No. _____

In the

Supreme Court of the United States

Marco Antonio Murillo,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal defendants enjoy the right to indictment as to some facts that alter the likely sentence within a mandatory range of punishment?

   Subsidiary question: whether the case should be remanded in light of *United States v. Haymond*, __U.S.__, 139 S.Ct. 2369 (2019)?

PARTIES TO THE PROCEEDING

Petitioner is Marco Antonio Murillo, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

Table of Authorities

Cases **Page(s)**

Statutes

United States Constitution

PETITION FOR A WRIT OF CERTIORARI

Petitioner Marco Antonio Murillo seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The written judgment of conviction and sentence was entered September 11, 2018, and is reprinted as Appendix A. The unpublished opinion of the Court of Appeals is available as *United States v. Murillo*, 772 Fed. Appx. 166 (5th Cir. June 20, 2019) (unpublished). It is reprinted in Appendix B to this Petition.

JURISDICTION

The opinion and order of the Court of Appeals affirming the sentence was issued June 20, 2019. *See* [Appx. B]. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL CONSTITUTIONAL PROVISIONS, RULES, AND SENTENCING GUIDELINES 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 defence.

Section 3553(a) of Title 18 of the United States Code provides:

> (a)Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for—
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
> (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
> (5) any pertinent policy statement—
> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to

such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

A. District Court Proceedings

Petitioner Marco Antonio Murillo pleaded guilty to a superseding indictment that charged him with possessing an unspecified quantity of a mixture containing methamphetamine with intent to distribute it. This plea was pursuant to a plea agreement which waived his right to appeal. In connection with the plea, he admitted that the quantity involved was 6,217 grams of approximately 98% pure methamphetamine.

A Presentence Report found a base offense level of 38, due to the quantity and purity of methamphetamine. It calculated a Guideline range of 240 months on this basis. In the absence of the PSR's quantity and purity findings, the base offense level would have been just 12, and the Guideline range just 24-30 months imprisonment. The defense filed a sentencing memorandum arguing that the purity of the methamphetamine in question did not substantially reflect his culpability, and that a lesser sentence was appropriate.

The district court agreed with the PSR's Guideline range, but imposed 188 months imprisonment.

B. Proceedings on Appeal

Petitioner appealed unsuccessfully, arguing that the government had breached the plea agreement. The court of appeals affirmed the sentence on June 20, 2019. *See* [Appendix B]. Six days later, this Court issued *United States v. Haymond*, __U.S.__, 139 S.Ct. 2369 (2019).

REASONS FOR GRANTING THIS PETITION

There is a reasonable probability of a different result if the court below is instructed to reconsider its decision in light of *United States v. Haymond*, __U.S.__, 139 S.Ct. 2369 (2019).

The Fifth and Sixth Amendments to the United States Constitution provide federal criminal defendants with the right to have each element of their offense found by a grand jury and placed in the indictment, then proven to a jury beyond a reasonable doubt. *See United States v. Cotton*, 535 U.S. 625, 627 (2002). Facts relevant to punishment that are not elements of the defendant's offense, however, need not be placed in the indictment, need not be proven to a jury, and need not be proven beyond a reasonable doubt. *See United States v. Booker,* 543 U.S. 220, 259 (2005). The defendant's procedural protections, therefore, depend critically on whether they are characterized as "elements" of the defendant's offense, or merely "sentencing factors."

In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), this Court held that the constitution does not require a state legislature to treat the defendant's possession of a firearm as an element of his or her offense, even if that fact triggers a mandatory minimum punishment. *See McMillan*, 477 U.S. at 91-92. According to the *McMaillan* court, this fact could be proven to judge by a mere preponderance of the evidence. *See id*. *McMillan* acknowledged, however, "that there are constitutional limits to the State's power in this regard; in certain limited circumstances *Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged." *Id*. at 86.

The *McMillan* court found that the Pennsylvania law did not transgress these limits because it did not establish a presumption or shift any burden to the defendant. *See id*. 87. Further, it noted that the finding did not increase the statutory maximum of the offense. *See id.* 87. And it saw no evidence that the Pennsylvania legislature "had restructure[ed] existing crimes in order to 'evade' the commands of *Winship*…" *Id*. As such, this Court concluded that the statute at issue "gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id*. at 88.

A decade later, this Court began to revisit the distinction between elements of an offense and facts that go only to sentencing. In *United States v. Watts*, 519 U.S. 148 (1997), it held that a district court may increase the defendant's Guideline range on the basis of conduct of which the defendant has been acquitted. *See Watts*, 519 U.S. at 156. *En route* to that conclusion, it reaffirmed *McMillan*'s holding that "application of the preponderance standard at sentencing generally satisfies due process." *Id*. (citing *McMillan*, 477 U.S. at 91-92, and *Nichols v. United States*, 511 U.S. 738, 747-748 (1994)). But it added a caveat: the circuits had offered diverging opinions "as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence," and it expressly declined to resolve this divergence of opinion. *Id*. Further, it limited *McMillan*'s blessing for the preponderance standard to cases where "there was no allegation that the sentencing enhancement was 'a tail which wags the dog of the substantive offense'". *Id*. at 156, n.2 (quoting *McMillan*, 477 U.S. at 88). As such, after

Watts it was certainly arguable that the relaxed constitutional protections typically applicable at sentencing might sometimes be constitutionally inadequate, even if the fact at issue did not alter the statutory range of punishment.

Almendarez-Torres v. United States, 523 U.S. 224 (1998), confirmed that the effect of a fact on the sentencing range is not the sole or dispositive factor in determining whether it must be treated as an element. That case held that the fact of a prior conviction need not be treated as an element of the defendant's offense even if it increases the maximum punishment. *See Almendarez-Torres*, 523 U.S. at 247. That holding stemmed from this Court's recognition that "recidivism … is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Id*. at 243. Relying heavily on this observation and a collection of factors named in *McMillan*, this Court thus held that 8 U.S.C. §1326's use of a prior conviction to elevate a maximum sentence for illegally re-entering the country provided no reason "to think Congress intended to 'evade' the Constitution, either by 'presuming' guilt or 'restructuring' the elements of an offense." *Id* at 246 (quoting *McMillan*, at 86-87, 89-90). Yet this Court closed the opinion with the same caveat it offered in *Watts*: it "express(ed) no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence." *Id*. 248.

Apprendi v. New Jersey, 530 U.S. 466 (2000), finally set a bright line rule: "Other 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." *Apprendi*, 530 U.S. at 490. For the purpose of a defendant's constitutional protections, *Apprendi* largely discarded the significance of legislative labels, holding that "the relevant inquiry is one not of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id*. at 494. Other than the fact of a prior conviction, facts that increase the maximum penalty are to be treated as elements of the offense, not sentencing factors, whatever the legislature intended. *See id*. at 476. That analysis would quickly be extended by this Court to the right to have facts placed in the indictment. *See Cotton*, 535 U.S. at 627. Twelve years after *Apprendi*, this Court also extended its holding to facts that established a mandatory minimum, largely overruling *McMillan*. *See Alleyne v. United States*, 570 U.S. 99 (2013). Facts that establish a mandatory minimum punishment must now be proven to a jury beyond a reasonable doubt. *See Alleyne*, 570 U.S. at 107.

To summarize: before *Apprendi*, this Court's analysis in *McMillan*, *Watts*, and *Almendarez-Torres* held or strongly suggested that some facts relevant to sentencing could be due elemental treatment if they came to resemble a "tail that wags the dog of the substantive offense," or presented a risk that constitutional guarantees could be "evaded" at sentencing. Factors that influenced this holistic determination – sentencing factor or disguised element – included: the nature of the finding, *see Almendarez-Torres*, 523 U.S. at 247, whether it involved a prior conviction, *see id*., the impact on the sentence or sentencing range, *see McMillan*, 477 U.S. at 88-89;

Watts, 519 U.S. at 156, n.2, and the allocation of the burden of proof, *see McMillan*, 477 U.S. at 87.

Apprendi and *Alleyne* showed that one of these factors – an effect on the mandatory sentencing range – would *always* transform a sentencing factor into an element, unless it involved a sentencing factor. But they did not hold that other factors *could not* combine to do so. An effect on the mandatory sentencing range, in other words, became a sufficient condition for a fact's elemental status, but it was not clear whether it was also a necessary one. Such holistic comparisons were discouraged by language in this Court's 2004 decision of *Blakely v. Washington*, 542 U.S. 296 (2004), which poked fun at the "tail that wags the dog" standard. *See Blakely v. Washington*, 542 U.S at 311, n. 13. In this opinion, the Court, writing through Justice Scalia, observed that *Apprendi* "has prevented full development of this line of jurisprudence." *Id.*

This Court's recent decision in *Haymond v. United States*, __U.S. __, 139 S.Ct. 2369 (June 26, 2019), however, rather strongly suggests some that facts may be due elemental treatment based on a holistic evaluation of their similarity to elements, and the risk that constitutional guarantees will be "evaded." *Haymond* addressed the constitutionality of 18 U.S.C. 3583(k), which requires a five year term of imprisonment for supervised release revokees subject to sex offender registration who commit one of a specified list of sex offenses. *See Haymond*, 139 S.Ct. at 2375 (Gorsuch, J., plurality op.). Five Justices found that the provision (Subsection (k)), violates the jury trial guarantee of the Sixth Amendment, though they did not join a

common opinion. *See Haymond*, 139 S.Ct. at 2385 (Gorsuch, J., plurality op.); *Haymond*, 139 S.Ct. at 2386 (Breyer, J., concurring).

A plurality opinion authored by Justice Gorsuch applied *Apprendi* and *Alleyne*, to find that the five year penalty required by Subsection (k) added time to the defendant's minimum punishment, and thus required the protections of a jury trial and proof beyond a reasonable doubt under *Alleyne*. *See Haymond*, 139 S.Ct. at 2379-2380 (Gorsuch, J., plurality op.). Notably, these four Justices expressed concern that the use of judicial fact-finding at revocation hearings could be used to evade the defendant's right to a jury trial:

> If the government and dissent were correct, Congress could require anyone convicted of even a modest crime to serve a sentence of supervised release for the rest of his life. At that point, a judge could try and convict him of any violation of the terms of his release under a preponderance of the evidence standard, and then sentence him to pretty much anything.

Haymond, 139 S.Ct. at 2380 (Gorsuch, J., plurality op.). Manifestly, these Justices regarded the risk of "evasion" realistic in the context of provisions like Subsection (k). And this appraisal influenced the outcome.

Justice Breyer concurred in the decision. He believed that supervised release is generally akin to parole, which may be revoked based on preponderance findings without the benefit of a jury. *See Haymond*, 139 S.Ct. at 2385 (Breyer, J., concurring). But he nonetheless believed that proceedings arising under §3583(k) are "less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach." *Haymond*, 139 S.Ct. at 2365 (Breyer, J., concurring).

Specifically, he noted that §3583(k) hinged on proof of a discrete set of federal crimes, and imposed a determinate, mandatory penalty. *See Haymond*, 139 S.Ct. at 2365 (Breyer, J., concurring).

The outcome of *Haymond* unmistakably turned on factors other than the effect of a disputed fact on the defendant's mandatory sentencing range. Justice Gorsuch's plurality, like the majorities in *McMillan*, and *Almendarez-Torres*, was influenced by the risk that legislatures might seek to evade constitutional guarantees to punish criminal conduct that would otherwise constitute a separate offense. Justice Breyer's concurrence undertook a global comparison of Subsection (k) findings to "traditional elements." In this respect, it echoed the "tail that wags the dog" standard applied in *McMillan*, *Watts*, and *Almendarez-Torres*.

A global assessment of the quantity and purity findings made here, and an objective assessment of the risk that sentencing has been used to "evade" constitutional guarantees, provides a reasonable argument that these findings should be treated as elements of the defendant's offense. As such, it is reasonably probable after *Haymond* that such facts must be placed in the charging instrument.

The quantity and purity of the methamphetamine at issue would – if properly litigated – subject the defendant to an aggravated form of the offense to which he pleaded. *See* 21 U.S.C. §841(b). As such, they resemble the findings of a "distinct criminal offense" that Breyer regarded as disguised elements in *Haymond*. *See Haymond*, 139 S.Ct. at 2365 (Breyer, J., concurring). Because of the Fifth Circuit's longstanding view that all allegations in a PSR must be rebutted by the defendant,

see United States v. Vital, 68 F.3d 114 (5th Cir. 1995), it cannot be said here, as it could in *McMillan*, that Petitioner was not subject to no presumption of guilt. *See McMillan*, 477 U.S. at 86-87. Further, the facts at issue here, have not, like the prior conviction in *Almendarez-Torres*, resulted from other criminal proceedings at which the defendant enjoyed the rights of trial by jury, proof beyond a reasonable doubt, and confrontation. *See Apprendi*, 530 U.S. at 488 (distinguishing *Almendarez-Torres* because in *Almendarez-Torres* the "three earlier convictions for aggravated felonies … all … had been entered pursuant to proceedings with substantial procedural safeguards of their own …"). Finally, and most critically, the quantity and purity findings made here elevated the defendant's Guideline range from 24-30 months to 240 months, an increase of between 800% to 1,000% and of between 18 and 20 years imprisonment. A finding that produces so massive an expansion of sentencing liability may be fairly characterized as a tail that wags the dog of the substantive offense.

Further, the quantity and purity and findings at issue here carry a serious risk that they will stand in for criminal trials in cases where the prosecution cannot (or does not care to) shoulder the burden of proving quantity and purity. At the time of the decision below, Fifth Circuit law was clear that facts that alter the Guidelines need not be treated as elements of the defendant's offense. *See United States v. Tuma*, 738 F.3d 681, 693 (5th Cir. 2013). That conclusion has been sufficiently complicated by *Haymond* – which postdates the opinion below -- as to merit remand. *See Lawrence v. Chater*, 516 U.S. 163,167 (1996).

There are, admittedly, a number of potential procedural obstacles to reversal in this case. The issue was not preserved in either district court or below, and there is a waiver of appeal. But GVR is not a decision on the merits. *See Tyler v. Cain*, 533 U.S. 656, 665, n.6 (2001); *accord State Tax Commission v. Van Cott*, 306 U.S. 511, 515-516 (1939). Accordingly, procedural obstacles to reversal should be decided in the first instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964)(*per curiam*)(GVR "has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent"); *Torres-Valencia v. United States*, 464 U.S. 44 (1983)(*per curiam*)(GVR utilized over government's objection where error was conceded; government's harmless error argument should be presented to the Court of Appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990)(Stevens, J., dissenting)(speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945)(remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the court of Appeals).

CONCLUSION

Petitioner requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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