No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES GIBSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether the Petitioner's sentence violated his Sixth Amendment right to a jury trial when the district court imposed a minimum mandatory sentence of life imprisonment based on a finding that the Petitioner had been previously convicted of two or more felony drug offenses – a finding that was not found beyond a reasonable doubt by the jury (i.e., the Petitioner requests the Court to reconsider its holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

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2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, JAMES GIBSON, requests the Court to issue a writ of certiorari to review the judgment/order of the Eleventh Circuit Court of Appeals entered in this case on July 17, 2018. (A-3).[1]

D. CITATION TO ORDER BELOW

The order below was not reported.

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the final judgment of the Eleventh Circuit Court of Appeals.

F. CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

G. STATEMENT OF THE CASE

The Petitioner was charged in an indictment with the following two counts: (1) conspiracy to distribute and possession with intent to distribute more than 5 kilograms of cocaine and more than 50 grams of cocaine base (21 U.S.C. §§ 841(b)(1)(A)(ii),

[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

(b)(1)(A)(iii), and 846) and (2) possession with intent to distribute more than 500 grams of cocaine (21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(ii)). The Petitioner was tried jointly with his brothers – Codefendants Leondray Gibson and Sidney Gibson. Prior to trial, the Government filed a 21 U.S.C. § 851 enhancement notice alleging that the Petitioner has two or more prior convictions for felony drug offenses. (A-43).

The trial commenced on August 9, 2010, and concluded on August 16, 2010. At the conclusion of the trial, the jury found the Petitioner guilty as charged for both counts. (A-40).[2] Notably, during the trial, the jury was *not* asked to find beyond a reasonable doubt whether the Petitioner had, in fact, been previously convicted of two or more felony drug offenses (i.e., the jury's verdict makes no finding regarding any prior convictions).

Sentencing was conducted on November 22, 2010. The district court sentenced the Petitioner to life imprisonment for count 1 and 360 months' imprisonment for count 2. (A-33). The Eleventh Circuit Court of Appeals subsequently affirmed the convictions and sentences. *See Gibson v. State*, 708 F.3d 1256 (11th Cir. 2013).

Following the direct appeal, the Petitioner timely filed a motion pursuant to 28 U.S.C. § 2255. The Petitioner raised several claims in the motion, including a claim that his sentence violates the Sixth Amendment. On June 12, 2017, the magistrate judge issued a report and recommendation recommending that this claim be denied. (A-8). Thereafter, the district court entered an order adopting the report and

[2] The jury found Codefendant Sidney Gibson guilty as charged of both counts and Codefendant Leondray Gibson guilty as charged of count 1.

recommendation. (A-6).

The Petitioner then filed an application for a certificate of appealability in the Eleventh Circuit Court of Appeals. On July 17, 2018, a single circuit judge denied a certificate of appealability on the Petitioner's § 2255 claim. (A-3). In the order, the judge stated the following:

> In *Almendarez-Torres v. United States*, the Supreme Court held that prior convictions are not an "element" that must be found by a jury. 523 U.S. 224, 226-27 (1998). In *Alleyne* [*v. United States*, 570 U.S. 99 (2013)], the Supreme Court noted that *Almendarez-Torres* excepted prior convictions from the requirement that a jury must make a finding of fact to impose a mandatory minimum, and stated that it was not revisiting *Almendarez-Torres* at that time. *Alleyne*, 570 U.S. at 111. This Court has stated that:
>
> > We recognize that there is some tension between *Almendarez-Torres* on the one hand and *Alleyne* and *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000),] on the other. However, we are not free to do what the Supreme Court declined to do in *Alleyne*, which is overrule *Almendarez-Torres*. As we have said before, we are bound to follow *Almendarez-Torres* unless and until the Supreme Court itself overrules that decision.
>
> *United States v. Harris*, 741 F.3d 1245, 1250 (11th Cir. 20l4) (quotation omitted). The Supreme Court has not yet overruled *Almendarez-Torre*s.
>
> Here, Mr. Gibson's case is squarely foreclosed by this Court's precedent in Harris. *See Harris*, 741 F.3d at 1250.

(A-4).

H. REASON FOR GRANTING THE WRIT

The question presented is important and has a potential impact on numerous criminal prosecutions nationwide.

This case provides the Court with an opportunity to reconsider whether a jury must find the existence of a criminal defendant's prior conviction before the prior conviction can be used to increase the defendant's sentence beyond the otherwise applicable statutory maximum.

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Court held that 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. In the instant case, the Petitioner's sentence was increased due to facts/elements not proven beyond a reasonable doubt to the jury. The jury was never asked to determine whether the Petitioner had previously been convicted of a felony drug offense. However, at sentencing, district court found that the Petitioner had been previously convicted of two or more felony drug offenses. Pursuant to this finding, the Petitioner was sentenced to a minimum mandatory sentence of life imprisonment for count 1. The Petitioner submits that his sentence for count 1 violates his constitutional right to a jury trial. But for the finding by the district court that the Petitioner had been previously convicted of two or more felony drug offenses, the district court would have had discretion to impose a sentence of less than life imprisonment.

The judicial factfinding at issue in the Petitioner's case concerns recidivism. In

Almendarez-Torres v. United States, 523 U.S. 224 (1998), the Court held that the prior aggravated felony conviction enhancement prescribed in 8 U.S.C. § 1326(b) was not an element of the offense but rather a sentencing factor. The Court discerned no constitutional problem with allowing the petitioner's sentence to be increased from a maximum of two years to a maximum of twenty years based on the petitioner's prior aggravated felony conviction, despite the fact that the prior conviction had not been charged in the indictment.

The Petitioner prays the Court to reconsider its holding in *Almendarez-Torres*. As Justice Scalia pointed out in his dissenting opinion in *Almendarez-Torres*, "there is no rational basis for making recidivism an exception" to the general rule that any fact altering the maximum penalty for a crime must be proved to a jury beyond a reasonable doubt. *Almendarez-Torres*, 523 U.S. at 258 (Scalia, J., dissenting).

The validity of the holding in *Almendarez-Torres* was called into question by the Court's opinion in *Apprendi*. *Apprendi* confirmed the general Sixth Amendment rule that facts increasing the quantum of punishment that a defendant faces must be found by a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490. Although *Apprendi* did not overrule *Almendarez-Torres*, the Court made no secret that it was retreating from the broader constitutional foundations of *Almendarez-Torres*:

> Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant

> rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

Apprendi, 530 U.S. at 489-90; *see also id.* at 487 ("*Almendarez-Torres* represents at best an exceptional departure from the historic practice that we have described.").

Notably, the vote in *Almendarez-Torres* was five-four, with Justice Thomas voting with the majority. In his concurring opinion in *Apprendi*, Justice Thomas acknowledged the fallacy of the holding in *Almendarez-Torres*, stating that "one of the chief errors of *Almendarez-Torres* – an error to which I succumbed – was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence." *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring). The proper analysis, Justice Thomas continued, was instead "the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment . . . it is an element." *Id.* at 521. Thus, explained Justice Thomas, "it is evident why the fact of a prior conviction is an element under a recidivism statute." *Id.*

In *Shepard v. United States*, 544 U.S. 13 (2005), the Court further called into question the holding of *Almendarez-Torres*. In *Shepard*, the Court ruled that in determining whether a prior conviction qualified as a predicate felony for the Armed Career Criminal Act (hereinafter "ACCA"), 18 U.S.C. § 924(e), when the statute of conviction is sufficiently broad to include both qualifying and non-qualifying offenses, a sentencing court "is generally limited to examining the statutory definition [of the prior offense of conviction], charging document, written plea agreement, transcript of

plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16. The *Shepard* opinion comes very close to overruling *Almendarez-Torres*, but stops just short. Justice Souter wrote for a plurality of four, and Justice Thomas concurred in the result. Justice Souter reasoned that recent "[d]evelopments in the law . . . provide a further reason to adhere to the demanding requirement that any sentence under the ACCA rest on a showing that a prior conviction 'necessarily' involved . . . facts equating to generic burglary." *Shepard*, 544 U.S. at 24. Therefore, Justice Souter reasoned that *Almendarez-Torres* does not help the Government: "While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to . . . *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." *Id.* Justice Souter acknowledged that the Court was heading down the path of receding from *Almendarez-Torres*:

> The dissent charges that our decision may portend the extension of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to proof of prior convictions, a move which (if it should occur) "surely will do no favors for future defendants in Shepard's shoes." According to the dissent, the Government, bearing the burden of proving the defendant's prior burglaries to the jury, would then have the right to introduce evidence of those burglaries at trial, and so threaten severe prejudice to the defendant. It is up to the future to show whether the dissent is good prophesy, but the dissent's apprehensiveness can be resolved right now, for if the dissent turns out to be right that *Apprendi* will reach further, any defendant who feels that the risk of prejudice is too high can waive the right to have a jury decide questions about his prior convictions.

Shepard, 544 U.S. at 26 n.5.

After *Shepard*, the Petitioner submits several members of the Court have a "serious constitutional doubt" about the continuing viability of *Almendarez-Torres*. Justice Thomas goes further in his *Shepard* concurrence, writing that "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided":

> *Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. *See* 523 U.S. at 248-49 (SCALIA, J., joined by STEVENS, SOUTER, and GINSBURG, JJ., dissenting); *Apprendi*, *supra*, at 520-21 (THOMAS, J., concurring). The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements." *Harris v. United States*, 536 U.S. 545, 581-82 (2002) (THOMAS, J., dissenting).

Shepard, 544 U.S. at 27-28 (Thomas, J., concurring). Accordingly, after *Apprendi* – and now *Shepard* – there exists no justification to exempt prior convictions from the Sixth Amendment.

Finally, in *Alleyne v. United States*, 570 U.S. 99 (2013), the Court took an additional step in its Sixth Amendment jurisprudence. In *Alleyne*, the Court reconsidered its prior decision in *Harris v. United States*, 536 U.S. 545 (2002), in which the Court "held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment." *Alleyne*, 570 U.S. at 103. The *Alleyne* Court overruled *Harris* and decided that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and

found beyond a reasonable doubt . . . [and i]t follows, then, that any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Id*. In light of *Alleyne*, the Petitioner submits that it is now ripe for the Court to reconsider its holding in *Almendarez-Torres*

Accordingly, based on the foregoing, the Petitioner requests the Court to consider *Almendarez-Torres*' continuing viability. The Petitioner prays the Court to grant the petition in this case in order to address this important issue.

I. CONCLUSION

The Petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully Submitted,

/s/ Michael Ufferman

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