No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RONALD ERIC ARY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court should grant review to determine whether a Texas deferred adjudication can qualify as a "prior conviction" for the purposes of the sentencing enhancement in 18 U.S.C. § 2252(b)(1)?

II. Whether all facts – including the fact of a prior conviction – that increase a defendant's statutory maximum must be pleaded in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt?

PARTIES

Ronald Eric Ary is the petitioner; he was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ronald Eric Ary respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the sentence was entered June 14, 2018, and is provided in the Appendix to the Petition and is reported at *United States v. Ary*, 892 F.3d 787 (5th Cir. 2018). [Appx. A]. The district court entered judgment on January 6, 2017 sentencing the defendant, which judgment is attached as an Appendix. [Appx. B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on June 14, 2018. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

Title 18 U.S.C. § 2252(b)(1) provides in relevant part:

> (B)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a *prior conviction* under this chapter . . . *or under the laws of any state* relating to aggravated sexual abuse, or abusive sexual conduct involving a minor or ward . . . such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years. (*Emphasis added*).

The Texas Code of Criminal Procedure, Article 42.12 §5(a) specifically provides for a process of accepting a guilty plea but deferring an adjudication of guilt pending a defendant's participation in community Supervision:

> . . . the judge may, after receiving a plea of guilty or no contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt.

The Fifth Amendment to the United States Constitution provides:

> Criminal actions--Provisions concerning--Due process of law and just compensation clauses.
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> Rights of the accused.
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On August 16, 2016, Ronald Eric Ary (Ary) was indicted for one count of distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2). (ROA.17-18).[1] On September 21, 2016, Ary entered a guilty plea without a written plea agreement (ROA.39-46). and stipulated to the following facts as a part of his factual resume:

> 1. On or about July 18, 2016, in the Fort Worth Division of the Northern District of Texas, Ronald Eric Ary, the defendant, knowingly distributed a visual depiction using any means or facility of interstate and foreign commerce, and the producing of such visual depictions involved the use of a minor engaged in sexually explicit conduct, and the visual depictions are of such conduct. Specifically, Ary used the Internet and the Kik Instant Messaging application to distribute the following visual depiction of a minor engaged in sexually explicit conduct as defined in 18 U.S.C. § 2256: a video file depicting an infant next to an adult male's penis; the adult male ejaculates into the infant's mouth.
>
> 2. On July 22, 2016, FBI agents conducted a search of Ary's cell phone which was located in Erath County, Texas and which was seized pursuant to a warrant. Ary agreed to speak with FBI Agent Chris Thompson, Ary acknowledged that he used the Kik Instant Messaging application to trade child pornography.
>
> 3. A review of the Kik Instant Messaging application showed that Ary had communicated with an individual on or about July 18, 2016, during which he sent the individual the video file described in paragraph one. Ary sent the video from his phone using the Kik Instant Messaging application and the Internet while he was at home in Dublin, Texas.
>
> 4. Ary agrees that the Internet and Kik Instant Messaging application are means and facilities of interstate and foreign commerce. He also stipulates that he knew that the video file he distributed depicted a real minor engaged in sexually explicit conduct.
>
> 5. To commit the offense, Ary used his Apple I phone 4 cellular telephone.

(ROA.40-41).

After the guilty plea, the probation officer prepared a pre-sentence investigation report (PSR). Applying U.S.S.G. §2G2.2, the probation officer found that Ary's total offense level, after a reduction for three levels for timely acceptance of responsibility, was a level 42. (PSR, ¶¶ 39-53) The probation officer found that Ary's criminal history

[1] For the convenience of the Court and the parties, the Petitioner is citing to the record on appeal in support of the statement of facts.

score was 4, resulting in a category III. (PAR ¶59). The advisory guideline imprisonment range was 360 months to Life. (PSR ¶ 105). According to the charge set forth in the indictment, the statutory maximum term of imprisonment Ary could receive was 240 months (PSR ¶ 105). However, the PSR set forth that if the court found the defendant had a prior sex offense involving a minor, the minimum term of imprisonment was increased to 15 years and the maximum term of imprisonment was increased to 40 years. (PSR ¶¶ 104,106).

Ary filed an objection to the PSR raising the argument that his prior deferred adjudications for Indecency with a Child[2], Texas Penal Code §21.11 and Aggravated Sexual Assault , Texas Penal Code § 22.021 do not qualify as "prior convictions for the purposes of the sentencing enhancement under 18 U.S.C. § 2252(b)(1). (Defendant's Objections to PSR, Objection One).

Ary further objected that in order to be subjected to the sentencing enhancement in 18 U.S.C. § 2252(b)(1) the prior convictions must be alleged in the indictment. The basis of this argument is that the Supreme Court decision in *Almendarez-Torres*, 523 U.S. 224 (1998) should be reversed and that Ary's maximum sentence should be limited to twenty years because there was no sentencing enhancement alleged in the indictment. (Defendant's Objection to PSR, Objection Three).

The probation officer filed an addendum rejecting Ary's objections. (PSR Addendum).

At sentencing, the district court overruled Ary's objections (ROA.90) and sentenced him to 360 months imprisonment and a term of supervised release of Life.

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[2] The Texas offense of indecency with a child younger than 17 years of age, regardless whether the deferred adjudication qualifies as a prior conviction can not count as a predicate offense for the enhancement, because it allows for a conviction based on contact with an individual who is 16 years of age. *See Esquival-Quintana v. Sessions*, 137 F.3d 1562, 1568-73 (2017). Therefore, the remaining issue is whether the deferred adjudication for the offense of Aggravated Sexual Assault of a child younger than 14 years old is a "prior conviction" for the purposes of the enhance.

(ROA.97-98). Ary raised these objections on direct appeal, and on June 14, 2018, the Court of Appeals for the Fifth Circuit affirmed Ary's sentence. *United States v. Ary*, 892 F.3d 787 (5th Cir. 2018). [Appx. A]

REASONS FOR GRANTING THE WRIT

I. This Court should grant review to determine whether a Texas deferred adjudication can qualify as a "prior conviction" for the purposes of the sentencing enhancement in 18 U.S.C. § 2252(b)(1), particularly when the Court of Appeals ignored Texas law which specifically provides that Mr. Ary's prior deferred adjudication was not a conviction.

The sentencing enhancement provisions of 18 U.S.C. § 2252(b)(1) applies when "such person has a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor . . . ." 18 U.S.C. § 2252(b)(1). Ary contends that under Texas and Federal law, neither of the two deferred adjudications relied on by the district court to enhance his sentence were "prior convictions" because they both were deferred adjudications. *See* (ROA.102-114).

A. Standard of Review and Preservation of the Issue Below

The issue of whether a prior state deferred adjudication is a "prior conviction" for the purposes of a sentencing enhancement is a question of law reviewed *de novo*. *See United States v. Mills*, 843 F.3d 210, 213 (5th Cir. 2016). Mr. Ary raised this issue in his objections to the PSR, and it was overruled by the district court at the sentencing hearing. (Defendant's Objections to the PSR, Objection One; ROA.90-91). Mr. Ary raised this same issue in the Fifth Circuit Court of Appeals, and that court rejected Ary's argument and affirmed the sentence. [Appx A].

B. Applicable Law and Discussion

The sentencing enhancement provisions of 18 U.S.C. § 2252(b)(1) applies when "such person has a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor . . . ." 18 U.S.C. § 2252(b)(1). Thus, the statute specifically requires that the defendant have a prior conviction under the laws of the State in question.

The Texas Code of Criminal Procedure, specifically provides for a process of accepting a guilty plea but deferring an adjudication of guilt pending a defendant's participation in community Supervision:

> . . . the judge may, after receiving a plea of guilty or no contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt.

Texas Code of Criminal Procedure Article 42.12 §5(a).

That is, of course, exactly what happened with Ary's deferred adjudication for the offense of Indecency with a Child and the offense of Aggravated Sexual Assault. (ROA.103,109).

This Court has spoken clearly on this subject in *Deal v. United States*, 508 U.S. 129 (1993). In the context of what constitute a "subsequent conviction" for the sentencing enhancement to a 20-year maximum in 18 U.S.C. § 924(c), the Supreme Court stated:

> we think it unambiguous that "conviction" refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction. A judgment of conviction includes both the adjudication of guilt and the sentence.

Deal v. United States, 508 U.S. at 132.

Under the unambiguous language of Texas Code of Criminal Procedure Article 42.12 §5(a), there is no question that in a Texas deferred adjudication, the adjudication of guilt and the conviction are not entered.

Appellant recognizes that prior to 1997, the Texas Penal Code specifically prohibited the use of a deferred adjudications for the purposes of a sentencing enhancements under state law. *See Scott v. Texas*, 55 S. W. 3d 593, 597 (Tex. Crim. App. 2001). However, in 1997, the statute was amended to allow limited use of deferred adjudications for certain sex offender cases for sentencing enhancement purposes. *Id.* at 596. Accordingly, since the 1997 amendment a deferred adjudication in certain sex offenses, such as Aggravated Sexual Assault, could be treated as a conviction for the limited purposes of the mandatory life sentence in Texas Penal Code §12.42(c)(2)(B). The Fifth Circuit erroneously relied heavily on this provision to justify its opinion affirming Mr. Ary's sentence. *See United States v. Ary*, 892 F.3d at 790.

However, that exception that allows the State to treat a deferred adjudication like a conviction for a very limited purpose does not alter the straightforward language of *Deal.* In the context of whether a disposition qualifies as a "prior conviction" for the purpose of a statutory sentencing enhancement in a Federal Statute, "judgment of conviction includes both the adjudication of guilt and the sentence." *Deal v. United States*, 508 U.S. at 132.

More importantly, it appears that under state law, the exception created by the Texas legislature in 1997, did not apply to Ary's conviction, which was for an offense that occurred in 1993. (ROA.108). *See Scott v. State,* 55 S.W. 3d at 596, n.6 ; *quoting* Acts 1997, 75th Leg., ch. 667, §7. ("An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose."). Therefore, the Fifth Circuit misapplied the law in its opinion by finding that under Texas law, Mr. Ary's deferred adjudications qualified as prior convictions.[3]

[3] Mr. Ary also has a deferred adjudication for a 1998 indecency with a child younger than 17 offense. However, this prior offense, even if it can be counted as a prior conviction, can not qualify as a predicate offense. *See Esquival-Quintana v. Sessions*, 137 F.3d at 1568-73.

Moreover, despite the Fifth Circuit's decision in Mr. Ary's case, there exists ample Fifth Circuit precedent in addition to *Deal* which mandated the conclusion that a deferred adjudication is not a conviction for these purposes. *See United States v. Dotson*, 555 F.2d 134, 135 (5th Cir. 1977)(Upholding the district court's dismissal of a false statement on a firearms application where the defendant had received a deferred adjudication); and *United States v. Garcia* 917 F.2d 1370, 1375 (5th Cir. 1990)("Under Texas law, successful probation of a deferred adjudication is not deemed to be a conviction.")

In *Dotson*, the Court of Appeals specifically pointed out that, "no oral adjudication was ever made by the district judge." *United States v. Dotson*, 555 F.2d at 135. "No adjudication of guilt was ever made." *Id*.

"Because there was no conviction of the prior offense at the time the defendant purchased the firearm he had not previously been convicted of a felony and therefore made no false statement on his application for the firearm, nor did he receive the firearm unlawfully . . ." *Id*.

A case relied upon by the government and the Fifth Circuit below was *United States v. Cisneros*, 112 F.3d 1272, 1280-1281 (5th Cir. 1997), in which a panel of this Court found that a Texas deferred adjudication qualified as a prior conviction for the purposes of the sentencing enhancements set forth in 21 U.S.C. § 841(b)(1)(a). The problem with *Cisneros* is that the Court applied Sentencing Guideline language to the question of whether a deferred adjudication qualified as a prior conviction for a statutory sentencing enhancement. The Court in *Cisneros* seemed to be unaware that they were applying guideline language to a non-guideline, statutory enhancement, and actually ignored binding precedent from a prior published opinion, that is, *Dotson*, and also controlling Supreme Court precedent in *Deal.* Likewise, the Court's reliance in *Cisneros* on *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), was

misplaced. There is nothing in the record in *Dickerson* which suggests that the Court was dealing with a deferred adjudication. The record simply showed a guilty plea and a probation. Of course, in the present case, there is no dispute that both of the prior cases relied upon by the district court were deferred adjudications. *Dickerson* simply does not address the issue that is now before this Court.

The bottom line is that there simply was not a finding of guilt, a guilty verdict or an adjudication guilt which would allow the court to treat either of Ary's deferred adjudications as prior convictions for the purposes of a statutory sentencing enhancement. In its opinion affirming Mr. Ary's sentence, the district court misapplied Texas law to conclude that Mr. Ary's deferred adjudications qualified as "prior convictions".

II. This Court should grant review to finally resolve the issue of whether all facts – including the fact of a prior conviction – that increase a defendant's statutory maximum must be pleaded in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt.

Title 18 U.S.C. § 2251(b)(1) punishes distribution of child pornography with a term of imprisonment of not less than five years and not more than 20 years. However, that same statute provides for a statutory enhancement to not less than 15 years and not more than 40 if "such person has a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor." 18 U.S.C. § 2252(b)(1). The district court determined that Ary was subject to enhancement under § 2252(b)(1). (ROA.90-91). Mr. Ary challenged the enhancement both in the district court and on appeal. He argued that ranges of punishment, and specifically the enhancement to the 15-to-40 year range of imprisonment, provided for

in § 2252(b)(1) define separate offenses, and that, because his indictment did not allege a prior conviction, it charged only the 0-to-20 year range of punishment, and failed to invoke the 15-to-40 year sentencing enhancement in 18 U.S.C. § 2252(b)(1). Because Ary's sentence exceeds the 20-year maximum under § 2252(b)(1), he contends that it violates due process.

A. Standard of Review and Preservation of this issue below.

Ary challenges his sentence on the ground that it violates due process. The legality of a criminal sentence *de novo*. *United States v. Valencia-Gonzales*, 172 F.3d 344, 345 (5th Cir. 1999). Ary did raise the issue below in the district court, and the court overruled his objection. (Defendant's Objections to the PSR, PSR Addendum, ROA.90.91). Mr. Ary also raised and preserved this issue in the court of appeals. *See United States v. Ary*, 892 F.3d 787

B. This Court Has Suggested it Will Re-consider its Decision in *Almanderaz-Torres*.

In *Almendarez-Torres*, this Court held that the enhanced penalties in 8 U.S.C. § 1326(b) are sentencing factors, rather than elements of separate offenses. 523 U.S. at 235. Moreover, and of particular relevance to this appeal, this Court further ruled that this construction of § 1326(b) does not violate due process; and held that a prior conviction need not be treated as an element of the offense, even if it increases the statutory maximum penalty. *Id.* at 239–47.

Just two years after *Almendarez-Torres* was decided, the Court appeared to cast doubt on it. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Court announced that, under the Sixth Amendment, facts that increase the maximum sentence must be proved to the jury beyond a reasonable doubt. 530 U.S. at 490. The

Court acknowledged that this general principle conflicted with the specific holding in *Almendarez-Torres* that a prior conviction need not be treated as an element under § 1326(b). The Court found it "arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply" to prior convictions as well. *Id.* at 489. But because *Apprendi* did not involve a prior conviction, the Court considered it unnecessary to revisit *Almendarez-Torres*. *Apprendi*, 530 U.S. at 490. Instead, the Court framed its holding to avoid expressly overruling the earlier case. *Id.* at 489.

This Court has continued to question *Almendarez-Torres*'s reasoning and suggest that the Court would be willing to revisit its holding. *See Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013); *see also Descamps v. United States*, 133 S. Ct. 2276, 2295 (2013) (Thomas, J., concurring) (stating that *Almendarez-Torres* should be overturned).

In *Alleyne*, the Court applied *Apprendi*'s rule to mandatory minimum sentences, holding that any fact that produces a higher sentencing range—not just a sentence above the mandatory maximum—must be proved to a jury beyond a reasonable doubt. 133 S. Ct. at 2162–63. In its opinion, the Court apparently recognized that *Almendarez-Torres*'s holding remains subject to Fifth and Sixth Amendment attack. *Alleyne* characterized *Almendarez-Torres* as a "narrow exception to the general rule" that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt. *Id.* at 2160 n.1. But because the parties in *Alleyne* did not challenge *Almendarez-Torres*, the Court said that it would "not revisit it for purposes of [its] decision today." *Id*.

The Court's reasoning nevertheless strengthens a future challenge to *Almendarez-Torres*'s recidivism exception. *Alleyne* traced the treatment of the relationship between crime and punishment, beginning in the Eighteenth Century, repeatedly noting how "[the] linkage of facts with particular sentence ranges … reflects the intimate connection between crime and punishment." *Id.* at 2159 ("[i]f a fact was

by law essential to the penalty, it was an element of the offense"); *see id.* (historically, crimes were defined as "the whole of the wrong to which the law affixes [ ] punishment … include[ing] any fact that annexes a higher degree of punishment") (internal quotation marks and citations omitted); *id.* at 2160 ("the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted") (internal quotation marks and citation omitted). The Court concluded that, because "the whole of the" crime and its punishment cannot be separated, the elements of a crime must include any facts that increase the penalty. The Court recognized no limitations or exceptions to this principle.

Alleyne's emphasis that the elements of a crime include the "whole" of the facts for which a defendant is punished seriously undercuts the view, expressed in *Almendarez-Torres*, that recidivism is different from other sentencing facts. *See Almendarez-Torres*, 523 U.S. at 243–44; *see also Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") *Apprendi* tried to explain this difference by pointing out that, unlike other facts, recidivism "'does not relate to the commission of the offense' itself[.]" 530 U.S. at 496 (quoting *Almendarez-Torres*, 523 U.S. at 230). But the Court did not appear committed to that distinction; it acknowledged that *Almendarez-Torres* might have been "incorrectly decided." *Id.* at 489; *see also Shepard v. United States*, 544 U.S. 13, 26 n.5 (2005) (acknowledging that Court's holding in that case undermined *Almendarez-Torres*); *Cunningham v. California*, 549 U.S. 270, 291 n.14 (2007) (rejecting invitation to distinguish between "facts concerning the offense, where *Apprendi* would apply, and facts [like recidivism] concerning the offender, where it would not," because "*Apprendi* itself … leaves no room for the bifurcated approach").

Three concurring justices in *Alleyne* provide additional reason to believe that the Court would be willing to revisit *Almendarez-Torres*. *See Alleyne*, 133 S. Ct. at 2164

(Sotomayor, Ginsburg, Kagan, J.J., concurring). Those justices noted that the viability of the Sixth Amendment principle set forth in *Apprendi* was initially subject to some doubt, and some justices believed the Court "might retreat" from it. *Id.* at 2165. Instead, *Apprendi*'s rule "has become even more firmly rooted in the Court's Sixth Amendment jurisprudence." *Id.* Reversal of precedent is warranted when "the reasoning of [that precedent] has been thoroughly undermined by intervening decisions." *Id.* at 2166. The view of Justices Sotomayor, Ginsburg, and Kagan that *Apprendi* is now firmly rooted precedent that must be given full effect, combined with the view of Justice Thomas that *Almendarez-Torres* was wrongly decided, suggests that the Court may be ready to grant certiorari on this question.

If *Apprendi*, its progeny, and, most recently, *Alleyne*, undermine *Almendarez-Torres*, as Ary argues, his sentence exceeds the statutory maximum. The indictment alleged only the elements of the 18 U.S.C. §2252(a)(2) offense; it did not allege a prior conviction. Because Ary was charged only with the § 2252(a)(2) offense, his maximum punishment should have been limited to 20 years' imprisonment.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of *certiorari*.

Respectfully submitted this 12th day of September, 2018.

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