No.

IN THE

# Supreme Court of the United States

CLAUDIUS L. FINCHER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does the district court's resolution of a contested factual question under 18 U.S.C. § 3553(f) (safety-valve statute) for the purpose of determining whether a mandatory-minimum sentence applies under 21 U.S.C. § 841(b)(1)(B), violate the defendant's Sixth Amendment right to have a jury determine all facts necessary to raise the mandatory sentencing range?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Claudius Fincher. Respondent is the United States of America. No party is a corporation.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Claudius Fincher respectfully petitions for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Seventh Circuit

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., *infra*, 1a–10a) is reported at 929 F.3d 501. The opinion of the district court (App., *infra*, 11a–15a) is unreported.

## JURISDICTION

The Seventh Circuit issued its decision on July 9, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution's Sixth Amendment 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."

When Petitioner was convicted and sentenced, 18 U.S.C. § 3553(f) (2018) provided in relevant part:

> **(f) Limitation on applicability of statutory minimums in certain cases.** Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) . . . the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—
>
> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
>
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
>
> (3) the offense did not result in death or serious bodily injury to any person;
>
> (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense…; and
>
> (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.

## INTRODUCTION

18 U.S.C. § 3553(f), a "limitation on applicability of statutory minimums" that's often called the "safety valve" statute, voids mandatory-minimum provisions for non-violent drug offenders without significant criminal history. According to the statute, a sentencing court "shall" apply the statute (that is, shall *not* apply any mandatory-minimum) to a drug offender who meets the five criteria listed on the preceding page of this brief. § 3553(f). Here, the parties disputed whether Petitioner possessed a firearm in connection with his drug offense. *See* § 3553(f)(2).

In cases involving a dispute under § 3553(f), as here, judicial fact-finding "trigger[s] a mandatory minimum," and thus "alters the prescribed range of sentences to which a criminal defendant is exposed." *See Alleyne v. United States*, 570 U.S. 99, 112 (2013). Here, if the district judge had found that Petitioner did not possess a firearm in connection with his drug offense, he *could not* have applied the mandatory-minimum at 21 U.S.C. § 841(b)(1)(B). However, the judge found otherwise, so he *was required* to apply the mandatory minimum. As such, the Sixth Amendment as interpreted in *Alleyne* prohibited the judge from engaging in this fact-finding.

Section 3553(f) seems different from the statutes addressed in *Alleyne* and predecessor cases because it was enacted to benefit certain defendants. But any graduated sentencing scheme has winners and losers. So the fact that § 3553(f) is written in the negative, to focus on the winners, is irrelevant. To illustrate, each of this Court's recent Sixth Amendment cases involve provisions that could be described negatively:

- *Apprendi*: Defendant convicted of possession of a firearm for an unlawful purpose that is *not* a hate crime would *not* be subject to an enhanced sentence.[1]
- *Ring*: Defendant convicted of murder in the *absence* of any aggravating factors may *not* be sentenced to death.[2]
- *Blakely*: Defendant convicted of kidnaping *without* aggravating facts faces a sentencing range of 49-to-53 months.[3]
- *Booker*: Defendant convicted of crack distribution in the *absence* of evidence that he sold 566 grams could *not* get a life sentence.[4]

And if wording a graduated-penalty scheme in the negative could resolve Sixth Amendment concerns, then Congress could overrule *Alleyne* by rewriting 18 U.S.C. § 924(c) as follows:

> Any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, . . . shall . . . be sentenced to a term of imprisonment of not less than 10 years; except that—

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[1] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[2] *Ring v. Arizona*, 536 U.S. 584 (2002).

[3] *Blakely v. Washington*, 542 U.S. 296 (2004).

[4] *United States v. Booker*, 543 U.S. 220 (2005).

> (i) if the firearm was not discharged, the term of imprisonment is reduced to 7 years;
>
> (ii) if the firearm was neither discharged or brandished, the term of imprisonment is further reduced to 5 years.

This is structured as a *reduction* to a mandatory-minimum, requiring proof of negatives, as with § 3553(f). But the sentencing scheme remains precisely the same: if a defendant discharges a firearm, he's subject to a 10-year minimum; if he brandishes it, he's subject to a 7-year minimum; otherwise, he gets a 5-year minimum. *See* § 924(c). Thus, this rewrite could not eliminate the Sixth Amendment's demand for jury findings.

The Sixth Amendment question presented here involves one of the last (or perhaps *the* last) sentencing provision in the federal codebook under which a defendant's statutory range turns on judicial fact-finding post-*Apprendi*, *Ring*, *Blakely*, *Booker*, and *Alleyne*. It warrants review for this reason and also because it impacts an unknown but undoubtedly large number of the most sympathetic defendants convicted of drug-distribution offenses (those without criminal history). Moreover, Congress recently amended § 3553(f) so that it covers not just a defendant like Petitioner, who has no criminal history at all, but also defendants who have a relatively modest criminal history. Thus, the question presented here is even more impactful than when Petitioner first presented it in the district court, and it deserves this Court's attention.

## STATEMENT OF THE CASE

Petitioner had a clean record when he was charged in federal court with conspiring with his uncle to distribute heroin in Madison, Wisconsin. After Petitioner dropped out of college in 2015, he visited his grandmother in Madison and ended up staying for more than a year, until he was arrested in this case. While in Madison, Petitioner got to know his uncle, who did not have a clean record; his uncle sold drugs in the Madison area. Petitioner and his uncle sold heroin to undercover officers in August and September, 2017, resulting in federal charges.

The district court record reveals that while the district case was pending, almost until sentencing, the parties thought Petitioner would not be subject to any mandatory-minimum based on the application of the "safety valve" statute, 18 U.S.C. § 3553(f), although the quantity of heroin involved would otherwise trigger a minimum under 21 U.S.C. § 841(b)(1)(B). Section 3553(f) at the time applied to a defendant who did not garner more than one criminal-history point under the sentencing guidelines and met other criteria, including that he did not use violence or possess a weapon in connection with the offense.

However, around the time the original presentence report was filed, DNA testing revealed that Petitioner had handled a firearm (a handgun) found at the apartment where Petitioner and his uncle lived, and where drugs and paraphernalia involved in the conspiracy were seized. Petitioner's uncle had also handled the firearm. The prosecutor informed defense counsel that he no longer thought § 3553(f) applied, based on the notion that Petitioner possessed a weapon in connection with his drug

offense. *See* § 3553(f) (safety valve factors). Given this "jarring change in the trajectory of [the] case," defense counsel informed the district court that she was delaying a proffer session with law enforcement until it could be determined whether Petitioner's DNA on the firearm precluded application of the safety-valve statute. Defense counsel asked the district court to provide additional time for PSR objections and to set off sentencing, which request the court granted. The parties then briefed the application of § 3553(f).[5]

The defense made two arguments—one factual, one legal. As a factual matter, there was no evidence that Petitioner possessed a firearm "in connection with his drug offense." The defense granted that DNA evidence showed that Petitioner "undoubtedly possessed the firearm at some point," but there was no evidence connecting the firearm to his offense. The gun was "merely present in a kitchen drawer of the apartment." No drug transactions took place at the apartment, the gun was found as far away from drugs as was possible in the apartment, no one brought the gun to any of the controlled buys, and neither defendant was carrying a weapon when he was arrested.

The defense also argued that as a legal matter, the district court was not permitted to resolve the factual dispute against him under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013). The dispute over whether

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[5] The defense also made a guideline objection about the application of U.S.S.G. § 2D1.1(b)(1), but Petitioner does not press that argument in this Court.

Petitioner possessed a firearm in connection with his drug offense was quintessentially factual, and the resolution of that dispute would determine whether Petitioner was subject to a five-year mandatory-minimum sentence. Thus, Petitioner argued, the Sixth Amendment and *Alleyne* barred the judge from determining the matter.

The district court ruled against Petitioner, before sentencing. It found that various factors (presence of firearm in an apartment where drugs were found, fact that the firearm was not a hunting rifle, etc.) combined to show by a preponderance of the evidence that Petitioner had possessed the firearm in question in connection with the drug offense. As for Petitioner's constitutional argument, the district court ruled that the Sixth Amendment did not apply in this context. It relied on circuit opinions (from outside of the Seventh Circuit) reasoning that *Alleyne* does not apply to § 3553(f) because § 3553(f) does not *increase* sentencing exposure, it *reduces* it, and also based on "practical problems" that would arise if *Alleyne* were applied here. App., infra, 12a–13a.

That settled, the district court proceeded to sentencing, where it imposed the mandatory-minimum five years' imprisonment.

On appeal, the parties again disputed whether the facts supported the district court's finding that Petitioner had possessed a firearm in connection with his drug offense. And Petitioner again argued that this sort of dispute cannot be resolved by judges. Petitioner pointed out that his mandatory sentencing range was set by *two* statutes: 21 U.S.C. § 841(b)(1)(B) & 18 U.S.C. § 3553(f). Given the nature of these statutes, a defendant facing sentencing on a drug

charge that comes with a presumptive mandatory-minimum based on drug quantity cannot actually know the mandatory sentencing range without considering both § 841(b) (presumptive mandatory-minimum) and § 3553(f) (mandatory limitation on mandatory-minimums in drug cases). Thus, Petitioner argued, it does not make sense to treat § 3553(f) as some sort of sentence-reduction provision (akin to Fed. R. Crim. P. 35) for Sixth Amendment purposes. And thus, district judges are not permitted to resolve a factual dispute so as to preclude application of § 3553(f) and thereby raise the mandatory sentencing range.

The Seventh Circuit rejected this argument, agreeing with its sister circuits that *Alleyne*'s Sixth Amendment holding applies only to facts that "increase the mandatory minimum," while § 3553(f) only "potentially allows for relief from that mandatory minimum, . . . it does not increase or trigger it." App., *infra*, at 7a. The Seventh Circuit rejected Petitioner's argument that this reasoning is improperly formalistic, holding that the Sixth Amendment distinguishes between a sentence determined by base-range-plus-aggravator and a sentence determined by aggravated-range-plus-mitigator. *Id.* ("Safety valve eligibility factors do not combine with the base offense to create a new, aggravated crime. Instead, the base offense triggers the mandatory minimum on its own. Safety-valve eligibility mitigates the offense's penalty; it does not aggravate it.")

## REASONS FOR GRANTING THE PETITION

### I. This Court should grant review to determine how the Sixth Amendment applies to § 3553(f), an issue that affects a growing number of defendants.

"[T]he Framers adopted the Sixth Amendment's promise that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury.' In the Fifth Amendment, they added that no one may be deprived of liberty without 'due process of law.' Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has 'extended down centuries.'" *United States v. Haymond*, __ U.S. __, 139 S. Ct. 2369, 2376 (2019) (quoting *Apprendi*, 530 U.S. at 477) (internal brackets omitted).

The Sixth Amendment requires the prosecution to prove every element of a criminal offense to a jury beyond a reasonable doubt. And over the past couple of decades, this Court has decided a series of cases (*Apprendi*, *Ring*, *Blakely*, *Booker*, *Alleyne*, and most recently *Haymond*) clarifying that any fact that increases the statutory sentencing range (whether the floor or the ceiling—the minimum or maximum) *is* an element that must be proven to a jury beyond a reasonable doubt. In other words, the legislature cannot reduce the prosecution's Sixth Amendment burden by calling something a sentencing factor. *See Haymond*, 139 S. Ct. at 2377–78 (discussing the history of this jurisprudence).

This case is about a sentencing floor, as with *Alleyne* and *Haymond*. More specifically, Petitioner's argument addresses a sentencing floor in the context of a sentencing range that is determined with reference to two statutes—not just one. Section 841(b)(1)(B) provides that distributing a certain quantity of various controlled substances (relevant here, 100 grams of heroin) results in a 5-year mandatory-minimum sentence. But § 3553(f) provides that § 841(b)'s mandatory-minimum provisions are void where certain factors are present. Both statutes are mandatory, such that in order to determine whether a drug-distribution offense involving 100 grams of heroin carries a mandatory-minimum, the sentencing court must consider both statutes. Thus, Petitioner has consistently argued in this case that a judge is not permitted to find facts under *either* provision so as to determine that § 841(b)(1)(B)'s mandatory-minimum *does* apply. And that is exactly what happened here: Petitioner argued that there wasn't even a preponderance of the evidence supporting the government's notion that he had possessed a firearm in connection with his drug offense, but the district court disagreed; and it was this factual finding that sealed Petitioner's fate.

The issue presented here affects a significant number of the most sympathetic drug-distribution defendants: those with little or no criminal history. These are the defendants for whom Congress enacted § 3553(f). *See United States v. Marin*, 144 F.3d 1085, 1090 (7th Cir. 1998) (explaining that pre-3553(f), the only possibility of relief from mandatory-minimum sentences for drug defendants was for those who provided the government with valuable information

and thus the lowest-level drug offenders (who didn't know much) generally did not qualify, so Congress enacted § 3553(f) in order to benefit "first-time, non-violent drug offenders who played a minor role in the offense and have made a good faith effort to cooperate with the government"). And these are the defendants for whom the determination of whether a quantity-based mandatory minimum applies can turn on a factual finding about whether, *inter alia*, he possessed a firearm in connection with his offense. *See* §3553(f).

Moreover, Congress recently amended § 3553(f), such that it now applies to defendants who have *some* criminal record, just not a very serious one. *See* § 355(f)(1) (2019); *see also* Pub. L. 115-391, Title IV, § 402(a) (Dec. 21, 2018), 132 Stat. 5221. Before, the statute only led to factual disputes in the small number of cases (like this one) where a drug-distribution defendant had no criminal history, and thus he could have some hope that § 3553(f) would apply. But going forward, given the recent amendment, the federal courts can expect to see many more factual disputes. And thus, not only is the issue presented here an important one, but it is growing in importance. And by accepting certiorari review of this case at this time, this Court can forestall future litigation on the question presented.

## II. This case is an excellent vehicle for considering this important issue.

Whether judicial fact-finding that determines whether or not a mandatory-minimum sentence applies in a drug case given the interaction of 21 U.S.C. § 841(b) with 18 U.S.C. § 3553(f) was fully litigated in the district court and on appeal to the Seventh Circuit, which decided the issue on the merits.

Moreover, in this case, this was the "big" issue that would control Petitioner's sentence. If Petitioner's possession of a firearm—at some point in the past, under unknown circumstances—was in connection with his drug offense, he would be subjected to a five-year sentencing floor. If not, then there was no floor; Petitioner, a first-time criminal defendant who remained free on bond throughout his federal case, would be eligible for probation, or any other sentence.

And although the district and circuit courts ruled that a preponderance of the evidence supported that Petitioner had possessed a firearm in connection with his drug offense, the evidence was not overwhelming and the matter was hotly contested. Thus, if the government had been held to its burden of proving that Petitioner possessed a firearm in connection with his drug offense to a jury beyond a reasonable doubt, there is a reasonable probability—indeed, a high probability—that there would have been a different result.

### A. The decision below is wrong.

Petitioner recognizes that the circuit courts that have ruled on the question presented here have all ruled against him. In addition to the Seventh Circuit in this case, four other circuits have issued published opinions contrary to Petitioner's position: *United States v. Leanos*, 827 F.3d 1167 (8th Cir. 2016); *United States v. King*, 773 F.3d 48 (5th Cir. 2014); *United States v. Lizarraga-Carrizales*, 757 F.3d 995 (9th Cir. 2014); *United States v. Harakaly*, 734 F.3d 88 (1st Cir. 2013). In each of these decisions, along with the one that is the subject of this petition, the court has essentially ruled that the Sixth Amendment does not apply to judicial factual-finding that *eliminates* a mandatory-minimum sentence; it only applies to judicial fact-finding that *prompts* a mandatory minimum.

But this is a distinction without a difference. Fact-finding that makes a mandatory-minimum sentence not *not* apply should not be treated differently than fact-finding that makes such a sentence apply—the effect is identical.

In the introduction to this petition, Petitioner illustrated that all of the statutory-sentencing-range provisions that this Court has addressed in recent Sixth Amendment cases could be rearticulated in the negative, such that a judicial finding of fact could *eliminate* an *otherwise*-applicable increase in the range. *See infra* at 8–9. Thus, the Seventh Circuit was wrong to hold that the Sixth Amendment does not apply to fact-finding under § 3553(f) based on a formalistic distinction between § 3553(f) and statutes that this Court has previously examined, which distinction does not actually make a difference.

This Court's contemporary Sixth Amendment jurisprudence grew out of *Jones v. United States*, 526 U.S. 227, 230 (1999), in which the Court held that any fact that increases the maximum sentence is elemental. And since *Jones*, the Court has consistently rejected formalistic arguments seeking to limit the Sixth Amendment of in favor of the unwavering principle that "any fact that, by law, increases the penalty for a crime [other than the fact of a prior conviction] is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 570 U.S. at 102 (citing *Apprendi*, 530 U.S. at 483 n.10, 490).

Marching through this history, first, prosecutors argued that even post-*Jones*, there was a difference between an "element" and a "sentencing factor," with the latter immune from Sixth Amendment scrutiny. *Apprendi*, 530 U.S. at 478. This Court squarely rejected that idea, where the sentencing "factor" has mandatory consequences for the applicable sentencing range. *Id.* at 478–83; *see also Ring*, 536 U.S. at 604–05.

Then it was argued that *Apprendi*'s holding only applied to statutes, not guideline-based sentencing schemes. *Booker*, 543 U.S. at 231–32. But this Court also squarely rejected that idea—again where the facts relevant to the scheme have mandatory consequences for the sentencing range. *Id.* at 237–39; *see also Blakely*, 542 U.S. at 301–03, 309. In *Booker*, the Court explained: "More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate." 543 U.S. at 238. It emphasized that the Sixth Amendment's application to sentencing laws must be guided not by "formalism,

but by the need to preserve Sixth Amendment substance." *Id.* at 23.

Most recently, this Court in *Alleyne* rejected the government's argument that facts that increase mandatory-minimum sentences (distinct from maximum sentences) are immune from Sixth Amendment scrutiny. The overriding principle is this: "a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed." *Id.* at 108.

Thus, the circuits that have considered the question presented here have been wrong in reading this Court's Sixth Amendment cases in a formalistic, fact-bound way. Section 3553(f) is a *mandatory* limitation on mandatory-minimums—it is an on/off switch for those minimums. Under the Sixth Amendment and *Alleyne*, judicial fact-finding cannot be the impetus for throwing that switch.

So although the safety-valve statute operates differently than the other statutes this Court has addressed in the cases discussed above, fact-finding under § 3553(f) (where there's a disputed issue of fact) fits squarely within the holding of *Alleyne*, so long as that holding is not read in an overly rigid, formalistic way. In this case, the determination of whether Petitioner possessed a firearm in connection with his drug offense was a "fact that, by law, increase[d] the penalty" for that offense, by mandating a minimum sentence. *Alleyne*, 570 U.S. at 103. Thus, the statute violated the Sixth Amendment in requiring Petitioner to prove (really, disprove) that fact to a judge.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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