No. 15-___

IN THE

Supreme Court of the United States

RICHARD E. CRAYTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Richard Crayton was convicted by a jury of distributing heroin, 21 U.S.C. § 841(a)(1). That conviction exposed him to a statutory sentencing range of zero to 20 years. The jury deadlocked in deciding whether the government had proved, beyond a reasonable doubt, that the distribution of heroin also resulted in death. If the jury had found that death resulted, § 841(b)(1)(C) would have increased the statutory mandatory minimum to 20 years.

Despite the jury's deadlock, the district court found by a preponderance of the evidence that death resulted and imposed the mandatory minimum 20-year sentence under this Court's then-controlling decision in *Harris v. United States*, 536 U.S. 545 (2002). In doing so, the district court expressed "serious doubts about the wisdom, fairness, and effectiveness" of the 20-year mandatory minimum but was "bound to impose" it. Pet.App. 42a. In fact, as the judge noted, Crayton did not even know the victim or distribute heroin to her, instead selling to an intermediary who received only probation for his direct role.

Just five months after denying certiorari on Crayton's direct appeal, this Court granted certiorari in *Alleyne v. United States*, __ U.S. __, 133 S. Ct. 2151 (2013), which ultimately overruled *Harris*. *Alleyne* repeatedly explained that "[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 2162. Shortly after *Alleyne*, Crayton filed a federal habeas petition seeking its benefit.

There is no dispute now that Crayton's conviction is constitutionally deficient. Even the Seventh Circuit recognized that "*Alleyne* would have affected the outcome, had the decision been rendered earlier." Pet.App. 6a. But because Crayton had the misfortune to exhaust his appeals five months before this Court granted certiorari, the district court refused to give *Alleyne* any retroactive effect. The Seventh Circuit affirmed, with a lengthy concurrence by Judge Ann C. Williams explaining that the majority's interpretation of *Alleyne* was entirely incorrect and that *Alleyne* should apply retroactively.

Therefore, the Question Presented is as follows:

Whether the Seventh Circuit's facially incorrect application of *Alleyne v. United States* is justified by its conclusion that *Alleyne* does not apply retroactively.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are:

The United States of America, through the U.S. Attorney's Office for the Western District of Wisconsin.

Richard E. Crayton, an individual incarcerated at the Federal Correctional Institution in Sandstone, Minnesota.

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The District Court's opinion dismissing Crayton's petition for a writ of habeas corpus is reproduced in the Appendix as Pet.App. 25a. The Seventh Circuit's opinion affirming the District Court's dismissal, and the separate concurrence of Judge Ann C. Williams, is reproduced in the Appendix as Pet.App. 1a.

JURISDICTION

The Seventh Circuit affirmed the denial of Crayton's petition for a writ of habeas corpus on June 25, 2015. Pet.App. 23a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This petition presents questions that do not involve any dispute over the interpretation of statutes or regulations, but instead focus on interpretation of this Court's precedents.

STATEMENT OF THE CASE

Petitioner Richard Crayton is currently serving a 20-year mandatory minimum sentence that indisputably would violate the Constitution if imposed today. Crayton was indicted on January 23, 2010 for distribution of heroin that resulted in the death of Nicole Hedges, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). Distribution under § 841(a)(1) carries a statutory sentencing range of zero to 20 years. If death results from the use of the distributed heroin, the mandatory minimum increases to 20 years. 21 U.S.C. § 841(b)(1)(C). Crayton, who had never met Hedges or distributed heroin to her directly, pleaded not guilty, and the case went to trial.

The underlying facts are straight-forward. In mid-2009, Kevin Krugel and Nicole Hedges were kicked out of a substance abuse center. Krugel then contacted numerous people for heroin. The next day, he drove with a different acquaintance, Dominic Beccerra, to purchase one gram of heroin from Crayton. Krugel and Becerra then drove to meet Hedges at a shelter in Merrill, Wisconsin. There, Hedges requested heroin from Krugel, who provided it to her. Hedges died hours later from "heroin toxicity or overdose."

At trial, the central issue was whether the heroin Krugel gave to Hedges was the same heroin Krugel bought from Crayton. The government acknowledged to the jury that it had the burden to prove beyond a reasonable doubt that Hedges' death resulted from using the heroin that Crayton distributed. Crayton argued that Krugel and Becerra bought heroin from other sources as well, making it impossible to know the source of the heroin Krugel gave to Hedges.

The district court charged the jury on distribution and separately instructed the jury that if it found distribution, it would then consider a special verdict question asking whether death resulted from the distribution. Consistent with the government's acknowledgement, the court admonished the jury that "[i]t is the government's burden to prove beyond a reasonable doubt that [Hedges'] death resulted from using heroin distributed by defendant." Jury Instructions at 5, *United States v. Crayton*, No. 10-cr-00012 (W.D. Wis.), Dkt. #54.

During deliberations, the jury twice requested guidance from the court on the "death resulted" in-

struction. First, the jury sent a note to the judge stating, "We would like to know if the drugs that the defendant sold were mixed with drugs that [Krugel] perhaps bought from someone else – would still hold him responsible for a 'yes' on the special verdict question." Transcript at 2, *United States v. Crayton*, No. 10-cr-00012 (W.D. Wis.), Dkt. 90. Later that day, the jury asked another question about the verdict form, suggesting to the judge that they were confused about when to consider the "death resulted" issue. Both times the court instructed the jury to answer on the basis of testimony and instructions it had heard.

Later that day, the jury members informed the judge that they had reached a unanimous verdict of guilty on the distribution charge but were deadlocked on the special verdict. The judge instructed the jurors to continue deliberations, again emphasizing that they must attempt to determine whether the government had proved its case "beyond a reasonable doubt."

An hour later, the jury reported again that it was deadlocked on the special verdict question. The judge agreed and entered a verdict of guilty on the distribution charge and inconclusive on the special verdict "death resulted" issue. As a result, there was no jury finding beyond a reasonable doubt on the death resulted question, and the jury was discharged.

In contrast to the jury's inability to find the "death resulting" enhancement beyond a reasonable doubt, the district court at sentencing found by a preponderance of the evidence that the heroin distributed by Crayton to Kruger resulted in the death of Hedges. Pet.App. 26a. The judge referred to her

finding as establishing that Crayton was "guilty under the statute." Pet.App. 40a. Based on that conclusion, the court discarded the zero to 20-year range to which the jury's distribution verdict exposed Crayton under § 841(a)(1) and instead applied the 20-year mandatory minimum "death resulted" enhancement. *Id.*

The district court expressed "serious doubts about the wisdom, fairness, and effectiveness" of the mandatory 20-year sentence that it imposed. *Id.* at 42a. The judge explained that she had "seen no evidence to suggest" that the mandatory minimum sentence would serve its intended, deterrent effect but explained that she was "bound to impose" it. *Id.* The judge acknowledged the "clear disparities" that the mandatory minimum created—for example, Kruger, who *actually* gave Hedges the heroin that caused her death, received only probation.

On direct appeal, Crayton argued among other things that the district court violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by increasing the statutory minimum by a judicial finding based on the preponderance of the evidence. The Seventh Circuit affirmed on December 27, 2011. *See United States v. Crayton*, 455 Fed. App'x 688 (7th Cir. 2011).

Crayton filed a petition for a writ of certiorari in this Court, arguing among other things that *Harris* should be overruled. Crayton's petition was denied on May 14, 2012. *Crayton v. United States*, __ U.S. __, 132 S. Ct. 2379 (2012).

Less than a month later, the government cited Crayton's case in its brief opposing the requested writ of certiorari in the *Alleyne* case. *See* Brief for

the United States in Opposition at *6, *Alleyne v. United States*, 133 S. Ct. 2151 (2012) No. 11-9335, 2012 WL 4750324. Within five months of denying Crayton's petition on direct appeal, the Court had granted certiorari in *Alleyne*.

On June 17, 2013, this Court held in *Alleyne* that "[f]acts that increase the mandatory minimum sentence are . . . elements [of the offense] and must be submitted to the jury and found beyond a reasonable doubt." __ U.S. at __, 133 S. Ct. at 2158. As a result, it is now clear that any fact that alters the range of punishment to which a defendant is exposed may not be found by a judge on a preponderance standard.

Less than two months after *Alleyne* was decided, Crayton filed his present § 2255 petition for post-conviction relief. [1] The district court held that *Alleyne* does not apply retroactively and denied the petition.

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[1] Crayton initially requested post-conviction relief under *Alleyne* on February 21, 2013. The district court erroneously dismissed that first-filed 28 U.S.C. § 2255 petition without prejudice because *Alleyne* was still pending. The Seventh Circuit subsequently explained that this was "an improper procedure" and that the district court should have stayed its proceedings to avoid prejudicing Crayton's right to present a first § 2255 petition. *See* Pet.App. 3a (citing *Rhines v. Weber*, 544 U.S. 269 (2005); *Purvis v. United States*, 662 F.3d 939 (7th Cir. 2011). As a result, the lower courts treated Crayton's current § 2255 filing as an initial petition, though the distinction does not matter here because this Court has the authority to recognize retroactive application of its precedents on both first- and second-or-successive petitions. *See* 28 U.S.C. § 2255(h)(2).

The Seventh Circuit affirmed, subject to a strongly-worded concurrence in the judgment. Writing separately, Judge Williams emphasized that lower courts' *Alleyne* retroactivity analysis had been "permeated" by the "simply not true" belief that court findings of fact that increase minimum sentences *still* are limited to sentencing and do "'not constitute a new offense.'" Pet.App. 7a (Williams, J., concurring) (citation omitted). Judge Williams explained that the majority's analysis of *Alleyne* improperly focused on the wholly irrelevant conclusion "that findings based on the preponderance standard" may properly "be the basis of a valid *sentence*." *Id*; *see also* Pet.App. 5a (asserting that *Alleyne* did not hold that "findings on the preponderance standard are too unreliable in general to be the basis of a valid sentence").

Similarly, Judge Williams explained that the majority's argument that "'the judge still would have been entitled to sentence Crayton to 20 years in prison for distributing heroin after finding by a preponderance of the evidence that his product did kill Hedges'" is wrong because "being entitled to do something and being required to do something are two very different things." Pet.App. 15a (Williams, J., concurring). And she explained that the majority's assertion missed the point because the district court could have sentenced Crayton to 20 years without any finding whatsoever that death resulted; the harm was that she was *compelled* to enter a mandatory minimum based on a preponderance of the evidence even though she "clearly did not want to sentence Crayton so high." *Id.*

Instead, Judge Williams recognized that *Alleyne* is "a decision about . . . guilt" and what must be "proven beyond a reasonable doubt." *Id.* at 13a-14a. *Alleyne* established that when "statutes provide for different statutory ranges of punishment," those elements "are not the same offense but instead constitute two different offenses." *Id.* at 7a.

Judge Williams in turn explained how the majority's incorrect interpretation of *Alleyne* tainted its retroactivity analysis by masking the extent to which *Alleyne*'s holding is "implicit in the concept of ordered liberty." *Teague v. Lane*, 489 U.S. 288, 307 (1989) (internal quotation marks omitted).

Judge Williams engaged in a far-reaching analysis of this Court's retroactivity decisions both before and after *Teague*, ultimately concluding that "*Alleyne* meets [*Teague*'s] requirements." Pet.App. 10a (Williams, J., concurring). She explained that *Alleyne*'s decision about the fundamental elements of a crime that must be found beyond a reasonable doubt is akin to the landmark decision in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), which this Court not only found to be retroactive on collateral review but also has said would satisfy *Teague*'s standard. Pet.App. 9a-13a, 15a-20a (Williams, J., concurring). She concurred in the judgment only because this Court has not previously found a new rule of criminal procedure to meet *Teague*'s standard. *Id.* at 22a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit fundamentally misinterpreted this Court's decision in *Alleyne*. As Judge Williams explained, the majority erroneously treated *Alleyne* as addressing sentencing only, when in fact

the decision explains how the elements of a crime are defined. This fundamental misinterpretation led the Seventh Circuit, as it has other courts, to misconstrue the retroactivity of *Alleyne* as the sea change it really is under *Teague*.

Alleyne could not be clearer: "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury" and "found beyond a reasonable doubt." __ U.S. at __, 133 S. Ct. at 2155. Yet the Seventh Circuit relied on the same argument raised by the *dissent* in *Alleyne* to claim that *Alleyne* was not a watershed rule of constitutional procedure because the "the judge still would have been entitled to sentence Crayton to 20 years in prison . . . by a preponderance of the evidence." Pet.App. 5a. As *Alleyne* itself explained, that argument is "undoubtedly true" but also entirely "beside the point." __ U.S. at __, 133 S. Ct. at 2162. For "a finding of fact [that] alters the legally prescribed punishment so as to aggravate it . . . necessarily forms a constituent part of a *new offense* and *must be submitted to the jury*. It is no answer to say that the defendant could have received the same sentence with or without that fact." *Id.* (emphases added).

By ignoring this Court's direction completely, the Seventh Circuit exposed Crayton, and other criminal defendants in his situation, to plainly unconstitutional conviction of a more serious crime by a judge's preponderance-of-the-evidence factfinding. Few rights can be as fundamental as the right to be free from conviction unless the government proves "each element" of the crime beyond a reasonable doubt. *Id.* at 2161. That Crayton had the misfortune to have his direct appeal denied by the Court mere months

before *Alleyne* was granted should not prevent the Court from recognizing *Alleyne* as the watershed rule it is and applying it retroactively under *Teague*.

I. The Seventh Circuit Disregarded *Alleyne*'s Clear Teaching.

There can be no question that the Seventh Circuit misinterpreted *Alleyne* in the decision below. The majority recognized that *Alleyne* overruled *Harris v. United States*, 536 U.S. 545 (2002), and that the issue was whether "*Alleyne's* rule applies retroactively on collateral review." Pet.App. 1a-2a. But at that point its analysis went off the rails. The court pointed to other court cases refusing to apply *Alleyne* retroactively, *see* Pet.App. 3a-4a (citing cases), then concluded with little analysis "that the other circuits are correct" in rejecting retroactivity. *Id.*

The two reasons that the Seventh Circuit offered for its opinion are simply wrong. First, the court claimed that this Court's decision in *Schiro v. Summerlin*, 542 U.S. 348 (2004), suggests that *Alleyne* is not retroactive. *Id.* *Schiro* held that *Ring v. Arizona*, 536 U.S. 584 (2002), was not retroactive in holding that *Apprendi* required a jury—not a judge—to find additional facts that make a capital defendant death-eligible. The Seventh Circuit believed that even though the burden of persuasion in *Ring* remained unchanged (it was the constitutionally-required, beyond-a-reasonable-doubt standard at all times), the fact that a change in the identity of the factfinder was not retroactive necessarily means that a change in the burden of persuasion similarly was not retroactive. *Id.* at 4a.

That simply does not follow. *Schiro* explained that the reason for refusing to give procedural rules the same retroactive application as substantive rules is that they "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise" and termed this a "more speculative connection to innocence." 542 U.S. at 352. The issue in *Ring* and *Schiro*—the identity of the factfinder who makes the reasonable doubt determination—fits neatly into that characterization. A change in the identity of the factfinder who makes the reasonable doubt determination has no more than a "speculative connection to innocence." *Id.*

In sharp contrast, the burden of persuasion itself is fundamental to innocence; it is the very essence of what it means to be convicted of a crime. The reasonable doubt finding of fact reached by the judge in *Ring* and *Schiro* may have violated the Sixth Amendment jury right, but retroactivity was not implicated because it did not raise fundamental questions of innocence. In stark contrast, *Alleyne*'s finding does. Both Alleyne and Crayton were found guilty of an aggravated crime based on an additional fact found to a lower burden of proof. The Seventh Circuit's only answer was that *Apprendi* changed both identity of decision-maker and burden of persuasion but has not to date been held retroactive. Pet.App. 4 Of course, that is precisely the question the Seventh Circuit was asked to determine.

The Seventh Circuit's first error led to its second, a facially incorrect characterization of *Alleyne*. Consider the central error: the Seventh Circuit explained that "neither *Apprendi* nor *Alleyne* concluded that

findings on the preponderance standard are too unreliable in general to be the basis of a valid *sentence*." Pet.App. 4a-5a (emphasis added).

As Judge Williams recognized, there is nothing wrong with that statement as far as it goes. Pet.App. 13a (Williams, J., concurring). The trouble is that it is simply wrong to "characteriz[e] . . . *Alleyne* as a decision about *sentencing*, rather than *guilt*." *Id.* at 13a-14a (emphasis added). Indeed, *Alleyne* itself acknowledged that judges retain "broad sentencing discretion," but *only* when the judge exercises that discretion within the range of possible sentences already fully authorized by the jury's reasonable doubt determination. __ U.S. at __, 133 S. Ct. at 2163. As a result, the Seventh Circuit's assertion that "*Alleyne* did not . . . recognize a fundamental principle that sentences must rest on findings supported by proof beyond a reasonable doubt" is at best a highly misleading act of misdirection. Pet.App. 5a.

Far worse, that same act of misdirection underlies cases from other circuits on which the Seventh Circuit relied to reach its decision. *See, e.g.*, *United States v. Olvera*, 775 F.3d 726, 731 (5th Cir. 2015) (interpreting *Alleyne* and *Apprendi* as based on "'the imposition of a proper sentence rather than the determination of guilt or innocence'") (citation omitted); *Butterworth v. United States*, 775 F.3d 459, 466 (1st Cir. 2015) (same, noting that "'findings by federal judges . . . nonetheless are adequate to make reliable decisions about punishment'") (citation omitted).

The Seventh Circuit's incorrect characterization of *Alleyne* as about *sentencing*, rather than *guilt*, led it to repurpose the *Alleyne* dissent's rejected logic. Because it noted that "[j]udges routinely make find-

ings, based on a preponderance of the evidence, that dramatically affect the length of criminal sentences," the Seven Circuit believed that the fact that a judge could have sentenced Crayton to 20 years in prison regardless of what the jury found rendered the question of what the jury found irrelevant. Pet.App. 5a.

Judge Williams again nailed the distinction the majority elided, explaining that "being entitled to do something and being required to do something are two very different things" and noting the practical effect of the majority's error on the facts of this case, where the judge "clearly did not want to sentence Crayton so high, but she was *bound* to, based upon a finding by a preponderance of the evidence that death resulted." Pet.App. 15a (Williams, J., concurring) (emphasis in original). In fact, if the Seventh Circuit, or any court, applied the analysis it used in Crayton's case in a case on direct review, summary reversal would be warranted under Supreme Court Rule 16.1.

II. The Seventh Circuit's Clearly Erroneous Interpretation of *Alleyne* Caused It to Misunderstand the Watershed Significance of the Decision.

The Seventh Circuit's incorrect dismissal of *Alleyne* as nothing more than a sentencing decision caused it to fundamentally misapply this Court's retroactivity precedent. Under *Teague*, new procedural rules must be applied retroactively if such procedures are "implicit in the concept of ordered liberty." 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part) (internal quotation

marks omitted)). Rules meet this standard if they are "watershed rules of criminal procedure," meaning that they "'alter our understanding of the *bedrock procedural elements* that must be found.'" *Id.* (quoting *Mackey*, 401 U.S. at 693-94 (Harlan, J., concurring in part and dissenting in part) (emphasis in original)). As this Court has subsequently explained, a watershed rule is also identified by the fact that its infringement "'seriously diminish[es] the likelihood of obtaining an accurate conviction'" at the same time that it alters understanding of bedrock principles. *Tyler v. Cain*, 533 U.S. 656, 665 (2001).

The Seventh Circuit barely acknowledged these standards. Drawing on its incorrect analysis of *Alleyne*, it asserted that the decision "curtails legislatures' ability to restrict judicial discretion in sentencing" by requiring them to "submit the discretion-reducing facts to the jury under the reasonable-doubt standard." Pet.App. 5a. The court then asserted cryptically that "[t]hat principle is some distance from a rule that defendants are entitled to have all important facts resolved by the jury under the reasonable-doubt standard." *Id.* And the court concluded that because judges can "increase a sentence based on facts found on the preponderance standard," that *Alleyne* is "not so fundamental that it must apply retroactively on collateral review." *Id.*

In other words, the Seventh Circuit said that because *Alleyne* still allows judges to find facts by a preponderance standard in setting a criminal defendant's sentence *within* a range authorized by a jury verdict, *Alleyne*'s central holding forbidding factfinding by a preponderance of the evidence that *alters* that range is not a change in the "bedrock pro-

cedural elements" of criminal procedure. As already noted, the Seventh Circuit is far from unique in this error, which merely highlights the need for review by this Court. *See, e.g.*, *Olvera*, 775 F.3d at 731; *Butterworth*, 775 F.3d at 466.

Judge Williams again was exactly right in pointing out the constitutional deficiency of the majority's statement. She observed that she was "not sure what [the majority] means by the concept of 'important facts'" in light of *Alleyne*'s requirements, but noted that "if by 'important facts' [the majority] means 'facts that increase a statutory minimum or maximum,' it is wrong." Pet.App. 16a (Williams, J., concurring). It is only by misconstruing *Alleyne* as a sentencing decision instead of a decision about something as fundamental as the facts that must be found by a reasonable doubt standard that the Seventh Circuit could hope to insulate its decision from applying retroactively.

Judge Williams' concurrence provided a far more accurate analysis of the retroactivity issue. She correctly recognized that prior retroactivity decisions in this area have fallen into the same trap of viewing *Alleyne* and *Apprendi* as sentencing decisions only, rather than fundamental questions of what must be proved beyond a reasonable doubt to determine "a defendant's guilt of a particular offense." Pet.App. 8a (Williams, J., concurring) (citing examples). And she cogently explained that *Alleyne* bears striking similarities to the one case, *Gideon v. Wainwright*, that this Court has explained provided a watershed rule that *would* have been retroactive under *Teague* (if that case had been decided). *See Saffle v. Parks*,

494 U.S. 484, 495 (1990); *see also* Pet.App. 8a (Williams, J., concurring).

Judge Williams explained that the *Teague* watershed rule inquiry applies to cases "'implicating the fundamental fairness and accuracy of the criminal proceeding.'" *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). This means that a new rule must "seriously diminish the likelihood of obtaining an accurate conviction" and must "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (internal quotation marks omitted) (emphasis in original). She explained that *Alleyne* "meets these requirements" because the reasonable doubt standard "'plays a vital role in the American scheme of criminal procedure'" by operating as "'a prime instrument for reducing the risk of convictions resting on factual error.'" Pet.App. 10a (Williams, J., concurring) (quoting *Cage v. Louisiana*, 498 U.S. 39, 39-40 (1990) (citations omitted). And such bedrock cases as *In re Winship* teach that "[t]he reasonable-doubt standard implicates the fundamental fairness and accuracy of criminal proceedings because 'a person accused of a crime would be at a severe disadvantage . . . if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.'" 10a-11a (quoting 397 U.S. 358, 363 (1970)); *see also id.* at 11a ("the Supreme Court has said that the reasonable-doubt requirement is a basic protection 'without which a criminal trial cannot reliably serve its function'") (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993)).

And, as Judge Williams likewise explained, *Alleyne* is a bedrock procedural rule because it settled once and for all what constitutes an "element" of a crime that must be found beyond a reasonable doubt. Pet.App. 11a-12a (Williams, J., concurring). *Ivan V. v. City of New York*, 407 U.S. 203 (1972), and *Hankerson v. North Carolina*, 432 U.S. 233 (1977), *unanimously* made retroactive *In re Winship* and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), which established that proof beyond a reasonable doubt of every fact that constitutes a crime is required and that burden shifting of such elements to the defendant is constitutionally improper. In other words, cases that fundamentally instruct a court what must be proved to convict a criminal defendant of a crime should apply retroactively. In the same way, *Alleyne* conclusively demonstrates *what* facts constitute elements that are necessary to "the determination of guilt or innocence with respect to the offense of distribution of heroin that resulted in death," and therefore may not be found by a preponderance of the evidence only. Pet.App. 14a (Williams, J., concurring). Retroactivity should follow.

Nor is the fact that *Alleyne* came on the heels of *Apprendi* a barrier to retroactivity. As Judge Williams noted, the same objection could have been made as to *Gideon*, the "paradigmatic example" of a bedrock procedural rule. *See Gray v. Netherland*, 518 U.S. 152, 170 (1996); Pet.App. 16a (Williams, J., concurring). *Gideon* was merely the culmination of a long series of cases requiring Sixth Amendment counsel for different groups of individuals. *See* Pet.App. 16a-17a (Williams, J., concurring) (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938) (counsel for

indigent federal defendants); *Powell v. Alabama*, 287 U.S. 45 (1932) (counsel for indigent state defendants in certain circumstances); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (same for all state capital cases).

Indeed, Judge Williams explained that at least twenty-six Supreme Court decisions prior to *Gideon* discussed the extent to which the right to counsel attached in state prosecutions. *See* Pet.App. 17a n2 (citing *Moore v. Michigan*, 355 U.S. 155, 159 n.7 (1957)) (Williams, J., concurring). In other words, the retroactively-applicable *Gideon* was just the final, authoritative step that established the final rule from a long line of precedents. This background indicates that there is no requirement for a new procedural rule to spring fully grown and armed, like Athena from the head of Zeus, in order to be retroactively applicable under *Teague*. Instead, "*Gideon* merely clarified and extended the scope of a preexisting right because the right to counsel previously existed in federal prosecutions, special circumstances, and state inmates prosecuted for capital offenses." Pet.App. 19a (Williams, J., concurring).

As a result, "*Alleyne* is similar to *Gideon* in that it is the culminating case in a long-running debate regarding a fundamental right. *Gideon* settled the debate of when our Constitution requires that the government provide counsel to indigent defendants. *Alleyne* settled the debate of how a 'crime' is defined." Pet. App. 19a (Williams, J., concurring). Just as *Gideon*'s retroactivity was not altered by the fact that its analytical predecessors had not been found retroactive, so also *Alleyne* should be retroactive re-

gardless of the cases upon which it builds and to which it provides the capstone.

III. Judge Williams' Thoughtful Concurrence and the Underlying Facts Make this Case a Good Vehicle for Addressing *Alleyne*'s Retroactivity.

Judge Williams' thoughtful concurrence and the facts of this case make Crayton's petition a particularly good vehicle to address *Alleyne*'s retroactivity. First, the opinion below appears to be among the first in which any court has engaged in a reasoned analysis of the retroactivity of *Alleyne* rather than dismissing the issue in a relatively cursory fashion. As explained above, Judge Williams' insightful and careful consideration provides this Court with a much-needed evaluation of the retroactivity issue not present in other lower court decisions.

Second, the facts of this case bring the retroactivity issue into particularly stark relief. Crayton's sentencing judge stated on the record that she had "serious doubts about the wisdom, fairness and effectiveness of the statutory penalty in this case." Pet.App. 42a. The judge only imposed her sentence because she was compelled by the now-reversed *Harris* decision. She acknowledged the "clear disparities" in sentencing that the mandatory minimum created. Krugel "actually was the person that indisputably gave Nicole Hedges the heroin," yet was sentenced to probation. Pet.App. 35a. Crayton sold heroin only to Krugel, who in turn gave the heroin to the decedent, Hedges. Crayton never met Hedges or distributed anything to her.

As a result, there is not merely a theoretical constitutional issue at stake in this petition. Instead, Crayton was unquestionably punished according to a constitutionally deficient finding of fact by only a preponderance of the evidence, forcing Crayton's trial judge to punish him far more severely than she believed was proper. Pet.App. 42a; *see also* Pet.App. 15a (Williams, J., concurring) ("[The judge] clearly did not want to sentence Crayton so high, but she was *bound* to, based upon a finding by a preponderance of the evidence that death resulted.") (emphasis in original).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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