No. _____

IN THE

Supreme Court of the United States

JONATHAN TORRES-ARROYO,
Petitioner,

v.

STATE OF NEW JERSEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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QUESTION PRESENTED

Did the New Jersey Courts make an invalid distinction from *Alleyne v. United States*, 570 U.S. 99 (2013), in holding that the defendant's right to a jury trial was not violated by a mandatory minimum sentence that was authorized -- but not required -- by the sentencing court's findings?

TABLE OF CONTENTS

PAGE NOS.

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Page Nos.

Cases

Statutes

Statutes (Cont'd)

Other Authorities

OPINIONS BELOW

The unpublished opinion of the New Jersey Superior Court, Appellate Division (November 21, 2018) appears at pages 1 to 6 of the appendix. The order of the New Jersey Supreme Court denying certification (June 3, 2019) appears at page 7 of the appendix.

JURISDICTION

The New Jersey Supreme Court filed its order on June 3, 2019. This petition for a writ of certiorari is filed within ninety days of the order. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

Section one of the Fourteenth Amendment to the United States Constitution states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE MATTER INVOLVED

In the New Jersey Superior Court, the indictment charged defendant Jonathan Torres-Arroyo with (1) third-degree burglary and (2) third-degree theft of property worth more than $500. At his jury trial, the prosecutor alleged that Torres-Arroyo had burglarized a Jersey City house. The evidence was that the homeowners had returned from a two-day trip to find their front door ajar and their possessions missing. A soft-drink bottle left inside the house had Torres-Arroyo's DNA on it. The jury convicted of both charges.

The court then sentenced Torres-Arroyo to concurrent prison sentences: for burglary, an indeterminate term with a maximum of seven years and, for theft, an indeterminate term with a maximum of five years. In addition, New Jersey law authorized the imposition of a mandatory minimum term, during which the defendant would be ineligible for parole -- but only if the sentencing court found that the aggravating factor(s) substantially outweighed the mitigating factor(s). *See N.J.S.A.* § 2C:43-6b, -7b; *State v. Dunbar*, 108 N.J. 80, 92 (1987). In Torres-Arroyo's case, the sentencing court found three statutory aggravating factors and one statutory mitigating factor. The court found that the "aggravating factors clearly and substantially outweigh the sole mitigating factor." The court thereupon sentenced Torres-Arroyo to a twenty-eight-month mandatory minimum without parole eligibility.

At the Appellate Division, Torres-Arroyo argued that the mandatory minimum violated his right to a jury trial because it was only legally authorized once

the sentencing court found at least one aggravating factor and found that the aggravating factors substantially outweighed the mitigating factors.[1] Two days before Torres-Arroyo's oral argument, the New Jersey Supreme Court rejected a similar challenge in another case. *See State v. Kiriakakis*, 235 N.J. 420 (2018). The Appellate Division affirmed Torres-Arroyo's sentence on the binding authority of *Kiriakakis*. Torres-Arroyo's petition for certification, asking the New Jersey Supreme Court to reconsider *Kiriakakis*, was denied.

[1] Torres-Arroyo also argued that the evidence was insufficient that he was the burglar, rather then a person whose DNA was left on the bottle at another time, such as during a separate trespass. The Appellate Division rejected the argument.

REASONS FOR GRANTING THE WRIT

The petitioner, Jonathan Torres-Arroyo, respectfully prays that a writ of Certiorari issue to review the decision of the Superior Court of New Jersey, Appellate Division. That decision, which affirmed Torres-Arroyo's sentence, warrants review for two basic reasons:

1. The New Jersey scheme under which Torres-Arroyo received a mandatory minimum sentence violates the right to a jury trial. The relevant line of cases begins with *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and extends through *Ring v. Arizona*, 536 U.S. 584 (2002) and *Alleyne v. United States*, 570 U.S. 99 (2013). Under those cases, a fact finding that increases the defendant's sentencing exposure is an element that must be submitted to the jury. In New Jersey, a mandatory minimum sentence is only authorized once the sentencing court finds that the aggravating factors substantially outweigh the mitigating factors. Thus, a judicial finding improperly allowed the sentencing court to impose a harsher sentence on Torres-Arroyo than that authorized by the jury verdict alone.

2. New Jersey's justification for this scheme conflicts with cases of this Court. In *State v. Kiriakakis*, 235 N.J. 420 (2018), the New Jersey Supreme Court asserted that a mandatory minimum sentence *required* by the sentencing court's findings, as in *Alleyne,* is impermissible; in contrast, a mandatory minimum *authorized* by the sentencing court's findings and imposed as a matter of discretion, as here, is permissible. This distinction conflicts with the language and results of this Court's cases, which have always emphasized the impropriety of a sentence

greater than that *authorized* by the jury verdict alone. Certiorari should be granted to clarify the law.

Below, the petition addresses each of these reasons in turn.

I. A synthesis of this Court's cases, especially *Alleyne v. United States*, 570 U.S. 99 (2013) and *Ring v. Arizona*, 536 U.S. 584 (2002), establishes that Torres-Arroyo's right to a jury trial was violated when he received a mandatory minimum sentence that was only authorized once the sentencing court found that the aggravating factors substantially outweighed the mitigating factors.

Initially, the process through which the sentencing court arrived at Torres-Arroyo's sentence must be understood. A New Jersey sentencing court sets the length of the maximum sentence from within a statutory range. *See N.J.S.A.* § 2C:43-6a, -7a. To decide the maximum, the court exercises "structured discretion." *State v. Case*, 220 N.J. 49, 63 (2014). Aggravating and mitigating factors listed in a statute are identified and weighed. *N.J.S.A.* § 2C:44-1a, -1b. When the balance tips towards the aggravating factors, the maximum sentence tends towards the upper end of the range; when the balance tips towards the mitigating factors, the maximum sentence tends towards the lower end of the range. *Case*, 220 N.J. at 64-65.

Although the maximum sentence is fixed, the actual time to be served is indeterminate. Indeed, if the defendant earns the expected amount of time credit, he will typically be eligible for parole consideration after serving approximately one-

fifth of the maximum term. *See N.J.S.A.* § 2C:30:4-123.51; N.J. State Parole Board, *The Parole Book: A Handbook on Parole Procedures for Adult and Young Adult Inmates* 35 (5th ed. 2012), available at https://www.state.nj.us/parole/docs/AdultParoleHandbook.pdf.

A sentencing court, however, may sometimes constrain indeterminacy by imposing a mandatory minimum term of up to one-half the maximum term, during which time the defendant will be ineligible for parole. *N.J.S.A.* § 2C:43-6b, -7b. These mandatory minimums are for more egregious cases: they are "the exception" and "are not to be treated as routine or commonplace." *Case*, 220 N.J. at 66. Most importantly, before obtaining the discretion to impose a mandatory minimum, the sentencing court must find that "the aggravating factors substantially outweigh the mitigating factors." *N.J.S.A.* § 2C:43-6b; *see N.J.S.A.* § 2C:43-7b; *State v. Dunbar*, 108 N.J. 80, 92 (1987). Thus, a mandatory minimum is not legally authorized unless a sentencing court (1) finds at least one aggravating factor and (2) finds that any aggravating factors substantially outweigh any mitigating factors.

In Torres-Arroyo's case, the court found three aggravating factors: number three, a heightened risk of reoffending, *N.J.S.A.* § 2C:44-1a(3); number six, a particularly extensive prior record, *N.J.S.A.* § 2C:44-1a(6); and number nine, a heightened need for deterrence, *N.J.S.A.* § 2C:44-1a(9). The court found mitigating factor number six, the defendant will compensate the victim, *N.J.S.A.* § 2C:44-1b(6). The court found that the "aggravating factors clearly and substantially outweigh the sole mitigating factor." The court then sentenced Torres-Arroyo to a twenty-

eight-month mandatory minimum without parole eligibility, which was one-third of his aggregate maximum sentence of seven years.

Because Torres-Arroyo's mandatory minimum was only authorized based upon court findings -- rather than jury findings -- he was deprived of his right to a jury trial.

This thesis is derived from the line of landmark cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000). These cases start with the fundamental principle that each element of a crime must be proven to the jury beyond a reasonable doubt. 530 U.S. at 477, 484-85. Before *Apprendi*, judicial fact findings were often permitted to increase the authorized sentence range, without being considered elements that had to be submitted to the jury. Then this Court held: "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." *Id.* at 490 (quoting *Jones v. United States*, 526 U.S. 227, 252-253 (1999) (Stevens, J., concurring)). Thus, the post-*Apprendi* inquiry as to whether a particular finding is an element to be submitted to the jury is one of effect, rather than form: "[D]oes the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" If so, the finding may not be made by the sentencing court. *Apprendi*, 530 U.S. at 494.

In subsequent cases, this Court continued to focus on whether judicial findings improperly increased the defendant's sentencing exposure. In *Ring v.*

Arizona, 536 U.S. 584 (2002). Ring was convicted of felony murder. A statute specified "death or life imprisonment" as the sentencing options. 536 U.S. at 603-04. Nevertheless, a sentencing court was authorized to impose a death sentence only upon finding at least one statutory aggravating factor and failing to find any mitigating factors "sufficiently substantial to call for leniency." *Id.* at 592-93, 597. After duly finding two aggravating factors that outweighed the sole mitigating factor, the *Ring* sentencing court imposed a death sentence. *Id.* at 594-95.

This Court held that Ring's right to a jury trial had been violated. Extolling effect over form, the Court reasoned that the more general statute "authorized" death only in a "formal" sense; an additional judicial finding was still necessary to impose a death sentence. *Id.* at 604. The Court restated the *Apprendi* rule: "[I]f 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." *Ring*, 536 U.S. at 602.

The case of *Blakely v. Washington*, 542 U.S. 296 (2004), also involved a statute that improperly gave the sentencing court the option of imposing a higher sentence upon additional fact findings. A general statute established the outer limit of Blakely's sentence as ten years. But a more specific statute prohibited a sentence longer than fifty-three months, unless the sentencing court found factors justifying an upward departure. 542 U.S. at 299-300. The sentencing court found such factors in Blakely's case and sentenced him to more than fifty-three months. *Id.* at 300-01. Similar to *Ring*, the prosecution argued that Blakely's sentence, although beyond

the normal range authorized by the more specific statute, was formally authorized by the more general statute. *Blakely*, 542 U.S. at 303. This Court disapproved of the sentencing scheme, explaining:

> [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*. . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.

542 U.S. at 303-04 (emphasis in original); *see also United States v. Booker*, 543 U.S. 220, 233-35 (2005) (applying *Blakely* to invalidate federal guideline sentencing based on judicial fact findings).

In a case similar to *Ring*, this Court invalidated another sentencing scheme that gave the sentencing court the option of imposing death upon additional fact findings. In *Hurst v. Florida*, 136 S.Ct. 616 (2016), Hurst was convicted of capital murder. Life was the default sentence. 136 S.Ct. at 620. But the sentencing court also had the option of imposing a death sentence upon finding "sufficient aggravating circumstances" and "insufficient mitigating circumstances to outweigh the aggravating circumstances." *Id.* at 620, 622. The sentencing court made such findings and sentenced Hurst to death. *Id.* at 620.

This Court reversed on the strength of *Ring*. Describing that precedent as a case where "a judge could sentence Ring to death only after independently finding at least one aggravating circumstance," the Court stated that the analysis was the same in Hurst's case. *Hurst*, 136 S.Ct. at 621-22. In other words, the sentencing

judge had improperly "increased Hurst's authorized punishment based on her own factfinding." *Id.* at 622.

A crucial development is that the Supreme Court has recently decided to treat enhanced minimum sentences in the same fashion as enhanced maximum sentences. Previously, this Court had held that *Apprendi* did not apply to the floor of a sentencing range; in other words, a judge could permissibly make a fact finding that triggered an enhanced mandatory minimum sentence. *Harris v. United States*, 536 U.S. 545, 554 (2002). However, the case of *Alleyne v. United States*, 570 U.S. 99, 103 (2013), overruled *Harris*. Alleyne was convicted of using or carrying a firearm in relation to a crime of violence. The sentence range was five years to life. But if the gun was "brandished," the sentence range was seven years to life. 570 U.S. at 103-04, 112. In Alleyne's case, the sentencing court -- not the jury -- made the finding that the gun had been brandished and sentenced Alleyne to seven years. *Id.* at 104.

This Court held that the increase in the minimum end of the range -- based solely on a judicial finding -- had violated Alleyne's right to a jury trial. "A fact triggering a mandatory minimum alters the prescribed range of sentences to which a defendant is exposed." *Alleyne*, 570 U.S. at 112. The Court highlighted that wrongdoers are entitled to know how long they will be in prison. And "the obvious truth" is "that the floor of a mandatory range is as relevant to wrongdoers as the ceiling." Id. 112-13. The higher floor aggravates the "expected punishment" and "heightens the loss of liberty." *Id.* at 113. It was immaterial that Allyene could

possibly have spent seven years in prison even under the lower range: "The essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime." *Id.* at 115-16.

Examining the *Apprendi* line of cases as a whole, the key question is whether a judicial fact-finding finding authorizes the imposition of a sentence that is not authorized by the jury verdict alone. In other words, does a judicial fact-finding increase the defendant's sentencing exposure? If so, the enhanced sentence violates the defendant's right to a jury trial. Moreover, given the *Alleyne* decision, judicial findings that authorize enhanced floors are just as improper as judicial findings that authorize enhanced ceilings.

In Torres-Arroyo's case, the scheme was just like that forbidden in *Ring* and *Hurst*, only here the scheme applied to the floor of the range. Under the applicable New Jersey law, a jury verdict alone does not authorize a mandatory minimum term without parole eligibility; such a mandatory minimum requires the sentencing court -- not the jury -- to be "clearly convinced that the aggravating factors substantially outweigh the mitigating factors." *N.J.S.A.* 2C:43-6b, -7b; *Dunbar*, 108 N.J. at 92. Thus, if the sentencing court did not (1) find at least one an aggravating factor and (2) find that any aggravating factor(s) substantially outweighed the mitigating factor(s), Torres-Arroyo's sentence could not include any mandatory minimum. But because the sentencing court made these two findings, a mandatory minimum was authorized. In short, New Jersey's scheme improperly allowed the

court to impose a harsher sentence on Torres-Arroyo than that authorized by the jury verdict alone.

In sum, because sections 2C:43-6b and -7b allow a court to sentence a defendant to a harsher sentence than is authorized by the jury verdict, they violate the constitutional requirement that a jury find all elements beyond a reasonable doubt. Accordingly, the mandatory minimum imposed on Torres-Arroyo was unconstitutional.

II. The New Jersey Supreme Court's decision in *State v. Kiriakakis*, 235 N.J. 420 (2018) -- which incorrectly distinguished a mandatory minimum *authorized* by the sentencing court's findings, as in Torres-Arroyo's case, from a mandatory minimum *required* by the sentencing court's findings, as in *Alleyne* -- conflicted with this Court's cases and, in any event, demonstrates the need for clarification.

In this case, the Appellate Division provided little reasoning of its own in rejecting Torres-Arroyo's claim that the mandatory minimum violated his right to a jury trial. The binding case relied upon by the Appellate Division was the New Jersey Supreme Court's decision in *State v. Kiriakakis*, 235 N.J. 420 (2018). The facts of *Kiriakakis* were similar to Torres-Arroyo's case: the *Kiriakakis* sentencing court found three aggravating factors; found two mitigating factors; found that the aggravating factors substantially outweighed the mitigating factors; and sentenced Kiriakakis to a mandatory minimum term during which he would be ineligible for parole. 235 N.J. at 427-28.

In analyzing this situation under the *Apprendi* line of cases, the New Jersey Supreme Court properly recognized that the mandatory minimum was not legally authorized without the sentencing court's finding of an aggravating factor: "Admittedly, without the finding of an aggravating factor -- just a single step in the sentencing process -- a mandatory-minimum term cannot be sustained under *N.J.S.A.* 2C:43-6(b)." *Kiriakakis*, 235 N.J. at 445. Despite this recognition, the court also confusingly characterized the jury verdict as authorizing a maximum sentence in the range of five to ten years and "a parole ineligibility range of zero to five years." *Id.* at 442.

The last quoted proposition was incorrect; as the court had recognized, the mandatory minimum of up to one-half the maximum sentence was *not* authorized by the jury verdict alone. In actuality, the sentencing court had to make additional findings -- that at least one aggravating factor existed and that factor substantially outweighed any mitigating factors. The New Jersey Supreme Court's mistake seemed to be similar to that criticized in *Ring* and *Blakely*: that is, misperceiving that the maximum permissible sentence for *Apprendi* purposes "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S. at 303-04 (emphasis in original); *see Ring*, 536 U.S. at 604.

At any rate, the New Jersey Supreme Court's principle reasoning was that the ultimate decision whether to impose a mandatory minimum sentence was "highly discretionary" and depended on a weighing of the aggravating and

mitigating factors. *Kiriakakis*, 235 N.J. at 443. The court emphasized that "no fact found by the sentencing court *required* the imposition of a mandatory-minimum sentence"; in contrast, the court highlighted that the finding of brandishing in *Alleyne* "*automatically* triggered a seven-year mandatory-minimum term beyond the five-year mandatory-minimum sentence authorized by the jury's verdict." *Kiriakakis*, 235 N.J. at 444 (emphasis added). In the end, the discretionary nature of the ultimate decision in Kiriakakis's case convinced the New Jersey Supreme Court that, in contrast to *Alleyne*, "traditional sentencing factors" were being applied to set a mandatory minimum sentence within "the mandatory-minimum range." *Kiriakakis*, 235 N.J. at 445-46.

Contrary to the reasoning in *Kiriakakis*, the *Alleyne* decision did not turn on the circumstance that judge's factfinding in that case *required* the mandatory minimum sentence. The *Apprendi/Alleyne* line of cases applies equally when a judge's factfinding *authorizes* an enhanced mandatory minimum sentence.

As suggested above in Point I, the cases leading up to *Alleyne* contain various statements that judicial fact findings may not "authorize" an enhanced sentence, "expose" the defendant to an enhanced sentence, and other similar formulations. A few examples -- out of many more -- are detailed:

> ● "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." *Apprendi*, 530 U.S. at 490 (quoting *Jones*, 526 U.S. at 252-253 (Stevens, J., concurring)).
>
> ● "[I]f 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." *Ring*, 536 U.S. at 602.

● "In effect, 'the required finding [of an aggravated circumstance] exposed [Ring] to a greater punishment than that authorized by the jury's guilty verdict.'" *Id.* at 604 (quoting *Apprendi*, 530 U.S. at 494).

● "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." *Blakely*, 542 U.S. at 304.

● An enhanced sentence is improper when "the jury's verdict alone does not authorize the sentence," and "[t]he judge acquires that authority only upon finding some additional fact." *Id.* at 305.

● "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. *Booker*, 543 U.S. at 244.

Likewise, examining the facts of the pre-*Alleyne* cases, the invalid enhanced sentences were often simply authorized -- not required -- by judicial fact findings; a further discretionary decision was often required to actually impose the enhanced sentence. In *Ring* and *Hurst*, for example, the infirmity was that the death penalty was authorized -- but not required -- upon the judge's finding of an aggravating factor. *See Ring*, 536 U.S. at 592-93, 603-04; *Hurst*, 136 S.Ct. at 620, 622. In *Blakely*, the infirmity was that an "exceptional sentence" above the normal maximum was authorized -- but not required -- upon the judge's finding of an aggravating factor. *See* 542 U.S. at 299-300.

In general, *Alleyne* held that the principles enunciated in the *Apprendi* line of cases should apply to the prescribed minimum sentence, as well as the prescribed

maximum sentence. *Alleyne*, 570 U.S. at 111-116. As in previous decisions, the Court's language condemned judicial fact-findings *authorizing* the imposition of a enhanced sentence. The decision, for example, referred to: "facts that increase the prescribed range of penalties to which a criminal defendant is exposed"; "[f]acts that expose a defendant to a punishment greater than that otherwise legally prescribed"; a fact that "alters the prescribed range of sentences to which a criminal defendant is exposed"; "facts increasing the legally prescribed floor"; a fact "[e]levating the low-end of a sentencing range"; a fact that "alters the legally prescribed punishment so as to aggravate it"; and a fact that "aggravates the legally prescribed range of allowable sentences." *Id.* at 111 to 115.

To be sure, the facts of *Alleyne* involved a mandatory minimum sentence that was required, not only authorized, upon a particular judicial fact-finding. *Id.* at 103-04. Thus, some of the court's language was inevitably geared towards such a "mandatory mandatory" minimum. *See id.* at 111-116. But the underlying reasoning of the decision is unmistakable, especially when viewed in the context of the previous decisions in the *Apprendi* line: judicial fact findings may not authorize a sentence that is not authorized by the jury verdict alone. The *Alleyne* decision did not depend on the circumstance that the judicial fact finding not only authorized, but required, the enhanced minimum.

In short, the New Jersey Supreme Court drew a distinction that conflicts with the reasoning and facts of the *Apprendi* line of cases. Torres-Arroyo's case is the vehicle to provide needed clarification. Certiorari should be granted.

CONCLUSION

For the reasons set forth above, the Court should grant certiorari to review the decision of the New Jersey Superior Court, Appellate Division.

Respectfully submitted,

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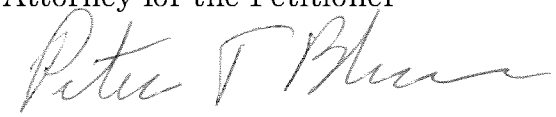

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