No. ___________

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2020

KEVIN RENE APARICIO-LEON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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Issue Presented

1. Whether an indictment charging a person for possession with intent to distribute a "mixture or substance containing a detectable amount of methamphetamine" puts that person on notice that he could be sentenced for possessing with intent to distribute "ice."

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kevin Rene Aparicio-Leon (Aparicio) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Aparicio's conviction and sentence is styled: *United States v. Aparicio-Leon,* 963 F. 3d 470 (5th Cir. 2020).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the Aparicio's conviction and sentence was announced on June 29, 2020 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the date of the judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions

U.S. Const. amend. V.

No person shall . . . be deprived of life, liberty, or property, without due process of law[.]

U.S. Const. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]

Statutory Provisions

Title 21 U.S.C. § 841(a)(1). Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

> To manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

Title 21 U.S.C. § 841(b)(1)(A)(viii). Penalties

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:

. . .

> In the case of a violation of subsection (a) of this section involving
>
> . . .
>
> 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams of 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 5 years and not more than 40 years[.]

<u>U.S.S.G. Provisions</u>

U.S.S.G. § 2D1.1(c) Drug Quantity Table

Level 34

At least 5 KG but less than 15 KG of Methamphetamine, or
at least 500 G but less than 1.5 KG of Methamphetamine (actual), or
at least 500 G but less than 1.5 KG of "Ice"

Statement of the Case

The indictment to which Aparicio purportedly pled guilty charged him with possessing with intent to distribute a controlled substance, "a mixture or substance containing a detectable amount of methamphetamine." And yet Aparicio was not sentenced for possessing with intent to distribute a "mixture or substance" of methamphetamine – he was sentenced instead for possessing with intent to distribute "ice."

Aparicio argued on appeal that he was sentenced for an offense for which he was not charged, in derogation of his Fifth Amendment right to indictment by a grand jury and Sixth Amendment right to notice of the charges against him. More specifically, Aparicio's indictment did not put him on notice that he could be sentenced for "ice." Based on the judicially found fact that the methamphetamine at issue was "Ice" – not the alleged "mixture or substance" – the high end of what Aparicio's advisory sentencing range should have been was 44 months less than the sentence he actually received.

<u>First Reason for Granting the Writ</u>: "Ice" is a different drug from methamphetamine.

Powder cocaine / crack cocaine analogy

When Congress passed the Anti-Drug Abuse Act of 1986, it enacted *statutes* that imposed much higher penalties for cocaine base than powdered cocaine. *United States v. Brisbane,* 367 F.3d 910, 912 (D.C. Cir. 2004). The reason: Cocaine base, because it can be *smoked*, produces a quicker, shorter, and more intense high, and is thus much more addictive. *Id.* at 911, 913; *United States v. Harding,* 971 F.2d 410, 413 (9th Cir. 1992). According to the Supreme Court, "[c]rack cocaine was a relatively new drug when the 1986 Act was signed into law[.]" *Kimbrough v. United States,* 552 U.S. 85, 95 (2007).

In 1990, Congress directed the Sentencing Commission to create "more severe" penalties for "ice" for the same reason Congress had previously, *by statute*, imposed higher penalties for cocaine base; i.e., it was *smokable* and therefore more addictive:

> Title XI directs the United States Sentencing Commission to recommend through its guidelines process that judges deal more severely in the sentencing process with the offenses involving methamphetamine when it is in the smokable form of "ice."

H.Rep. No. 681(I), 101st Cong., 2d Sess. (1991), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6476.

> The growing usage of smokable crystal methamphetamine, or "ice" as it is known on the streets, and the severe health hazards associated with its usage, warrant the imposition of *more substantial penalties for offenses where it is involved.* However, in order that judges may have needed flexibility when fashioning a sentence for a particular defendant, this title does not create any mandatory minimum penalties for offenses involving "ice." Instead, the Committee has determined that the better approach is to direct that the United States Sentencing Commission, through its guidelines, recommend that judges impose *more severe penalties for offenses* where the methamphetamine involved is in the form of "ice." (Emphasis added)

Id. at 6514-15.

"Ice" is a different drug

The Anti-Drug Abuse Act of 1986 did not list methamphetamine as a prohibited controlled substance in 21 U.S.C. § 841(b)(1). Anti-Drug Abuse Act of 1986, Pub. L. 99-570, § 1002, 100 Stat. 3207, 3207-2 (1986). When the first Sentencing Guidelines Manual came out in 1987, methamphetamine appeared only in the drug equivalency tables. U.S.S.G. § 2D1.1, cmt. n. 10 (1987). As part of the Anti-Drug Abuse Act of 1988, Congress added methamphetamine (not "ice") to the list of controlled substances set forth in § 841(b)(1). Anti-Drug Abuse Act of 1988, Pub. L. 100-690, § 6470, 102 Stat. 4181, 4376-4378 (1988). In response to this statutory change, the Sentencing Commission added methamphetamine to the drug quantity table in § 2D1.1. U.S.S.G. App. C, amend. 125. The issue of what to do about "ice" did not come before Congress until 1990. "Ice" is a purer, more potent form of methamphetamine. *United States v. Walker,* 688 F.3d 416, 418 n. 2 (9th Cir. 2012). During congressional debates, it was referred to as a "dangerous new drug." 136 Cong. Rec. H13288 (daily ed. Oct. 27, 1990) (statement of Representative Don Edwards). The Eleventh Circuit has also referred to "ice" as a "new drug." *United States v. Carroll*, 6 F.3d 735, 748 (11th Cir. 1993).

***Second Reason for Granting the Writ*: The Sentencing Commission – which has no authority to define criminal offenses – created a new set of offenses for smokable methamphetamine ("ice") cloaked as sentencing factors.**

The Sentencing Commission is an agency. *United States v. Booker,* 543 U.S. 220, 243 (2005). It is not a legislature. *United States v. Havis,* 927 F.3d 382, 383 (6th Cir. 2019) (en banc). Congress has given the Commission three goals:

> (1) to accomplish the purposes of sentencing as set forth in the Sentencing Reform Act of 1984;
>
> (2) to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records . . . while maintaining sufficient flexibility to permit individualized sentences," where appropriate; and
>
> (3) to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."

Mistretta v. United States, 488 U.S. 361, 374, 109 S. Ct. 647, 656 (1989). Conspicuously absent from this list is the authority to define crimes. The definitions of the elements of a federal criminal offense are entrusted solely to the legislature. *Liparota v. United States,* 471 U.S. 419, 424 (1985). The Commission has no authority to amend a statute. *Neal v. United States,* 516 U.S. 284, 290 (1996). Additionally, the text of the U.S.

Constitution does not permit delegation of legislative power to an agency. *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 472 (2001). Only a statute can make the violation of an agency regulation a federal crime. *See United States v. Glghazouli,* 517 F.3d 1179, 1183 (9th Cir. 2008).

Despite the fact that "ice" was considered a new drug, Congress did not enact a statute adding "ice" to the list of controlled substances set forth in 21 U.S.C. § 841(b)(1). The word "ice" does not even appear in 21 U.S.C. § 841(b). Congress simply issued a directive to the Sentencing Commission to add "ice" to the drug quantity table in in § 2D1.1. Crime Control Act of 1990, Pub. L. 101-647, § 2701, 104 Stat. 4789, 4912 (1990). The Sentencing Commission complied. U.S.S.G. App. C, amend. 370. As a result of this amendment, "ice" is sentenced more severely than methamphetamine mixture by a 10:1 ratio. U.S.S.G. § 2D1.1 cmt. n. 8(D).[1] The net result is the Sentencing Commission has created a new set of offenses for smokable methamphetamine, just as it did for smokable cocaine, but without a statute that criminalizes "ice."

[1] The Commission appears to have promulgated the amendment solely on the basis of the Congressional directive – not as a result of its own empirical research. *See United States v. Hayes,* 948 F. Supp. 2d 1009, 1023 (N.D. Iowa 2013).

<u>Third Reason for Granting the Writ:</u> Indicting an individual for possessing with intent to distribute a mixture or substance containing a detectable amount of methamphetamine does not put that person on notice that he can be sentenced for possessing with intent to distribute "ice."

Under the Fifth Amendment, a defendant has a "substantial right to be tried only on charges presented in an indictment returned by a grand jury." *United States v. Miller,* 471 U.S. 130, 140 (1985). When a grand jury returns an indictment, due process requires that the indictment provide the defendant with adequate notice of the crime with which he has been charged. *Russell v. United States,* 369 U.S. 749, 763-64 (1962). Statutes provide notice. Sentencing Guidelines do not. *Beckles v. United States,* 550 U.S. ___, 137 S.Ct. 886, 895 (2017) (The Sentencing Guidelines do not regulate the public by prohibiting conduct.).

The charge forms the basis for the punishment

"The defendant's ability to predict with certainty the judgment from the face of the felony indictment flow[s] from the invariable linkage of punishment with crime." *Apprendi v. New Jersey,* 530 U.S. 466, 478 (2000). "[A]n accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason." *S. Union Co. v. United States*, 567 U.S. 343, 356 (2012). Thus, a sentence must be based upon the crime of conviction. *See Alleyne v. United States*, 570 U.S. 99, 115 (2013) ("It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny[.]"). The grand jury charged Aparicio with possessing with intent to distribute a mixture or substance containing a detectable amount of methamphetamine. The grand jury did not indict him for possessing with intent to distribute "ice." The Supreme Court has held that the Sixth Amendment requires that any fact "essential to the punishment" must be admitted by the defendant or proved to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. Aparicio admitted to possessing with intent to distribute methamphetamine; he did not admit to possessing with intent to distribute "ice."

Conclusion

For the foregoing reasons, Petitioner Aparicio respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Certificate of Service

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 11th day of August 2020.

/s/ John A. Kuchera
John A. Kuchera, Attorney for
Petitioner Kevin Rene Aparicio-Leon