IN THE
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2020

_____

No. _____

RICHARD CRUZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

_____

*PETITION FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SECOND CIRCUIT*

_____

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December 1, 2020

## QUESTIONS PRESENTED

I. Whether the definition of "felony drug offense" for the purposes of 21 U.S.C. §851 is void for vagueness after Johnson, Dimaya, and Davis.

II. Whether, assuming arguendo that the "felony drug offense" definition is not void for vagueness, Petitioner is nonetheless entitled to resentencing due to the court's failure to abide by the dictates of 21 U.S.C. §851(b).

III. Whether the use of Petitioner's prior conviction to increase the mandatory minimum sentence violated the Fifth and Sixth Amendments, where the jury did not find it beyond a reasonable doubt.

IV. Whether the jury verdict form was coercive and suggestive, improperly impinging on Petitioner's Fifth and Sixth Amendment rights, where it did not ask the jury which drugs were involved in the conspiracy but rather assumed that cocaine base was involved.

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Petitioner, Richard Cruz, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Second Circuit Court of Appeals entered in this proceeding on September 18, 2020.

## OPINION BELOW

The decision of the Second Circuit, United States v. Murray, 826 Fed. Appx. 97 (2d Cir. 2020), appears in the Appendix hereto.

## JURISDICTION

The judgment of the Second Circuit was entered on September 18, 2020. This petition was timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

## STATUTES INVOLVED

**21 U.S.C. §802(44):** The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

**21 U.S.C. §851: Proceedings to establish prior convictions**
**(a) Information filed by United States Attorney**
**(1)** No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may

postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.
**(2)** An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.
**(b) Affirmation or denial of previous conviction**
If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.
**(c) Denial; written response; hearing**
**(1)** If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1). The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.
**(2)** A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon,

shall be waived unless good cause be shown for failure to make a timely challenge.

**(d) Imposition of sentence**

**(1)** If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

**(2)** If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

**(e) Statute of limitations**

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

## STATEMENT OF THE CASE

Petitioner Richard Cruz [hereinafter "Petitioner"], along with co-defendant Gary Dickens, was charged by Superseding Indictment with one count of conspiracy to possess with intent to distribute and distribute a controlled substance, in violation of 21 U.S.C. §841(b)(1)(B). The government filed an Enhanced Penalty Information pursuant to 21 U.S.C. §851, alleging that Petitioner had been previously convicted of a drug felony, and was therefore subject to an increased mandatory minimum sentence of ten years pursuant to 21 U.S.C. §841(b)(1)(B). After a jury trial (D'Agostino, J., presiding), Petitioner was convicted. The court sentenced him to ten years' imprisonment, to be followed by a term of supervised release of eight years.

A number of cooperating co-conspirators testified at trial, in the hopes of securing more lenient sentences. Telephone records, texts, and recorded calls that were intercepted pursuant to warrant were introduced at trial. Dickens would travel to the Bronx from Messena, New York, or send co-conspirators, to purchase crack cocaine, which Dickens would then resell up in Messena. Western Union records showed money being wired to co-conspirators or directly to Petitioner.

Cooperator and drug addict Emely Rosario testified that Dickens wired her money to get drugs, which she twice obtained from Petitioner in the Bronx. Cooperator and drug addict Tammy Phillips testified that she took Dickens to the Bronx seven or eight times to obtain drugs. She had no contact with, or knowledge of, Petitioner. In fact, she would drive Dickens to the Castle Hill Projects, miles away from Petitioner's residence in a different part of the Bronx. Cooperator Carri Polaski, one of Dickens' customers, drove him to New York twice, but she, too, never encountered Petitioner.

There were three seizures of crack cocaine: 16.2 grams seized from co-conspirator Andre Murray in late July 2017, 4.552 grams seized from co-conspirator Michael Morehouse in late August 2017, and 11.431 grams seized from Rosario, also in late August 2017. The jury convicted both Petitioner and Dickens of the drug conspiracy charge, and found that the amount of crack cocaine reasonably foreseeable to each was 28 grams or more.

On appeal, the Second Circuit rejected all of Petitioner's claims. It held that the definition of "felony drug offense" was not unconstitutionally vague, stating without elaboration that Johnson, Dimaya, and Davis were all

inapposite. It also held that, in any event, it could not find that the use of this enhancement was plain error where there was no binding precedent from the Supreme Court or the Second Circuit. It held that, in the circumstances of this case, Petitioner did not show prejudice, because he failed to dispute the prior felony in the presentence report, and he did not contest the criminal history category computation, which was based in part on the prior drug felony.

As to Petitioner's Fifth and Sixth Amendment challenge to the use of his prior to increase the mandatory minimum sentence, the Second Circuit held that it was bound by Supreme Court precedent to hold that this did not violate Petitioner's Fifth and Sixth Amendment rights.

Finally, the appeals court held that there was no plain error in the verdict form's language, because the indictment alleged no drug other than crack cocaine was involved in the conspiracy. The Court also reasoned that, had the jury found that some other drug was involved, it could have responded to the crack cocaine amount questions in the negative – that is, by finding that neither 28 grams or more, or less than 28 grams, of crack cocaine was involved in the conspiracy – and that the verdict form was not coercive.

## REASONS FOR GRANTING THE PETITION

**This case presents important questions of federal law that have not been, but should be, settled by this Court.**

I. The definition of "felony drug offense" for the purposes of 21 U.S.C. §851 is void for vagueness after Johnson, Dimaya, and Davis.

The government violates due process "by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes or so standardless that it invites arbitrary enforcement." Johnson v. United States, 576 U.S. 591, 595 (2015). "In our constitutional order, a vague law is no law at all." United States v. Davis, 139 S.Ct. 2319, 2323 (2019). The definition of 'felony drug offense' that led to the doubling of Petitioner's mandatory minimum sentence is just such a vague law.

21 U.S.C. §841(b)(1)(B) provides that if a person commits a drug offense after one prior conviction for a "felony drug offense," the mandatory minimum sentence increases from five years to ten.[1] "Felony drug offense" is defined as:

[1] Under the First Step Act, this has been changed to 'serious drug felony,' 21 U.S.C. §802(57), for those sentenced on or after December 21, 2018. The definition of that term references 18 U.S.C. §924(e)(2), which is limited to, inter alia, offenses under the Controlled Substances Act and state crimes involving "manufacturing, distributing, or possessing with intent," a controlled substance as defined by federal law.

> an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country **that prohibits or restricts conduct relating to** narcotic drugs, marijuana, anabolic steroids, or depressant or stimulant substances.

21 U.S.C. §802(44) (emphasis added). Under the principles set forth in Johnson, 576 U.S. 591, Sessions v. Dimaya, 138 S.Ct. 1204 (2018), and Davis, 139 S.Ct. 2319, this definition of 'felony drug offense' is void for vagueness.

In Johnson, this Court held that the residual clause of the definition of 'violent felony' in the Armed Career Criminal Act was void for vagueness. That clause defined violent felony as including any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. §924(e)(2)(B)(ii). This Court found this definition to be unconstitutionally vague because it forced courts to go beyond the elements of the crime and instead determine "whether the prior crime '*involves conduct*' that presents too much risk of physical injury." Id. at 596 (emphasis in original). The problem was the "indeterminacy of the wide-ranging inquiry." Id. at 597.

Here, too, the court is not asked to determine whether a defendant's prior offense has an element of drug trafficking or possession. Rather, although the court is not asked to assess the amount of risk posed by the

prior crime, it must do something equally nebulous – that is, determine whether the prior conviction is for a crime that prohibits or restricts "conduct relating to" drugs. The court is required to decide whether a certain type of "conduct," as a categorical matter, sufficiently "relates to" drugs such that it may serve to double the mandatory minimum.

In Dimaya, this Court held that the residual clause in the definition of "crime of violence" in the criminal code, 18 U.S.C. §16(b), was also void for vagueness. It noted that "references to a 'conviction,' 'felony,' or 'offense' … are read naturally to denote the crime as *generally* committed." Id., 138 S.Ct. at 1217 (citations and internal quotation marks omitted).

Determining whether a prior conviction was for a 'felony drug offense,' then, requires the same categorical approach that fatally flawed the statute at issue in Dimaya (and in Johnson and Davis as well). This is particularly true in light of "the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction," Johnson, 135 S.Ct. at 2562, as well as the "serious Sixth Amendment concerns" that would arise from having the judge make those factual determinations. Descamps v. United States, 570 U.S. 254, 269 (2013).

In Davis, this Court invalidated the residual clause of the definition of 'crime of violence' in 18 U.S.C. §924(c)(3)(B). It reiterated that "the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'" Id., 139 S.Ct. at 2326. In the context of §841, of course, the judge is evaluating not the degree of risk posed, but the connection – that is, the relationship – between the defendant's 'conduct' and drugs. The same problems that sounded the death knell for the statutes at issue in Johnson, Dimaya, and Davis, require the definition of 'felony drug offense' in §802(44) to be held void for vagueness as well.

II. Assuming arguendo that the prior "felony drug offense" definition is not void for vagueness, Petitioner is nonetheless entitled to resentencing due to the court's failure to abide by the dictates of §851.

21 U.S.C. §851 sets forth requirements to establish prior convictions used to increase sentences under the drug laws. To seek an enhanced penalty, the government must file, before trial, an information stating "the previous convictions to be relied upon." 21 U.S.C. §851(a)(1). Here, the government did so, alleging a 2007 federal conviction for two counts of distributing and possessing with intent to distribute crack cocaine. However, the court did not comply with the ensuing §851 requirements.

After conviction but before sentence is imposed, the court must inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information. 21 U.S.C. §851(b). It also must "inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence." Id. These procedural safeguards are "mandatory prerequisites to obtaining a punishment based on the fact of a prior conviction." Carachuri-Rosendo v. Holder, 560 U.S. 563, 568 (2010). The court here engaged in neither of these prerequisites.

If a defendant denies any allegation of the information or claims that the conviction is invalid, he must file a written response, which triggers a hearing. 21 U.S.C. §851(c)(1). If any factual allegation concerning the prior conviction is challenged, the government bears the burden of proof beyond a reasonable doubt. If the defendant claims that the conviction alleged was obtained in violation of the Constitution, he bears the burden of proof by a preponderance of the evidence. 21 U.S.C. §851(c)(2). The court's failure to comply with §851(b) meant that there was no denial or claim of invalidity, and thus no hearing.

This case differs from United States v. Curet, 670 F.3d 296 (1st Cir.), *cert. denied*, 566 U.S. 1041 (2012), where the defendant challenged the §851 information, but later affirmatively withdrew and explicitly waived this claim. As a result, the Court held that there was no requirement of a hearing. While the Court found that the district court should have conducted the §851(b) colloquy nonetheless, it found no reversible error. There were no specific problems related to the predicate conviction, but more to the point, "the typical basis for finding reversible error on the basis of a §851(b) violation is that such a violation prevented a defendant from filing a response under §851(c) which may have been successful." Id. at 301. In Curet, the fact that the defendant filed a response under §851(c) but later chose to withdraw it showed that he understood his rights under the statute. Id.

The same is not true in this case. Petitioner did not file a §851(c) response. In the absence of the §851(b) colloquy, there was no basis for the Court to conclude "either that [the defendant] appreciated his ability to challenge the prior conviction for sentencing purposes or that any challenge to the prior conviction would have been futile." Id., *quoting* United States v.

Ruiz-Castro, 92 F.3d 1519, 1536 (10th Cir. 1996), *overruled on other grounds by* United States v. Flowers, 464 F.3d 1127 (10th Cir. 2006).

The use of this prior conviction doubled the mandatory minimum sentence – from five years to ten – that applied to Petitioner. "Considering that a [multi]-year sentencing enhancement turns on the outcome of the §851 procedure, the failure to comply fully with the statute's procedural requirements should not casually be deemed harmless error." United States v. Espinal, 634 F.3d 655, 667 (2d Cir. 2011).

Finally, although §851(e) precludes a defendant from challenging the "validity" of a prior conviction which occurred more than five years prior, that would not prevent Petitioner from challenging the prior conviction (which occurred some ten years prior) on other bases notwithstanding its age. Under §851(c)(1), a defendant may challenge the prior conviction by: (1) denying "any allegation of the information of prior conviction," or (2) claiming that "any conviction alleged is invalid" – that is, that it was "obtained in violation of the Constitution." 21 U.S.C. §851(c)(2). See also 21 U.S.C. §851(d)(2) ("If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an

increased sentence as a matter of law," court may impose sentence without the enhancement). It is only a challenge to the 'validity' of the prior conviction that may be time-barred; other challenges are not.

III. The use of Petitioner's prior conviction to increase the mandatory minimum sentence violated the Fifth and Sixth Amendments, where the indictment did not allege the prior conviction and the jury did not find it beyond a reasonable doubt.

21 U.S.C. §841(b)(1)(B) provides that the mandatory minimum sentence for drug crimes involving 28 grams or more of cocaine base (crack) is five years, unless the defendant had a prior felony drug conviction,[2] in which case the mandatory minimum sentence is ten years. Prior to trial, the government filed an 'Enhanced Penalty Information.' It alleged that Petitioner had been convicted on November 27, 2007 of two counts of distributing and possessing with intent to distribute five grams or more of cocaine base. The court held that Petitioner was subject to the ten-year mandatory minimum sentence.[3]

[2] Under the First Step Act, this has been changed to 'serious drug felony,' 21 U.S.C. §802(57), for those sentenced on or after December 21, 2018.

[3] The court determined that Petitioner's total offense level was 24, with a Criminal History Category of IIII. This would have put Petitioner in a sentencing range of 63-78 months.

Under the Fifth and the Sixth Amendments, Petitioner should not have been subject to the enhanced mandatory minimum sentence of ten years without a jury finding beyond a reasonable doubt that he had a qualifying prior felony drug conviction. Although Almendarez-Torres v. United States, 523 U.S. 224 (1998), held that prior convictions used to support recidivist enhancements need not be set forth in an indictment or proved beyond a reasonable doubt, the continuing validity of that decision has been called into doubt.

In Apprendi v. New Jersey, 530 U.S. 466, 489-90 (2000), this Court expressly acknowledged "it is arguable that Almendarez-Torres was incorrectly decided." The Court referred with approval to Justice Scalia's dissent in Almendarez-Torres, stating that it was "clear beyond peradventure" that "due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." Apprendi, 530 U.S. at 589, n.15 (citation omitted).

The Apprendi Court noted as well the 'pedigree' of the pleading requirement, ignored by Almendarez-Torres, quoting Justice Clifford's "succinct" statement of the age-old rule in United States v. Reese, 92 U.S.

214, 232-33 (1876): "[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." Apprendi, 530 U.S. at 489, n.15. See also Dretke v. Haley, 541 U.S. 386, 395 (2004) (characterizing Apprendi as "reserving judgment as to the validity of Almendarez-Torres").

Moreover, Justice Thomas, who joined in the 5-4 majority opinion in Almendarez-Torres, subsequently repudiated that holding. In his concurring opinion in Apprendi, Justice Thomas acknowledged that Almendarez-Torres was wrongly decided:

> If a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element. (To put the point differently, I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment). When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute.

Apprendi, 530 U.S. at 521 (Thomas, J., concurring). In Shepard v. United States, 544 U.S. 13, 27 (2005)(Thomas, J., concurring), Justice Thomas noted that Almendarez-Torres "has been eroded by [the] Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that Almendarez-Torres was wrongly decided."

In Alleyne v. United States, 570 U.S. 99 (2013), this Court held that any fact that increases the mandatory minimum sentence is an element of the crime that must be submitted to the jury and found beyond a reasonable doubt (overruling Harris v. United States, 536 U.S. 545 (2002)). In so doing, the Court expressly noted that the parties did not contest the Almendarez-Torres prior conviction exception to the rule set forth in Apprendi that "facts which increase the prescribed range of penalties to which a criminal defendant is exposed" are elements. For that stated reason, this Court did not revisit it. Id. at 111, n.1.

Alleyne is one in a long line of Supreme Court cases emphasizing the importance of a jury finding beyond a reasonable doubt of every fact legally essential to a sentence. Most recently, in United States v. Haymond, 139 S.Ct. 2369 (2019), this Court held that the Fifth and Sixth Amendments were violated where an enhanced mandatory minimum sentence on revocation of supervised release was imposed based on facts found by a judge. The Court again emphasized that "[a] judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct." Id. at 2376. "[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., *quoting* Blakely v. Washington, 542 U.S. 296, 304 (2004).

In sum, "[i]t is genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject…" Almendarez-Torres, 523 U.S. at 251 (Scalia, J., dissenting). This Court should grant this petition for certiorari, and so hold.

IV. The jury verdict form was coercive and suggestive, improperly impinging on Petitioner's Fifth and Sixth Amendment rights, where it did not ask the jury which drugs were involved in the conspiracy but rather assumed that cocaine base was involved.

The court correctly instructed the jury that the elements of Count One – the drug conspiracy charge – were that two or more individuals entered into an unlawful agreement, that the defendant knowingly and willfully became a member of the conspiracy, and that the conspiracy involved the possession with intent to distribute or distribution of "one or more controlled substances." It told the jury that the government alleged that object of the conspiracy was the possession with intent to distribute and distribution of cocaine base. It went on to instruct that cocaine base was a controlled substance. The court later directed: "If you find the defendant guilty of

Count One of the indictment, you must make a determination as to the quantity of the cocaine base for which that defendant is responsible."

The jury verdict form asked:

> As to Count One of the Indictment, charging Defendant **RICHARD CRUZ** with conspiracy to distribute and/or possess with the intent to distribute a controlled substance, how do you find?

If the jury's answer to this question was 'guilty' – which it was – it was asked to proceed to the next question:

> Was the amount of the mixture or substance which contained cocaine base that Defendant **RICHARD CRUZ** reasonably could have foreseen as being involved in the conspiracy 28 grams or more?

The jury answered that question 'Yes.'

The problem with the way the verdict form was worded is that it unfairly suggested to the jury that cocaine base was a drug involved in the conspiracy. The jury should have been asked, first, what drug or drugs were involved in the conspiracy (or whether it found that cocaine base was involved), and if the jury answered that cocaine base was in fact involved, then – and only then – should the verdict form have inquired about the amount of this drug involved.

For example, in United States v. Taylor, 816 F.3d 12 (2d Cir. 2016), the defendant was charged with conspiracy to distribute and possess with

intent to distribute five kilograms or more of cocaine. The verdict sheet required the jury "to specify, in the event of a guilty verdict on count one, whether the conspiracy proven involved cocaine." Id. at 17. The court went on to instruct the jury: "Specifically, should you determine that the conspiracy charged in count one involved a mixture or substance containing cocaine," it then had to determine the weight of the cocaine. Id. On appeal, the Second Circuit approved of the special verdict form. Id. at 19.

The coercive quality to the verdict form was especially troubling in the context of this case. There was evidence presented at trial upon which the jury could have relied to find that there was a conspiracy involving drugs other than cocaine base. Coconspirator Emely Rosario testified about Percocets. Coconspirator Tammy Phillips testified about cocaine, marijuana, Vicodan and Percocets. Coconspirator Carri Poliski testified about buying and selling cocaine. Poliski admitted to the police selling one ounce of cocaine per week from 2015 through 2017. Cocaine was seized from coconspirators.

Accordingly, asking the jury whether Petitioner was guilty of a drug conspiracy – specifically "conspiracy to distribute and/or possess with the intent to distribute a controlled substance" – did not answer the question of

what "controlled substance" the jury found was involved in the conspiracy. This question is one that, under the Fifth and Sixth Amendments, Petitioner was entitled to have the jury answer.

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. By inquiring what amount of cocaine base was involved without ever ascertaining whether in fact the jury found that cocaine base was involved in the conspiracy, the court rather than the jury decided the type of drug involved. This violated Petitioner's constitutional rights to due process and trial by jury.

Facts – such as drug quantity – that raise the maximum allowable sentence must be submitted to the jury and found beyond a reasonable doubt, "even if the defendant ultimately received a sentence falling within … the range applicable without that aggravating fact." Alleyne, 570 U.S. at 115. Because the question concerning the amount of cocaine base was improperly suggestive, the jury's answer must be disregarded. As a result, Petitioner should be resentenced pursuant to 21 U.S.C. §841(b)(1)(C), which has no mandatory minimum term of imprisonment.

Additionally, the court used the wrong guideline range here, basing that range on the jury's answer to the coercive question. Although the guideline range did not factor into Petitioner's original sentence, because the ten-year minimum mandatory sentence applied, application of an incorrect guidelines range, regardless of whether the ultimate sentence is within that range, satisfies the plain error standard and entitles a defendant to resentencing. Molina-Martinez v. United States, 136 S.Ct. 1338 (2016).

## Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

December 1, 2020

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