-15 (1999); *Johnson* v. *United*

States, 520 U.S. 461, 466-470 (1997). Such an error is harmless and does not affect a defendant's substantial rights when the "evidence supporting [the omitted element] was * * * overwhelming." *Neder*, 527 U.S. at 16. In making that determination, the court should consider the record as a whole. *Id.* at 15-16, 19.

In *Alleyne*, this Court held that brandishing a firearm "constitutes an element of a separate, aggravated offense that must be found by the jury" "because the fact of brandishing [the firearm] aggravates the legally prescribed range of allowable sentences" and triggers a seven-year mandatory minimum sentence under 18 U.S.C. 924(c)(1)(A)(ii). 133 S. Ct. at 2162. As applied to the drug offense here, when used to increase a mandatory minimum sentence, drug type and quantity are "element[s]" of the offense. See *Burrage* v. *United States*, 134 S. Ct. 881, 887 (2014) (same as to "death results" enhancement factor in 21 U.S.C. 841(b)). Just as in *Neder*, the court of appeals must evaluate whether the record contains overwhelming evidence of the omitted element of the offense to determine whether an *Alleyne* error affected substantial rights. See *Olano*, 507 U.S. at 734-735 (defendant bears the burden of persuasion on plain-error review to show that the error in question affected substantial rights).

b. In light of the overwhelming evidence, the court of appeals correctly found that any rational jury would have concluded that petitioner conspired to possess at least 280 grams of cocaine base and thus would have convicted him on the aggravated offense. As the court of appeals explained, the four specific transactions to which petitioner admitted during his sworn testimony and on which he relied in seeking a lower sentence

(and which were captured in recorded phone calls) yielded a sum of 248 grams. Pet. App. 9a-10a. Only an additional 32 grams of crack cocaine was necessary to trigger the ten-year mandatory minimum sentence under 21 U.S.C. 841(b)(1)(A). That quantity was readily established by the remaining evidence, including 123 grams of crack cocaine seized from petitioner's home and petitioner's testimony on cross-examination admitting responsibility for roughly 500 additional grams of crack cocaine. Pet. App. 2a-3a, 11a-12a.

Petitioner argues (Pet. 10, 19-20) that his Sixth Amendment rights would be violated if an appellate court could assess facts that were not presented to a jury. Because he pleaded guilty, petitioner argues any facts adduced at sentencing cannot be considered by the court of appeals. In his view, such fact-finding constitutes an improper "assumption" "about what would have occurred at a trial" and "permit[s] an appellate court to speculate about what a hypothetical jury would have found in a trial that never happened." Pet. 19-20 (citation omitted) (quoting *United States* v. *Guerrero-Jasso*, 752 F.3d 1186, 1204 (9th Cir. 2014) (Berzon, J., concurring)). Petitioner's argument that harmless- or plain-error review violates the Sixth Amendment when it considers facts not presented at trial, however, is foreclosed by this Court's decisions in *Neder*, *Cotton*, and *Washington* v. *Recuenco*, 548 U.S. 212 (2006). Those decisions establish that an appellate court may consider evidence not submitted to a jury or established by a guilty plea when determining whether an omitted offense element was supported by overwhelming evidence and, therefore, the absence of a jury finding was harmless.

In *Neder*, this Court applied harmless-error analysis where the district court failed to instruct the jury on a necessary element (materiality) of a fraud offense. 527 U.S. at 4. To decide whether the instructional error was harmless, the Court evaluated the evidence even though "the jury's instructions preclude[d] any consideration of evidence relevant to the omitted element." *Id.* at 17-18. *Neder* emphasized that an appellate court's "thorough examination of the record" for harmlessness does not usurp the role of the jury; "[r]ather, a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Id.* at 19. If it does not, "holding the error harmless does not reflect a denigration of the constitutional rights involved." *Ibid.* (brackets, citation, and internal quotation marks omitted).

In *Recuenco*, this Court similarly applied harmless-error review where a sentence-enhancing element was not submitted to the jury. 548 U.S. at 214-215, 221-222. The Court expressly rejected the argument that petitioner advances, holding that harmless-error analysis applies even if the "jury did not find [the defendant] guilty of each of the elements of the offenses with which he was charged." *Id.* at 221; see *Cotton*, 535 U.S. at 633-634 (failure to allege drug quantity in the indictment or to submit that factor to the petit jury was not reversible plain error on the fourth prong of plain-error analysis in light of overwhelming evidence on that issue); *Johnson*, 520 U.S. at 469-470 (failure to submit materiality element to jury did not "seriously affect the fairness, integrity or public reputation of judicial proceedings" because that element was essen-

tially "uncontroverted" and established by "overwhelming" evidence).

It follows from these decisions that a reviewing court may evaluate the record as a whole to determine whether it was reversible error where the defendant's conviction failed to establish an element of the offense. The court of appeals therefore correctly considered petitioner's sworn testimony at sentencing to find that overwhelming evidence established the threshold drug weight that required a ten-year mandatory minimum sentence under 21 U.S.C. 841(b)(1)(A). Accordingly, no reversible plain error occurred as a result of petitioner's failure to expressly admit such quantity at his guilty plea hearing.

2. Petitioner contends (Pet. 11-18) that a three-way circuit split exists on whether an appellate court can evaluate sentencing-phase evidence to determine whether an *Alleyne* error requires reversal under plain-error review. Any narrow disagreement among the courts of appeals on this question is not worthy of review. This Court's precedents already resolve the issue in favor of the majority position, which was applied in this case, making further review unwarranted here. And the proper treatment of *Alleyne* errors on plain-error review is a transitional issue of diminishing importance: now that this Court has established that facts that trigger an enhanced mandatory minimum sentence must be alleged and established in accordance with Sixth Amendment requirements, proceedings containing *Alleyne* errors are unlikely to occur with any frequency in the future.

a. No substantial division of authority exists on whether courts of appeals may consider sentencing evidence or evidence adduced at other phases of the

proceeding in determining whether "overwhelming evidence" establishes the omitted element on plain-error review. See *United States* v. *Payne*, 763 F.3d 1301, 1303-1304 (11th Cir. 2014) (per curiam) (harmless error where fact yielding higher mandatory minimum was "supported by uncontroverted evidence" presented at sentencing hearing and the record did not "contain[ ] evidence that could rationally lead to a contrary finding") (citation omitted; brackets in original); see also *United States* v. *Climer*, 591 Fed. Appx. 403, 411 (6th Cir. 2014) (finding that, based on facts adduced at sentencing, "[a]ny reasonable jury would have found that [the defendant] was responsible for distributing in excess of one kilogram of heroin"), cert. denied, 135 S. Ct. 2393 (2015).

Petitioner errs in contending (Pet. 17-18) that the decision below creates a conflict with the Ninth Circuit over whether an appellate court may consider a defendant's sworn statements at sentencing in evaluating whether a Sixth Amendment violation requires reversal on plain-error review. Petitioner claims (Pet. 17) that the Ninth Circuit has adopted a "categorical" rule that requires an appellate court to "disregard any post-conviction admissions by the defendant." Pet. 17-18 (citing *United States* v. *Nordby*, 225 F.3d 1053, 1061 n.6 (2000), overruled in part by *United States* v. *Buckland*, 289 F.3d 558, 568 (9th Cir. 2002) (en banc), and *Butler* v. *Curry*, 528 F.3d 624, 648 n.16 (9th Cir.), cert. denied, 555 U.S. 1089 (2008)).

Although decisions of the Ninth Circuit have stated that "admissions at sentencing are not relevant" to harmless-error analysis of errors under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), *Butler*, 528 F.3d at 648 n.16, the Ninth Circuit neither has applied this

rule consistently, nor has it extended this rule to plain-error review. For example, the Ninth Circuit has permitted an appellate court to consider sentencing proceedings to "help [it] adduce what other evidence might have been produced at trial, had the question been properly put before the jury," *United States* v. *Salazar-Lopez*, 506 F.3d 748, 755 (2007), cert. denied, 553 U.S. 1074 (2008), and has allowed consideration of evidence presented at sentencing when the defendant "did not dispute [its] authenticity," *United States* v. *Zepeda-Martinez*, 470 F.3d 909, 913 (2006).

In *United States* v. *Jordan*, 291 F.3d 1091, 1097 (2002), the Ninth Circuit refused to consider "a stipulation by the defendant at sentencing," in reviewing whether an *Apprendi* error was harmless. But *Jordan* found that this Court's decision in *Cotton* "d[id] not control" because the "lack of drug quantity in the indictment and jury decision in [*Cotton*] was analyzed under plain error, not harmless error," and the defendants in *Cotton* failed to establish the fourth prong of the plain-error test, which is inapplicable on harmless-error review. *Id.* at 1096 n.7. The Ninth Circuit in *Jordan* also found reliance on the sentencing record to be inappropriate because the defendant "had no notice from the indictment that quantity would be an issue" and thus it was not clear whether the defendant "might have contested quantity and what evidence [he] might have presented" had he understood that drug quantity was an element of the offense. *Id.* at 1096; see *United States* v. *Hunt*, 656 F.3d 906, 915 (9th Cir. 2011) (Plea and sentencing proceedings provided "an inadequate record" where defendant's "intent regarding drug type was never litigated."). In this case, by contrast, the indictment

charged petitioner with the mandatory minimum drug quantity and, with full notice that such quantity would determine his eligibility for an enhanced mandatory minimum sentence, petitioner testified at sentencing to facts that overwhelmingly established the threshold drug quantity. See Pet. App. 3a-5a.

The Ninth Circuit has not confronted a case like this one where the defendant pleaded guilty, understood that he was contesting drug quantity, and testified under oath at the sentencing hearing. Pet. App. 3a-5a. Given that the Ninth Circuit is willing to consider evidence the defendant does not dispute in conducting harmless-error review, it might be willing to consider his under-oath testimony in evaluating the substantial-rights issue here. In any event, even if the Ninth Circuit would decline to consider a defendant's sentencing admissions in determining whether an *Alleyne* error affected substantial rights, this case involves plain-error review, and it does not appear that the Ninth Circuit has conclusively declined to consider such admissions in conducting the fourth prong of plain-error analysis, which applies here.[3] See

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[3] *Nordby* involved plain-error review, 225 F.3d. at 1059-1060; in that case, however, the defendant "demonstrated more than a reasonable doubt that he was responsible" for the drug quantity at issue and thus the evidence was neither overwhelming nor uncontested as to that element, *id.* at 1061. Moreover, the Ninth Circuit in *Nordby* evaluated not only the contested evidence at trial, but also evidence presented by the defendant at sentencing that demonstrated he was not responsible for the threshold drug amount. *Id.* at 1060-1061. It was in that context that the Ninth Circuit noted, in dicta, that its review encompasses the "whole record," but excludes "any admissions made by [the defendant] at sentencing," for purposes of determining prejudice suffered as a result of an *Apprendi* error. *Id.* at 1061 n.6 (citation omitted).

pp. 21-23, *infra*. Accordingly, no reason exists to believe petitioner would have prevailed in overturning his sentence in that circuit.

b. Petitioner next argues (Pet. 12-17) that the circuits are divided about how to apply harmless-error analysis because, he contends, the Eighth Circuit requires automatic reversal for *Alleyne* errors, and the Fourth and Sixth Circuits ignore the "overwhelming evidence" test and instead apply the causal-connection test, which asks whether the district court would have imposed a different sentence if it understood that the mandatory minimum was inapplicable. Those claims of conflicts do not warrant review.

i. The majority of courts of appeals that have addressed the issue apply *Neder*'s overwhelming evidence standard to a claimed Sixth Amendment violation under *Alleyne*. See, *e.g.*, *United States* v. *Pizarro*, 772 F.3d 284, 299 (1st Cir. 2014) (affirming on harmless-error review where "overwhelming evidence supports the requisite findings of" drug quantity); *Payne*, 763 F.3d at 1303-1304 (11th Cir.) (finding affirmance warranted under harmless-error review if "uncontroverted evidence" supported omitted element); *United States* v. *Long*, 748 F.3d 322, 329 (7th Cir.) ("We will not reverse under [the plain-error] standard if we are convinced that upon a properly worded indictment, a properly instructed jury would have found the defendants guilty of distributing the requisite threshold quantities of narcotics.") (citations and internal quotation marks omitted), cert. denied, 134 S. Ct. 2832 (2014); *United States* v. *Mack*, 729

Nordby did not address whether a defendant's sentencing admissions that overwhelming establish the requisite drug quantity may be relevant to the fourth prong of plain-error review.

F.3d 594, 608 (6th Cir. 2013) ("If it is clear to us beyond a reasonable doubt that the outcome would not have been different even if the district court had instructed the jury on the element of brandishing and required the jury to make a finding on that element, then harmless error occurred."), cert. denied, 134 S. Ct. 1338 (2014).

ii. In *Lara-Ruiz*, the Eighth Circuit purported to apply plain-error review to an *Alleyne* error in imposing a 300-month sentence after finding that the defendant was subject to a mandatory minimum seven-year sentence for brandishing a firearm during a drug-trafficking crime under 18 U.S.C. 924(c)(1)(A)(ii). 721 F.3d at 558-559. The court found that the defendant's substantial rights had been affected, even though the sentencing court expressly stated that it would have imposed the same sentence if the lower, five-year mandatory minimum was applied, because the defendant had been "sentenced for a crime which he did not commit according to the jury." *Id.* at 558. For these same reasons, and without consideration of the strength of the evidence supporting the brandishing element, the court concluded that the error affected the integrity of the judicial proceedings and remanded for resentencing under the non-enhanced mandatory minimum. *Id.* at 559.

In *Lara-Ruiz,* the Eighth Circuit placed substantial weight on the fact that "neither the indictment nor the jury verdict referenced brandishing a firearm," and on that basis distinguished this Court's decision in *Johnson*, which considered the district court's failure to instruct the jury on an element of the offense. *Lara-Ruiz*, 721 F.3d at 559. In this case, by contrast, the indictment did charge petitioner with the

minimum-enhancing fact. It is not clear that the Eighth Circuit would extend its holding in *Lara-Ruiz* to these circumstances.

In any event, notably absent from the Eighth Circuit's reasoning in *Lara-Ruiz*, was any mention of *Cotton*, where this Court found no reversible plain error despite an essentially identical error in the indictment.[4] 535 U.S. at 631-633. *Lara-Ruiz* therefore incorrectly concluded that reversal is required for an *Alleyne* error on plain-error review without regard to whether the omitted element was overwhelmingly proved. Because that decision is inconsistent with this Court's treatment of similar Sixth Amendment errors, the Eighth Circuit itself may reconsider its approach in an appropriate case.[5] That isolated holding, however, does not justify review in this case, where the court of appeals correctly applied this Court's plain-error analysis.

iii. Petitioner is incorrect (Pet. 15-17) that the decision below diverges from the Fourth and Sixth Circuits by assessing whether the omitted element was

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[4] The Eighth Circuit in *Lara-Ruiz* found its decision was controlled by *United States* v. *Maynie*, 257 F.3d 908 (2001), cert. denied, 534 U.S. 1151, and 535 U.S. 944 (2002), which had held that the indictment's failure to charge the defendant with the enhancing element, coupled with the jury's failure to find that element, was reversible plain error. *Id.* at 911, 921. But *Maynie* was decided prior to this Court's decision in *Cotton*, which abrogated *Maynie*'s reasoning in the plain-error context. See *Cotton*, 535 U.S. at 631-632.

[5] The Eighth Circuit cited *Lara-Ruiz* in remanding for resentencing in *United States* v. *Shaw*, 751 F.3d 918, 923 (2014). In that case, however, the government conceded reversible *Alleyne* error and did not argue that overwhelming evidence established that the defendant brandished the firearm. *Ibid.*

supported by overwhelming evidence rather than by applying the causal-connection test to evaluate whether the district court would have imposed a different sentence in the absence of the mandatory minimum sentence.

Petitioner acknowledges that the Sixth Circuit applied the overwhelming evidence test in *Mack*, 729 F.3d at 609, which asked whether "undisputed trial evidence" established the omitted element beyond a reasonable doubt. Pet. 16 (citation omitted). He is incorrect, however, that *United States* v. *McCloud*, 730 F.3d 600 (6th Cir. 2013), cert. denied, 134 S. Ct. 1528 (2014), suggests a different test. In *McCloud,* it was undisputed that the drug quantity (19.4 grams of crack cocaine) was well *below* the applicable mandatory minimum threshold weight (28 grams), but the district court incorrectly listed the applicable statutory range as 5-to-40 years of imprisonment instead of 0-to-20 years of imprisonment.[6] *Id.* at 601-603. The court of appeals in *McCloud* emphasized that that case did not involve an *Alleyne* error, *id.* at 604, but rather, concerned the district court's procedural error in using the incorrect statutory range at sentencing, *id.* at 603. In that context, the Sixth Circuit evaluated whether the district court would have imposed a lower sentence if it had used the correct statutory sentencing range. *Id.* at 604-605. The court did not retreat from the consideration of overwhelming evidence in evaluating *Alleyne* errors. Indeed, the court of ap-

[6] Between the defendant's plea and sentencing, his statutory sentencing range had been reduced as a result of the Fair Sentencing Act of 2010, Pub. L. No. 111–220, 124 Stat. 2372, from 5-to-40 years of imprisonment to 0-to-20 years of imprisonment. *McCloud*, 730 F.3d at 601.

peals in *McCloud* declined to apply the Eighth Circuit's decision in *Lara-Ruiz* for two reasons: the Sixth Circuit disagreed with *Lara-Ruiz*'s analysis and the Sixth Circuit found *Lara-Ruiz* distinguishable from the case before it. *Ibid.* Accordingly, nothing in *McCloud* assists petitioner here.

In two subsequent unpublished opinions, moreover, the Sixth Circuit applied an approach consistent with the First Circuit's decision below, holding that, where it "appear[ed] beyond a reasonable doubt that the jury would have found" the threshold drug quantity, "there is no prejudice not because the sentence would necessarily have been the same if the mandatory minimum were not in play but based on a logically prior step: the mandatory minimum would have applied if the jury had been properly instructed." *United States* v. *Watson*, No. 12-1903, 2015 WL 5000651, at *17 (6th Cir. Aug. 24, 2015); see *Climer*, 591 Fed. Appx. at 409-411 (applying overwhelming evidence test to evaluate *Alleyne* violation).

The Fourth Circuit has also applied the overwhelming evidence test in plain-error, but not harmless-error, review. See *United States* v. *Robinson*, 460 F.3d 550, 560 (2006); *United States* v. *Smith*, 441 F.3d 254, 272-273, cert. denied, 549 U.S. 903, and 549 U.S. 931 (2006).[7] The Fourth Circuit's decision in *United States* v. *DeLeon*, 539 Fed. Appx. 219 (2013) (per curiam), cited by petitioner (Pet. 15-16), involved preserved errors evaluated under harmless, not plain

[7] The Third Circuit's recent en banc decision in *United State*s v. *Lewis*, 802 F.3d 449 (2015), similarly distinguished between the standard applicable on harmless- and plain-error review, finding the overwhelming evidence test applicable only in the latter situation. *Id.* at 457.

error.[8] 539 Fed. Appx. at 221. Because the Fourth Circuit has distinguished between the test applicable on harmless- and plain-error review, *DeLeon* is not inconsistent with the court of appeals' application of the overwhelming evidence test on plain-error review here.[9]

3. Not only does any variation in the circuits over the transitional *Alleyne* plain-error issue not warrant this Court's review, but this case would be a poor vehicle in which to address it. The court of appeals rested its holding on the third prong of the plain-error test, which asks whether the error affects petitioner's substantial rights. Pet. App. 6a, 9a, 12a. Therefore, it did not reach the fourth, discretionary prong of plain-error review. But this Court has twice declined to grant relief on the fourth prong, even after assuming that a Sixth Amendment error affected substantial rights. In both *Cotton* and *Johnson*, the Court held that where the evidence was "overwhelming" and

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[8] Petitioner also cites (Pet. 16 n.2) *United States* v. *Mubdi*, 539 Fed. Appx. 75 (2013) (per curiam), where the Fourth Circuit remanded on plain-error review for a violation of *Alleyne* by applying the causal-connection test, rather than by evaluating the case for overwhelming evidence. But, other than the defendant's failure to object to the PSR's drug weight at his initial sentencing, there was no other evidence on which the court of appeals in *Mubdi* might have relied to determine whether overwhelming evidence supported the necessary drug quantity. See *id.* at 76-77.

[9] In an unpublished opinion, the Tenth Circuit remanded for resentencing without consideration of harmlessness in a death-results drug case, apparently based entirely on the government's concession. *United States* v. *Lake*, 530 Fed. Appx. 831, 832 (2013). In a later published opinion, the Tenth Circuit rejected a part of *Lake* for providing no analysis. *United States* v. *Cassius*, 777 F.3d 1093, 1098, cert. denied, 135 S. Ct. 2909 (2015).

"essentially uncontroverted," "no basis [existed] for concluding that the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Cotton*, 535 U.S. at 632-633 (second set of brackets in original) (quoting *Johnson*, 520 U.S. at 470).

Here, petitioner pleaded guilty without a plea agreement to an indictment that charged the threshold drug quantity necessary to support an enhanced mandatory minimum under 21 U.S.C. 841(b)(1)(A). At his plea hearing, petitioner was made aware that he faced a mandatory minimum ten-year sentence. 10/4/12 Tr. 8; see *id.* at 9 (district court confirmed petitioner's understanding of the penalties). The district court expressly informed petitioner that he would be leaving it to the court "to decide the amount of drugs involved and to decide what the penalty is going to be." *Id.* at 12. Petitioner did not object. Then, at sentencing, in an effort to secure a lower sentence, petitioner voluntarily took the stand to describe his drug activities. Pet. App. 3a-5a. His own admissions formed the basis for the court of appeals' conclusion that evidence of the threshold drug quantity was "overwhelming." *Id.* at 9a-12a.

Even assuming that any *Alleyne* error affected petitioner's substantial rights, just as in *Cotton* and in *Johnson*, reversal would be unwarranted here under the fourth prong of plain-error analysis. Reliance on petitioner's own admissions to affirm his sentence strongly indicates that any formal *Alleyne* "error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Cotton*, 535 U.S. at 632-633; cf. *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (Sixth Amendment violation occurs when a

sentencing judge relies on his own factfinding to exceed the maximum sentence set "solely on the basis of the facts reflected in the jury verdict or *admitted by the defendant*".) (emphasis omitted). "No 'miscarriage of justice' will result here if [the Court] do[es] not notice the error." *Johnson*, 520 U.S. at 470 (citation omitted).

These facts further underscore why this Court's intervention is not warranted as a general matter on this issue. In the course of a guilty plea, a defendant typically admits facts establishing a contested element of an offense. This case presents an unusual situation in which petitioner pleaded guilty but, because *Alleyne* had not yet been decided, was not asked to, and did not, admit culpability for the requisite drug weight. Now that *Alleyne* has clarified that facts increasing a mandatory minimum sentence are to be treated as elements of an offense, that scenario is unlikely to occur in future cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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