No. __–_____

IN THE

SUPREME COURT OF THE UNITED STATES

CLYDE RETIZ,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

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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

Clyde Retiz, is the petitioner, who was the defendant-appellant below. The United States of America is the respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Clyde Retiz, 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Retiz,* 736 Fed. Appx. 500 (5th Cir. September 6, 2018)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The judgment of conviction and sentence was imposed October 6, 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 September 6, 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:

> 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.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. Facts and Proceedings Below

Between 2015 and 2017, Fort Worth police repeatedly caught Clyde Retiz– then between 19 and 21 years old – with marijuana, cocaine, and methamphetamine. *See* (ROA.118-121).[1] The most the police ever caught him with was 28.07 grams of cocaine, following a controlled buy. *See* (ROA.119).

In March of 2017, the police arrested Mr. Retiz. *See* (ROA.121). Fatefully, and without any discernible benefit, he also admitted pattern of drug dealing over a year. *See* (ROA.121). Specifically, he admitted selling an ounce of methamphetamine once a week for a year. *See* (ROA.121). He also admitted accompanying his cousin to distribute another ounce of methamphetamine once a week during the same year. *See* (ROA.121). And he admitted a few other somewhat larger transactions. *See* (ROA.121). The greatest of the methamphetamine transactions involved four ounces; the greatest of the cocaine transactions also involved four ounces. *See* (ROA.121).

Mr. Retiz pleaded guilty to one count of possessing a detectable amount of methamphetamine with intent to distribute it. *See* (ROA.30-32). A Presentence Report (PSR) found that the Guidelines recommended a sentence of 121 to 151 months imprisonment, a conclusion it reached in no small part due to the drug quantity. *See* (ROA.124, 136). The PSR used the repeated one ounce deliveries of unseized cocaine and methamphetamine to assign Mr. Retiz a base offense level of 32. *See* (ROA.122, 124). Specifically, it added together the quantities involved each of these deliveries to determine the scale of the offense. *See* (ROA.122, 124).

The defense objected to the drug quantity calculation, pointing to Note Five of USSG §2D1.1. *See* (ROA.144). This Note calls on the district court to determine whether the drugs seized from the defendant adequately reflect "the scale of the offense." *See* USSG 2D1.1, comment. (n. 5).

[1]Citations to the record on appeal in the court of appeals are included in hopes that they may be of use to the government in answering the Petition, or the Court in evaluating it.

The defense argued that the better way to approximate the scale of the offense in this case was to consider the amounts typically dealt, or the most dealt at any one time, not to add small quantities repetitively trafficked over long periods. *See* (ROA.144).

The district court overruled this Objection, *see* (ROA.91), and the defense pressed a similar claim under 18 U.S.C. §3553(a), *see* (ROA.90-102). The court, however, imposed a Guideline sentence of 140 months imprisonment, the approximate middle of the Guideline range it believed applicable. *See* (ROA.105).

B. The Appeal

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, raising the same Guideline issue pressed in the district court. The court of appeals rejected that contention. *See* [Appendix A].

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, proven to a jury beyond a reasonable doubt, 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 and Sixth Amendments. 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 and Sixth Amendments if this

Court finds it to be reasonable based exclusively on the facts in the indictment. Here, the reasonableness of the 140 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 nearly three kilograms of methamphetamine, rather than the detectable amount 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. Ofray-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 has not raised the issue below, 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 December 3, 2018,

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