

No. 17-950

IN THE
Supreme Court of the United States

ROSS WILLIAM ULBRICHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**BRIEF OF DRUG POLICY ALLIANCE AND LAW
ENFORCEMENT ACTION PARTNERSHIP AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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**BRIEF OF DRUG POLICY ALLIANCE AND
LAW ENFORCEMENT ACTION
PARTNERSHIP AS AMICI CURIAE
IN SUPPORT OF PETITIONER**

The undersigned respectfully submit this amici curiae brief in support of the petition for a writ of certiorari.¹

INTERESTS OF AMICI CURIAE

The **Drug Policy Alliance** (“DPA”) leads the nation in promoting drug policies that are grounded in science, compassion, health, and human rights. DPA is a nonprofit organization governed by a board of directors who bring a wealth of public health, science, civil liberties, social justice, and criminal justice experience to the drug policy reform movement. DPA actively participates in the legislative process and seeks to roll back the excesses of the drug war, block harmful new initiatives, and promote sensible drug policy reforms.

The Law Enforcement Action Partnership (“LEAP”) is a nonprofit composed of police, prosecutors, judges, corrections officials, and other criminal justice professionals who seek to improve public

¹ No counsel for any party authored this brief in whole or in part, and no person other than amici or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties received notice of amici’s intent to file this brief more than ten days before the filing deadline pursuant to Rule 37(2)(a). Petitioner filed a blanket letter of consent with the Clerk’s Office, and respondent provided written consent to the filing of this amici brief in a letter dated January 23, 2018.

safety, promote alternatives to arrest and incarceration, address the root causes of crime, and heal police-community-relations through sensible changes to our criminal justice system.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case exemplifies the problems with judicial factfinding that the framers sought to prevent in passing the Sixth Amendment.

The district court sentenced petitioner Ross Ulbricht to life without parole, the harshest punishment our legal system allows short of death. That sentence depended on facts that were never found by the jury. The government only charged petitioner with drug-related offenses at trial, yet after the jury was discharged the government sought to convince the judge that petitioner distributed a total quantity of drugs far in excess of the amount found by the jury, that he could be held responsible for six alleged overdose deaths, and that he committed other uncharged misconduct. The district court accepted the government's claims – despite serious factual disputes over the reliability of that evidence – and imposed a sentence that would have been substantively unreasonable based on the facts found by the jury.

The Sixth Amendment safeguards a criminal defendant's right to trial by jury. That fundamental right requires not only that a jury find every element of a charged crime, but also any fact that increases the punishment for that crime. *Blakely v. Washington*, 542 U.S. 296, 301 (2004). As explained in detail in the petition, the Sixth Amendment guarantee thus forbids judges from finding the facts necessary to support an otherwise unreasonable sentence.

But that is precisely what occurred here. The district court relied on its own conclusions about fact-intensive issues in sentencing petitioner to life without

parole. Given the nature and complexity of those issues – allegations including overdose deaths and drug quantities – it is far from clear that petitioner should be held responsible for the deaths at all. He has the right to have a jury of his peers decide.

As a first-time offender convicted of drug crimes, petitioner’s guideline range would have resulted in a maximum 30-year sentence based on the facts found by the jury. Given petitioner’s youth, that guidelines-sentence would have allowed for the possibility of redemption. Instead, the facts found by the judge resulted in a guidelines “range” of life imprisonment, and the court opted to impose that sentence. Because petitioner’s sentence would have been unreasonable absent the facts found by the district court, the imposition of that sentence violated the Sixth Amendment.

This case squarely presents an important Sixth Amendment issue and provides a compelling example of the dangers of judicial factfinding. This Court should grant the petition for a writ of certiorari.

ARGUMENT

This case presents a particularly egregious example of judicial factfinding for at least two reasons. First, the extent of the factfinding here was significant and involved complex questions about causation for drug-related deaths that are better left to juries. Second, the sheer magnitude of the sentence imposed for drug crimes renders this case notable and worthy of review.

I. This Case Highlights the Problems with Judicial Factfinding Because Petitioner’s Sentence Rests on the Resolution of Complex and Difficult Factual Issues.

In deciding to impose a sentence of life without parole on petitioner, the district court heard extensive evidence and made findings of fact on complex questions. Most relevant here, the court determined that six alleged overdose deaths could be properly attributed to petitioner. But the court’s erroneous analysis in that regard – and the complexity of societal factors leading to overdose deaths – illustrate why the framers designed the Sixth Amendment to leave such factual questions to a jury.

1. At petitioner’s sentencing, the district court allowed into evidence information about six overdose deaths that were allegedly connected to drugs purchased on the Silk Road. C.A. App. 1474-76. Petitioner opposed consideration of the overdose deaths and submitted a report by defense expert Mark L. Taff, M.D., concluding that the information was insufficient to demonstrate a direct link between drug purchases from Silk Road and the deaths. C.A. App. 904. The government provided no rebuttal to Dr. Taff’s report.

The district court nonetheless appeared to conclude that petitioner should be held responsible for the six overdose deaths. The court rejected any need to show that the deaths were connected to petitioner with a “reasonable degree of medical certainty,” and instead merely asked “whether there is a connection between the purchase of drugs on Silk Road and [the]

death' in the sense that the sale of those drugs created a risk of death." App. 90a.

Applying that lax theory of causation, the district court attributed several deaths to petitioner despite their significant attenuation from the charged conduct. For example, in considering the death of Preston B., who ingested a drug given to him by a friend and subsequently jumped from a balcony, the court found, "by a preponderance of the evidence, that Preston's death is properly associated with Silk Road and that his death was related to a purchase of drugs from Silk Road. Would he have died on that evening if Silk Road had never existed? To suggest so is pure speculation. We know that he died after having ingested drugs available to him through Silk Road." C.A. App. 1478. The court similarly concluded that the death of Alejandro N., who obtained a drug from a friend who had bought it from a dealer who, in turn, may have obtained it from the Silk Road, was properly attributable to petitioner. In doing so, the court noted, "Would the dealer have obtained [the drug] elsewhere in the absence of getting it from Silk Road? It would be pure speculation to think so." C.A. App. 1479-80.

Attributing those the six deaths to Silk Road, however, is itself speculation. The actual causes of overdose are incredibly complex. More than 64,000 Americans were deemed to have died from a drug overdose in 2016 – more than from gunshot wounds or car

crashes – making overdoses the leading cause of accidental death in the United States.² Yet many of these deaths are a result of an interrelated set of circumstances rather than drug use alone.

Factors that directly contribute to an overdose death include the user’s tolerance, use of multiple drugs, circumstances of consumption, and familiarity with the substance. Consider deaths linked to opioid use: a full 67% of heroin overdose deaths and 77% of prescription opioid overdose deaths are caused by the mixing of opioids with other drugs or alcohol.³

A number of societal factors indirectly contribute to overdose deaths as well; stigmatization of drug users, for instance, makes seeking and obtaining treatment and other health services more difficult. None of these factors can be controlled by the person who supplied the drugs, nor are these factors addressed by

² National Institute on Drug Abuse, *Overdose Death Rates*, <https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates> (last updated Sept. 2017); Centers for Disease Control and Prevention, *Prescription Opioid Overdose Data*, <http://www.cdc.gov/drugoverdose/data/overdose.html> (last updated Aug. 1, 2017); American Society of Addiction Medicine, *Opioid Addiction 2016 Facts & Figures* (2016), available at <http://www.asam.org/docs/default-source/advocacy/opioid-addiction-disease-facts-figures.pdf>; Centers for Disease Control and Prevention, *Vital Statistics Rapid Release, Provisional Overdose Death Counts*, National Center for Health Statistics, <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm> (last updated Jan. 12, 2018).

³ Kenneth Anderson, *The Polydrug Poisoning Epidemic: Drug Mixing and Opioid Overdose* (presentation given at the Drug Policy Reform Conference, Arlington, VA, Nov. 21, 2015), available at <http://www.hamsnetwork.org/polydrug.pdf>.

criminalizing drug sellers or traffickers.⁴ And many of these factors were implicated in this case. *See, e.g.*, C.A. App. 1480 (one of the decedents had pneumonia and multiple drugs in his system at the time of his death); C.A. App. 1484-85 (another decedent appears to have struggled with drugs in secrecy for several years and “asked no one for help because he wanted no one to know”).

The extent and complexity of the district court’s factual inquiries here highlight why such questions must be resolved by a jury when they subject a criminal defendant to a higher sentence. For that reason, this case provides a particularly good vehicle for this Court to resolve the Sixth Amendment issue presented.

2. When the complex array of causes for drug deaths is ignored, so are the interventions that have the potential to address them. Lives could have been saved if better legal and public health protections were in place, including: 1) educating people on how to prevent, recognize and respond to an overdose; 2) limits on prescriptions for opioid pain relievers; 3) increased access to substance use disorder treatment, including Medication-Assisted Treatment; 4) expanded access to and training for administering naloxone, a drug used to reverse opioid overdose; 5) ensured access to integrated prevention services, including access to sterile injection equipment and supervised consumption services; 6) the establishment of Good Samaritan or 911 drug immunity laws which encourage people experiencing overdose and those at the scene of an overdose to seek medical help; and 7)

⁴ *Id.*

allowing people to test what is in their drugs so that they are aware of what they are consuming and how potent it is.

a. Nationally, more overdose deaths are caused by prescription drugs than all illegal drugs combined.⁵ Opioid use disorder is driving the overdose epidemic in the United States.⁶ This is largely the result of opioid prescriptions quadrupling in number of since 1999.⁷ In response, many states have taken efforts to reduce access to prescription opioids. As this has happened, studies indicate that opioid-dependent individuals have switched from prescription painkillers to heroin, which is relatively less expensive and easier to access.⁸ Many of the heroin overdose deaths could

⁵ National Institute on Drug Abuse, *National Overdose Deaths from Select Prescription and Illicit Drugs*, https://www.drugabuse.gov/sites/default/files/overdose_data_1999-2015.xls (last updated Sept. 2017) (showing that prescription drugs were the underlying cause of death in 57% of national overdose deaths in 2015).

⁶ Centers for Disease Control and Prevention, Nat'l Ctr for Health Statistics, *Number and Age-Adjusted Rates of Drug-poisoning Deaths Involving Opioid Analgesics and Heroin: United States, 1999–2014* (2015), available at http://www.cdc.gov/nchs/data/health_policy/AADR_drug_poisoning_involving_OA_Heroin_US_2000-2014.pdf.

⁷ Rose A. Rudd et al., *Increases in Drug and Opioid Overdose Deaths – United States, 2000-2014*, 64 *Morbidity and Mortality Weekly Rpt.* 1378 (Jan. 1, 2016), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6450a3.htm>.

⁸ Margaret Warner, et al., Centers for Disease Control and Prevention, Nat'l Ctr for Health Statistics, *Trends in Drug-poisoning Deaths Involving Opioid Analgesics and Heroin: United States, 1999–2012* (Dec. 2014), available at http://www.cdc.gov/nchs/data/hestat/drug_poisoning/drug_poisoning_deaths_1999-

be prevented if safer prescribing techniques were used for opiate drugs consistent with recommendations issued by the Centers for Disease Control and Prevention.⁹

b. Studies show that for persons already dependent on opioids or other drugs, several public health interventions can prevent fatal drug overdoses.¹⁰ Substance use treatment, including Medication-Assisted Treatment for opioid dependency, has been demonstrated to be a safe and effective method of reducing the risk of overdose.¹¹ Similarly, integrated preven-

2012.pdf; K. Michelle Peavy et al., “Hooked on” *Prescription-Type Opiates Prior to Using Heroin: Results from a Survey of Syringe Exchange Clients*, *J. Psychoactive Drugs* 44(3), 259-65 (Aug. 2012); Robin A. Pollini et al., *Problematic Use of Prescription-Type Opioids Prior to Heroin Use Among Young Heroin Injectors*, 2 *Subst. Abuse Rehabil.* 173 (Oct. 2011), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3536052/pdf/sar-2-173.pdf> (“high proportion of young heroin IDUs [injection drug users] reported problematic prescription-type opioid use prior to initiating heroin use”); Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths – United States, 2010-2015*, 65 *Morbidity and Mortality Weekly Rpt.* 1445 (Dec. 30, 2016), available at <https://www.cdc.gov/mmwr/volumes/65/wr/mm655051e1.htm> (“data have demonstrated that nonmedical use of prescription opioids is a significant risk factor for heroin use”); American Society of Addiction Medicine, *supra* note 2 (“Four in five new heroin users started out misusing prescription painkillers.”).

⁹ See Rudd et al., *supra* note 7.

¹⁰ *Id.*

¹¹ See *id.*; Nora D. Volkow et al., *Medication-Assisted Therapies – Tackling Opioid-Overdose Epidemic*, 370 *N. Engl. J. Med.*

tion services, like syringe exchange programs and supervised injection facilities,¹² have been effective at preventing overdoses directly through safer drug use education and indirectly by helping participants access substance use treatment.¹³

Access to naloxone is also an essential tool for preventing overdoses from becoming fatal. Naloxone is a FDA-approved drug with no potential for abuse.¹⁴ It

2063 (May 2014), available at <http://idhdp.com/media/362598/nejm-%E2%80%94.pdf>.

¹² Approximately 100 supervised injection facilities, or “safe injection sites” as they are sometimes called, operate in over 65 cities globally. According to a report from the San Francisco Department of Public Health, none of these facilities have reported an overdose death and many have transferred thousands of clients into detox services. San Francisco Dep’t of Public Health, *San Francisco Safe Injection Services Task Force 2017 Final Report 4* (Sept. 2017), available at <https://www.sfdph.org/dph/files/SISTaskforce/SIS-Task-Force-Final-Report-10-20-17.pdf>.

¹³ See, e.g., Brandon D.L. Marshall et al., *Reduction in Overdose Mortality After the Opening of North America’s First Medically Supervised Safer Injecting Facility*, 377 *The Lancet* 9775, 1429-1437 (April 2011), available at <http://www.communityinsite.ca/injfacility.pdf>; Rudd et al., *supra* note 7; Corey Davis et al., The Network for Public Health Law, *Legal Interventions to Reduce Overdose Mortality: Naloxone Access and Overdose and Good Samaritan Laws*, (last updated July 2017), available at https://www.networkforphl.org/_asset/qz5pvn/network-naloxone-10-4.pdf; *Drug Overdose Immunity and Good Samaritan Laws*, National Conference of State Legislatures (June 5, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/drug-overdose-immunity-good-samaritan-laws.aspx>.

¹⁴ See Alexander R. Bazazi, et al., *Preventing Opiate Overdose Deaths: Examining Objections to Take-Home Naloxone*, 21 *J. Health Care for the Poor & Underserved* 1108 (Dec. 2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC>

is designed to counteract the deadly effects of an opioid overdose and can be easily administered by non-medical persons, such as family and friends of the overdose victim.¹⁵

c. In addition to public health safeguards, legal protections can also dramatically reduce incidents of fatal overdose. Good Samaritan or 911 drug immunity laws foster willingness to report drug emergencies, as does public education about the protections those laws provide in order for overdose witnesses to seek emergency medical interventions without fear of legal repercussions. Most overdose deaths occur one to three hours after the victim has initially ingested or injected drugs.¹⁶ The chance of surviving an overdose, like that of surviving a heart attack, depends greatly on how fast one receives medical assistance. But unlike witnesses to heart attacks, who rarely think twice

3008773/; *Drug Overdose Immunity and Good Samaritan Laws*, *supra* note 13; Davis et al., *supra* note 13; Rudd et al., *supra* note 7.

¹⁵ *Id.*

¹⁶ Karl A. Sporer, *Acute Heroin Overdose*, 130 *Ann. Intern. Med.* 584 (1999), available at <http://moravek.org/ovisnosti/an-nintmed-01.htm>; Drug Policy Alliance, *Opioid Overdose: Addressing the Growing Problem of Preventable Deaths* (Feb. 2016), available at http://www.drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet_%20Opioid%20Overdose%20-%20Addressing%20a%20National%20Problem%20%28Feb.%202016%29.pdf; Peter J. Davidson et al., *Witnessing Heroin-Related Overdoses: The Experiences of Young Injectors in San Francisco*, 97 *Addiction* 1511 (Dec. 2002).

about calling 911, witnesses to an overdose often hesitate to call for help out of fear of police involvement.¹⁷ Without these legal protections in place, witnesses fear prosecution for use or possession of an illicit substance and do not call for emergency medical treatment which could otherwise save the life of an overdose victim.

d. Drug checking is another effective tool for reducing overdose. Increasingly, one of the risks of opioid use is that people who use these substances will unknowingly acquire a drug that has been adulterated with far more potent synthetic opioids, such as fentanyl.¹⁸

While pharmaceutical fentanyl is a synthetic opioid approved for treating severe pain,¹⁹ illicitly manufactured fentanyl is often added to heroin to cut costs

¹⁷ *Id.*; K.C. Ochoa et al., *Overdosing Among Young Injection Drug Users in San Francisco*, 26 *Addict Behav.* 453 (May 2001); Robin A. Pollini et al., *Response to Overdose Among Injection Drug Users*, 31 *Am. J. Prev. Med.* 261 (Sept. 2006); Melissa Tracy et al., *Circumstances of Witnessed Drug Overdose in New York City*, 79 *Drug Alcohol Depend.* 181 (Aug. 1, 2005).

¹⁸ Drug Enforcement Administration, *DEA Issues Nationwide Alert on Fentanyl as Threat to Health and Public Safety* (March 18, 2015), <http://www.dea.gov/divisions/hq/2015/hq031815.shtml>.

¹⁹ D. Adam Algren et al., *Fentanyl-Associated Fatalities Among Illicit Drug Users in Wayne County, Michigan (July 2005-May 2006)*, 9 *J. Med. Toxicology* 106 (March 2013), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3576499/pdf/13181_2012_Article_285.pdf.

while increasing potency.²⁰ The number of overdose deaths involving synthetic opioids, excluding methadone but including fentanyl, increased by 72% from 2014 to 2015.²¹ Roughly 9,500 people died from overdoses involving synthetic opioids other than methadone and heroin in 2015.²² Provisional findings from 2016 indicate that drug deaths involving fentanyl more than doubled from 2015 to 2016.²³

While most common in heroin, there have been cases of counterfeit Xanax and Oxycodone tablets adulterated with fentanyl.²⁴ Adulterated substances

²⁰ See, e.g., Megan Kennedy, *Dayton Men Federally Charged in Dealing Drugs to Users Who Died as Result*, WDTN.com (Jan. 5, 2016), <http://wdtn.com/2016/01/05/dayton-men-federally-charged-in-dealing-drugs-to-users-who-died-as-result/>; Heather Yakin, *Sullivan County Man Indicted on Federal Drug Charges for Heroin*, Times Herald-Record (Dec. 18, 2015, 11:41 AM), <http://www.recordonline.com/article/20151218/NEWS/151219396>; James O'Malley, *Philly Man to Serve up to 25 Years in Buckingham Teen's OD Death*, The Intelligencer (Dec. 18, 2015), http://www.theintell.com/news/local/philly-man-to-serve-up-to-years-in-buckingham-teen/article_e8803c6c-a5d9-11e5-a1eb-bb32659a37c4.html.

²¹ Centers for Disease Control and Prevention, *Synthetic Opioid Data*, <https://www.cdc.gov/drugoverdose/data/fentanyl.html> (last updated Dec. 16, 2016).

²² Rose A. Rudd et al., *supra* note 8, at 1450, Table 2.

²³ Deaths involving “synthetic opioids,” a category dominated by illicit fentanyl increased from 9,580 in 2015 to 20,145 in 2016. National Institute on Drug Abuse, *National Overdose Deaths*, *supra* note 5; National Institute on Drug Abuse, *Overdose Death Rates*, *supra* note 2 (showing 20,145 overdose deaths were attributable to synthetic opioids other than methadone in 2016).

²⁴ Claire McNeill, *Pinellas Sheriff: Nine Overdose Deaths in 2016 Linked to Counterfeit Xanax*, Tampa Bay Times (March 21,

lead to higher numbers of hospitalizations and fatal overdoses.²⁵ Technology exists to test heroin and opioid products for adulterants, but it has so far been widely unavailable at a public level in the U.S. (aside from a mail-in service run by Ecstasydata.org). Making these services available in the context of a community outreach service or, at the very least, as a pilot project or research study, would lower the number of deaths and hospitalizations and also allow for real-time tracking of local drug trends.

Because fatal overdoses are primarily the result of a multitude of complex medical and public policy failings, and not drug use alone or the provision of a drug alone, it was particularly problematic for a single person – the judge – to determine that petitioner should be held responsible for the alleged overdose deaths. That complicated question would be better left to a jury of twelve of petitioner’s peers, who possess a broader range of experience and are better equipped to decide what responsibility, if any, petitioner bore in those deaths.

II. The Court Imposed an Unusually Harsh Sentence on a First-Time Offender Based on Its Own Factual Finding in Violation of the Sixth Amendment.

The district court imposed a sentence of life without parole on a young, first-time offender. That sentence would have been substantively unreasonable

2016), <http://www.tampabay.com/news/publicsafety/pinellas-sheriff-nine-overdose-deaths-in-2016-linked-to-counterfeit-xanax/2270250>.

²⁵ Rudd et al., *supra* note 7.

absent the judicially found facts. And as discussed below, the sentence is particularly harsh. It falls well outside the norm for sentences for federal drug crimes, and goes against the evidence-based trend away from ineffective lengthy sentences. This severe sentence based on facts never found by the jury further highlights the need for this Court's review.

1. Life sentences are exceedingly rare in the federal criminal justice system, particularly for individuals, like petitioner, with no prior criminal record.²⁶ “Virtually all offenders convicted of a federal crime are released from prison eventually and return to society”²⁷ This is particularly true for people convicted of drug offenses, including drug trafficking.

In 2013, life sentences were “imposed in less than one-third of one percent of all [federal] drug trafficking cases.”²⁸ Nationally, only 2% of all persons sentenced to life in prison in the federal system were convicted of drug offenses.²⁹ Life sentences are typically reserved for persons who committed violent crimes. As of 2013, over 90% of all life sentences in the United

²⁶ Glenn R. Schmitt & Hyun J. Konfrst, United States Sentencing Commission, *Life Sentences in the Federal System* (Feb. 2015), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf.

²⁷ *Id.* at 1.

²⁸ *Id.* at 4.

²⁹ Ashley Nellis & Jean Chung, The Sentencing Project, *Life Goes On: The Historic Rise in Life Sentences in America* 7 (2013), available at http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf.

States were imposed on persons convicted of murder, sexual assault, rape, aggravated assault, robbery, or kidnapping.³⁰

In addition, typical sentences for drug convictions are significantly shorter than the life term imposed on petitioner. According to the United States Sentencing Commission, the typical sentence for a federal drug conviction is 66 months, or 5.5 years, in prison.³¹ In state prisons and jails – which control almost 91% of the total United States incarcerated population³² – the average drug trafficking sentence is only 49 months, or 4.1 years.³³

Moreover, very few federal defendants are sentenced to life terms when shorter terms are available under the sentencing guidelines. Only 17 out of 153 people, or 11% , sentenced to life in the federal system in 2013 were convicted of crimes for which the sentencing guidelines offered a minimum term that was

³⁰ *Id.*

³¹ United States Sentencing Commission, *Quick Facts, Drug Trafficking Offenses* (June 2017), <https://www.ussc.gov/research/quick-facts/drug-trafficking> (federal drug trafficking sentences vary by drug type, ranging from an average of 26 months or 2.2 years in prison for marijuana to an average of 87 months or 7.25 years for methamphetamine trafficking convictions).

³² Danielle Kaeble & Lauren Glaze, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Stat., *Correctional Populations in the United States, 2015*, NCJ 249513, Dec. 2016, at 19, available at <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>.

³³ Michael H. Tonry, *Sentencing Fragments: Penal Reform in America, 1975-2025* 29 (2016).

shorter than life in prison.³⁴ In other words, 89% of people sentenced to life in federal prison were sentenced according to the guideline minimum.³⁵

Petitioner's life sentence is far harsher than typical sentences for drug trafficking. It also falls outside the range recommended by guidelines if the facts found by the district court were omitted. And given petitioner's youth and absence of criminal history, the life sentence is particularly shocking. Absent the judicially found facts in this case, petitioner's sentence would have been reversible error.

2. In addition to being far harsher than typical punishments for drug trafficking, petitioner's sentence runs against the trend – based on extensive research and evidence – away from harsh federal drug sentences. After decades of severe federal sentencing guidelines for drug offenses that have not resulted in positive public policy impacts, such as reduced drug use or drug-related activity, and high costs borne by society and individuals, lawmakers are moving to reform harsh sentences for federal drug convictions.

a. For nearly fifty years the failed war on drugs has demonstrated that draconian sentences do not deter drug law violations. Since Richard Nixon declared the war on drugs in 1971, millions of people have been imprisoned. The number of people incarcerated for drug-related offenses rose from 40,900 in 1980 to 469,545 in 2015, and sentence lengths increased from an average of 22 months in 1986 to 62 months by

³⁴ Schmitt & Konfrst, *supra* note 26, at 9.

³⁵ *Id.*

2004.³⁶ If longer sentences actually deterred drug crime, these increased punishments should have deterred further illicit drug-related conduct.

Yet those increased sentences have done nothing to reduce drug use. To the contrary, drug use rates in the United States have steadily remained among the highest in the world.³⁷ Despite the increase in sentences and sentence severity for drug-related crimes, the rate of illicit drug use in the U.S. continued to increase, from 6.7% in 1990, the height of the war on drugs, to 9.2% in 2012.³⁸ And the recidivism rate for persons convicted of drug offenses between 2005 and 2010 was 76.9% within five years of release.³⁹

³⁶ The Sentencing Project, *Fact Sheet: Trends in U.S. Corrections* 3 (June 2017), available at <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

³⁷ Recovery Brands, *Drug Use in America vs. Europe in 10 Maps*, <http://recoverybrands.com/drugs-in-america-vs-europe/> (last visited Jan. 30, 2018); Eduardo Porter, *Numbers Tell of Failure in Drug War*, N.Y. Times (July 3, 2012), http://www.nytimes.com/2012/07/04/business/in-rethinking-the-war-on-drugs-start-with-the-numbers.html?_r=0; Serena Dai, *A Chart That Says the War on Drugs Isn't Working*, The Atlantic (Oct. 12, 2012), <https://www.theatlantic.com/national/archive/2012/10/chart-says-war-drugs-isnt-working/322592/>.

³⁸ Office of National Drug Control Policy, *National Drug Control Strategy: Data Supplement 2014* 24 (2014), available at https://obamawhitehouse.archives.gov/sites/default/files/ondcp/policy-and-research/ndcs_data_supplement_2014.pdf.

³⁹ Matthew R. Durose et al., U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Stat., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, NCJ 244205, April 2014, available at <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986>.

These dramatic incarceration rates have given many social science researchers the opportunity to evaluate whether imprisonment effectively deters criminal activities. Research has consistently shown that incarceration, especially lengthy sentences, does not deter crime.⁴⁰ Increased arrests or increased severity of criminal punishment for drug-related offenses do not, in fact, result in less use (demand) or fewer sales (supply).⁴¹

Rather than deterring criminal conduct, numerous studies have found that incarcerating people who sell drugs results in a “replacement effect,” in which the market responds to the demand for drugs by replacing drug sellers sent to prison with either new recruits or by increased drug selling by actors already

⁴⁰ See, e.g., Donald Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders*, 48 *Criminology* 357 (May 2010) (study found that variations in prison and probation time have no detectable effect on rates of re-arrest and suggests that, at least among those facing drug-related charges, incarceration and supervision seem not to deter subsequent criminal behavior); Samuel R. Friedman et al., *Drug Arrests and Injection Drug Deterrence*, 101 *Am. J. Pub. Health* 344, 347 (Feb. 2011), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3020200/pdf/344.pdf> (“Changes in hard drug arrest rates did not predict changes in [injection drug use] population rates. These results are inconsistent with criminal deterrence theory and raise questions about whether arresting people for hard drug use contributes to public health.”)

⁴¹ Green & Winik, *supra* note 40; Friedman et al., *supra* note 40, at 347.

in the market.⁴² As one study concluded, the main effect of imprisoning people who sell drugs “is merely to open the market for another seller.”⁴³

Even if a slight deterrent effect of incarceration did exist, studies show that any such benefit would be obtained by a shorter sentence. Indeed, research shows that harsher sentences, including life terms, are no more effective than shorter sentences at deterring illegal activities.⁴⁴

In sum, the criminalization and incarceration policies which comprise “the war on drugs” have sent millions of people to jail and prison for drug offenses, but have failed to deter illicit drug-related activities within the country.

b. In accordance with that realization, lawmakers have begun to turn away from harsh sentences for drug crimes. The United States Sentencing Commission, with support from Democrats and Republicans in Congress, “voted unanimously to reduce sentencing

⁴² Roger K. Przybylski, Colorado Criminal Justice Reform Coalition, *Correctional and Sentencing Reform for Drug Offenders 2* (Sept. 2009), available at http://www.ccjrc.org/wp-content/uploads/2016/02/Correctional_and_Sentencing_Reform_for_Drug_Offenders.pdf.

⁴³ Anne Morrison Piehl et al., *Right-Sizing Justice: A Cost Benefit Analysis of Imprisonment in Three States*, Center for Civic Innovation at the Manhattan Institute, Civic Report No. 8, Sept. 1999, at 13, available at https://www.manhattan-institute.org/pdf/cr_08.pdf.

⁴⁴ See, e.g., Ihekwoaba D. Onwudiwe et al., *Deterrence Theory*, in *Encyclopedia of Prisons & Correctional Facilities* 236 (Mary Bosworth ed., 2005), available at <https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf>.

guidelines for most federal drug trafficking offenses.”⁴⁵ This change, which took effect in November of 2014, reduced most sentences for drug trafficking convictions by an average of 11 months.⁴⁶ Similarly, in 2015, a bipartisan sentencing reform bill was introduced in Congress.⁴⁷ A similar bipartisan bill was introduced again in 2017.⁴⁸ And outside of the United States, many countries, including many of our allies in Europe, do not have life in prison without parole or “whole-life sentences” for any offense.⁴⁹ The countries that do have whole life sentences use them sparingly.⁵⁰

c. The trend toward evidence-based practices and away from draconian sentences is well recognized. Indeed, as the Second Circuit stated in its opinion below, “[r]easonable people may and do disagree about

⁴⁵ United States Sentencing Commission, *Policy Profile: 2014 Reduction of Drug Sentences* (2015), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/profile_2014_drug_amendment.pdf.

⁴⁶ *Id.*

⁴⁷ Sentencing Reform and Corrections Act of 2015, S.2123, 114th Cong. (2015).

⁴⁸ Sentencing Reform and Corrections Act of 2017, S.1917, 115th Cong. (2017).

⁴⁹ Nellis & Chung, *supra* note 29, at 16-17.

⁵⁰ See, e.g., Ministry of Justice, *Offender Management Statistics Quarterly, England and Wales*, July 27, 2017, at 1, 3, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/633154/offender-managemen-statistics-bulletin-q1-2017.pdf (as of June 2017, only 59 out of 85,863 (0.07%) persons in prison in England and Wales are serving whole-life sentences).

the social utility of harsh sentences for the distribution of controlled substances,” and in light of this disagreement the court acknowledged that it is “very possible that, at some future point, we will come to regard these policies as tragic mistakes and adopt less punitive and more effective methods of reducing the incidence and costs of drug use.” App. 93a.

With that larger context in mind, the injustice of petitioner’s sentence becomes more apparent. Although petitioner’s severe sentence is unlikely to deter future drug crimes, the judge seemed to determine a harsh sentence was necessary for deterrence, citing the fact that petitioner’s “sentencing [was] being closely watched.” C.A. App.1328. Despite the fact that lawmakers are increasingly turning away from such ineffective sentences, petitioner nonetheless must spend the rest of his life in prison.⁵¹ And that draconian sentence hinges solely on facts found by a single

⁵¹ Indeed, if petitioner’s sentence were an effective general deterrent, then it should have prevented other darknet websites. Yet a recent article estimates that there are thousands of these websites, several hundred of which facilitate the sale of illicit drugs. See Daniel Moore & Thomas Rid, *Cryptopolitik and the Darknet*, 58 *Survival* 7 (Feb. 2016), available at <http://dx.doi.org/10.1080/00396338.2016.1142085>. Dozens of these darknet websites are self-professed Silk Road copycats, such as Silk Road 2.0 and Silk Road 3.0. See, e.g., Cyrus Farivar, *Copycat Site Mourns Silk Road Verdict, Blames Ulbricht’s Bad OpSec*, *Ars Technica* (Feb. 5, 2015, 10:33 AM), <http://arstechnica.com/tech-policy/2015/02/copycat-site-mourns-silk-road-verdict-blames-ulbrichts-bad-opsec/>; Joseph Cox, *Dark Web Drug Markets Are Desperately Clinging to the Silk Road Brand*, *Motherboard* (Oct. 22, 2015, 6:30 AM), <http://motherboard.vice.com/read/dark-web-drug-markets-are-desperately-clinging-to-the-silk-road-brand>; Silk Road Drugs, *University Helped FBI Take Down Silk Road*

judge rather than a jury of petitioner's peers. The gravity of that error warrants this Court's review.

CONCLUSION

For the reasons stated above, amici respectfully ask this Court to grant the petition for a writ of certiorari.

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