NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

JUSTIN SAIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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. **QUESTION PRESENTED FOR REVIEW**

The "safety valve," 18 U.S.C. § 3553(f) is a federal statute that, in combination with the federal drug statute, 21 U.S.C. § 841, determines whether a mandatory minimum sentence applies. Currently, when the government proves an individual possessed a certain quantity of drugs, the individual is subject to a set mandatory minimum. The burden then shifts to the individual, however, to prove that he acted with minimal culpability under the safety valve. If the individual can so prove, he is sentenced with no mandatory minimum.

Because the safety valve sets forth facts determinative of a mandatory minimum, is the government, instead of the individual, required to prove at least one safety valve fact beyond a reasonable doubt pursuant to *Alleyne v. United States*, 570 U.S. 99 (2013) and *Mullaney v. Wilbur*, 421 U.S. 684 (1975) in order to apply the mandatory minimum?

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PRAYER FOR RELIEF

Petitioner, Mr. Justin Sain, prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

1. Opinion, United States Court of Appeals for the Sixth Circuit, *United States v. Justin Sain*, No. 19-5145 (February 14, 2020).

2. Judgment, United States District Court for the Eastern District of Tennessee at Chattanooga, *United States v. Justin Sain*, No. 1:18-cr-39 (February 12, 2019).

JURISDICTIONAL STATEMENT

Justin Sain pled guilty to one count of conspiracy to distribute and possess with intent to distribute fifty grams or more of methamphetamine, under 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846. He received the mandatory minimum sentence of 10-years' incarceration. The judgment was entered on February 12, 2019, and Sain filed a timely notice of appeal on February 20, 2019. The United States Court of Appeals for the Sixth Circuit affirmed the district court on February 14, 2020.

This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1). Rule 13 of the Supreme Court generally allows for ninety days

within which to file a Petition for a Writ of Certiorari after entry of the order of the Court of Appeals. However, in its March 19, 2020 Order, and in response to COVID-19, the Court extended the time for filing a petition for certiorari review to 150 days. Accordingly, this Petition is timely filed.

Pursuant to Rule 29.4(a), appropriate service is made to the Solicitor General of the United States and to Assistant United States Attorney Brian Samuelson, who appeared in the United States Court of Appeals for the Sixth Circuit on behalf of the United States Attorney's Office, a federal office which is authorized by law to appear before this Court on its own behalf.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the United States Constitution provides in relevant part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment provides in pertinent part, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The federal drug statute, 21 U.S.C. § 841, is divided into multiple subsections, only the first two of which are relevant here. Subsection (a) is titled "unlawful acts," and in relevant part provides:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . . .

21 U.S.C. § 841(a)(1). The next subsection, (b), is titled "penalties," and in pertinent part provides that:

> Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> > (1)(A) In the case of a violation of subsection (a) of this section involving . . .
> >
> > > (viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; . . .
>
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . .

21 U.S.C. § 841(b)(1)(A). Lower drug weights carry lesser mandatory minimums.

The "safety valve" is located at 18 U.S.C. § 3553(f) and provides in relevant part:

> 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—
>
> (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
>
> (B) a prior 3-point offense, as determined under the sentencing guidelines; and
>
> (C) a prior 2-point violent offense, 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, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; 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, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement. . . .

REASONS FOR GRANTING OF THE WRIT

This Court has not yet determined whether the statutory "safety valve," 18 U.S.C. § 3553(f), in tandem with the incrementally increasing mandatory minimums of the federal drug statute, 18 U.S.C. § 841, are aggravating sentencing elements which must be proved to a jury beyond a reasonable doubt. Yet, because the federal mandatory minimums are applied ubiquitously across the country, and have drastic consequences for the individuals facing them, this is an important constitutional question of federal law. And, here it is a question that has not been, but should be, settled by this Court. *See* Rules of the Supreme Court 10(c). Moreover, applying the 10-year mandatory minimum here, in the absence of a finding by a jury, beyond a reasonable doubt, of at least one of the safety valve aggravating factors, Sain's sentence was ordered "in a way that conflicts with relevant decisions of this Court," namely *Alleyne v. United States*, 570 U.S. 99 (2013); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); and *Patterson v, United States*, 432 U.S. 197 (1977). Rules of the Supreme Court 10(c).

The district court, relying upon Sixth Circuit precedent, sentenced Mr. Sain to ten years in prison, not because that was what the judge determined was appropriate, but because that was the lowest sentence he could order. And this determination—that a mandatory minimum applied at all—was the result of a finding of *fact*, made by a judge, and under a burden far removed from the "beyond

a reasonable doubt" standard. The safety valve, 18 U.S.C. § 3553(f), in tandem with the mandatory minimums of the federal drug statute, 18 U.S.C. § 841, set forth aggravating sentencing elements which measure a defendant's level of culpability. Under *Alleyne*, 570 U.S. 99; *Mullaney*, 421 U.S. 684, and *Patterson*, 432 U.S. 197, at least one of these aggravating elements must be found by a jury, beyond a reasonable doubt, in order to apply the mandatory minimum. But, pursuant to current Sixth Circuit law, the district court placed the burden on Mr. Sain, not the government. Accordingly, his ten-year sentence is not only unjust, as noted by the district court, but it is also unconstitutional.

The Sixth Circuit did not reach the merits, noting that it was a question of first impression in its Circuit, which was "inappropriate to address under plain error review". (Appx., at 4.) While not reaching the merits, it did, however note that eight other circuits held that *Alleyne* does not require the government to prove a safety valve aggravating factor beyond a reasonable doubt. (Appx., at 4 (citing *United States v. Fincher*, 929 F.3d 501, 504 (7th Cir. 2019) (collecting cases))). But neither *Fincher*, nor any of the cases it points to, even cite, let alone discuss, the heart of Sain's argument—that *Mullaney* precludes shifting the burden to Sain because the safety valve, in tandem with drug weight, measures the presumed element of culpability, an element that cannot be shifted to the defendant to disprove.

Instead, as the Seventh Circuit explained, each Circuit decision relies on the conclusory assertion that the safety valve does not *increase* a mandatory minimum and therefore *Alleyne* does not apply. *Id.* at 504 ("[u]nderlying these decisions is the recognition that a mandatory minimum sentence is not increased by the defendant's ineligibility for safety-valve relief. Rather, it is already triggered by the offense; the safety-valve provision merely provides lenity[.]"). But, as this Court's holdings in *Mullaney* and *Patterson* demonstrate, the constitutional question before us is not as simple as whether the safety valve factors increase or erase a mandatory minimum. Having not addressed this burden-shifting problem, none of those circuit cases speak to the issue raised here.

The Sixth Circuit noted that it had repeated held that the burden of proving eligibility for a sentence without regard to any mandatory minimum was properly placed on the defendant, to so prove by a preponderance of the evidence. (Appx., at 4 (*citing United States v. Barron*, 940 F.3d 903, 914 (6th Cir. 2019)).) It has thus interpreted an important question of federal law, currently unaddressed by this Court, in a way that conflicts with relevant decisions of this Court. This case presents the Court with the opportunity to correct that error, and error that impacts scores of individuals charged with federal drug crimes, and thus certiorari review is appropriate. This Court should grant certiorari review to address this important constitutional question.

BACKGROUND

Despite the district court's statement that it was not a just result, Justin Sain was sentenced to 120 months (10 years) in federal prison for conspiracy to possess 50 grams or more of methamphetamine (actual) with the intent to distribute it. (Judgment, R 85, Page ID# 391-92.) He had zero criminal history points, as his only two prior convictions were misdemeanors for possession of a controlled substance that were too old to garner points. (Presentence Investigation Report, "PSR", R. 60, Page ID# 238-39, ¶ 27-29.) On those prior convictions, he had spent only a few months in jail total. (Objections to PSR, R. 67, Page ID# 300.) His guideline range was 87 to 108 months, but he had a mandatory minimum of ten years under the federal drug statute, 21 U.S.C. § 841(b)(1)(A). (Appx. 3.)

Sain had no history of violence, to the contrary, he was a loving father, who was very involved in raising his three sons, the youngest two of which were 3 years old and 11 months old, respectively, at the time of his sentencing. (See generally, PSR, R. 60); (Support Letters, R. 79-1, Page ID# 367.) He was a volunteer firefighter, he helped coach his oldest son's baseball team, and he supported his partner—the mother of his two youngest boys, in her community efforts as Vice President of Kimbro's Wish, a local non-profit organization. (Support Letters, R. 79-1, Page ID# 367.)

Sain came to the attention of law enforcement because he happened to arrive at his drug dealer's home while federal agents were preparing to serve a search warrant on the dealer. (PSR, R. 60, Page ID# 236; TR Sentencing, R. 94, Page ID# 632.) The agents observed Sain enter the residence, remain for a few moments, and then leave. (PSR, R. 60, Page ID# 236.) Law enforcement followed him, and he was eventually stopped for a traffic violation. (*Id.*) While outside his vehicle, he was searched and officers found methamphetamine on his person. (*Id.*) They then searched his vehicle, where they located a .44 caliber Smith & Wesson revolver along with syringes, digital scales, and a meth pipe. (*Id.* at Page ID# 237.)

Before the district court Sain argued that he did not possess the gun in connection with his drug trafficking offense, but instead had it for hunting and recreation. (Appx 3.) He presented evidence that he and his family were very avid hunters, including photos of both him and his father hunting with the exact gun that Sain was arrested with.[1] (Objections, R. 67, Page ID# 301-03; Supp. Objections, R. 80-1, Page ID# 370-71; TR Sentencing, R. 94, Page ID# 612-14.) When Sain was a child his father owned a gun store, Manchester Sporting Goods,

[1] "When loaded to its maximum and with heavy, deeply penetrating bullets, the .44 Magnum cartridge is suitable for short-range hunting of all North American game—though at the cost of heavy recoil and muzzle flash when fired in handguns, less so in carbines and rifles." https://en.wikipedia.org/wiki/.44_Magnum (last visited July 8, 2020).

and he eventually built a large shooting range on his property, where Sain resided (*Id.*; TR Sentencing, R. 94, Page ID# 612.) His father confirmed that Sain would shoot for sport weekly on his personal range. (Objections to PSR, R. 67, Page ID# 302; TR Sentencing, R. 94, Page ID# 612-13.) The gun was a gift from his father, and had immense sentimental value as. (Support Letters, R. 79-1, Page ID# 366; Objections to PSR, R. 67, Page ID# 302.) Sain kept a gun, usually this exact gun, in his vehicle all the time, something his father does as well. (*Id.*; TR Sentencing, R. 94, Page ID# 615.) Possessing a firearm is part of his self-identity. (Objections to PSR, R. 67, Page ID# 302.)

Sain argued that he should be eligible for the statutory safety valve, 18 U.S.C. § 3553(f), which would mean he would have no mandatory minimum sentence, because he did not possess the gun in connection with the drug trafficking offense. (Appx. 3-4; Objections to PSR, R. 67, Page ID# 301.) If the safety valve applied, not only would there be no mandatory minimum, but he would receive an additional reduction in his guideline range under USSG § 5C1.2. (*Id.* at Page ID# 307-09.)

The district court ultimately held that Sain has not proven by a preponderance of the evidence that the gun was not possessed in connection with the drug trafficking offense. (*Id.* at Page ID# 635-38.) Thus, the court felt bound to conclude that the safety valve was not applicable. (*Id.* at 638.) But, the court was

not happy with the result of that conclusion, as it believed the 10-year mandatory minimum was not a fair sentence. (*Id.* at Page ID# 638.)

The court explained, "[t]hat said, as is often the case with mandatory minimum sentences, I don't think the Court's legal ruling gets us any closer to a just result in this case." (*Id.*) "I would much rather have the flexibility to sentence the defendant to what I believe is a more just result, but I also have taken an oath to apply the law . . . ." (*Id.* at Page ID# 639.) The district court then pronounced sentence, without affirming that he believed the sentence complied with the parsimony provision of § 3553(a) requiring that the sentence be sufficient, but not greater than necessary to accomplish the goals of § 3553(a)(2). (*Id.* at Page ID# 644.)

On appeal, Sain argued that the safety valve, 18 U.S.C. § 3553(f), in tandem with the mandatory minimums of the federal drug statute, 18 U.S.C. § 841, set forth aggravating sentencing elements which measure a defendant's level of culpability. Under *Alleyne*, 570 U.S. 99; *Mullaney*, 421 U.S. 684; and *Patterson*, 432 U.S. 197, he argued, at least one of these aggravating elements must be found by a jury, beyond a reasonable doubt, in order to apply the mandatory minimum. The Court of Appeals did not reach the merits of the argument, noting instead that it was an issue of first impression in the Sixth Circuit, and thus "inappropriate to address under plain error review." (Appx. 4.) The instant petition for certiorari review followed.

ARGUMENT

I. *Alleyne* Requires the Government to Prove, Beyond a Reasonable Doubt, at Least One Safety Valve Aggravating Fact Before a Mandatory Minimum Sentence Under the Federal Drug Statute, 21 U.S.C. § 841 Can Be Imposed.

At his sentencing, and relying on the Sixth Circuit's prior case law, the district court placed the burden on Sain to prove, by a preponderance of the evidence, that he qualified under safety valve, 18 U.S.C. § 3553(f), for a sentence below the mandatory minimum. *United States v. Felix*, 711 F. App'x 259, 262 (6th Cir. 2017) (citing *United States v. Bolka*, 355 F.3d 909, 912 (6th Cir. 2004)); see also *United States v. Adu*, 82 F.3d 119, 123-24 (6th Cir. 1996). But, the rationale behind these cases pre-dates this Court's clear statement in *Alleyne* that the government must prove, beyond a reasonable doubt, all the facts necessary for application of a mandatory minimum. *Alleyne*, 570 U.S. at 103 (*citing Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10 (2000)). And, this requirement of due process was recently emphasized again. *United States v. Haymond*, 139 S. Ct. 2369, 2381 (2019) (a defendant cannot be subjected to a mandatory minimum sentence of incarceration based on judge-found facts under a mere preponderance standard). Placing the burden on the defendant to prove he is entitled to escape a mandatory minimum violates due process as set forth in *Alleyne* and the cases it relies upon.

"[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." *Alleyne*, 570 U.S. at 117 (quoting *Apprendi*, at 519 (Thomas, J., concurring)). "Any 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." *Alleyne,* 570 U.S. at 103 (citing *Apprendi*, 530 U.S. at 483 n.10). This includes facts that increase the mandatory minimum applicable to a defendant. *Alleyne*, 570 U.S. at 103. While sentencing courts have broad discretion to consider any fact when determining where within statutory limits to place a defendant's sentence, the mandatory minimum or maximum cannot be increased based on facts that are not proven beyond a reasonable doubt. *Id.* 115-16. So, "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Id.* at 114.

The federal drug statute and sentencing scheme that Sain was sentenced under violates *Alleyne*, because it applies a mandatory minimum sentence on the basis of facts that have not been proven beyond a reasonable doubt. Even worse – it applies a mandatory minimum if a *defendant* fails to prove certain facts by a preponderance of the evidence. *See Mullaney*, 421 U.S. at 701-02 (explaining that shifting the burden to the defendant is worse than merely reducing the government's

burden to a preponderance because, "in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous . . . conviction").

Sain pled guilty to 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), coupled with § 846 (the conspiracy statute). Section 841 is divided into multiple subsections, only the first two of which are relevant here. Subsection (a) is titled "unlawful acts," and in relevant part provides:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . . .

21 U.S.C. § 841(a)(1). The next subsection, (b), is titled "penalties," and in pertinent part provides that:

> Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> > (1)(A) In the case of a violation of subsection (a) of this section involving . . .
> >
> > (viii) 50 grams or more of methamphetamine
> >
> > . . .
>
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . .

21 U.S.C. § 841(b)(1)(A). But, this statute cannot be read standing alone, as it is not the final word on whether a mandatory minimum applies. Instead, we must also look to what is often called "the safety valve," at 18 U.S.C. § 3553(f). This subsection is titled "limitation on applicability of statutory minimums in certain cases," and provides in relevant part:

> 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—
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> (1) the defendant does not have—
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> (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
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> (B) a prior 3-point offense, as determined under the sentencing guidelines; and
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> (C) a prior 2-point violent offense, as determined under the sentencing guidelines;
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> (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;
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> (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, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
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> (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, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement. . . .

18 U.S.C. § 3553(f) (emphasis added). The safety valve statute tells a sentencing judge that he *shall* impose a sentence without regard to the mandatory minimum, if the listed elements are met. Thus, the mandatory minimum in § 841(b)(1)(A) only applies if (1) the defendant possessed the requisite quantity of drugs, and (2) at least one of the safety valve elements is present. Said another way, Congress has told us that there are certain people who do not deserve a mandatory minimum sentence, even if they possess the requisite quantity of drugs. The only way we can determine if a person justifies application of the mandatory minimum is by looking to certain facts identified in the safety valve statute. And, "a jury must find *all* of the facts necessary to authorize a judicial punishment." *Haymond*, 139 S. Ct. at 2381.

Further, the fact that the safety valve is located in a sentencing statute (18 U.S.C. § 3553) and not included as part of the drug statute (21 U.S.C. § 841) does not change its essential character. The Court explained as much in *Apprendi*, "merely because the state legislature placed its hate crime sentence 'enhancer' 'within the sentencing provisions' of the criminal code 'does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense.'" 530 U.S. at 495 (citation omitted).

The safety valve elements determine, just as much as the drug quantity, whether a defendant will be subject to a mandatory minimum. Accordingly, due process requires that the government prove, beyond a reasonable doubt, that safety valve, in addition to drug weight, allows the mandatory minimum to be triggered.

A. The Burden Shifting Currently Utilized When Applying Safety Valve Further Supports Placing the Burden Squarely on the Government.

A compelling analogy is found in *Mullaney*, where the Supreme Court held that a Maine sentencing scheme violated due process. 421 U.S. at 698. In Maine, a jury could presume a defendant was sufficiently culpable to be guilty of murder if the state proved at trial that the killing was both intentional and unlawful. *Mullaney*, 421 U.S. at 686. Based on that presumption of culpability, the defendant would receive a mandatory sentence of life imprisonment. *Id.* at 686 n.3. The sentencing scheme then shifted the burden to the defendant and gave him a chance

to prove, by a preponderance of evidence, that he lacked that requisite culpability by proving he acted in the "heat of passion by sudden provocation." *Id.* at 686. If he was able to prove this lesser level of culpability, then instead of mandatory life, he faced a statutory maximum of twenty-years imprisonment. *Id.* at 686 n.3.

This burden shifting – on the issue of whether a defendant had a sufficient level of culpability to warrant a certain mandatory minimum level of punishment – violates due process. *Id.* at 698. The Court explained, "Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less 'blameworth(y),' they are subject to substantially less severe penalties." *Id.* at 698. The Court detailed the constitutional problem, "[b]y drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt *the fact upon which it turns*, Maine denigrates the interests found critical in [the safeguards of due process discussed in] *Winship*." *Id.* (emphasis added) (*referring to In re Winship*, 397 U.S. 358 (1970)). *Mullaney* means that the burden-shifting here, on whether a defendant has a sufficient level of culpability to justify the mandatory minimum, is similarly unconstitutional

Important for us here, the Court also rejected a number of arguments presented by the state in support of this scheme. First, the state argued that the burden shifting was okay because "the fact in question [heat of passion] does not come into play

until the jury already has determined that the defendant is guilty and may be punished for at least manslaughter." *Id.* at 697. Thus, the state argued, "the absence of the heat of passion . . . is not a 'fact necessary to constitute the crime' of felonious homicide . . . ." *Id.* In response, the Supreme Court explained that due process (as it explained in its prior *Winship* case) "is concerned with substance rather than this kind of formalism. The rational of [*Winship*] requires an analysis that looks to the operation and effect of the law as applied and enforced." *Id.* at 699. Thus, because the different levels of culpability established different crimes, the state could not remove the burden of proving culpability from the prosecution. *Id.* at 697-98.

The same is true here, as discussed in further detail below (at Section II). Here, the statutes are written so that the mandatory minimum is triggered by drug weight, to be removed if the defendant can prove his limited culpability through the safety valve factors, but, at bottom, both drug weight and the safety valve factors measure culpability. The operation and effect of the statutes is to presume sufficient culpability based on drug weight, then shift to the defendant the burden of disproving that presumption. Indeed, culpability is the sole element justifying the incrementally increasing mandatory minimums, yet the prosecution is not required to establish beyond a reasonable doubt the fact upon which those increases turn.

B. Safety Valve is Different from an Affirmative Defense.

One might ask, why shouldn't we think of the safety valve as presenting mitigating factors which are properly proved by the defendant—just as affirmative defenses must be proved by the defendant by a preponderance of the evidence? But, the Court has answered this question for already as well.

Just two years after *Mullaney*, the Court further explained how the burden-shifting scheme in that case is distinguishable from the Court's line of cases upholding state laws requiring that affirmative defenses (such as insanity) be proven by the defendant by a preponderance of the evidence. *Patterson*, 432 U.S. at 202-207. In *Patterson*, the Court was again considering a state's murder statute, but unlike *Mullaney*, the New York statute defined murder "as causing the death of another person with intent to do so." 432 U.S. at 205. Thus the elements of murder were limited to "[t]he death, the intent to kill, and causation [were] the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder." *Id.* But, unlike the *Mullaney* scheme, "[n]o further facts are either presumed or inferred in order to constitute the crime." *Id.* at 205-06. Thus, the Court upheld New York's affirmative defense statute, providing that if the defendant proved by a preponderance of the evidence that he "acted under the influence of extreme emotional disturbance . . ." the crime was reduced to manslaughter. *Id.* at 206.

At first blush, *Mullaney* and *Patterson* may appear at odds, but they are not, as the Court explained, precisely because the *Mullaney* murder statute created a presumption of culpability that was then shifted to the defendant to disprove. *See id.* at 215 ("[s]uch shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause"). Because "nothing was presumed or implied against Patterson . . . his conviction [was] not invalid under any of our prior cases [including *Mullaney*]." *Id.* at 216.

In other words, the difference between *Mullaney* and *Patterson* is that in *Mullaney* the state defined "murder" as requiring a intent *plus* malice aforethought (*i.e*. culpability), while in *Patterson* the offense of "murder" required only intent. And, what made *Mullaney* unconstitutional was that for the culpability element, malice aforethought, the burden was shifted to the defendant to disprove. Here, Sain falls into the *Mullaney* camp, because (as detailed below at Section I(C)) a sufficient level of culpability is presumed by drug quantity—a presumption necessary to each increasing mandatory minimum—which the defendant must then disprove if he wants to avoid the mandatory minimum.

The *Patterson* Court explained that in *Mullaney* the jury was allowed to presume a sufficient level of culpability based on other facts in order to convict the

defendant of murder (with the burden shifting to the defendant to prove a lesser level of culpability). 432 U.S. at 205-06. And, in its *Apprendi* decision in 2000 the Court would again point to *presuming culpability* as the distinguishing factor that set *Mullaney* apart. 530 U.S. at 484-85, 494-95 ("[t]he [New Jersey hate-crimes enhancement] thus runs directly into our warning in *Mullaney* that *Winship* is concerned as much with the category of substantive offense as 'with *the degree of criminal culpability*' assessed").

What due process does not allow, is presuming the element of culpability based on the existence of other facts, and then shifting the burden to the defendant to disprove the requisite level of culpability. That is precisely what has occurred with the federal drug statute and the safety valve.

C. The Safety Valve, in Tandem with the Drug Mandatory Minimums, Are a Proxy for Measuring Culpability.

A brief history of the development of the drug mandatory minimums and the safety valve makes clear that the two are derived from the same ultimate goal of Congress – to reflect the defendant's level of culpability. The mandatory minimums in 18 U.S.C. § 841 were first set back in 1986, and at that time Congress expressed its intent that the 5-year and 10-year mandatory minimums would apply to mid-level dealers, and to "kingpins," respectively. See *United States v. Dossie*, 851 F. Supp. 2d 478, 480 (E.D.N.Y. 2012) (quoting from U.S. Sent'g

Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 24 (2011) (which in turn cited 132 Cong. Rec. 27, 193–94 (Sept. 30, 1986); and H.R. Rep. No. 99–845, pt. 1, at 11–12 (1986))).

Thus, the mandatory minimums, set by drug weight alone, reflected Congress' desire to punish more harshly those it deemed more culpable. The *Dossie* court further quoted from Senator Robert Byrd as describing Congress' intent for the ten-year minimum (which was applied to Sain): "For the kingpins—the masterminds who are really running these operations—and they can be identified by the amount of drugs with which they are involved—we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years...." 851 F. Supp. 2d at 480 (quoting from U.S. Sent'g Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 24 (2011)). The five-year mandatory minimum, Senator Byrd explained, was for, "the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail—a minimum of 5 years for the first offense." 851 F. Supp. 2d at 480 (quoting from U.S. Sent'g Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 24 (2011)).

But, instead of tying the mandatory minimum to proof of a defendant's actual role in the offense, Congress instead tied the minimums to drug type and quantity

alone. *Id*. This miss-match has been widely criticized, as evidenced by Judge Gleeson's opinion in *Dossie*, and echoed in his decision *United States v. Kupa*, 976 F. Supp. 2d 417, 422-23 (2013). But, nonetheless, the intent of the mandatory minimums was to punish more harshly those who were more culpable.

This desire to properly reflect an individual defendant's culpability was also the driving force behind establishment of the safety valve, which came about in 1994. *See* H.R. Rep. 103-460 (1994). The House Report again explained that the five and ten-year mandatory minimums were intended to be applied to "mid-level" traffickers and "kingpin" traffickers. *Id.* But because the mandatory minimums were triggered by drug quantity alone, "mandatory minimums did in some cases lead to instances in which offenders who markedly differed in seriousness, nonetheless received similarly severe sentences." *Id.*

As a result, the safety valve was created "to permit a narrow class of defendants, those who are the least culpable participants in such [drug] offenses, to receive strictly regulated reductions in prison sentences for mitigating factors currently recognized under the federal sentencing guidelines." *Id.* The report explained such a safety valve was needed, because "[i]ronically, . . . for the very offenders who most warrant proportionally lower sentences—offenders that by guideline definitions are the least culpable—mandatory minimums generally operate to block the sentence from reflecting mitigating factors." *Id.*

This legislative history establishes that the drug mandatory minimums, in conjunction with the safety valve, set out different categories of defendants who Congress has determined deserve different statutory ranges of imprisonment. The distinct statutory ranges are intended to reflect the defendant's level of culpability.

Here, the federal drug statute, 841 U.S.C. § 841(a), the statute that Sain pled guilty to, uses drug weight as a proxy for culpability. Just as in *Mullaney*, the drug statute creates a presumption that the defendant has a sufficient level of culpability based on the finding of other facts (*i.e.*, *via* drug weight). Also as in *Mullaney*, the safety valve then puts the burden on the defendant to prove a lesser level of culpability in order to escape the mandatory minimum. In both cases the element at issue is culpability, and in both cases the level of culpability is the defining fact that distinguishes the crimes from each other. Due process does not allow for this type of burden shifting. *Patterson*, 432 U.S. at 215. And, because certain facts must be present pursuant to the safety valve for the drug mandatory minimum to apply, *Alleyen* similarly requires these facts be proven by the government beyond a reasonable doubt.

Because the government was not required to so prove, Sain's mandatory minimum sentence violates due process, and his case should be remanded for application of the proper standard.

II. Regardless of Whether Safety Valve Increases or Erases a Mandatory Minimum, *Alleyne, Mullaney* and *Patterson* Mean that the Safety Valve Burden Should be on the Government.

While it is true that eight Circuits have concluded *Alleyne* does not apply to the safety valve (*see* Appx., at 4 (*citing Fincher*, 929 F.3d at 504)), not one of those decisions cites—let alone discusses—*Mullaney*'s rejection of a functionally equivalent burden shifting scheme. Instead, as noted by the Seventh Circuit in *Fincher*, each Circuit decision relies on the conclusory assertion that the safety valve does not increase a mandatory minimum and therefore *Alleyne* does not apply. *Fincher*, 929 F.3d at 504 ("Underlying these decisions is the recognition that a mandatory minimum sentence is not increased by the defendant's ineligibility for safety-valve relief. Rather, it is already triggered by the offense; the safety-valve provision merely provides lenity[.]").

This conclusion is problematic for multiple reasons, and circling back to the distinction between *Mullaney* and *Patterson* is instructive, because it tells us that the constitutional question before us is not as simple as whether the safety valve factors increase or erase a mandatory minimum. The two cases are wholly aligned on this point: "shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." *Patterson*, 432 U.S. at 215; *see also Mullaney*, 421 U.S. at 698. Where the two cases diverge is with respect to whether the statute at issue

included an ingredient that was "so important." *See Patterson*, 432 U.S. at 212-13 (discussing the difference between the statute it was considering and that in *Mullaney*); *see also Mullaney*, 421 F.3d at 688. The Court drew that line by looking to how the state defined the crime of murder. *Patterson*, 432 U.S. at 213-13, 215-16. In *Mullaney*, murder had three indispensable elements: intentional, unlawful (meaning, not a soldier in battle, police officer acting pursuant to law, or someone acting in self-defense), *and* with malice aforethought. 421 U.S. at 685-86; *see also Patterson*, 432 U.S. at 212-213. Malice aforethought was the requirement that the killer have a sufficient level of culpability. This element—sufficient culpability—was presumed with a finding of an intentional, unlawful killing. *Mullaney*, 421 U.S. at 686; *Patterson* 432 U.S. at 212-13.

In *Patterson*, by contrast, the state defined "murder" with only two necessary elements: causing a killing, that was intentional. *Patterson*, 432 U.S. at 198, 205-06. But "[n]o further facts [were] either presumed or inferred in order to constitute the crime." *Id*. at 205-06. In other words, having malice aforethought was not a necessary element of murder. *See id*. at 198. While the state allowed an affirmative defense if the defendant could prove by a preponderance of evidence that the killing was "under the influence of extreme emotional disturbance," this defense did not negate any element of murder. *Id*. at 198. At bottom—the difference between *Mullaney* and *Patterson* is that in *Mullaney* the state defined "murder" as

requiring a sufficient level of culpability (intent plus malice aforethought), while in *Patterson* the offense of "murder" required only intent.

Not only did the *Mullaney* statute require intent plus malice aforethought, but such sufficient culpability was presumed based on other facts, which then shifted the burden to the defendant to disprove. *Mullaney*, 421 U.S. at 686-87; *see also Patterson*, 432 U.S. at 212-13. In *Mullaney*, the state made a sufficient culpability "so important that it must either be proved or presumed" in order to be guilty of murder. *See Patterson*, 432 U.S. at 215. In *Patterson*, there was no such culpability requirement. Thus, the *Mullaney* statute was unconstitutional because it shifted the burden to the defendant to negate the culpability presumption, while in *Patterson* the statute survived because the affirmative defense did not go to a necessary element of "murder." Culpability in *Patterson* beyond intent was never implied or presumed. It simply didn't matter under the definition of "murder."

Here, with the safety valve, Congress has made culpability the defining element that separates individuals into the different mandatory minimums. (*See* above at Section I(c)). Realizing that drug weight is not a sufficiently accurate measure of culpability, it established the safety valve to allow "a narrow class of defendants, those who are the least culpable participants in such [drug] offenses," to be sentenced without the mandatory minimum. (*Id*. at Page 32 (citing H.R. Rep.

103-460 (1994))). Thus, just like *Mullaney*, being guilty of the 10-year mandatory minimum requires not only an intent to distribute drugs, but intent plus sufficient culpability (measured by drug weight in combination with at least one safety valve aggravating factor).

But, instead of including these safety valve factors as part of the government's necessary proof, Congress placed the safety valve burden on the defendant and removed the decision from the jury entirely. 18 U.S.C. § 3553(f). By making culpability a necessary element of each of the progressive mandatory minimums, the drug statute falls squarely into the *Mullaney* category of statutes. It thus violates due process to require the defendant to disprove that level of culpability via the safety valve. *Mullaney*, 421 U.S. at 701-02; *Gall v. Parker*, 231 F.3d 265, 287 n.4 (6th Cir. 2000) ("if an affirmative defense bears a necessary relationship to an element of the charged offense, the burden of proof of that defense may not be placed on the defendant." (citation omitted)).

Here is another important point to note: The statute at issue in *Mullaney* is similar to the safety valve, but it is not the same. To the contrary, the safety valve is even more violative of Sain's Due Process and Sixth Amendment rights because the statute never gives him the opportunity to present his "defense" to a *jury*. Not only does the safety valve require him to negate an essential element of the

mandatory minimum, *i.e*. sufficient culpability, but the statute leaves that determination to a judge.

Mullaney and *Patterson* are informative. They show us that the assertion which is the basis of the Circuit decisions relied upon by the Court of Appeals (Appx., at 4 (*citing Fincher*, 929 F.3d at 504 (collecting cases))) is unduly conclusory, *i.e*. that the due process and Sixth Amendment concerns in *Apprendi* and *Alleyne* do not reach the safety valve because it merely removes a mandatory minimum. But, *Mullaney* and *Patterson* cannot be read here without the additional instructive language of *Alleyne*. *Mullaney* and *Patterson* address the due process concerns underlying shifting burdens of proof, but *Alleyne* emphasizes the constitutional requirement that such facts be submitted to a jury. So even if the Court concludes that the safety valve is more like the affirmative defense in *Patterson* (which Sain rejects), the safety valve would still fail to be constitutional because it infringes his Sixth Amendment right to present his "defense" to a jury.

If anything, the *Apprendi* and *Alleyne* line of cases expands an individual's protections when the fact at issue is withheld from jury deliberation. *See Gall*, 231 F.3d at 287 n.3. And nothing in *Alleyne* forecloses applying its reasoning to the safety valve. The Circuit cases that are summarized in *Fincher* repeatedly state that "*Alleyne*, by its terms, applies to facts that 'increase[] the mandatory minimum.'"

United States v. Harakaly, 734 F.3d 88, 97 (1st Cir. 2013); *see also Fincher*, 929 F.3d at 504. These courts then conclude that the protections of *Alleyne* cannot be "extended" to facts that remove a mandatory minimum. *See Harakaly*, 734 F.3d at 98; *Fincher*, 929 F.3d at 505 ("[u]nder *Alleyne*, a fact that combines with the base offense to create a new, aggravated offense is an element of the crime. 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"). But none of those cases even attempt to explain *why* a fact that erases a mandatory minimum should be treated differently from a fact that applies a mandatory minimum. And, as *Mullaney* and *Patterson* show us, that simple difference is not sufficient standing alone.

It is true that in both *Haymond* and *Alleyne* the Supreme Court discussed facts that *increase* the range of punishment. But this is because the structure of the statutes it addressed in those cases presented the essential facts that way. Neither confronted a statute structured in the way the safety valve is, where the same essential element is addressed in two separate statutes, one addressing drug weight, and the other addressing the safety valve factors. Instead, this type of structure was addressed in *Mullaney*, which the Supreme Court cited as support for its *Apprendi* holding. *Apprendi*, 530 U.S. at 494-95.

In fact, in *Apprendi* the Court explained that were it presented with a statute structured the way the safety valve is, that it would "be required to question whether [such structure] was constitutional under [*Patterson* and *Mullaney*]." *Id*. at 489 n. 16. In *Apprendi*, the Court was addressing a New Jersey statute that increased the maximum permissible punishment based on a finding of fact, *i.e.*, whether a defendant convicted of assault did so with a purpose to intimidate. The Court found that such fact, purpose to intimidate, must be proven to a jury beyond a reasonable doubt.

But, importantly, the Court also explained that the New Jersey legislature could not cure this problem by merely assuming the defendant acted with a purpose to intimidate, and then shifting that burden to the defendant to disprove in order to be eligible for a lower statutory maximum. *Id*. at 490 n.16 ("[I]f New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not, [] we would be required to question whether the revision was constitutional under this Court's prior decisions[.]" (citing *Patterson*, 432 U.S. at 210; *Mullaney*, 421 U.S. at 698-702)). *Apprendi* itself foreshadows a finding that the safety valve burden cannot be placed on the defendant.

The assertion that *Alleyne* doesn't apply to the safety valve because the safety valve does not increase a mandatory minimum also overlooks other important pieces of *Alleyne*. It ignores the repeated distinction the Court makes between facts that set, or change, the permissible range of punishment and facts that determine where within the permissible range a sentence should fall. *Alleyne*, 570 U.S. at 113 n.2 (noting the important difference between facts that alter the legally prescribed range so as to increase the available penalty and facts that are "used to guide judicial discretion in selecting a punishment 'within limits fixed by law'" (citations omitted)); *Apprendi*, 530 U.S. at 490 n.16.

The summary conclusions of the Circuit decisions collected in *Fincher*, 929 F.3d at 504 also ignore the reasons this Court gave for its holding in *Alleyne*. 570 F.3d at 112-13. The reason such facts must be included on the indictment and proven to a jury, beyond a reasonable doubt, is because the public is entitled to notice of the legally prescribed range of punishment affixed to particular conduct. *Id.* ("[d]efining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment" (*citing Apprendi*, 530 U.S. at 478-79). The historical practice of including the *bottom* and the top of the range of punishment for particular acts "allowed those who violated the law to know, *ex ante*, the contours of the penalty that the legislature affixed to the crime—and comports with the

obvious truth that the floor of a mandatory range is as relevant to wrongdoers as the ceiling." *Id*. at 112-13.

Thus "if 'a statute prescribes a particular punishment to be inflicted on those who commit it *under special circumstances which it mentions*, or with particular aggravations,' then those special circumstances must be specified in the indictment." *Id*. at 112 (quotations omitted) (emphasis added). The safety valve factors are "special circumstances" that indicate "a particular punishment." The reasoning utilized in *Alleyne* applies with equal force to the safety valve factors as it does to the drug weight – both facts dictate the legal range of punishment – thus the public is entitled to notice when either could impact the applicable statutory range. Neither the court below, nor any of the Circuit decisions to address this question, even attempt to explain why this reasoning doesn't apply equally to the safety valve factors.

To the contrary, the Court's most recent case on this topic, *Haymond*, focuses on whether a fact changes the *prescribed range of punishment*, which further supports applying *Alleyne* to the safety valve. In *Haymond*, the Court explained, "[a] judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct." 139 S. Ct. at 2376. And, "[i]n the early Republic, if an indictment or 'accusation . . . lack[ed] any particular fact which the

law ma[d]e essential to the punishment,' it was treated as 'no accusation' at all." *Id*. (alterations in original). "Because the Constitution's guarantees cannot mean less today than they did the day they were adopted, it remains the case today that a jury must find beyond a reasonable doubt *every fact* 'which the law makes essential to [a] punishment' that a judge might later seek to impose." *Id*. (citations omitted). The factors identified in the safety valve are essential to the mandatory minimum—at least one of them is required to limit the range of punishment.

Under *Mullaney* and *Patterson* the burden shifting utilized by the safety valve is unconstitutional. And nothing in *Apprendi*, nor *Alleyne*, precludes this conclusion. The fact that none of the Circuit decisions collected in *Fincher* tackles this question—the very heart of the issue before us—means that this Court should not consider the reasoning of those cases persuasive.

In sum, Sain was sentenced to a 10-year mandatory minimum, even though the district court believe that was unjustly high. That mandatory minimum applied because he admitted to possessing a certain quantity of drugs, but the district court erred by shifting the burden to Sain to prove that he has a minimal level of culpability, such that the mandatory minimum should not apply. Because the safety valve aggravating factors set the minimum punishment he could receive, the government should have been required to allege them in the indictment and prove

them to a jury beyond a reasonable doubt. This issue is not unique to Sain, but impacts scores of defendants charged under the federal drug statute, 21 U.S.C. § 841, it is therefore of great importance to many individuals. Accordingly, this Court should grant review.

CONCLUSION

In consideration of the foregoing, Mr. Justin Sain respectfully prays that the petition for certiorari be granted to review the opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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