No. 08-673

In the Supreme Court of the United States

RICKEY CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), is violated where a sentencing court finds a fact that, as a statutory matter, exposes a defendant to an enhanced sentence but where the actual sentence imposed does not exceed the maximum sentence that would have been authorized by the jury's verdict or the defendant's admissions alone.

2. Whether drug quantity is an element of the offenses of possessing a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 841, and conspiring to distribute and to possess a controlled substance with the intent to distribute, in violation of 21 U.S.C. 846.

3. Whether this Court's decision in *Harris* v. *United States*, 536 U.S. 545 (2002), should be overruled.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 538 F.3d 803. The order of the district court (Pet. App. 23a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2008. The petition for a writ of certiorari was filed on November 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty to one count of conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846, and one count of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to ten years of

imprisonment, to be followed by five years of supervised release. Pet. C.A. App. SA16-SA18, SA22, SA235-SA238. The court of appeals affirmed. Pet. App. 1a-22a.

1. Juan Corral was a drug dealer who trafficked in multi-kilogram quantities of cocaine. At a hearing held to determine the quantity of drugs involved in petitioner's offenses, Corral estimated that, between September 2001 and June 2002, he purchased more than 250 kilograms of cocaine. Corral sold drugs in quantities that ranged from a few ounces to several kilograms at a time. Repeat customers generally purchased larger quantities. Pet. App. 3a; Pet. C.A. App. SA92, SA97, SA99-SA100, SA102-SA107, SA109-SA110.

Petitioner was one of Corral's repeat, multi-kilogram customers. Between February 2002 and June 2002, Corral sold petitioner approximately 17 kilograms of cocaine, in quantities ranging from three to eight kilograms. Pet. App. 3a-4a; Pet. C.A. App. SA119, SA121, SA126-SA127.

2. a. A grand jury in the Northern District of Illinois returned a multi-count indictment charging petitioner and 11 others with conspiring to distribute and to possess with intent to distribute "in excess of 5 kilograms of mixtures and substances containing cocaine and in excess of 50 grams of mixtures and substances containing cocaine base." Pet. C.A. App. SA16-SA33. Petitioner was also charged with "knowingly and intentionally possess[ing] with intent to distribute a controlled substance, namely mixtures and substances containing cocaine." *Id.* at SA22.

b. Petitioner pleaded guilty to both counts against him without the benefit of a plea agreement. Pet. App. 2a; Pet. C.A. App. SA56-SA84. At the plea hearing, petitioner did not specifically admit that his offenses in-

volved any particular quantity of cocaine. Pet. App. 2a. During the hearing, however, the prosecutor stated that "[t]he mandatory minimum penalty is ten years imprisonment," based on the government's view that petitioner was "accountable for at least 15 kilograms of cocaine." Pet. C.A. App. SA65; see *id.* at SA66; see also 21 U.S.C. 841(b)(1)(A)(ii).

Defense counsel disagreed with the government's drug-quantity estimates, Pet. C.A. App. SA68, and took the position "that, at most, a mandatory minimum of five years is applicable," *id.* at SA67; see *id.* at SA65. Defense counsel also stated, however, that petitioner "kn[ew] that the sentence is driven or caused to a great extent by the amount of narcotics that the Court finds," *id.* at SA67, and did not dispute the court's ability to make findings that would trigger a ten-year mandatory minimum sentence. Petitioner also answered "[y]es" when the district judge asked him if he understood that the court "ha[d] to make these fact findings" and that, "if it turn[ed] out the Government is right," he would be facing a sentence of "between ten years and life." *Id.* at SA71-SA72. The court accepted petitioner's guilty plea. *Id.* at SA81.

c. The district court held a hearing to determine the quantity of drugs attributable to petitioner. Pet. App. 3a-4a. At the conclusion of the hearing, the court found, by a "preponderance of the evidence," that the amount of cocaine attributable to petitioner in the drug conspiracy was "more than fifteen kilograms." Pet. C.A. App. SA209; see Pet. App. 6a.

d. At petitioner's sentencing hearing, the attorney for the government—who was not the same prosecutor who had represented the government at petitioner's plea and drug-quantity hearings—stated that petitioner was

not subject to a mandatory minimum penalty and noted that petitioner had not "plead[ed] to a specific amount that would invoke the mandatory minimum." Pet. C.A. App. SA245; see *id.* at SA244. At the conclusion of the hearing, the district court sentenced petitioner to 48 months of imprisonment, which was 60 months below the bottom end of the advisory Guidelines range of 108 to 136 months of imprisonment. Pet. App. 7a; Pet. C.A. App. SA260-SA261.

e. The next day, the government filed a motion to correct petitioner's sentence in light of the ten-year mandatory minimum that is specified in 21 U.S.C. 841(b)(1)(A)(ii) for any offense involving "5 kilograms or more of" cocaine. See Pet. App. 8a; see also Pet. C.A. App. SA266-SA269; Fed. R. Crim. P. 35(a). The district court granted the government's motion and re-sentenced petitioner to 120 months of imprisonment. Pet. App. 28a. Although the court stated that it did "not believe that the evidence [at the drug-quantity hearing] would have been sufficient to sustain a decision beyond a reasonable doubt," the court reiterated its previous determination, made "by a preponderance of the evidence, that [petitioner] had purchased between fifteen and fifty kilograms of cocaine." *Id.* at 24a.

3. The court of appeals affirmed. Pet. App. 1a-22a. As relevant here, the court reiterated its previous holdings "that judges may find facts, by a preponderance of the evidence, that subject a defendant to a statutory mandatory minimum," and that this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), "has no application where a drug dealer is given a sentence at or below the [20-year] maximum provided in" 21 U.S.C. 841(b)(1)(C). Pet. App. 16a (quoting *United States* v. *Hernandez*, 330 F.3d 964, 980 (7th Cir. 2003), cert. de-

nied, 541 U.S. 904, and 541 U.S. 1040 (2004)). The court of appeals also stated that it had "carefully analyzed whether drug quantity constitutes an element of an *§ 841* offense that must be proven to a jury beyond a reasonable doubt, and ha[d] decided time after time that neither the statute, nor *Apprendi* and its progeny, dictates such a result." *Id.* at 17a. The court of appeals also concluded that "the district court did not clearly err in finding by a preponderance of the evidence that [petitioner's] *§ 841* offense involved more than 15 kilograms of cocaine." *Id.* at 21a.

ARGUMENT

1. Petitioner argues (Pet. 14-20) that the Fifth and Sixth Amendment rights associated with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), are violated whenever a criminal defendant "is 'exposed' to the *risk of* a" higher sentence as the result of a fact found by a judge applying a preponderance-of-the-evidence standard, regardless of whether the sentence that is ultimately *imposed* is within the maximum that would have been authorized by the jury's verdict or the defendant's admissions alone. Pet. 19 (emphasis added). This Court recently denied a petition for a writ of certiorari that sought review of the same question and relied on the same conflict in lower-court authority that petitioner identifies. See *Butterworth* v. *United States*, 129 S. Ct. 37 (2008) (No. 07-10067); see also *Seymour* v. *United States*, 129 S. Ct. 527 (2008) (No. 07-1608); *Simmons* v. *United States*, 547 U.S. 1022 (2006) (No. 05-7336) (case on collateral review); *O'Neal* v. *United States*, 541 U.S. 960 (2004) (No. 03-7686). There is no reason for a different result here.

a. As the majority of courts of appeals have correctly held, no *Apprendi* error occurs so long as the sentence actually imposed does not exceed the maximum sentence that would have been authorized based on the jury's verdict or the defendant's admissions alone.[1] *Apprendi* holds that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that *increases the penalty* for a crime *beyond* the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphases added). In *Apprendi* itself, the 12-year sentence imposed by the trial court on the relevant count was two years higher than would have been authorized in the absence of the relevant judge-found fact. See *id.* at 474. The same is true of all of the subsequent decisions in which this Court has found a violation of the Fifth and Sixth Amendment rights recognized in *Apprendi*: in each of those cases, the sentence ultimately imposed exceeded what would have been the legal maximum in the absence of any judge-found facts. See *Cunningham* v. *California*, 549 U.S. 270, 275-276 (2007) (defendant sentenced to 16 years of imprisonment; maximum sentence in the absence of judge-found facts would have been 12 years of imprisonment); *Washington* v. *Recuenco*, 548 U.S. 212, 215 (2006) (39 and 15 months of

[1] See, *e.g.*, *United States* v. *Webb*, 545 F.3d 673, 678 (8th Cir. 2004); *United States* v. *Kelly,* 519 F.3d 355, 363 & n.3 (7th Cir. 2008); *United States* v. *Lizardo*, 445 F.3d 73, 89-90 (1st Cir.), cert. denied, 549 U.S. 1007 (2006); *United States* v. *Serrano-Lopez*, 366 F.3d 628, 638 & n.9 (8th Cir. 2004); *United States* v. *Goodine*, 326 F.3d 26, 27-32 (1st Cir. 2003), cert. denied, 541 U.S. 902 (2004); *United States* v. *Copeland*, 321 F.3d 582, 604-605 (6th Cir. 2003); *United States* v. *Sanchez*, 269 F.3d 1250, 1279 (11th Cir. 2001) (en banc), cert. denied, 535 U.S. 942 (2002); *United States* v. *Williams*, 235 F.3d 858, 863 (3d Cir. 2000), cert. denied, 534 U.S. 818 (2001).

imprisonment, respectively); *United States* v. *Booker*, 543 U.S. 220, 227 (2005) (as to defendant Booker, 360 and 262 months of imprisonment, respectively); *Blakely* v. *Washington*, 542 U.S. 296, 298-300 (2004) (90 and 53 months of imprisonment, respectively); *Ring* v. *Arizona*, 536 U.S. 584, 597 (2002) (death penalty and life imprisonment, respectively); *United States* v. *Cotton*, 535 U.S. 625, 628-629 (2002) (30 and 20 years of imprisonment, respectively).

Petitioner cites (Pet. 14-15, 17) isolated statements from this Court's cases that he asserts establish that "*Apprendi* rights attach upon exposure to a higher statutory maximum penalty." Pet. 17. But the holdings of those cases do not support petitioner's view: none found a constitutional violation in a case where the defendant did not *receive* a sentence that was greater than that authorized by the jury's verdict alone. See pp. 6-7, *supra*; accord *Shepard* v. *United States*, 544 U.S. 13 (2005) (see Pet. 17); *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111 (2003) (see Pet. 17). And this Court has also repeatedly stated—including in some of the decisions relied upon by petitioner—that the Sixth Amendment inquiry turns on the sentence that is "impose[d]." *Cunningham*, 549 U.S. at 275; see *ibid.* (stating that *Apprendi* establishes that a judge may not "*impose* a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant") (emphasis added); *Booker*, 543 U.S. at 245 (stating that the "Sixth Amendment is violated by the *imposition* of an enhanced sentence under the United States Sentencing Guidelines") (citation omitted; emphasis added); see also *Oregon* v. *Ice*, 129 S. Ct. 711, 716 (2009) (repeating Court's statement in *Apprendi* that the constitutional rule in question applies to "any fact

that *increases the penalty* for a crime beyond the prescribed statutory maximum") (quoting *Apprendi*, 530 U.S. at 490) (emphasis added); *Rita* v. *United States*, 127 S. Ct. 2456, 2466 (2007); see *id.* at 2477 (Scalia, J., concurring in part and concurring in the judgment) ("We have repeatedly affirmed the proposition that judges can find facts that help guide their discretion *within* the sentencing range that is authorized by the facts found by the jury or admitted by the defendant."); *Blakely*, 542 U.S. at 304 (stating that the Sixth Amendment is violated "[w]hen a judge *inflicts* punishment that the jury's verdict alone does not allow") (emphasis added).

Petitioner's sentence of 120 months of imprisonment is less than the 240 months of imprisonment that would have been authorized for an offense involving an unspecified quantity of cocaine. See 21 U.S.C. 841(b)(1)(C). Accordingly, petitioner's Sixth Amendment claim fails.

b. Petitioner cites *United States* v. *Gonzalez*, 420 F.3d 111, 125-127 (2d Cir. 2005), and *United States* v. *Velasco-Heredia*, 319 F.3d 1080 (9th Cir. 2003), as support for his argument that *Apprendi* prohibits any judicial factfinding that authorizes, but does not result in, punishment greater than that which would have been authorized by the defendant's admissions or a jury's verdict alone. Although petitioner is correct that there is a conflict, that conflict does not warrant this Court's review.

Velasco-Heredia was a pre-*Booker* drug distribution case in which the Ninth Circuit held that the district court could not make post-verdict findings on drug quantity using a preponderance of the evidence standard for purposes of triggering a mandatory minimum sentence, because under 21 U.S.C. 841(b)(1)(A) and (B) such

findings also trigger increases in the statutory maximum sentence. 319 F.3d at 1085. Based on the guilt-phase verdict, the defendant was subject to a maximum sentence of five years; if the trier of fact had found the quantity of marijuana that the judge later found at sentencing, the maximum would have been 40 years. Even though the defendant was sentenced only to the mandatory minimum of five years, the Ninth Circuit thought that the judicial factfinding that underlay the mandatory-minimum finding also "*exposed*" the defendant to a higher maximum sentence and thus was a Sixth Amendment violation. *Id.* at 1085-1086.

In *Gonzalez*, the Second Circuit considered whether a district court erred in refusing to permit a defendant to withdraw his guilty plea for conspiring to distribute 50 grams or more of cocaine base when the defendant contested drug quantity during the plea allocution. The court of appeals held that the guilty plea could not be deemed "knowing, voluntary, or sufficient to support a judgment of conviction on a § 841(b)(1)(A) charge," 420 F.3d at 116, because the defendant had not been informed that he had a right to a jury determination of drug quantity and because he failed to admit the element of drug quantity, *ibid.* In so holding, the court reaffirmed its ruling in *United States* v. *Thomas*, 274 F.3d 655 (2d Cir. 2001) (en banc), that drug quantity is an element of a Section 841(a) offense, and it concluded that a defendant's exposure to an enhanced statutory maximum raises *Apprendi* concerns. *Gonzalez*, 420 F.3d at 125-131.

Velasco-Heredia and *Gonzalez* incorrectly applied the constitutional principles set forth in this Court's decisions. As explained above, the Sixth Amendment inquiry turns on the sentence actually imposed, not on

whether the same facts that trigger a mandatory minimum sentence would also, as a statutory matter, authorize a higher maximum sentence. See pp. 6-8, *supra*.

Although the incorrect constitutional analysis contained in *Velasco-Heredia* and *Gonzalez* conflicts with the court of appeals' correct constitutional analysis in this case, further review is not warranted here. First, because petitioner did not seek to withdraw his guilty plea or to challenge the factual basis for his plea, the principal holding of *Gonzalez* is not implicated.

Second, it is far from clear that the exposure-versus-imposition question has significant practical importance. Outside the context of a mandatory minimum sentence, the government is unaware of any case in which the Second Circuit has reversed a sentence for *Apprendi* error on the ground that the sentencing court's finding of drug quantity "exposed" the defendant to an increased maximum sentence when the sentence imposed did not exceed the term of imprisonment supported by the jury's verdict or the defendant's admissions. Cf. *Thomas*, 274 F.3d at 664 ("The constitutional rule of *Apprendi* does not apply where the sentence imposed is not greater than the prescribed statutory maximum for the offense of conviction."). The Ninth Circuit has repeatedly found any such error harmless. See, *e.g.*, *United States* v. *Alvarez*, 358 F.3d 1194, 1212 (stating that defendant's *Apprendi* claim was "wholly without merit" because the defendant was sentenced below the statutory maximum authorized by the jury's verdict"), cert. denied, 543 U.S. 887 (2004). As a result, it appears that the first question upon which petitioner seeks review has little practical importance outside the context of the imposition of mandatory minimum sentences under 21 U.S.C. 841. And, as

discussed in the next sections, see pp. 11-15, *infra*, those issues do not warrant this Court's review at this time.

2. Petitioner also contends (Pet. 20-25) that, as a matter of statutory construction, drug quantity is an element of the offense under 21 U.S.C. 841. This Court has previously denied petitions for writs of certiorari that sought review of that question, including a petition that relied on all but one of the authorities upon which petitioner relies here and that was supported by an amicus brief joined by the same amicus (the National Association of Criminal Defense Lawyers) that urges the Court to grant this petition for a writ of certiorari. See *Goodine* v. *United States*, 541 U.S. 902 (2004) (No. 03-596). Compare Pet. 21-23, with Pet. at 4-11, *Goodine*, *supra* (No. 03-596). Further review is not warranted.

a. Before *Apprendi*, all 12 regional courts of appeals concluded that Congress did not intend for drug quantity to be an element of the offense under Section 841. Relying on the statutory text and structure, legislative history, and other interpretive clues, those courts concluded that Congress intended for drug quantity to be a sentencing factor.[2]

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[2] See, *e.g.*, *United States* v. *Lindia*, 82 F.3d 1154, 1160-1161 (1st Cir. 1996); *United States* v. *Campuzano,* 905 F.2d 677, 679 (2d Cir.), cert. denied, 498 U.S. 947 (1990); *United States* v. *Lewis,* 113 F.3d 487, 490-491 (3d Cir. 1997), cert. denied, 523 U.S. 1108 (1998); *United States* v. *Fletcher,* 74 F.3d 49, 53 (4th Cir.), cert. denied, 519 U.S. 857 (1996); *United States* v. *Morgan*, 835 F.2d 79, 81 (5th Cir. 1987); *United States* v. *Todd*, 920 F.2d 399, 407 (6th Cir. 1990); *United States* v. *Acevedo*, 891 F.2d 607, 611 (7th Cir. 1989); *United States* v. *Wood*, 834 F.2d 1382, 1388 (8th Cir. 1987); *United States* v. *Sotelo-Rivera*, 931 F.2d 1317, 1319 (9th Cir. 1991), cert. denied, 502 U.S. 1100 (1992); *United States* v. *Jenkins,* 866 F.2d 331, 334 (10th Cir. 1989); *United States* v. *Van Hemelryck*, 945 F.2d 1493, 1503 (11th Cir. 1991); *United States* v. *Patrick*, 959 F.2d 991, 995 n.5 (D.C. Cir. 1992).

The Court's decision in *Apprendi* concerns the requirements of the Constitution, not the interpretation of a statute. As the Eleventh Circuit has explained, "*Apprendi* did not announce any new principles of statutory construction," and, consequently, "does not change [pre-*Apprendi*] precedent interpreting [Section] 841." *United States* v. *Sanchez,* 269 F.3d 1250, 1268 (2001) (en banc), cert. denied, 535 U.S. 942 (2002). Rather, *Apprendi* imposes a "constitutional restraint," *ibid.*, that is "external to" the particular statutory scheme under which a prosecution occurs. *United States* v. *Brough,* 243 F.3d 1078, 1079 (7th Cir.), cert. denied, 534 U.S. 889 (2001). Thus, while *Apprendi* now requires that certain facts (such as drug quantity) be found by the jury beyond a reasonable doubt to support an sentence above an otherwise-applicable maximum, that constitutional holding does not alter Congress's intention to make drug quantity a sentencing factor.

This Court has repeatedly emphasized that it makes no difference for *Apprendi* purposes how the legislature structures a statute, what it calls a fact that increases the statutory maximum sentence, or whether it intends for that fact to be treated as an element of the offense. See *Ring*, 536 U.S. at 602 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."); see also *Blakely*, 542 U.S. at 303 ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"); *Apprendi*, 530 U.S. at 494 ("[T]he relevant inquiry is one not of form, but of effect—does the re-

quired finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?").

The Court has stated that facts that trigger *Apprendi*'s rule, whether or not intended by the legislature to be elements, are the "functional equivalent of" elements when they are used to enhance a sentence, and thus must be subject to the same constitutional requirements when they are so used. *Apprendi*, 530 U.S. at 494 n.19. But that does not mean that such facts must be treated as *statutory* elements. Whether drug quantity is an "element" of a Section 841 offense does not "depend[] on the actual sentence imposed," Pet. 25 (quoting *Gonzalez*, 420 F.3d at 124 n.10), but on whether Congress intended for it to be so. See *Staples* v. *United States*, 511 U.S. 600, 604 (1994) ("[T]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.") (quoting *Liparota* v. *United States,* 471 U.S. 419, 424 (1985)).

b. Since *Apprendi*, all but one of the court of appeals that have revisited the issue have reaffirmed their previous conclusion that drug quantity is not an element of the Section 841 offense.[3] In contrast, petitioner is correct that the Second Circuit has held, post-*Apprendi*, that drug quantity is an element of a Section 841(a) of-

[3] See *Serrano-Lopez*, 366 F.3d at 638; *United States* v. *Toliver*, 351 F.3d 423, 430 (9th Cir. 2003), cert. denied, 541 U.S. 1079 (2004); *Goodine*, 326 F.3d at 31-32; *United States* v. *Smith*, 308 F.3d 726, 740-741 (7th Cir. 2002); *Sanchez*, 269 F.3d at 1268-1269. To the extent that petitioner suggests that the Ninth Circuit's decision in *Velasco-Heredia* should be understood as stating that drug quantity is an element of the offense under 21 U.S.C. 841(a), see Pet. 21-22, the Ninth Circuit's subsequent decisions refute that contention. See *United States* v. *Thomas*, 355 F.3d 1191, 1194 (2004) ("Drug Quantity Is Not an Element Under 21 U.S.C. § 841.") (emphasis omitted); accord *Toliver*, 351 F.3d at 430.

fense. See *Gonzalez*, 420 F.3d at 122-125. That conflict in the circuits, however, has little practical significance and thus does not merit this Court's review.

In light of *Apprendi*'s constitutional holding, the courts of appeals have consistently recognized that, in order to support a sentence in excess of the otherwise-applicable statutory maximum under 21 U.S.C. 841(b), the threshold drug quantities specified in that subsection must be treated as if they are offense elements. That is, in order for an enhanced sentence to be imposed, the threshold drug quantity must be alleged in the indictment and submitted to the jury for determination beyond a reasonable doubt. See, *e.g., United States* v. *Jackson*, 327 F.3d 273, 285 (4th Cir.), cert. denied, 540 U.S. 1019 (2003); *United States* v. *Minore*, 292 F.3d 1109, 1116 (9th Cir. 2002), cert. denied, 537 U.S. 1146 (2003); *United States* v. *Barbosa*, 271 F.3d 438, 457 (3d Cir. 2001), cert. denied, 537 U.S. 1049 (2002). In cases where the government intends to seek an increase in the otherwise applicable statutory maximum sentence, federal prosecutors now routinely assure that the requisite drug quantity levels are charged in the indictment and submitted to the jury for determination beyond a reasonable doubt. Cf. Pet. C.A. App. SA17 (charging that the conspiracy with which petitioner was charged in Count 1 involved "in excess of 5 kilograms of * * * cocaine and in excess of 50 grams of * * * cocaine base"). Similarly, the Department of Justice has advised federal prosecutors that, during plea allocutions, defendants should be required to admit facts that increase the statutory maximum. Cf. *id.* at SA73 (prosecutor stating, without contradiction from defense counsel, that the facts petitioner was required "to admit in order to plead guilty to these two counts of the indictment" included

that he "conspired to knowingly and intentionally conspire to possess with intent to distribute and to distribute controlled substances, namely, in excess of five kilos of mixtures and substances containing cocaine"). Thus, although petitioner himself did not admit to any particular drug quantity at his plea hearing, the question of whether Congress intended for drug quantity to be an element of the offense under Section 841 is ordinarily of little tangible significance in drug prosecutions nationwide. That is confirmed by the rarity with which the issue presented in the petition for a writ of certiorari has arisen.

3. Petitioner contends (Pet. 25-30) that this Court should overrule its constitutional holding in *Harris* v. *United States*, 536 U.S. 545 (2002), that the Fifth and Sixth Amendment rights recognized in *Apprendi* do not apply to judge-found facts that are used solely to increase a defendant's minimum sentence. The Court has repeatedly denied petitions for writs of certiorari that asked it to overrule *Harris* or to declare that its more recent *Apprendi* decisions have already done so implicitly. See, *e.g.*, *Tidwell* v. *United States*, 129 S. Ct. 762 (2008) (No. 07-11458); *Butterworth*, *supra* (No. 07-10067); *Barnes* v. *United States*, 128 S. Ct. 647 (2007) (No. 06-12085); *Speller* v. *United States*, 127 S. Ct. 3005 (2007) (No. 06-10260); *Malouf* v. *United States*, 549 U.S. 1305 (2007) (No. 06-1154); *Roberson* v. *United States*, 549 U.S. 1214 (2007) (No. 06-7738); *Landers* v. *United States*, 547 U.S. 1099 (2006) (No. 05-8774). There is no reason for a different result here.

In *Harris*, this Court held that the constitutional rule announced in *Apprendi* does not preclude the use of facts found by a judge at sentencing to increase a defendant's mandatory minimum sentence. See 536 U.S. at

565, 567-568 (plurality opinion); *id.* at 569, 572 (Breyer, J., concurring in part and concurring in the judgment). As the plurality in *Harris* explained, the *Apprendi* rule rests on the Court's determination that use of a judge's factual findings to increase a defendant's sentence beyond the otherwise-applicable statutory maximum would contravene the "prevailing historical practice" that formed the backdrop for the Fifth and Sixth Amendments. *Id.* at 563. The *Harris* plurality further explained that "[t]here [i]s no comparable historical practice of submitting facts increasing the mandatory minimum to the jury, so the *Apprendi* rule d[oes] not extend to those facts." *Ibid.* The Fifth and Sixth Amendments "ensure that the defendant 'will never get *more* punishment than he bargained for when he did the crime,' but they do not promise that he will receive 'anything less' than that." *Id.* at 566 (plurality opinion) (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)).

This Court's subsequent decisions have not disturbed the Court's constitutional ruling in *Harris*. In *Blakely*, for example, this Court extended *Apprendi* to invalidate a sentencing enhancement based on judge-found facts that "involved a sentence greater than what state law authorized on the basis of the verdict alone." 542 U.S. at 305. The Court distinguished *Harris* on the ground that it "involved a sentencing scheme that imposed a statutory *minimum* if a judge found a particular fact." *Id.* at 304; see *Ring*, 536 U.S. at 604 n.5 (noting the Court's conclusion in *Harris* that "the distinction between elements and sentencing factors continues to be meaningful as to facts increasing the minimum sentence"). That distinction holds true today. See *Kimbrough* v. *United States*, 128 S. Ct. 558, 573 (2007) (stating that "sentencing courts remain bound by the mandatory minimum

sentences prescribed in" 21 U.S.C. 841(b)(1)); *Rita*, 127 S. Ct. at 2477-2478 n.2 (Scalia, J., concurring in part and concurring in the judgment) (recognizing that "eliminating discretion to impose *low* sentences is the equivalent of judicially creating mandatory minimums, which are not a concern of the Sixth Amendment" and citing *Harris*).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2009

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[4] Petitioner also asserts that this Court's review is needed in order "to clarify the scope of *Harris*" because "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." Pet. 29-30. That argument is simply a reprise of petitioner's earlier claims that this Court's holding in *Apprendi* applies to any factual determination that would, as a statutory matter, authorize an increase in the maximum penalty and that Congress intended for drug quantity to be an element of the offense under Section 841. In fact, the two court of appeals decisions upon which petitioner relies in this section of the petition for a writ of certiorari (the Second Circuit's decision in *Gonzalez* and the Ninth Circuit's decision in *Velasco-Heredia*) are the same two decisions upon which he relies with respect to the first two questions presented as well.