

No. 10-10392

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**In the Supreme Court of the United States**

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JENNIFER LYNN KRIEGER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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**BRIEF OF THE NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS AS *AMICUS  
CURIAE* IN SUPPORT OF PETITIONER**

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## TABLE OF CONTENTS

	<b>Page</b>
INTEREST OF THE AMICUS CURIAE.....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	7
I. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFUSION CLOUDING THIS AREA OF LAW. ....	7
A. The Circuits Disagree About When The <i>Apprendi</i> Protections Are Activated. ....	7
B. This Case Is An Appropriate Vehicle To Address Lingering Confusion About The Meaning And Vitality Of <i>Harris</i> and <i>McMillan</i> . ....	10
II. REVERSAL IS NECESSARY TO GIVE SUBSTANCE TO THE JURY TRIAL RIGHT.....	14
III. THE DISORDER IN THE COURTS HARMS THE CRIMINAL JUSTICE SYSTEM.....	16
A. Drug Crime Prosecutions Dominate The Criminal Justice System. ....	17
B. The Lack of Uniformity Is Problematic On A Systemic And Individual Level. ....	18
CONCLUSION .....	20

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	<i>passim</i>
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004).....	<i>passim</i>
<i>Burgess v. United States</i> , 553 U.S. 124 (2008).....	2
<i>Castillo v. United States</i> , 530 U.S. 120 (2000).....	18
<i>Cunningham v. California</i> , 549 U.S. 270 (2007).....	2, 3
<i>Gall v. United States</i> , 552 U.S. 38 (2007) .....	15
<i>Graham v. Florida</i> , 130 S. Ct. 2011 (2010) .....	14
<i>Greenlaw v. United States</i> , 554 U.S. 237 (2008).....	2
<i>Hankerson v. North Carolina</i> , 432 U.S. 233 (1977).....	19
<i>Harris v. United States</i> , 536 U.S. 545 (2002).....	<i>passim</i>
<i>In re Winship</i> , 397 U.S. 358 (1970).....	5
<i>Kennedy v. Louisiana</i> , 554 U.S. 407 (2008).....	2

## TABLE OF AUTHORITIES—continued

	Page(s)
<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007) .....	18
<i>Koon v. United States</i> , 518 U.S. 81 (1996) .....	15
<i>Martin v. Hunter’s Lessee</i> , 14 U.S. 304 (1816) .....	18
<i>McMillan v. Pennsylvania</i> , 477 U.S. 79 (1986) .....	<i>passim</i>
<i>Oregon v. Ice</i> , 555 U.S. 160 (2009).....	18
<i>Ring v. Arizona</i> , 536 U.S. 584 (U.S. 2002) .....	16
<i>Sanchez-Llamas v. Oregon</i> , 548 U.S. 331 (2006).....	2
<i>Tafflin v. Levitt</i> , 493 U.S. 455 (1990).....	18, 20
<i>Teague v. Lane</i> , 489 U.S. 288 (1989).....	18
<i>United States v. Barbosa</i> , 271 F.3d 438 (3d Cir. 2001) .....	9
<i>United States v. Confredo</i> , 528 F.3d 143 (2d Cir. 2008).....	10
<i>United States v. Gonzalez</i> , 420 F.3d 111 (2d Cir. 2005).....	8, 19

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
<i>United States v. Hollis</i> , 490 F.3d 1149 (9th Cir. 2007) .....	10
<i>United States v. Keith</i> , 230 F.3d 784 (5th Cir. 2000) .....	9
<i>United States v. O’Brien</i> , 130 S. Ct. 2169 (2010) .....	12
<i>United States v. Price</i> , 516 F.3d 597 (7th Cir. 2008) .....	10
<i>United States v. Scheffer</i> , 523 U.S. 303 (1998).....	16
<i>United States v. Velasco-Heredia</i> , 319 F.3d 1080 (9th Cir. 2003) .....	8
<i>United States v. Webb</i> , 545 F.3d 673 (8th Cir. 2008) .....	10
<i>United States v. Williams</i> , 238 F.3d 871 (7th Cir. 2001) .....	9
<i>United States v. Williams</i> , 464 F.3d 443 (3d Cir. 2006).....	10
<i>Wilkes v. United States</i> , 469 U.S. 964 (1984).....	19
 <b>Statutes, Rules and Regulations</b>	
18 U.S.C. § 924 .....	10
21 U.S.C. § 841 .....	2, 19
21 U.S.C. § 841(a).....	3

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
21 U.S.C. § 841(b).....	3
21 U.S.C. § 841(b)(1)(C) .....	3
 <b>Miscellaneous</b>	
Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics 2010, Table D-2 (March 31, 2010), <i>available at</i> <a href="http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx">http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx</a> .....	17
Frank O. Bowman, III, <i>Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended</i> , 77 U. CHI. L. REV. 367 (2010) .....	13
Hon. D. Michael Fisher, <i>Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing</i> , 46 DUQ. L. REV. 65 (2007).....	15
Bradley R. Hall, <i>Mandatory Sentencing Guidelines By Any Other Name: When “Indeterminate Structured Sentencing” Violates Blakely v. Washington</i> , 57 DRAKE L. REV. 643 (2009) .....	13
Andrew Levine, <i>The Confounding Boundaries of “Apprendi-Land”: Statutory Minimums and the Federal Sentencing Guidelines</i> , 29 AM. J. CRIM. L. 377 (2002) .....	13

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
Justice Sandra Day O'Connor, <i>Our Judicial Federalism</i> , 35 CASE W. RES. L. REV. 1 (1985).....	18
Charles J. Ogletree, Jr., <i>The Death of Discretion? Reflections on the Federal Sentencing Guidelines</i> , 101 HARV. L. REV. 1938 (1988).....	15
Kevin R. Reitz, <i>The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes</i> , 105 COLUM. L. REV. 1082 (2005).....	12, 13
United States Sentencing Comm'n, <i>Sourcebook of Federal Sentencing Statistics</i> , Figure A (2010), available at <a href="http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureA.pdf">http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureA.pdf</a> .....	17
United States Sentencing Comm'n, <i>Sourcebook of Federal Sentencing Statistics</i> , Table 3 (2010), available at <a href="http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table03.pdf">http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table03.pdf</a> .....	17
United States Sentencing Comm'n, <i>Sourcebook of Federal Sentencing Statistics</i> , Table 43 (2010), available at <a href="http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table43.pdf">http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table43.pdf</a> .....	17

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## INTEREST OF THE *AMICUS CURIAE* <sup>1</sup>

The National Association of Criminal Defense Lawyers (“NACDL”) is a non-profit organization with a national membership of over 11,500 attorneys and more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL seeks to foster the integrity, independence, and expertise of the criminal defense profession; to promote the fair administration of criminal justice; and to ensure adherence to the Bill of Rights in order to sustain the sanctity of the American system of justice.

NACDL has a strong interest in the preservation of the constitutional right to a jury trial. To this end, NACDL actively participates in cases addressing the constitutional implications of criminal punishment. NACDL served as *amicus curiae* in the watershed *Apprendi* case, as well as several follow-on matters. See *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (brief filed Jan. 13, 2000); see also, *e.g.*, *Harris v.*

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<sup>1</sup> Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. All parties have consented to the filing of this brief.

*United States*, 536 U.S. 545 (2002) (brief filed Jan. 23, 2002); *Cunningham v. California*, 549 U.S. 270 (2007) (brief filed May 8, 2006). It frequently appears as *amicus curiae* on a variety of issues related to sentencing under Section 841 and other statutes. See, e.g., *Burgess v. United States*, 553 U.S. 124 (2008) (brief filed Jan. 29, 2008); *Greenlaw v. United States*, 554 U.S. 237 (2008) (brief filed Feb. 21, 2008). Its views have repeatedly informed members of the Court. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 443 (2008) (citing NACDL brief); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 344 n.3 (2006) (same).

Jennifer Lynn Krieger’s petition raises several critical issues that have produced considerable confusion in the lower courts. NACDL believes the Court should grant the petition and resolve these quandaries in order to ensure that criminal defendants are treated fairly and uniformly regardless of the circuit in which they face prosecution.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Jennifer Lynn Krieger pleaded guilty to the charge of simple distribution of the drug fentanyl in violation of the Controlled Substances Act (21 U.S.C. § 841). Pet. App. 4a. The prosecution objected to the presentence report—which recommended a sentencing range of ten to sixteen months—and argued that Krieger instead should be subject to a mandatory minimum sentence of twenty years in prison because Jennifer Curry had died as a result of Krieger’s distribution of fentanyl. Pet. App. 5a. The trial judge found by a preponderance of the evidence that Curry’s death resulted from the fentanyl, and imposed the mandatory minimum sentence. Pet. App. 6a. Krieger’s petition raises timely and important issues

at the intersection of the Controlled Substances Act and *Apprendi*.

Section 841 is a key statutory vehicle for narcotics prosecutions. It prohibits the manufacture and distribution of controlled substances (Section 841(a)) and establishes escalating punishment ranges for violations of the statute (Section 841(b)). In part, Section 841 describes an “aggravated crime”: it defines the substantive prohibition “and then provides for increasing the punishment of that crime upon a finding of some aggravating fact.” *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring).

The aggravating fact at issue in this case is whether death resulted from use of a drug. Section 841(b)(1)(C) establishes a statutory sentencing range of zero to 20 years for simple distribution of fentanyl. If, however, “death . . . results” from use of the drug, the range shifts upward, with a mandatory minimum sentence of 20 years and a statutory maximum of life in prison. 21 U.S.C. § 841(b)(1)(C).

These sentencing ranges implicate the *Apprendi* doctrine. *Apprendi* established that it is “‘unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.’” 530 U.S. at 490 (citation omitted). Thus, “any fact that exposes a defendant to a greater potential sentence” must be pleaded in the indictment, presented to the jury, not a judge, and established beyond a reasonable doubt, rather than satisfying a preponderance standard. *Cunningham*, 549 U.S. at 281. The sentencing ranges also implicate this Court’s decision in *Harris*. In *Harris*, this Court reaffirmed its pre-*Apprendi* decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and concluded that

a factor that raises the mandatory minimum—but not the statutory maximum—sentence need not be “alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.” 536 U.S. at 558-59.

The lower court’s decision sits on one side of a deep circuit split regarding the proper interpretation of *Apprendi*. The lower court held that the “death resulting” factor may be found by a judge by a preponderance of the evidence so long as the sentence *actually imposed* does not exceed the statutory maximum for the underlying offense (here, 20 years). Pet. App. 10a-11a. Other courts, however, would require that factor to be submitted to the jury and proven beyond a reasonable doubt regardless of what sentence was ultimately imposed, because the factor increases the sentencing range to which the defendant is exposed. Looming over this disagreement is the uncertainty surrounding the meaning and continued vitality of *Harris* and *McMillan*.

The lower court’s tortured reading of *Apprendi* in this case flipped the criminal justice system on its head. As the trial judge observed, “one cannot escape the conclusion that Krieger, while convicted of distribution of divers amounts of narcotics, is being sentenced for homicide.” Pet. App. 39a. But Krieger was not given the constitutional and pragmatic protections afforded homicide defendants. Instead, the lower court’s application of *Apprendi* removed the quintessential element of homicide (causation) from the jury, diluted the prosecution’s burden of proof, and divested the judge of all discretion in sentencing. And this was not mere happenstance. It was only after the prosecution’s main witness—the doctor who had performed the autopsy—“fled the country under

a cloud of suspicion” and plea negotiations failed that the prosecution removed the “death resulting” language from the indictment and refashioned it as a sentencing factor. Pet. App. 3a-4a.

The end result was that “muddled and slim” evidence on the “death resulting” factor, which would not have supported a conviction for homicide beyond a reasonable doubt, forced the trial judge to impose an “unduly harsh” sentence of 20 years: that was the mandatory minimum for the aggravated offense, and any sentence greater than 20 years (the statutory maximum for the underlying offense) would plainly be unconstitutional under *Apprendi*. Pet. App. 25a, 42a. Thus, as the trial judge observed, it was the judicially-determined “death resulting” factor—not a jury’s factfinding, guilty plea, or judicial discretion—that “completely control[led] the ultimate sentence.” Pet. App. 41a.

This “absurd result” (*Blakely v. Washington*, 542 U.S. 296, 306 (2004)) diluted “the moral force of the criminal law” in this case. *In re Winship*, 397 U.S. 358, 364 (1970). See *Blakely*, 542 U.S. at 306 (observing that “[n]ot even *Apprendi*’s critics would advocate th[e] absurd result” of a judge sentencing a defendant for murder when the jury “convicted him only of illegally possessing the firearm used to commit it”). This apparently was not lost on the lower courts. The trial judge stated that, in light of “societal expectations and justice,” “had it the discretion to do so, [it] would insist that the Government prove [the ‘death resulting’ factor] beyond a reasonable doubt.” Pet. App. 41a. The Seventh Circuit devoted five pages of its opinion to “not[ing] the disagreement within the Supreme Court” regarding the viability of *McMillan*, observing that “[t]he thread by which

*McMillan* hangs may be precariously thin” and “[t]his case well demonstrates what happens when the principles of *McMillan* are pushed to their extreme.” Pet. App. 20a-25a. Both courts, however, concluded that the outcome in this case was mandated by this Court’s precedent. See Pet. App. 24a (“unless and until the Supreme Court explicitly overrules a case, we are bound by it”), 38a (under the plurality decision in *Harris*, “the Constitution is seemingly satisfied” in this case).

Review is necessary because, as the lower courts recognized, only this Court can clarify when the constitutional protections of *Apprendi* are activated. Before a defendant is functionally sentenced for homicide, with its increased loss of liberty and stigma, the defendant should be afforded the constitutional imperatives of a right to a jury trial and the protections inhering in the reasonable doubt standard. The issues raised in the petition are exceptionally important because of the massive number of prosecutions under Section 841. They further merit the Court’s attention because the lack of uniformity in the circuit courts produces dramatic inequalities based on nothing more than the jurisdiction in which a defendant is tried.

## ARGUMENT

### I. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFUSION CLOUDING THIS AREA OF LAW.

The deep division among lower courts over the proper application of *Apprendi* to the aggravating factors in Section 841 (and other statutes featuring escalating ranges) merits this Court’s attention. Courts cannot agree about the prosecution’s burden of proof when a finding that death resulted from a narcotics offense would increase the punishment range by exposing a defendant to otherwise inapplicable mandatory minimum and statutory maximum sentences. Intractably divergent answers to this question—overlaid by confusion about the meaning and vitality of *Harris* and *McMillan*—have created an unfortunate knot that only this Court can untangle.

#### A. The Circuits Disagree About When The *Apprendi* Protections Are Activated.

The central issue in this case surrounds the proper interpretation of *Apprendi*. Charles Apprendi pleaded guilty to possession of a firearm for an unlawful purpose, which was punishable under state law by 5 to 10 years in prison. 530 U.S. at 468. Thereafter, the prosecution moved for a “hate crime enhancement” which would raise the sentencing range to between 10 and 20 years “if the trial judge finds, by a preponderance of the evidence, that the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.” *Id.* at 468-69 (internal quotation marks and citation omitted). The trial

judge found that the hate crime enhancement applied, and sentenced Apprendi to 12 years of imprisonment. *Id.* at 471. This Court granted certiorari to decide “whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt.” *Id.* at 469. The Court answered in the affirmative: “Other than the fact of a prior conviction, \* \* \* [i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.’” *Id.* at 490 (internal citation omitted). The circuits disagree over when the *Apprendi* right to jury determination of a fact beyond a reasonable doubt attaches.

Under the Second and Ninth Circuit view, “[t]he *Apprendi* rule applies to the resolution of any fact that would substitute an increased sentencing range for the one otherwise applicable to the case,” regardless of the sentence ultimately imposed. *United States v. Gonzalez*, 420 F.3d 111, 129 (2d Cir. 2005). Under this reading of *Apprendi*, the “death resulting” factor, because it triggers an increased sentencing range, “must always be pleaded and proved to a jury or admitted by a defendant.” *Id.* at 131. See also *United States v. Velasco-Heredia*, 319 F.3d 1080, 1085 (9th Cir. 2003) (factor that increased sentencing range from zero to 5 years to 5 to 40 years triggered protections of *Apprendi*, even though judge sentenced defendant to 5 years in prison). In these circuits, then, *Apprendi* rights attach (and can be ascertained) before sentencing.

Other circuits, including the Seventh Circuit, have adopted a contrary position whereby *Apprendi* is implicated only when the “the actual sentence imposed is [more] severe than the statutory maximum” of the underlying offense. *United States v. Williams*, 238 F.3d 871, 877 (7th Cir. 2001). See also *United States v. Barbosa*, 271 F.3d 438, 457 (3d Cir. 2001) (*Apprendi* requires a factor to “be treated as an element” subject to *Apprendi* protections “only when it results in a sentence beyond the relevant statutory maximum.”); Pet. 11-12 (collecting cases). In these circuits, so long as the sentence actually imposed does not exceed the default statutory maximum, *Apprendi* does not require the “death resulting” factor to “be alleged in the indictment and proved to a jury beyond a reasonable doubt.” *United States v. Keith*, 230 F.3d 784, 787 (5th Cir. 2000).<sup>2</sup> In practice, this means that, as a matter of constitutional law, the prosecution must charge an aggravating factor in the indictment if it intends to seek a sentence above the maximum sentence for the underlying offense, but need not do so when it seeks to take advantage of an increased mandatory minimum sentence, so long as that sentence is below the statutory maximum of the underlying offense.

Whichever rationale is most sound, it is undeniable that this issue recurs with great frequency and affects the sentences of many defendants, with dramatically different results depending only on the location of the prosecution. See Point III, *infra*. And the difference of opinion between the lower courts

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<sup>2</sup> The First and Sixth Circuits nonetheless treat the “death resulting” factor as an element as a matter of statutory construction. See Pet. 12 n.2.

has become entrenched. Compare *United States v. Confredo*, 528 F.3d 143, 153 (2d Cir. 2008); *United States v. Hollis*, 490 F.3d 1149, 1155 & n.3 (9th Cir. 2007) with *United States v. Williams*, 464 F.3d 443, 449 (3d Cir. 2006); *United States v. Price*, 516 F.3d 597, 605 (7th Cir. 2008); *United States v. Webb*, 545 F.3d 673, 677 (8th Cir. 2008). Only this Court's intervention can bring about needed uniformity.

**B. This Case Is An Appropriate Vehicle To Address Lingering Confusion About The Meaning And Vitality Of *Harris* And *McMillan*.**

Krieger's petition also offers the Court an opportunity to revisit its fractured decision in *Harris* and resolve lingering uncertainty about whether *Apprendi* precludes the application of a preponderance of the evidence standard where, as here, the finding of an aggravating factor results in the imposition of a higher mandatory minimum sentence.

*Harris* addressed 18 U.S.C. § 924, the federal firearm statute. The text and structure of the statute imposed escalating mandatory minimums depending on how a defendant possessed or used a firearm during a crime. *Harris*, 536 U.S. at 550-51. The Court addressed whether the bundle of Fifth and Sixth Amendment rights governed the prosecution's effort to impose a higher mandatory minimum through a showing of brandishment or use of a firearm (or another aggravating factor). *Id.* at 556-566. The Court held that the defendant was not entitled to the benefit of a reasonable doubt determination by a jury. *Id.* at 568.

The *Harris* plurality held that "a fact increasing the mandatory minimum (but not extending the sen-

tence beyond the statutory maximum)” was not an element, and thus *Apprendi* did not apply. 536 U.S. at 557. This view rested primarily on the Court’s earlier holding in *McMillan*, which “sustained a statute that increased the minimum penalty for a crime, though not beyond the statutory maximum, when the sentencing judge found, by a preponderance of the evidence, that the defendant had possessed a firearm.” *Harris*, 536 U.S. at 550. The plurality rejected the notion that *Apprendi* had undermined *McMillan*. *Id.* at 565-67.

But, as the lower court in this case acknowledged, “at the time the *Harris* case was decided, five Supreme Court justices—a majority—believed that the holding in *McMillan* was inconsistent with *Apprendi*.” Pet. App. 20a.

The four dissenting Justices could not identify any constitutionally significant difference between findings that increased minimums and findings that increased maximums. They explained that “the principles upon which [*Apprendi*] relied apply with equal force to those facts that expose the defendant to a higher mandatory minimum,” because “[w]hether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed.” *Harris*, 536 U.S. at 579 (Thomas, J., dissenting). The dissenters thus concluded that *McMillan* failed to “withstand the logic of *Apprendi*.” *Id.* at 580. As they explained, *McMillan* directly contravened *Apprendi*, which focused on “any fact that increases or alters *the range* of penalties to which a defendant is exposed—which, by definition, must include increases or alterations to either the minimum or maximum penalties.” *Id.* at 582.

The deciding vote in *Harris* was cast by Justice Breyer. Justice Breyer joined in the Court's judgment, but only because he adhered to his preexisting disagreement with *Apprendi*. *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment). But, like the dissenting justices, he could not "easily distinguish *Apprendi* \* \* \* from this case in terms of logic" and expressly did not "agree with the plurality's opinion insofar as it finds such a distinction." *Ibid.*<sup>3</sup>

The nine years since *Harris* have only weakened its already unstable footing. Just last term, Justice Breyer stated during oral argument in *United States v. O'Brien*, 130 S. Ct. 2169 (2010), "at some point I guess I have to accept *Apprendi*, because it's the law and has been for some time," and restated his belief that "*Apprendi* does cover mandatory minimums." *O'Brien*, 130 S. Ct. at 2183 n.6 (Stevens, J., concurring). The circuit courts, including the lower court, have joined a growing chorus of commentators in

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<sup>3</sup> Justice Breyer foreshadowed the illogic of a distinction between maximums and minimums years earlier. In *Apprendi*, he explained that "as a practical matter," a mandatory minimum "is far more important to an actual defendant," because while a judge can "select any sentence below a statute's maximum," he or she is bound by a statutory minimum. 530 U.S. at 563 (Breyer, J., dissenting). Thus, "all the considerations of fairness that might support submission to a jury of a factual matter that increases a statutory maximum apply *a fortiori* to any matter that would increase a statutory minimum." *Ibid.*; see also Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1097 (2005) ("A mandatory minimum sentencing rule carries far greater significance for the actual punishment in most cases than the positioning of a theoretical maximum penalty.").

questioning the logic and continued vitality of *McMillan* and *Harris*. See, e.g., Pet. App. 20a (“[t]he thread by which *McMillan* hangs may be precariously thin”); Pet. 13-14 (collecting cases); Andrew Levine, *The Confounding Boundaries of “Apprendi-Land”: Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 424 (2002) (“But if the Court is to remain true to the constitutional principles underlying *Apprendi*, it should eventually overrule \* \* \* *Harris* \* \* \*.”); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1097 & n.54 (2005) (“*Harris* is another sizable hole in the constitutional Swiss cheese.”); Bradley R. Hall, *Mandatory Sentencing Guidelines By Any Other Name: When “Indeterminate Structured Sentencing” Violates *Blakely v. Washington**, 57 DRAKE L. REV. 643, 687, n.221 (2009) (“the staying power of the *McMillan/Harris* exception to *Blakely* \* \* \* is debatable”); Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 404-07 (2010).

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In sum, the issues raised in the petition have engendered intractable controversy in the lower courts. The recurring nature of the issues, their practical importance, and the depth of the division among the lower courts makes review appropriate at this time and in this case. Krieger’s experience crystallizes the key issue: the lower court was forced to impose an “unduly harsh” sentence of 20 years in prison, based on a single fact that satisfied the preponderance-of-the-evidence standard, but not the beyond-a-reasonable-doubt standard. Pet. App. 42a.

## II. REVERSAL IS NECESSARY TO GIVE SUBSTANCE TO THE JURY TRIAL RIGHT.

Entrusting the jury with determining the “death resulting” factor “give[s] intelligible content to the right of jury trial.” *Blakely*, 542 U.S. at 305. That right, this Court has held, “is no mere procedural formality, but a fundamental reservation of power in our constitutional structure” which ensures the people’s “control in the judiciary.” *Id.* at 305-06. Accordingly, this Court has cautioned that “[t]he jury could not function as circuitbreaker in the State’s machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.” *Id.* at 306-07.

But that is precisely what happened here. The offense that Krieger pleaded guilty to—simple distribution of fentanyl—was “a mere preliminary” to judicial inquiry into Curry’s death—“the crime the State *actually* [sought] to punish.” *Blakely*, 542 U.S. at 306-07. A finding that Curry’s death resulted from use of the fentanyl, which did “not flow inexorably from the underlying [offense]” (Pet. App. 41a), had “significant implications both for [Krieger]’s very liberty, and for the heightened stigma associated with” her offense. *Apprendi*, 530 U.S. at 495 (observing that “the potential doubling of one’s sentence—from 10 years to 20— \* \* \* is unquestionably of constitutional significance”). See generally *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010) (recognizing “a line between homicide and” other crimes “in terms of moral depravity and of the injury to the person and to the public”) (internal quotation marks and citation omitted). The prosecution strategically dropped the

death resulting allegation from the indictment and shifted factfinding responsibility to the trial judge under a lesser standard of proof.

In sanctioning this tactic, the lower court frustrated *Apprendi*'s purpose of "ensuring that the judge's authority to sentence derives wholly from the jury's verdict." *Blakely*, 542 U.S. at 306. In this case, a judicially-determined fact—not the jury's factfinding or a guilty plea—"completely control[led] the ultimate sentence" by "mandat[ing] the imposition of a [twenty-year] sentence." Pet. App. 23a, 41a.<sup>4</sup>

And there is no practical reason to permit judges, not juries, to determine whether death resulted from use of a drug. To the contrary, juries are well-suited to make findings regarding causation. While the jury trial right "does not turn on the relative rationality, fairness, or efficiency of potential factfinders"

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<sup>4</sup> The lower court's reading of *Apprendi* thus also weakened the role of the trial judge. The judge "had no discretion whatsoever in the choice of sentence" (Pet. App. 7a), and was forced to impose what he believed to be an "unduly harsh" sentence (Pet. App. 42a). In direct conflict with "federal judicial tradition," then, the trial judge was unable "to consider [Krieger] as an individual" and fashion a fair and just sentence. *Gall v. United States*, 552 U.S. 38, 52 (2007) (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)). See also Hon. D. Michael Fisher, *Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing*, 46 DUQ. L. REV. 65, 66 (2007) ("discretion in sentencing is key to fair and just sentences"); Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1954 (1988) ("[I]f one ignores every personal characteristic of the offender, other than those that appear to be aggravating factors of the crime, it is likely to lead to gross miscarriages of justice in individual cases.").

(*Ring v. Arizona*, 536 U.S. 584, 607 (U.S. 2002)), the lower court's rule ignores the jury's traditional role in finding causation. In this case, and in many cases, the causation determination will turn on witness credibility. As the trial judge acknowledged, "[t]he lynch pin of Krieger's defense" was that the government's main witness "lacks credibility." Pet. App. 33a. But "[a] fundamental premise of our criminal trial system is that the *jury* is the lie detector," proficient at "[d]etermining the weight and credibility of witness testimony" because of its "practical knowledge" of people. *United States v. Scheffer*, 523 U.S. 303, 312-13 (1998) (internal quotation marks and citations omitted).

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Requiring the "death resulting" factor to be proven to a jury beyond a reasonable doubt not only satisfies the constitutional guarantee of the right to a jury trial, but assigns the key task of finding whether death resulted to the institution best suited to that determination. It does so while applying an essential protection of the criminal justice system to a critical aspect of the criminal process. The lower court's rule to the contrary should not stand.

### **III. THE DISORDER IN THE COURTS HARMS THE CRIMINAL JUSTICE SYSTEM.**

The issues raised in the petition are exceptionally important in part because of the sheer number of people affected: prosecutions and sentences for drugs crimes, many of which involve imposition of mandatory minimum sentences, affect tens of thousands of criminal defendants every year. The lack of clarity about the governing rules creates unfair disparities for criminal defendants.

### A. Drug Crime Prosecutions Dominate The Criminal Justice System.

*Apprendi* issues related to drug crimes affect a staggering number of people. In the year ending March 31, 2010, the federal government commenced over 16,000 cases charging drug offenses. Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics 2010, Table D-2 (March 31, 2010), *available at* <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx>. Drug offenders accounted for more than 25,000 of the 83,946 defendants sentenced in 2010—28.9 percent of all federal criminal cases. United States Sentencing Comm’n, *Sourcebook of Federal Sentencing Statistics*, Figure A (2010), *available at* [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/FigureA.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureA.pdf) (“Sentencing Sourcebook”); *id.* at Table 3, *available at* [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/Table03.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table03.pdf).

The imposition of mandatory minimums is a constant in sentences for drug crimes. Over 64 percent of drug convictions result in the application of mandatory minimum sentences. Sentencing Sourcebook, Table 43, *available at* [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/Table43.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table43.pdf). In 2010 alone, nearly 7,000 five-year mandatory minimum and over 8,000 ten-year mandatory minimum sentences were meted out. *Ibid.* In short, the issues in Krieger’s petition affect the trials and sentences of thousands of criminal defendants in the federal courts.

### **B. The Lack Of Uniformity Is Problematic On A Systemic And Individual Level.**

The division of views among the lower courts creates unfortunate disparities that justify review. Under the status quo, a defendant in Albany or Seattle is bound by a different set of rules from one in Chicago or El Paso. To take advantage of the much higher mandatory minimum sentence imposed when a drug distribution offense results in death, the prosecution in the Second or Ninth Circuit must plead that fact in the indictment and prove it to the jury beyond a reasonable doubt. But the prosecution in other circuits merely prove it to a judge under the preponderance of the evidence standard.

In the past, the Court has granted review to resolve sentencing conflicts between the circuits. *Oregon v. Ice*, 555 U.S. 160 (2009); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Castillo v. United States*, 530 U.S. 120, 123-24 (2000). The desire to address such differences reflects the “fundamental principle” of the Constitution “that a single sovereign’s laws should be applied equally to all.” Justice Sandra Day O’Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 4 (1985). That principle requires “uniformity of decisions throughout the whole United States, upon all subjects within [its] purview.” *Martin v. Hunter’s Lessee*, 14 U.S. 304, 347-48 (1816).

In the “federal criminal law” context, there is an imperative “for uniformity and consistency.” *Tafflin v. Levitt*, 493 U.S. 455, 464-65 (1990) (internal citations omitted). The absence of uniformity creates an “unfortunate disparity in the treatment of similarly situated defendants,” which “hardly comports with the ideal of administration of justice with an even hand.” *Teague v. Lane*, 489 U.S. 288, 305, 315

(1989) (quoting *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977)). In words that resonate strongly here, Justice White explained:

The statute at issue defines a federal crime, and it should be applied uniformly throughout the United States. Yet, because of conflicting interpretations, defendants in some parts of this country may be punished for violations without proof or pleading of an element required in another judicial circuit. Criminal culpability for violation of federal statutes should turn on uniform law, not geography.

*Wilkes v. United States*, 469 U.S. 964, 965 (1984) (White, J., dissenting from denial of certiorari).

The disparity here is profound. As the lower court observed, “the average length of incarceration for defendants convicted under 21 U.S.C. § 841 for distribution of fentanyl where death has not resulted (and with a criminal history category of I—as was the case with Krieger) was seven months.” Pet. App. 18a. But Krieger’s sentence jumped to 20 years on the basis of “muddled and slim” evidence that was not sufficient to sustain a finding beyond a reasonable doubt. Pet. App. 25a. It is alarming that this result is a function of nothing more than location. Had Krieger been prosecuted in New York or Los Angeles, the mandatory minimum would not have applied because the government failed to plead and prove causation. *Gonzalez*, 420 F.3d at 115. A judge sitting in the Southern District of New York or Central District of California would have been able to use her discretion to fashion an appropriate sentence. Pet. App. 23a.

Such disparities should be intolerable. They offend the uniformity that anchors the criminal justice system. *Tafflin*, 493 U.S. at 464-65. And they contravene the principles of fairness that even *Apprendi*'s detractors realize lie at the intersection of the Fifth and Sixth Amendments. *Blakely*, 542 U.S. at 345-46 (Breyer, J., dissenting). Review is needed to eliminate these disparities that bedevil the application of Section 841.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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