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# In The Supreme Court of the United States

**RICKEY CLARK,**

*Petitioner,*

v.

**UNITED STATES OF AMERICA,**

*Respondent.*

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

## PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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## QUESTIONS PRESENTED

The Controlled Substances Act, 21 U.S.C. § 841(b), creates a staircase of escalating sentencing ranges predicated on drug quantity. Based on the district court's finding of drug quantity by a preponderance of the evidence, petitioner Rickey Clark was sentenced to the mandatory minimum ten-year term under § 841(b)(1)(A), which carried a maximum of life in prison. The district court acknowledged that the government failed to prove drug quantity beyond a reasonable doubt. Had the reasonable doubt burden applied, Clark would have been sentenced to a term of four years under § 841(b)(1)(C), which carried a sentencing range of zero to twenty years for offenses involving unspecified drug quantities. The questions presented are:

1. Whether a criminal defendant can be sentenced to a mandatory minimum and exposed to an increased maximum under 21 U.S.C. §§ 841(b)(1)(A) or -(b)(1)(B) based upon facts the government is unable to prove beyond a reasonable doubt. As the Seventh Circuit acknowledged in this case, the courts of appeals are divided on this question.

2. Whether the holding of *Harris v. United States*, 536 U.S. 545 (2002), that facts triggering a mandatory minimum may be found by the trial judge by a preponderance of the evidence, remains good law.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 538 F.3d 803 and reprinted in the Appendix to this petition.[1] App. 1a-22a. The order of the United States District Court for the Northern District of Illinois is unreported. App. 23a-28a.

## JURISDICTION

The judgment of the court of appeals was entered on August 19, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent provisions are set out in the Appendix. App. 29a-42a.

## STATEMENT OF THE CASE

This case raises important, recurring questions affecting numerous drug prosecutions in the federal courts. Under the Controlled Substances Act, 21 U.S.C. § 841, the sentence is largely dictated by the quantity of drugs attributed to the defendant. Section 841(b) contains three subsections, each containing its own sentencing range. A finding of drug quantity determines whether the defendant is sentenced under one subsection or another, and hence what minimum and maximum

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[1] Citations are to the Appendix to this Petition ("App."), to the appendix integrated into Petitioner's brief to the Seventh Circuit ("C.A. Integrated App."), and to the separate appendix to Petitioner's brief to the Seventh Circuit ("C.A. Separate App.").

penalties apply. Yet, as the Seventh Circuit acknowledged below, the courts of appeals are divided on whether drug quantity is an element of the offense that the government must prove to the jury beyond a reasonable doubt, or a sentencing factor that may be determined by the court by a preponderance of the evidence.

When the finding of drug quantity moves the defendant up the staircase of subsections, exposing him to both a higher mandatory minimum and a higher statutory maximum, the Second and Ninth Circuits require that the government prove drug quantity to a jury beyond a reasonable doubt. In the remaining circuits, drug quantity is sometimes an element of the offense and sometimes a sentencing factor, depending on the sentence ultimately imposed: When the sentence is below the maximum penalty authorized by the statute absent proof of drug quantity (the "default" statutory maximum under § 841(b)(1)(C)), drug quantity is a sentencing factor, but when the sentence is above the default statutory maximum, drug quantity is an element of the offense. Accordingly, in these circuits, whether drug quantity is an element or a sentencing factor is determined after sentencing, and thus the burden of proof remains unknown until the evidence has been submitted, the finding made, and the sentence imposed.

The split among the circuits reflects their differing interpretations of this Court's opinions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny, specifically whether the Fifth and Sixth Amendment rights protected by *Apprendi* attach when judicial fact-finding exposes a defendant to a higher statutory maximum, or only when the defendant is actually sentenced beyond the default statutory maximum.

The circuit courts are also divided regarding whether, as a matter of statutory interpretation, drug quantity is an element of an aggravated offense under §§ 841(b)(1)(A) or -(b)(1)(B). The appellate courts have come to different interpretations of the language, structure, and legislative history of the Controlled Substances Act.

Finally, the circuit split also reflects disagreement over the scope of *Harris v. United States*, 536 U.S. 545 (2002). Specifically, the circuit courts are divided on whether this Court's decision in *Harris*, allowing trial judges to find by a preponderance of the evidence facts triggering a statutory mandatory minimum penalty, applies when the judicially-found facts also expose the defendant to the risk of a higher maximum sentence (which was not the situation in *Harris*). *Harris* has engendered confusion in the lower courts, and appellate courts in five circuits have questioned whether its doctrinal underpinnings have been so eroded by subsequent decisions of this Court that the case may not remain good law.

The split in the circuits on these issues is intractable, as appellate courts on both sides of the divide have recently reaffirmed their positions. Only a decision of this Court can resolve the issues and create nationally binding law for the uniform administration of an important federal statute.

This case presents an ideal vehicle for resolving these issues. The burden of proof in this case truly mattered. In imposing a ten-year sentence, the district court found that "[w]hile the court was able to determine the drug quantity based on a preponderance of the evidence, it does not believe that the evidence would have been sufficient to sustain a decision beyond a reasonable doubt." App. 24a. Equally clear is that Clark would have

received a lower sentence absent the preponderance-level finding of drug quantity. The district court initially sentenced Clark to four years and later re-sentenced him to ten years based on the government's position that the drug quantity finding dictated a sentence within the ten-year-to-life range under § 841(b)(1)(A). App. 2a. There can be no suggestion that any error was harmless here; the record is clear that a finding of drug quantity that the government was unable to prove beyond a reasonable doubt not only exposed Clark to the risk of a life sentence but also increased his sentence from four to ten years.

*1. **The Charges.*** The government charged Clark by indictment with conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846, and possession of cocaine with intent to distribute, in violation of § 841(a)(1).[2] App. 23a. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. Clark moved to dismiss the indictment for failure to specify the alleged drug quantities, citing *Apprendi*. C.A. Separate App. 35-37. Upon denial of the motion, Clark entered a blind plea of guilty but did not admit that the offenses involved any specific quantity of cocaine. App. 2a. Clark maintained throughout the proceedings that he had received less than one kilogram of cocaine. App. 2a-3a.

As the Seventh Circuit noted, Clark repeatedly argued to the district court "that the quantity of drugs at

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[2] 21 U.S.C. § 846 provides that anyone who "attempts or conspires" to commit an offense specified by § 841 "shall be subject to the same penalties as those prescribed for the offense," thus adopting the penalty scheme set forth in § 841(b)(1) for conspiracy offenses. See 21 U.S.C. § 846.

issue is an element of his 21 U.S.C § 841 offense, and that the Fifth and Sixth Amendments precluded subjecting him to an enhanced sentence based on a drug quantity that was not determined by a jury beyond a reasonable doubt." App. 2a-3a. Adhering to Seventh Circuit precedent to the contrary, the district court overruled Clark's objections and convened a hearing to determine drug quantity by a preponderance of the evidence. App. 3a.

***2. The Drug Quantity Hearing.*** The government presented a single witness, co-defendant Juan Corral, a long-time drug dealer and gang member with drug, money laundering, and firearms convictions who admitted that he had lied under oath in the past and agreed that he was a perjurer. C.A. Separate App. 97-99, 109, 114-15, 128-31, 161-62.

Arrested in June 2002, and facing the possibility of lifetime imprisonment, Corral provided the government with purported drug quantity estimates for more than forty of his alleged customers strictly from memory, without any confirmatory books or records. C.A. Separate App. 127-28, 135-37, 159-61.

Corral testified that he met Clark in February 2002 and provided varying amounts of cocaine to him on unspecified occasions until Corral's arrest in June 2002. C.A. Separate App. 118-20, 126-27. Corral admitted that he had no memory of any specific drug transaction with Clark and no recollection of the number of such transactions. C.A. Separate App. 126, 172-73, 180-81.

Nevertheless, Corral estimated that he had provided Clark with a total of "maybe" 17 kilograms of cocaine. C.A. Separate App. 126. The district court noted the weakness of Corral's testimony: "I think he's trying to do his best, but I don't think his best is quite good

enough to send somebody away for." C.A. Separate App. 189; App. 4a.

The government sought to corroborate the testimony of its only witness with an excerpt from a government agent's summary and interpretation of wiretap intercepts contained in a complaint affidavit. App. 4a-6a; C.A. Separate App. 190-92. The summary was not introduced into evidence, but rather used to refresh Corral's recollection about two conversations he supposedly had with Clark on June 5, 2002 regarding "tickets." C.A. Separate App. 122-25, 212-14. Corral did not, however, testify that the transaction supposedly discussed in code that day ever occurred and the government conceded that it had no evidence that any transactions purportedly discussed with Clark in the wiretapped conversations ever actually took place. C.A. Separate App. 192.

Ultimately, however, the district court concluded that "for purposes of this drug quantity hearing, where the standard is a preponderance of the evidence," the court could rely on the uncalled agent's never-introduced interpretive summary of the telephone intercepts as "irrefutable evidence" that Clark "was discussing relatively large deals, that's deals in the five-to-six kilogram range with Mr. Corral on two occasions." C.A. Separate App. 207, 214; App. 4a-6a. Based on the assumption that two transactions totaling eleven kilograms occurred, the court hypothesized that if Clark had engaged in two more deals at three kilograms each, or one more deal at five or six kilograms, "we're over fifteen." C.A. Separate App. 207, 209. "So I think in this case I have to find that the preponderance of the evidence establishes that there was something more than fifteen kilograms involved. And that will be the ruling in Mr. Clark's case." C.A. Separate App. 209.

In a later Order, the district court emphasized that "Corral's testimony was vague and uncertain" and that the court "does not believe that the evidence would have been sufficient to sustain a decision beyond a reasonable doubt." App. 24a.

***3. The Sentencing.*** At sentencing, while again objecting to the determination of drug quantity by a preponderance of the evidence, Clark cited his lack of criminal convictions or arrests for narcotics or weapon offenses, and his long-term gainful employment supporting his wife and two children, in arguing for a downward departure from the United States Sentencing Guidelines. C.A. Separate App. 220 & n.1, 221; App. 7a. The government took the position that no mandatory minimum sentence applied and recommended a sentence "within the applicable Guideline range of 108 to 135 months." C.A. Separate App. 225-26; App. 7a.

Noting that Clark had only "a very minor criminal record" for gambling and was "a family man" with an "intact family" and "huge job stability, which really is quite extraordinary" who "appears to have a good life and a positive life," the court agreed that a sentence below the Guideline range was appropriate. App. 7a; C.A. Separate App. 251, 259-60. The court sentenced Clark to 48 months of imprisonment, a sentence that the court believed reflected the "seriousness of the offense," while giving Clark "an opportunity to resume the positive aspects of his past life when he is released." App. 7a-8a; C.A. Separate App. 260-62.

The following day, the government filed a motion to alter the sentence, pursuant to Fed. R. Crim. P. 35(a), contending that contrary to its prior statement to the court, the ten-year mandatory minimum sentence of 21

U.S.C. § 841(b)(1)(A) applied based on the court's drug quantity finding. App. 8a.

The district court agreed with the government that Seventh Circuit precedent allows facts that trigger mandatory minimum sentences, such as drug quantity, to be found by the judge by a preponderance of the evidence. App. 26a-27a. Observing that the Seventh Circuit "has noted the tension in this area of the law, but has declined to reconcile *Harris* with *Apprendi*, *Blakely*, and *Booker*, as long as *Harris* remains the Supreme Court's last word on the issue," the district court acknowledged that it "must follow the law of this circuit." App. 27a-28a. Accordingly, the court re-sentenced Clark to ten years. App. 28a. As the court explained, "I think that, based on Seventh Circuit precedent, I have no choice but to impose the ten-year mandatory minimum" but "my view is that the sentence is wrong under the Supreme Court line of cases beginning with *Apprendi*, going to *Blakely* and going to *Booker*." C.A. Integrated App. A22-A23. The court "urge[d]" Clark to exercise his right to appeal, "because I don't think this sentence is ultimately going to be held to be correct by the Supreme Court" and predicted that "by the time this case is over this sentence will be vacated." *Id.* at A23-A24. A29.

***4. The Appeal.*** On appeal, the Seventh Circuit affirmed Clark's sentence. The appellate court rejected Clark's arguments that the Fifth and Sixth Amendments, as interpreted by this Court in *Apprendi* and its progeny, and 21 U.S.C. § 841 as a matter of statutory interpretation, required drug quantity to be proved to a jury beyond a reasonable doubt before Clark could be sentenced for an aggravated offense under 21 U.S.C. § 841(b)(1)(A). App. 15a-18a. The Seventh Circuit adhered to its view that "judges may find facts, by a preponderance of the evidence, that subject a defendant to a

statutory mandatory minimum" and "*Apprendi* has no application" as long as the sentence is "at or below the maximum provided in § 841(b)(1)(C)." App. 16a. The Seventh Circuit also reaffirmed its view that "neither the statute, nor *Apprendi* and its progeny" require that "drug quantity constitutes an element of an § 841 offense that must be proved to a jury beyond a reasonable doubt." App. 17a. The Seventh Circuit acknowledged that "the Second and Ninth Circuits have adopted contrary approaches to drug quantity determinations under § 841," but declined to alter its own position based on the contrary views of those circuits. App. 17a.

## REASONS FOR GRANTING THE PETITION

The decision below perpetuates conflicts among the courts of appeals regarding important and frequently recurring issues of federal law that this Court has not directly addressed.

The first issue dividing the circuit courts is whether the Fifth and Sixth Amendment rights recognized by *Apprendi* protect a defendant when the government seeks an enhanced sentence based on judicial fact-finding, or only when the sentence ultimately imposed exceeds the default statutory maximum.

In addressing this question, the Second and Ninth Circuits have focused on this Court's language applying *Apprendi* broadly to protect against "exposure" to higher potential statutory maximums based on facts determined by a court by a preponderance of the evidence. In these two circuits, if a fact empowers a judge to sentence an individual to a higher statutory maximum, that fact must be charged in the indictment and proved beyond a reasonable doubt. As such, in the Second and

Ninth Circuits, *Apprendi* rights attach before sentencing. See *United States v. Gonzalez*, 420 F.3d 111, 129 (2d Cir. 2005) ("[W]e cannot conclude . . . that *Apprendi* and its progeny apply only to prosecutions that actually result in sentences exceeding otherwise applicable maximums. . . . The *Apprendi* rule applies to the resolution of any fact that would substitute an increased sentencing range for the one otherwise applicable to the case."); *United States v. Velasco-Heredia*, 319 F.3d 1080, 1085 (9th Cir. 2003) ("[B]ecause Velasco-Heredia's sentencing range as fixed by the court's verdict was constitutionally restricted to zero to five years pursuant to § 841(b)(1)(D), his exposure to the imposition of from five to forty years amounted to clear *Apprendi* error."). Like the Seventh Circuit in this case, the Second Circuit recently reaffirmed its position. See *United States v. Confredo*, 528 F.3d 143, 153 (2d Cir. 2008) ("Our Court has ruled that *Apprendi* applies not only where an enhanced sentence exceeds the statutory maximum but also where an enhancement exposes the defendant to the risk of a sentence that exceeds the statutory maximum.").

The rule is different in the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits. In these circuits, only if a judicially-found fact actually results in a judge imposing a sentence in excess of the default statutory maximum must that fact have been charged in the indictment and proved beyond a reasonable doubt. See, e.g., *United States v. Robinson*, 241 F.3d 115, 121-22 (1st Cir. 2001) ("[T]he *Apprendi* rule applies only in situations in which a judge-made factual determination actually boosts the defendant's sen-

tence beyond the basic statutory maximum. Theoretical exposure to a higher maximum punishment, in and of itself, is not enough.") (internal citations omitted).[3]

The second issue dividing the circuit courts is whether, as a matter of statutory interpretation, drug quantity is an element of an aggravated offense under §§ 841(b)(1)(A) and -(b)(1)(B). In addressing this question, the circuits are split along the same lines.

In the Second Circuit, "drug quantity is an element that must always be pleaded and proved to a jury or admitted by a defendant to support conviction or sentence on an aggravated offense under § 841(b)(1)(A) or -(b)(1)(B)." *Gonzalez*, 420 F.3d at 131. In the Ninth Circuit, while drug quantity is neither an element nor a sentencing factor, but rather "a material fact," it must still be submitted to the jury and proved beyond a reasonable doubt in a prosecution under §§ 841(b)(1)(A) or -(b)(1)(B). *United States v. Thomas*, 355 F.3d 1191, 1195 (9th Cir. 2004) ("[T]he relevant inquiry is not whether a penalty provision is an element, but rather whether it exposes the defendant to a longer sentence than would be authorized by the jury's guilty verdict.").

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[3] See also *United States v. Vazquez*, 271 F.3d 93, 98 (3d Cir. 2001) (*en banc*); *United States v. General*, 278 F.3d 389, 393 (4th Cir. 2002); *United States v. Keith*, 230 F.3d 784, 786-87 (5th Cir. 2000); *United States v. Copeland*, 321 F.3d 582, 603 (6th Cir. 2002); *United States v. Hernandez*, 330 F.3d 964, 980 (7th Cir. 2003) (*en banc*); *United States v. Aguayo-Delgado*, 220 F.3d 926, 933 (8th Cir. 2000); *United States v. Thompson*, 237 F.3d 1258, 1261-62 (10th Cir. 2001); *United States v. Sanchez*, 269 F.3d 1250, 1276 (11th Cir. 2001) (*en banc*); *United States v. Graham*, 317 F.3d 262, 273-74 (D.C. Cir. 2003).

In the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits, drug quantity is an element only if the defendant receives a sentence greater than the twenty-year statutory maximum of § 841(b)(1)(C). Otherwise, drug quantity is a sentencing factor that may be found by the court by a preponderance of the evidence. See, e.g., *United States v. Stark*, 499 F.3d 72, 80 (1st Cir. 2007) ("[D]rug quantity is not an element of the offense under 21 U.S.C. § 841 unless the amount of drugs is used to increase the defendant's sentence beyond the applicable maximum penalty.").[4]

The third issue dividing the courts of appeals is whether *Harris* authorizes the imposition of a mandatory minimum sentence when facts found by a judge by a preponderance of the evidence not only trigger the mandatory minimum but also expose the defendant to a higher maximum sentence, substituting a new sentencing range. The Second and Ninth Circuits have concluded that *Harris* does not apply in that situation. *Gonzalez*, 420 F.3d at 127 ("*Harris* simply does not speak to th[e] circumstance" where a judicially-found fact author-

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[4] See also *United States v. Vazquez*, 271 F.3d at 98; *United States v. Promise*, 255 F.3d 150, 156-57 (4th Cir. 2001) (*en banc*); *United States v. Doggett*, 230 F.3d 160, 164-65 (5th Cir. 2000); *United States v. Strayhorn*, 250 F.3d 462, 468 (6th Cir. 2001), *overruled in part by United States v. Leachman*, 309 F.3d 377, 383 (6th Cir. 2002); *United States v. Nance*, 236 F.3d 820, 825 (7th Cir. 2001); *United States v. Serrano-Lopez*, 366 F.3d 628, 638 (8th Cir. 2004); *United States v. Jones*, 235 F.3d 1231, 1236 (10th Cir. 2000); *United States v. Clay*, 376 F.3d 1296, 1301 (11th Cir. 2004); *United States v. Lafayette*, 337 F.3d 1043, 1048 (D.C. Cir. 2003).

izes the judge to impose a higher maximum as well as a mandatory minimum); *Velasco-Heredia*, 319 F.3d at 1085 ("The situation in this case contrasts with that in *Harris*, in which the defendant was never *exposed* to a greater maximum sentence.") (emphasis in original). Although the other circuits have not discerned such a limit to the scope of *Harris*, courts and commentators alike have expressed doubts regarding the reasoning and viability of *Harris*. See *infra* at pp. 25-29.

These issues that have divided the circuits are confronted every day in federal court. Moreover, because the circuit courts have come to conflicting conclusions, the questions are resolved differently every day depending on where the district court sits. Thus, the government faces a lower burden of proof as to drug quantity in prosecuting aggravated drug offenses in Chicago than in New York or Los Angeles, and defendants in Chicago, such as Clark, face higher sentences for the same offenses than do defendants in New York and Los Angeles on similar facts under the same federal statute.

The practical effect of this split is easily demonstrated. In this case, while Clark was sentenced in the Seventh Circuit to ten years imprisonment based on a drug quantity finding that the government could not prove beyond a reasonable doubt, in the Second and Ninth Circuits, under the exact same facts, the district court would have been free to sentence Clark to the four-year term that it believed was appropriate and sufficient.

The circuit split is entrenched, as evidenced by the fact that both the Seventh and Second Circuits recently reaffirmed their positions. Only a decision of this Court can resolve the issues and bring about uniformity in the administration of an important federal criminal statute

and consistency in the treatment of defendants at sentencing.

## I. Whether *Apprendi* Rights Attach Before Or After Sentencing Should Be Settled By This Court To Resolve A Split Among The Circuits.

In *Jones v. United States*, this Court held that under the Fifth and Sixth Amendments, "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. 227, 243 n.6 (1999). This was not, however, a revolutionary holding: prior cases had "suggest[ed] rather than establish[ed] this principle." *Ibid.*

In *Apprendi v. New Jersey*, the Court expanded on this principle, applying it to the states under the Fourteenth Amendment and holding that "'it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" 530 U.S. at 490 (quoting *Jones*, 526 U.S. at 252-53).

Since *Apprendi*, this Court has issued a number of opinions to clarify the scope of this constitutional principle.[5] Indeed, this Term the Court granted certiorari to

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[5] See, *Cunningham v. California*, 127 S. Ct. 856, 860 (2007) (reaffirming *Apprendi* as applied to California's Determinate Sentencing Law); *United States v. Booker*, 543 U.S. 220, 243-44 (2005) (reaffirming *Apprendi* as applied to the Federal Sentencing Guidelines); *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (clarifying that the "statutory maximum" for purposes of *Apprendi* is the maximum

address yet another issue under *Apprendi*. See *Oregon v. Ice*, 128 S. Ct. 1657 (2008) (granting writ of certiorari on the issue of whether *Apprendi* applies to facts required to impose consecutive sentences).

Never directly addressed in any of these cases, however, is when the Fifth and Sixth Amendment rights protected under *Apprendi* attach. This question of timing is an issue of critical constitutional and practical importance.

The view of the Second and Ninth Circuits that *Apprendi* rights attach before sentencing is amply supported by this Court's jurisprudence and, we submit, is the better-reasoned approach. These circuits have focused on this Court's repeated references to "exposure" in holding that a defendant's rights under *Apprendi* are violated when the defendant is faced with the potential of being sentenced to a higher statutory maximum.

In *Gonzalez*, the Second Circuit ruled that the district court erred in applying § 841(b)(1)(A) because the preponderance-level finding of drug quantity exposed the defendant to a higher statutory maximum, notwithstanding that he received a sentence below the maximum available under § 841(b)(1)(C) absent the drug quantity finding. 420 F.3d at 120. Rejecting the argument that *Apprendi* applies "only to prosecutions that actually result in sentences exceeding otherwise appli-

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sentence a judge may impose without additional factual findings); *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002) (applying *Apprendi* to capital-sentencing); *Harris*, 536 U.S. at, 568 (holding that *Apprendi* does not apply to facts only triggering a mandatory minimum); *United State v. Cotton*, 535 U.S. 625, 630-31 (2002) (clarifying that a defective indictment under *Apprendi* does not deprive a federal court of jurisdiction).

cable maximums," the court noted that "various pluralities of the Supreme Court . . . have persisted in using broad language, focusing on the increase in the sentencing range and not just an increase in the actual sentence, to identify facts that are properly treated as elements of aggravated crimes." *Id.* at 128-29.

Similarly, in *Velasco-Heredia*, the Ninth Circuit ruled that the district court erred in applying § 841(b)(1)(B) because the trial court's preponderance-level finding of additional drug quantity (beyond that stipulated to by the defendant) exposed the defendant to a higher statutory maximum, notwithstanding that the sentence imposed was no higher than the maximum available absent the drug quantity finding under § 841(b)(1)(D). 319 F.3d at 1083-86. The Ninth Circuit rejected the government's position that any error was harmless because the actual sentence imposed did not exceed the default statutory maximum because such an argument "put[] the cart before the horse." *Id.* at 1086.

As noted by the Second and Ninth Circuits, this Court has repeatedly used broad language suggesting that *Apprendi* rights attach upon exposure to a higher statutory maximum penalty. See, e.g., *Cunningham*, 127 S. Ct. at 863-64 ("This Court has repeatedly held that, under the Sixth Amendment, any fact that *exposes* a defendant to a greater *potential sentence* must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.") (emphasis added); *Shepard v. United States*, 544 U.S. 13, 24 (2005) ("[A]ny fact other than a prior conviction *sufficient to raise the limit of the possible federal sentence* must be found by a jury, in the absence of any waiver of rights by the defendant.") (emphasis added); *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) ("Put simply, if the existence of any fact (other than a prior conviction)

increases the maximum punishment *that may be imposed* on a defendant, that fact . . . constitutes an element, and must be found by a jury beyond a reasonable doubt.") (emphasis added); *Ring*, 536 U.S. at 613 ("[T]he finding of an aggravating circumstance *exposes* 'the defendant to a greater punishment than that authorized by the jury's guilty verdict.' When a finding has this effect, *Apprendi* makes clear, it cannot be reserved for the judge.") (Kennedy, J., concurring) (internal citation omitted) (emphasis added); *Jones*, 526 U.S. at 252 ("[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the [congressionally] prescribed *range of penalties to which a criminal defendant is exposed.*") (Scalia, J., concurring) (emphasis added); *Id.* at 252-53 ("[F]acts that increase the prescribed *range of penalties to which a criminal defendant is exposed*" must be submitted to a jury and "established by proof beyond a reasonable doubt.") (Stevens, J., concurring) (emphasis added).

In all of these cases, this Court took a pragmatic approach to protecting Fifth and Sixth Amendment rights. The Court's concern was not simply whether a fact resulted in a sentence above the default statutory maximum penalty, but whether the fact increased the "range of penalties" to which the defendant was exposed. As the Court noted in *Blakely*, prior to *Apprendi*:

> [A] defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.

*Blakely*, 542 U.S. at 311-12 (citing 21 U.S.C. § 841(b)(1)(A) and -(b)(1)(D)). As this Court warned:

> The jury could not function as a circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.

*Id.* at 306-07.

This Court's concern with the practical consequences of erosion of the Fifth and Sixth Amendment rights is justified in this case. The government offered only one witness at the drug quantity hearing and his testimony was, as the district court acknowledged, "vague and uncertain." App. 24a. Much like the situation this Court condemned in *Blakely*, the trial court relied not on facts proved to a jury but on facts "extracted from a report," here the complaint affidavit prepared by a government agent whom the government never called to testify. The district court made it clear it was "assuming the Government has this evidence" "for purposes of this drug quantity hearing, where the standard is a preponderance of the evidence, and I don't think the rules of evidence strictly apply." C.A. Separate App. 212, 214. Yet, the trial court's finding of drug quantity by a preponderance of the evidence at sentencing exposed Clark not only to a ten-year mandatory minimum sentence, where no mandatory minimum would have applied absent that finding, but also increased the maximum penalty Clark faced, from twenty years to life in prison. As the Ninth Circuit observed, it is "too clever by half" to allow the government to wait until the sentencing phase, where the burden of proof is lower (and, we add, where the rules of evidence do not apply) to prove the facts that expose the

defendant to a vastly higher maximum as well as a mandatory minimum sentence. *Velasco-Heredia*, 319 F.3d at 1086.

Moreover, this Court's dedication to protecting the right to a jury trial where the defendant is "exposed" to the risk of a serious sentence long predates *Apprendi* and its progeny. In the seminal case of *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court held that "the penalty *authorized* for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment." *Id.* at 159 (emphasis added). The defendant had the right to a jury trial because he was charged with a crime *punishable* by up to two years in prison, notwithstanding that he actually received only 60 days in prison. *Id.* at 162 n.35 (rejecting argument that "the critical factor is not the length of the sentence authorized but the length of the penalty actually imposed"). See also *Baldwin v. New York*, 399 U.S. 66, 69 (1970) ("The question in this case is whether the *possibility* of a one-year sentence is enough in itself to require the opportunity for a jury trial. We hold that it is. More specifically, we have concluded that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is *authorized*.") (emphasis added).

The broad language used in *Apprendi* and its progeny reflects this Court's historic concern with protecting the right to a jury trial where the defendant is exposed to the risk of a serious sentence. Where, as here, a defendant is exposed to the risk of a lifetime behind bars based on a drug quantity finding that the government could not prove beyond a reasonable doubt, the risk to Fifth and Sixth Amendment rights is serious and deserving of this Court's attention.

## II. Whether Drug Quantity Is An Element Of The Offense Under §§ 841(b)(1)(A) And -(b)(1)(B) Should Be Settled By This Court To Resolve A Split Among The Circuits.

This Court has yet to address whether drug quantity is an element of the offense under §§ 841(b)(1)(A) and -(b)(1)(B). In the absence of such a definitive ruling, the circuit courts will remain divided, with drug quantity being treated as an element in the Second Circuit, as a material fact requiring proof beyond a reasonable doubt in the Ninth Circuit, and sometimes as an element and sometimes a sentencing factor in the remaining circuits depending on the severity of the sentence imposed. Supreme Court review is warranted in order to ensure nationwide uniformity in the application of this important federal statute.

In holding that drug quantity is an element under § 841(b)(1)(A) and -(b)(1)(B), the Second Circuit has focused on the structure of the statute, noting that each subsection ((b)(1)(A), (b)(1)(B) and (b)(1)(C)) "operates independently of the others" and that "[w]ithin each subsection, the statute provides for each maximum sentence to be linked to a corresponding minimum (except where only a lifetime sentence is mandated)." *Gonzalez*, 420 F.3d at 121. Moreover, "even when Congress identified circumstances warranting identical sentencing ranges regardless of drug quantity . . . it repeated those penalties in each subsection rather than create a generally applicable provision," *ibid.*, indicating Congress's intent that each subsection be treated as an independent offense.

"Nothing in the structure of the statute suggests that the[] corresponding minimums and maximums . . . can be delinked to permit mixing and matching across subsections to create hybrid sentencing ranges not specified by Congress." *Ibid.* Where a defendant is sentenced to the mandatory minimum imposed by §§ 841(b)(1)(A) or -(b)(1)(B), but the drug quantities specified by those statutory sections are not proved beyond a reasonable doubt, the sentence cannot be justified by pointing to the fact that the sentence *could* have been imposed under § 841(b)(1)(C) without proof of drug quantity. Such an argument "distorts the intent of Congress and creates a link where there is not one." *Velasco-Heredia*, 319 F.3d at 1086.

Under § 841, drug quantity *may* be used to impose a sentence above the default statutory maximum for unquantified offenses set by § 841(b)(1)(C). Where such a sentence is in fact imposed, *all* the Circuits agree that drug quantity is an "element" of the offense that must be proved to the jury beyond a reasonable doubt. Thus, "'§ 841(a) no longer presents the *entire* offense; one element of the crime (drug quantity) is to be found in § 841(b).'" *Gonzalez*, 420 F.3d at 124 (citation omitted). But, in the majority of Circuits, drug quantity is a sentencing factor when the sentence imposed is below the default statutory maximum. See *supra* at pp. 12 & n.4. As noted by the Second Circuit, the majority view "cast[s] drug quantity in a dual role" for which there is no support in the statutory structure of § 841. *Gonzalez*, 420 F.3d at 122.

Even within those circuits in the majority, some concurring opinions express reservations about construing § 841 in such a manner. See, e.g., *Vazquez*, 271 F.3d at 113 ("[I]t is possible that Congress intended [drug type and quantity] to be sentencing factors for the judge to

determine. It strains credulity, however, to assert that Congress intended for type and quantity to be treated as sentencing factors in some cases and as elements in others. I know of no statute written in such a manner, nor am I aware of any statutes construed this way.") (Becker, C.J., concurring); *Promise*, 255 F.3d at 185 ("Either facts that affect the sentence a defendant receives are elements or they are not; they are not elements for some purposes and not for others.") (Luttig, J., concurring in the judgment).

The structure of § 841 also mirrors that of the federal carjacking statute (18 U.S.C. § 2119(2)) that this Court interpreted in *Jones*, holding that the "serious bodily injury" provision is an element of the offense. *Jones*, 526 U.S. at 242-43. Like the carjacking statute, § 841(a) appears to list offense elements, followed by the numbered paragraphs of § 841(b) describing penalties. However, this Court rejected such a "superficial impression" in *Jones*, finding that the numbered penalty subsections contained elements of the offense because they "provide for steeply higher penalties" and "condition them on further facts (injury, death) that seem quite as important as the elements in the principal paragraph." *Id.* at 233. Similarly, here, § 841(b) provides for steeply higher penalties based on facts such as drug type and quantity and whether death or serious bodily injury resulted from the offense, that seem "quite as important as the elements" in § 841(a), and thus should be interpreted as elements of the offense. *Id.*

The drug quantity provisions of § 841(b) dramatically alter the penalties to which the defendant is exposed, becoming "a tail which wags the dog of the substantive offense." *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986). For example, a defendant with no prior convictions faces a maximum penalty of five years imprison-

ment for distributing less than 50 kilograms of marijuana (§ 841(b)(1)(D)), but the maximum penalty for distribution of 100 kilograms or more of marijuana is forty years (§ 841(b)(1)(B)(vii)).

This Court has noted that where a particular fact dramatically affects the severity of the sentence, it is appropriate to "assume a [Congressional] preference for traditional jury determination of so important a factual matter." *Castillo v. United States*, 530 U.S. 120, 131 (2000). See also *Jones*, 526 U.S. at 243 (because a finding of "serious bodily injury" increased the authorized penalty by two-thirds under 18 U.S.C. § 2119, that fact was an element of the carjacking statute rather than a sentencing factor). Compare *Harris*, 536 U.S. at 554 (gradual and "incremental" increases in minimum penalties under 18 U.S.C. § 924(c)(1)(A) are "precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration" and "consistent with traditional understandings about how sentencing factors operate").

As this Court warned in *Jones*, leaving the determination of facts that have drastic impact on punishment to a judge—to be decided by the lowest burden of proof—would relegate the jury to a "low-level gatekeeping" function and "merit Sixth Amendment concern." *Jones*, 526 U.S. at 244, 248.

The construction of the statute adopted by the Second Circuit accords with the doctrine of constitutional avoidance:

> [W]here a statute is susceptible to two constructions, by one of which grave and doubtful constitutional questions arise and by the other which such questions are avoided, our duty is to adopt the latter. It is out of respect for Congress, which

> we assume legislates in the light of constitutional limitations, that we adhere to this principle, which has for so long been applied by this Court that it is beyond debate.

*Id.* at 239-40 (internal quotations and citations omitted). By construing drug quantity as an element for all prosecutions involving aggravated § 841(b)(1)(A) or -(b)(1)(B) offenses, where quantity *may* be used to impose a sentence above the statutory maximum for unquantified drug charges set by § 841(b)(1)(C), the vulnerability to *Apprendi* challenge is removed and the statute is no longer "open to constitutional doubt." *Id.* at 240.

The view of the majority of circuits merits concern for the further practical reason that it creates "intractable problems for parties and the courts." *Gonzalez,* 420 F.3d at 124 n.10.

> If the question of whether drug quantity is an element of an offense depended on the actual sentence imposed (specifically, on whether the sentence was above the otherwise applicable statutory maximum), it would be impossible to know until the final, sentencing phase of the litigation that drug quantity was an element of the crime of conviction that should have been pleaded in the indictment and proved beyond a reasonable doubt to the jury or admitted by the defendant.

*Id.* Thus, "[e]ven if the right to [jury] trial, as recognized in *Apprendi,* is violated only by certain sentences, the law cannot reasonably defer identification of the elements of a crime until after prosecution is concluded." *Id.* at 115.

## III. This Case Presents An Opportunity For The Court To Reconsider The Plurality Opinion In *Harris*.

This Court has recognized that "[its] decisions interpreting the Sixth Amendment are always subject to reconsideration." *Duncan*, 391 U.S. at 158 n.30. This case presents the Court with the opportunity to reconsider the fractured decision in *Harris*.

The majority of circuit courts have based their hybrid treatment of drug quantity—sometimes considered an element and sometimes a sentencing factor—on the plurality opinion in *Harris*, which has been read as holding that *Apprendi* does not apply to facts that trigger a mandatory minimum penalty where the defendant is not sentenced beyond the maximum penalty available absent those facts. See, e.g., *United States v. Jones*, 418 F.3d 726, 732 (7th Cir. 2005) (applying the *Harris* plurality opinion's statement that "judicially found facts used to set minimum sentences are not properly deemed 'elements' of the offense for Sixth Amendment purposes because the jury's verdict authorizes the judge to impose the minimum sentence with or without the judicial fact-finding").

In fact, the majority of the Justices in *Harris* rejected the plurality's statement on which the majority of circuits have so heavily relied. In Section III of the *Harris* plurality opinion, which did not command a majority, Justice Kennedy, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, 536 U.S. at 549, stated that "a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum)" may be determined by the judge without violating *Apprendi*. *Id.* at 557. But Justice Thomas' dissent, joined

by Justices Stevens, Souter and Ginsburg (all members of the *Apprendi* majority), concluded that "there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum" because "[w]hether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Id.* at 579 (Thomas, J., dissenting). The dissent explained that "[a]s a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense. Consequently, facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards." *Id.* at 577-78 (Thomas, J., dissenting). Although Justice Breyer concurred in the judgment based on his view that *Apprendi* was wrongly decided, his separate concurring opinion noted an inability to distinguish *Apprendi* from *Harris* "in terms of logic" and disagreed "with the plurality's opinion insofar as it finds such a distinction." *Id.* at 569 (Breyer, J., concurring). Justice O'Connor joined the plurality opinion but wrote a separate concurring opinion to express her belief that *Apprendi* was wrongly decided. *Id.* at 569 (O'Connor, J., concurring). Thus, as the dissent noted, "[t]his leaves only a minority of the Court embracing" the view that *Apprendi* applies to findings that raise the statutory maximum but not those that raise the statutory minimum. *Id.* at 583 (Thomas, J., dissenting).

This Court's decisions following *Harris* have continued to use expansive language applying *Apprendi* where the defendant is "exposed" to a higher potential penalty. See *supra* at pp. 16-17. Moreover appellate courts in five circuits have questioned whether the doctrinal underpinnings of *Harris* have been so eroded by subsequent Supreme Court decisions that *Harris* no longer remains

good law.[6] Obviously, only this Court can resolve those serious questions; the lower courts are bound to follow a Supreme Court decision until this Court itself says otherwise.

The continuing viability of *Harris* has also been questioned by legal commentators,[7] including the

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[6] See *Gonzalez*, 420 F.3d at 126 ("The logic of the distinction drawn in *Harris* between facts that raise only mandatory minimums and those that raise statutory maximums is not easily grasped."); *United States v. Grier*, 475 F.3d 556, 575 (3d Cir. 2006) (Rendell, J., concurring) ("Many, including Justice Breyer in *Harris* itself, have been unable to reconcile *McMillan* and *Harris* with the Supreme Court's holding in *Apprendi*. But 'it is th[e] [Supreme] Court's prerogative alone to overrule . . . its own precedents.'") (internal citations omitted) (alterations in original); *Jones*, 418 F.3d at 732 ("Although there may be some tension between *Booker* and *Harris*, . . . . to the extent that *Booker* has unsettled *Harris*, it is the Supreme Court's prerogative—not ours—to say so."); *United States v. Dare*, 425 F.3d 634, 641 (9th Cir. 2005) ("We agree that *Harris* is difficult to reconcile with the Supreme Court's recent Sixth Amendment jurisprudence, but *Harris* has not been overruled. We cannot question *Harris*' authority as binding precedent.") (internal citations omitted); *United States v. Barragan-Sanchez*, 165 Fed. Appx. 758, 760 (11th Cir. 2006) ("[W]hile it is possible that *Booker*'s remedial scheme could implicate mandatory minimum sentences in the future, until the Supreme Court holds that mandatory minimums violate the Fifth and Sixth Amendments of the Constitution, we are obliged to continue following *Harris* as precedent. . . . It is not given to us to overrule the decisions of the Supreme Court. . . . This is so even if we are convinced that the Supreme Court will overturn its previous decision the next time it addresses the issue.") (internal quotations omitted).

[7] See, e.g., Andrew Levine, *The Confounding Boundaries of "Apprendi-land": Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 424 (2002) ("But if the Court is to remain true to the constitutional principles underlying *Apprendi*, it should eventually overrule . . . *Harris* . . . ."); Kevin R.

Chairman of the Committee on Criminal Law of the Judicial Conference, who noted in Congressional testimony that "[m]any observers believe that *Harris* is no longer good law."[8]

Apart from whether *Harris* remains good law, the circuit courts are divided over whether *Harris* applies where the judicially found facts not only trigger a mandatory minimum but also increase the maximum penalty to which the defendant is exposed. In *Harris* the judicially-found facts *only* triggered a mandatory minimum sentence, and had no effect on the maximum penalty (life imprisonment). *Harris*, 536 U.S. at 554 (where a fact "alter[s] only the minimum" sentence, without "authoriz[ing] the judge to impose . . . higher penalties," the Constitution permits the fact to be treated as a sentencing factor). The Second Circuit concluded that *Harris* does not apply to drug quantity findings under § 841 that "raise[] a mandatory minimum sentence [while]. . . simultaneously rais[ing] a corresponding maximum, thereby increasing a defendant's authorized sentencing

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Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1097 & n.54 (2005) ("*Harris* is another sizeable hole in the constitutional Swiss cheese."); Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After* Booker, 2005 U. CHI. LEGAL F. 149, 214-15 (2005) (*Harris* is "in danger" because it creates a "weird asymmetry" allowing judicial fact-finding at the bottom of a guideline range but not at the top.).

[8] *How Judges Are Properly Implementing the Supreme Court's Decision in* United States v. Booker: *Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Sec. of the House Judiciary Comm.*, 109th Cong. 2 (Mar. 16, 2006) (statement of Judge Paul G. Cassell), *available at* http://www.uscourts.gov/testimony/Cassell031606.pdf.

range . . . ." *Gonzalez*, 420 F.3d at 126. The Ninth Circuit came to the same conclusion. *Velasco-Heredia*, 319 F.3d at 1085. As the Second Circuit explained:

> The *Apprendi* rule is, and after *Harris* remains, that 'it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.' It would turn this rule on its head to conclude that a fact, such as drug quantity, which unquestionably increases the 'range of penalties to which a criminal defendant is exposed,' is not an element of the crime that must be pleaded and proved beyond a reasonable doubt (or admitted by the defendant) because it increases the mandatory minimum sentence as well as the maximum. *Harris* simply does not speak to that circumstance.

*Gonzalez*, 420 F.3d at 126-27 (internal citations omitted) (quoting *Apprendi*, 530 U.S. at 490). The circuits are divided on whether *Harris* applies in such a situation, and there is a need, at a minimum, for the Court to clarify the scope of *Harris*.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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