

No. ____ - ____

IN THE
SUPREME COURT OF THE UNITED STATES

ARMANDO CHAVEZ, JR.,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

KEVIN JOEL PAGE
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746

QUESTIONS PRESENTED FOR REVIEW

- I. Whether facts that alter the range of “reasonable” federal sentences must be pleaded in the indictment in federal cases?

PARTIES

Armando Chavez, Jr., is the petitioner, who was the defendant-appellant below. The United States of America is the respondent, who was the plaintiff-appellee below.

TABLE OF CONTENTS

Question Presented.....	ii
Parties.....	iii
Table of Contents.....	iv
Index to Appendices.....	v
Table of Authorities.....	vi
Opinion Below.....	1
Jurisdictional Statement.....	1
Rules and Statutory Provisions.....	1
Statement of the Case.....	2
Reasons for Granting the Writ.....	3
I. The logical conclusion of <i>Alleyne v. United States</i> is that all facts that alter the range of substantively reasonable federal sentences must be treated as elements of the defendant's offense and pleaded in the indictment. This Court should hold the instant Petition pending the resolution of any case raising the issue on plenary review.....	3
Conclusion.....	6

INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas

TABLE OF AUTHORITIES

	<u>Page No.</u>
<u>FEDERAL CASES</u>	
<u>Alleyne v. United States</u> , __U.S.__, 133 S. Ct. 2151 (2013).....	3, 4
<u>Apprendi v. New Jersey</u> , 530 U.S. 466 (2001).....	3, 4
<u>Blakely v. Washington</u> , 542 U.S. 296 (2004).....	3
<u>Cotton v. United States</u> , 535 U.S. 625 (2002).....	3
<u>Cunningham v. California</u> , 549 U.S. 270 (2007).....	3
<u>Gall v. United States</u> , 552 U.S. 38 (2007).....	5
<u>Harris v. United States</u> , 536 U.S. 545 (2002).....	3
<u>United States v. Abu Ali</u> , 528 F.3d 210 (4th Cir. 2008).....	5
<u>United States v. Booker</u> , 543 U.S. 220 (2005).....	3, 4
<u>United States v. Funk</u> , 534 F.3d 522 (6th Cir. 2008).....	5
<u>United States v. Gaudin</u> , 515 U.S. 506 (1995).....	3
<u>United States v. Jones</u> , 531 F.3d 163 (2d Cir. 2008).....	5
<u>United States v. Levinson</u> , 543 F.3d 190 (3d Cir. 2008).....	5
<u>United States v. Ofrey-Campos</u> , 534 F.3d 1 (1st Cir. 2008).....	5
<u>United States v. Pugh</u> , 515 F.3d 1179 (11th Cir. 2008).....	5
<u>United States v. Shy</u> , 538 F.3d 933 (8th Cir. 2008)(same).....	5
<u>United States v. Tuma</u> , 738 F.3d 681 (5th Cir. 2013).....	2
<u>Williams v. New York</u> , 337 U.S. 241 (1949).....	4
<u>FEDERAL STATUTES</u>	
28 U.S.C. §1254(1).....	1
18 U.S.C. §3553(a).....	4

FEDERAL RULES

Fed. R. Crim. P. 52(b).	5
---------------------------------	---

UNITED STATES CONSTITUTION

U.S. Const. Amend V.	1
------------------------------	---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Armando Chavez Jr., respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Chavez*, No. 17-11463, 733 Fed. Appx. 195 (5th Cir. July 27, 2018)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The judgment of conviction and sentence was imposed December 1, 2017, and is also provided in the Appendix to the Petition. [Appx. B].

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on July 27, 2018. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Facts and Proceedings Below

After several months of investigation, Lubbock police officers conducted a traffic stop of Appellant Armando Chavez, Jr. and a passenger. They found methamphetamine in the car and arrested him. A federal indictment alleged that Mr. Chavez possessed with intent to distribute 500 grams or more of a mixture and substance containing methamphetamine and 50 grams or more of actual methamphetamine. Mr. Chavez pleaded guilty, admitted prior drug trafficking, and also admitted possession of 984.2 grams of methamphetamine (actual).

A Presentence Report (PSR) determined that he was subject to a Guideline range of 151-188 months imprisonment. It reached this conclusion based on its finding that Mr. Chavez had in fact trafficked more than 984.2 grams of methamphetamine (actual), rather than the 50 grams named in the indictment. The district court imposed a sentence of 188 months.

B. The Appeal

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, contending that the Fifth Amendment requires that facts tending to alter the maximum range of reasonable sentences be pleaded in the indictment. The court rejected this claim as foreclosed by Fifth Circuit precedent. *See* [Appendix A] (citing *United States v. Tuma*, 738 F.3d 681, 693 (5th Cir. 2013)).

REASONS FOR GRANTING THE PETITION

- I. The logical conclusion of *Alleyne v. United States* is that all facts that alter the range of substantively reasonable federal sentences must be treated as elements of the defendant's offense and pleaded in the indictment. This Court should hold the instant Petition pending the resolution of any case raising the issue on plenary review

The constitution entitles every criminal defendant to "a jury determination that [he or she] is guilty of every element of the crime with which he is charged beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). All elements of an offense must also be placed in the indictment. *See Cotton v. United States*, 535 U.S. 625, 627 (2002). For constitutional purposes, an element is a fact that "expose(s) the defendant to a greater punishment than that authorized by the jury's verdict..." *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2001).

Apprendi v. New Jersey, 530 U.S. 466 (2001), made clear that all facts that increase the maximum punishment must be treated as elements of the offense, and not as mere sentencing factors. *See Apprendi*, 530 U.S. at 490. Subsequently, this Court clarified that the principle extends to facts that increase the maximum of a mandatory Guideline range (*see Blakely v. Washington*, 542 U.S. 296, 302 (2004)), sentencing findings given broad or open-ended definitions by the legislature (*see Cunningham v. California*, 549 U.S. 270 (2007)), and facts that affect the appropriate range of punishment by the mandate of judicial rather than legislative authorities (*see United States v. Booker*, 543 U.S. 220, 237-244 (2005)).

Yet *Harris v. United States*, 536 U.S. 545 (2002), imposed an important limit on *Apprendi*'s holding that all facts must be treated as elements if they "expose the defendant to a greater punishment than that authorized by the jury's verdict." In *Harris*, this Court ruled that facts establishing mandatory minimums need not be proven to a jury beyond a reasonable doubt, because such facts merely limit the judge's "choices within the authorized range." *Harris*, 536 U.S. at 567.

But this Court has recently overruled *Harris*. *See Alleyne v. United States*, ___ U.S. __, 133 S.Ct. 2151 (2013). *Alleyne* reasoned that the two key rationale animating *Apprendi* – interposing the jury between the defendant and the government, and allowing the defendant to predict the punishment from the face of the indictment – apply with equal force to facts that establish mandatory

minimums. *See Alleyne*, 133 S.Ct. at 2161. After *Alleyne*, then, “[a]ny fact that, by law, increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt.” *Id.* at 2155. Given this holding, it is clear that facts that alter the range of reasonable punishments in the federal system must be treated as an element of the defendant's offense.

Following *United States v. Booker*, 543 U.S. 220 (2005), the discretion of federal sentencing judges to sentence within the statutory range is limited by *Booker*'s dictate that the sentence be substantively reasonable in light of the factors codified in 18 U.S.C. §3553(a). *See Booker*, 543 U.S. at 258-265. “Reasonableness” therefore provides a limitation on the sentence independent of the prescribed statutory maximums and minimums for the crime committed. Consequently, under *Booker*, facts that alter the range of “reasonable” sentences also “expose the defendant to a greater punishment than that authorized by the jury's verdict” for the purposes of the Fifth Amendment. They accordingly require elemental treatment under *Apprendi*.

Before *Alleyne*, it was possible to maintain that such facts were merely sentencing factors. *Harris*, after all, held that some facts may alter the punishment and yet escape *Apprendi* if they merely limit the judge's “choices within the authorized range.” Under *Alleyne*, however, all facts that increase the penalty must be treated as elements of the offense. *See Alleyne*, 133 S.Ct. at 2155. Facts that change the range of sustainable sentences within the statutory range plainly meet this criteria. *Alleyne* emphasized that judges may engage in “factfinding used to guide judicial discretion in selecting a punishment ‘within limits fixed by law.’” *Id.* at 2161 (quoting *Williams v. New York*, 337 U. S. 241, 246 (1949)). But in the post-*Booker* federal system, facts that establish the range of reasonable sentences do not merely “guide judicial discretion.” Rather, they establish a range of sentences that are permissible, and that can survive appellate review. *See Booker*, 543 U.S. at 258-265.

The sentence imposed in this case will only satisfy the Fifth Amendment if this Court finds it to be reasonable based exclusively on the facts in the indictment. Here, the reasonableness of the

188 month sentence plainly depends on facts that were not placed in the indictment or admitted by the defendant. These include the court's conclusion that he trafficked 984 grams of methamphetamine actual, rather than the 50 grams of methamphetamine actual pleaded in the indictment. To say that the district court's factual findings did not affect the range of reasonable punishments – neither the maximum of the range of reasonable punishment, *nor its minimum* – is essentially to say that the entire statutory range is reasonable in every case. Reasonableness review is deferential, but it is not the case that “district courts have a blank check to impose whatever sentences suit their fancy.” *See United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008); *see also United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008)(reading *Gall v. United States*, 552 U.S. 38 (2007), to “leave no doubt that an appellate court may still overturn a substantively unreasonable sentence, albeit only after examining it through the prism of abuse of discretion, and that appellate review has not been extinguished.”); *accord United States v. Levinson*, 543 F.3d 190, 195-196 (3d Cir. 2008); *United States v. Ofrey-Campos*, 534 F.3d 1, 44 (1st Cir. 2008)(using reasonableness review to reverse the sentence); *United States v. Abu Ali*, 528 F.3d 210, 269 (4th Cir. 2008)(same); *United States v. Funk*, 534 F.3d 522, 530 (6th Cir. 2008)(same); *United States v. Shy*, 538 F.3d 933 (8th Cir. 2008)(same).

Petitioner raised the issue on plain error below (*see* Fed. R. Crim. P. 52(b)), a fact that may prove a difficult vehicle problem for a plenary grant of *certiorari*. It is nonetheless appropriate to hold the case and remand in light of any other case that may raise the same claim. In the event that it grants such a Petition while the present case is still pending, it will be appropriate to hold the instant case until the plenary grant is resolved, and then, in the event of a favorable ruling, grant the instant Petition, vacate the judgment below, and remand for reconsideration.

CONCLUSION

Petitioner respectfully submits that this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit and vacate his sentence.

Respectfully submitted this October 25, 2018,

/s/ Kevin Joel Page
KEVIN JOEL PAGE
COUNSEL OF RECORD
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746