No. 18-_____

IN THE
SUPREME COURT OF THE UNITED STATES

NELSON FIGUEROA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Court has made clear that, with one (major) exception, the Fifth and Sixth Amendments to the U.S. Constitution require that facts that increase the statutory range of punishment must be charged in the indictment and proved to the jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 115-66, 133 S. Ct. 2151 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 488, 120 S. Ct. 2348 (2000). Application of that rule to statutory ranges for incarceration has remained steadfast. What has appeared to waiver is support for application of the rule to the Federal Sentencing Guidelines.

The Court later recognized that the U.S. Constitution required the government to prove the "truth of every accusation" against a defendant "which the law makes essential to the punishment." *Blakely v. Washington*, 542 U.S. 296, 301-02, 124 S. Ct. 2531 (2004). Jurists interpreted the *Blakely* approach as requiring a jury to find beyond a reasonable doubt the conduct used to set or increase a defendant's sentence in structured sentencing regimes such as the Guidelines. See, e.g., *United States v. Bell*, 808 F.3d 926, 927 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc). A year later, the Court concluded that the same Sixth Amendment principles noted in *Blakely* applied to the Guidelines. *United States v. Booker*, 543 U.S. 220, 243-44, 125 S. Ct. 738 (2005) (Stevens, J., joined by Scalia, Souter, Thomas, and Ginsburg, JJ.). But rather than applying the *Apprendi* rule to the Guidelines, the Court declared the Guidelines "advisory" in an attempt to avoid offending those same amendments. *Id.* at 245-46, 260-61 (Breyer, J., joined by Rehnquist, C.J., and O'Connor, Kennedy, and Ginsburg, JJ.).

Unfortunately, the remedial opinion in *Booker* was no remedy at all. The Court has noted that the Guidelines operate as law. They are the lodestone for federal sentencing and that remain the overwhelming source for and driving force behind establishing incarceration time and end up being the final determiner of the sentence in all but the rarest cases. Because of this reality, jurists and academics across the country have concluded that, as a practical matter, sentencing is right back where it started before *Booker*. See, e.g. *United States v. Henry*, 472 F.3d 910, 919 (D.C. Cir. 2007) (Kavanaugh, J., concurring).

Separately, justices have expressed support for elimination of the exception to the *Apprendi/Alleyne* rule when it comes to the "fact of prior conviction." Due to the number of federal defendants that appear after having at least one prior conviction, as a practical matter, the rule nearly swallows the rule. Moreover, justices have expressed that no logical reason exists for such an enormous exception to the Sixth Amendment.

The first question for the Court is, in light of the Guidelines' development into the de facto range of punishment in all but a very small percentage of cases, whether the rule of *Apprendi* must apply to the Guidelines to comport with the constitutional protections of due process and jury trial. The second question for the Court is whether *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998), was wrongly decided and must be overruled.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Nelson Figueroa respectfully petitions the Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The U.S. Court of Appeals for the Sixth Circuit affirmed the district court's sentence. *United States v. Nelson Figueroa*, No. 17-4058/4124 (6th Cir., Sep. 14, 2018). Pet.App. at 1a. The district court had sentenced Figueroa to serve a term of 192 months. *United States v. Nelson Figueroa*, No. 1:16-cr-00081 (N.D. Ohio, Oct. 12, 2017). Pet.App. at 11a.

STATEMENT OF THE BASIS FOR JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231, as the government had charged Figueroa with criminal offenses against the laws of the United States, namely 13 acts of using a communication facility for the commission of a felony in violation of 21 U.S.C. § 843.

The Sixth Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), as the district court entered a final judgment order, from which Figueroa timely appealed.

This Court has jurisdiction under 28 U.S.C. § 1254(1), as the Sixth Circuit rendered a final decision, affirming the district court, and because Figueroa is filing this petition within 90 days of that order. See Sup. Ct. R. 13.1, 13.3, 29.2.

RELEVANT CONSTITUTIONAL PROVISIONS

> No person shall * * * be deprived of life, liberty, or property without due process of law * * *.

U.S. Const., amend. V.

> In all criminal prosecutions, the accused shall enjoy to right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * and to be informed of the nature and cause of the accusation * * *.

U.S. Const., amend. VI.

STATEMENT OF THE CASE

The Court has made clear that, with one exception, the Fifth and Sixth Amendments to the U.S. Constitution require that facts that increase the statutory range of punishment must be charged in the indictment and proved to the jury beyond a reasonable doubt (or knowingly admitted by the defendant). *Alleyne v. United States*, 133 S. Ct. 2151, 2154, 186 L.Ed.2d 314 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10, 490, 120 S. Ct. 2348 (2000). The rule's exception—the "fact of prior conviction"—appears to have been born out of bad timing. The *Apprendi* decision followed on the heals of *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215 (1999), and only one year before *Jones*, the Court had held that recidivism is not an element of an offense that must be charged in an indictment. *Almendarez-Torres v. United States*, 523 U.S. 224, 247, 118 S. Ct. 1219 (1998).

Even from the date of the *Apprendi* decision itself, the Court appeared to be on a trajectory toward applying the same principles of *Apprendi* to the Federal Sentencing Guidelines. See *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring) (stating that any aggravating fact that "is by law a basis for imposing or increasing punishment" should be subject to the *Apprendi* rule);

id. at 544 (O'Connor, J., dissenting) (concluding that Thomas' then-view appeared to advocate for application of the rule to the Guidelines). And although it did so in a case that did not involve the Guidelines, the Court later recognized that the Constitution required the government to prove the "truth of every accusation" against a defendant "which the law makes essential to the punishment." *Blakely v. Washington*, 542 U.S. 296, 301-02, 124 S. Ct. 2531 (2004). Jurists interpreted the *Blakely* approach as requiring a jury to find beyond a reasonable doubt the conduct used to set or increase a defendant's sentence in structured sentencing regimes such as the Guidelines. See, e.g., *United States v. Bell*, 808 F.3d 926, 927 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc).

Unfortunately, the remedial opinion in *United States v. Booker,* 543 U.S. 220, 125 S. Ct. 738 (2005) did not remedy the constitutional conflict, as the Guidelines have remained the overwhelming source for and driving force behind setting the parameters of prison time for federal defendants and end up being the final determiner of the sentence in all but the rarest cases. The Guidelines are law and the "lodestone for sentencing." *Peugh v. United States*, 569 U.S. 530, 544, 133 S. Ct. 2072 (2013). Sentences remain anchored to the Guidelines and are set in accordance with the Guidelines in all but a small percentage of cases. *Molina-Martinez v. United States*, 133 S. Ct. 1338, 1346, 194 L. Ed. 2d 444 (2016) (citing several courses noting that in 80 percent of cases, the sentence imposed is within the guidelines or below the guidelines as a result of a government motion). Because of this reality, jurists and academics across the country have concluded that, as a practical matter, sentencing is right back where it started before *Booker.* See, e.g. *United States v. Henry*, 472 F.3d 910, 919 (D.C. Cir. 2007) (Kavanaugh, J., concurring). Consequently, the same reasoning behind the original *Apprendi* decision shows that its rule must

apply with equal force to the Guidelines in order for those Guidelines to be true to the Fifth and Sixth Amendment.

1. Against that backdrop, Figueroa pleaded guilty to 13 charges of illegal use of the mail (mailing proceeds of cocaine sales) without a plea agreement with the government.

2. Applying the U.S. Sentencing Guidelines, the district court set the total offense level at 28 as a result of drug quantity and a two-level reduction for acceptance of responsibility. The presentence investigation report assessed Figueroa nine criminal history points as a result of three prior sentences, including two prior federal cases, resulting in application of Criminal History Category IV. Thus, the recommended advisory guidelines range for incarceration was 110 to 137 months.

3. The government sought a sentence of 96 months. The district court imposed an aggregate sentence of 192 months, representing an upward variance of 55 months from the top of the guidelines range.

4. Figueroa remains in the custody of the U.S. Bureau of Prisons at Federal Correctional Institution Coleman Low in Coleman, Florida under a term of 204 months of incarceration (which includes a 12-month consecutive sentence imposed for violating supervised release).

REASONS FOR GRANTING THE PETITION FOR WRIT

This case presents two important constitutional questions that the Court should accept in order eliminate exceptions that are regularly made to the application of the Sixth Amendment right to trial by jury. The Court has made clear that, other than the fact of prior conviction, facts that increase statutory ranges for punishment must be charged in the indictment and proved to the jury. The rule has not been applied to facts that increase punishment under the U.S. Sentencing

Guidelines. The first question is whether the Sixth Amendment requires application of the rule of *Apprendi* and *Alleyne* to those Guidelines. If so, the second question is whether the exception to the rule concerning the "fact of prior conviction" must be eliminated so that the right to be convicted and punished only upon notice in an indictment and proof to a jury beyond a reasonable doubt (or a defendant's knowing admission of the allegation) applies to all facts that increase punishment.

I. The Court Should Grant Certiorari to Address whether the Practical Use of the U.S. Sentencing Guidelines as the De Facto Range of Punishment in Almost All Cases Means that the Guidelines are Constitutional Only if Facts that Increase Punishment under the Guidelines are Charged in the Indictment and Proved to a Jury (or Knowingly Admitted by the Defendant).

A. The Rule of *Apprendi*: With One Major Exception, Facts that Increase the Statutory Range for Punishment Must be Charged in the Indictment and Proved to the Jury beyond a Reasonable Doubt (or Knowingly Admitted by the Defendant).

The Constitution affords defendants the "right to a speedy and public trial, by an impartial jury." U.S. Const., amend. VI. Our constitutional system relies upon the jury as the "great bulwark of [our] civil and political liberties." *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348 (2000)(quoting 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-541 (4th ed. 1873)). That right is "designed to guard against a spirit of oppression and tyranny on the part of rulers[.]" *United States v. Gaudin*, 515 U.S. 506, 510-511, 115 S. Ct. 2310, 132 (1995) (quotation marks omitted); see also *Duncan v. Louisiana*, 391 U.S. 145, 155, 88 S. Ct. 1444 (1968) ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government."). Accordingly, before depriving a defendant of liberty, the government must obtain permission from the defendant's fellow citizens, who must be persuaded

themselves that the defendant committed each element of the charged crime beyond a reasonable doubt. That jury-trial right is "no mere procedural formality," but rather a "fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 306.

This precept is "rooted in longstanding common-law practice." *Cunningham v. California*, 549 U.S. 270, 281, 127 S. Ct. 856 (2007). The Court has noted that, early on in our history, judges had "very little explicit discretion in sentencing." see *Apprendi*, 530 at 479. Any "circumstances mandating a particular punishment" had to be charged to the jury in the indictment; there was "[no] distinction between an 'element' of a felony offense and a 'sentencing factor.'" *Id.* at 478, 480.

In the Nineteenth century, this idea began to shift, "from statutes providing fixed-term sentences to those providing judges discretion within a permissible range." *Id.* at 481. Crucially, this shift "has been regularly accompanied by the qualification that [such judicial] discretion was bound by the range of sentencing options prescribed by the legislature." *Id.*

By the late Twentieth century, the Court began to address state laws that increased a defendant's punishment based on factors found at sentencing, rather than based on factors found at trial. In *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411 (1986), the Court, "for the first time, coined the term 'sentencing factor' to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge." *Apprendi*, 530 U.S. at 485 (construing *McMillan*). Consistent with longstanding constitutional principles, *McMillan* held that a "sentencing factor" must at times be found by a jury because "(1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense, and (2) * * * a state scheme that keeps from the jury facts that 'expos[e] [defendants] to greater or additional

punishment,' may raise serious constitutional concern[s]." *Apprendi*, 530 U.S. at 486 (quoting *McMillan*, 477 U.S. at 85-88) (internal citations omitted).

In *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215 (1999), the district court gave the defendant a sentence beyond the statutory maximum based on a judicial finding that the carjacking offense he was convicted of involved "serious bodily injury." *Id.* at 230-31. This Court found that the carjacking statute required a jury, rather than a judge, to determine whether the crime involved "serious bodily injury," citing "grave" constitutional questions that would arise if the statute were to be interpreted otherwise. *Id.* at 231, 239.

Although *Jones* did not reach the constitutional issue, its constitutional discussion was significant, especially given that *Apprendi* explicitly "confirm[ed] the opinion * * * expressed in *Jones*," 530 U.S. at 490, that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243 n.6).

In *Apprendi*, the Court held that this same right applies to a sentencing factor that would increase a defendant's sentence beyond the statutory maximum because, like an element of a separate crime, such a sentencing factor results in a higher sentence than that which could be prescribed for the original crime. *Apprendi*, 530 U.S. at 476, 490. Thus, there was no "principled basis" for treating such a sentencing factor differently than an element of a crime. *Id.* at 476. The *Apprendi* Court discussed several centuries of precedent, summarizing that a criminal defendant

may not be "expose[d] * * * to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 482-83.

Recently, the Court extended that rule to preclude judicial fact-finding from increasing statutory minimums, as well as maximums. *Alleyne v. United States*, 133 S. Ct. 2151, 2155, 186 L.Ed.2d 314 (2013). The Court explained that "because the fact of brandishing aggravates the legally prescribed range of allowable sentences, it constitutes an element of a separate, aggravated offense that must be found by the jury." *Id.* at 2162.

B. The Rule of *Apprendi* Must Apply with Equal Force to the Federal Sentencing Guidelines if the Guidelines are to Operate Constitutionally.

The rule of *Apprendi*[1] expressly applies to statutory ranges of punishment. See *Apprendi*, 530 U.S. at 483 n.10, 490; *Alleyne*, 133 S. Ct. at 2154. The Court does not appear prepared to extend those rules to apply to *every* discretionary finding of a judge. See *Alleyne*, 133 S. Ct. at 2163 ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury."). But the Guidelines as a practical matter are today what they were before *Booker*—the lodestone and the range where a defendant's sentence lands in all but the unusual case. The Court's recent decisions in *Alleyne* and *Peugh v. United States*, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013), and Justice Thomas' concurrence in *Alleyne* suggest that at least some justices see no logical distinction between the elements of an offense and sentencing facts that are used to increase a sentence. Figueroa respectfully suggests that now is the time for the Count to expressly recognize that the same rationale behind the *Apprendi* rule applying to statutory ranges

[1] Hereafter, this petition refers to the rule as the "rule of *Apprendi*" or "*Apprendi* rule" even when the rule quoted has been one modified by *Alleyne*.

necessarily leads to a conclusion that the rule applies to the system that establishes the de facto range for punishment in nearly every case—the Federal Sentencing Guidelines.

1. Even at the Time of *Apprendi*, Grounds Existed for Concluding that the Rule would Logically Apply to the Guidelines.

The grounds for applying the rule of *Apprendi* to the Guidelines were apparent as early as the decision itself. Justice Thomas, in a concurring opinion, appeared to defend the broader position that the rule should apply to any type of increase to a sentence, stating that any aggravating fact that "is by law a basis for imposing or increasing punishment" should be subject to the *Apprendi* rule. *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring); see Susan N. Herman, *Applying* Apprendi *to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615, 622 (2002). And as Justice O'Connor noted at the time, that would appear to advocate for application of the rule to the Guidelines. *Apprendi*, 530 U.S. at 544 (O'Connor, J., dissenting); see *Applying* Apprendi, 87 IOWA L. REV. at 622 ("These sentencing factors, like the enhancement in *Apprendi*, can be described as providing a basis for imposing or increasing punishment.").

2. The *Blakely* Opinion Appeared to Show Movement in the Right Direction toward Applying the Rule of *Apprendi* to the Guidelines.

The Court "lurched toward" application of the *Apprendi* rule to the Guidelines in cases such as *Blakely*. See *United States v. Bell*, 808 F.3d 926, 927 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc). But the Court ended up backing away from it in its remedial opinion in *Booker*.

In *Blakely*, the Court noted that it was called upon to apply the rule of *Apprendi* to a state sentencing scheme. *Blakely*, 542 U.S. at 301. It described that rule as requiring that the

government prove "every accusation" and "any particular fact" "essential to the punishment" to a jury beyond a reasonable doubt:

> This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors," and that "an accusation which lacks any particular fact which the law makes essential to the punishment is * * * no accusation within the requirements of common law, and it is no accusation in reason."

Id. at 301-02 (citing 4 W. Blackston, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769), and 1 J. Bishop, CRIMINAL PROCEDURE § 87, p. 55 (2d ed. 1872). "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*[2]), or *any* aggravating fact (as [in *Blakely*]), it remains the case that the jury's verdict alone does not authorize the sentence." *Id.* at 305 (emphasis supplied).

Taking the *Blakely* language at face value appears to lead to the conclusion that the rule of *Apprendi* must apply to the Federal Sentencing Guidelines:

> Those who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene. Not even *Apprendi*'s critics would advocate this absurd result. Cf. 530 U.S., at 552-553, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (O'Connor, J., dissenting). The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish.

Blakely, 542 U.S. at 306- 07.

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[2] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002).

"Taken to its logical conclusion, the *Blakely* approach would require a jury to find beyond a reasonable doubt the conduct used to set or increase a defendant's sentence, at least in structured or guided-discretion sentencing regimes." *Bell*, 808 F.3d at 927 (Kavanaugh, J., concurring in denial of rehearing en banc). A judge "could not rely on uncharged conduct to increase a sentence, even if the judge found the conduct proved by a preponderance of the evidence." *Id.* at 928.

In *Booker*, a five-Justice majority of the Court held that the Federal Sentencing Guidelines were unconstitutional under the Fifth and Sixth Amendments to the extent that facts used to increase a criminal sentence (beyond what the defendant otherwise could have received) were not proved to a jury beyond a reasonable doubt. *Id.* at 226-27 (Stevens, J., joined by Scalia, Souter, Thomas, and Ginsburg, JJ.). "The logical upshot of this part of *Booker* (what is known as the *Booker* constitutional opinion) is that the Constitution is satisfied by a sentence in which sentencing facts are proved to a jury beyond a reasonable doubt." *United States v. Henry*, 472 F.3d 910, 918 (D.C. Cir. 2007) (Kavanaugh, J., concurring). That suggested for a moment that the *Booker* decision was following the *Blakely* trajectory toward applying the *Apprendi* rule to the Guidelines.

But a different five-Justice majority of the *Booker* Court held (in what is known as the *Booker* remedial opinion) took a step back from *Blakely*. This second majority held that, rather than requiring sentencing facts to be proved to a jury beyond a reasonable doubt, the Guidelines would become just one factor in the district court's sentencing decision. *Booker*, 543 U.S. at 245-46, 260-61 (Breyer, J., joined by Rehnquist, C.J., and O'Connor, Kennedy, and Ginsburg, JJ.). To Justice Stevens, the remedy effectively "undid" the rule of *Apprendi*. *Id.* at 302 (Stevens,

J., dissenting in part, joined by Scalia and Souter, JJ.) ("[B]y repealing the right to a determinate sentence that Congress established in the SRA, the Court has effectively eliminated the very constitutional right *Apprendi* sought to vindicate.").

3. Today, the Guidelines are Law and Operate as the De Facto Range for Punishment in an Overwhelming Majority of Cases.

Everything changed after *Booker*'s remedial decision—at least as to the words the district court used at a sentencing hearing and the courts of appeals used on appeal. But as a practical matter, very little changed.

"[T]here is no denying that the post-*Booker* system in substance closely resembles the pre-*Booker* Guidelines system in constitutionally relevant respects." see *Henry*, 472 F.3d 910, 919 (D.C. Cir. 2007) (Kavanaugh, J., concurring).[3] Although *Booker* declared the Guidelines advisory, the Guidelines remain what they were before *Booker*—the expected range of punishment and final range of punishment in all but a very small percentage of cases.

Before *Booker*, "[e]xcept in limited circumstances, district courts lacked discretion to depart from the Guidelines range." *Dillon v. United States*, 560 U.S. 817, 820, 130 S. Ct. 2683 (2010) (citing *Burns v. United States*, 501 U.S. 129, 133, 111 S. Ct. 2182 (1991)). The same is

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[3] "[T]he current system—in practice—works a lot like the pre-*Booker* system." *Henry*, 472 F.3d at 922 (Kavanaugh, J., concurring). See Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 678 (2006) ("All the things that troubled Sixth Amendment purists about the pre-*Booker* Guidelines system are unchanged."); Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO STATE J. CRIM. L. 37, 53 (2006); Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 347-55 (2006). "Four of the five Justices who joined the *Booker* remedial opinion, including its author Justice Breyer, did not find any constitutional problem with the Guidelines to begin with. So it is understandable that the current system as applied is not a major departure from the pre-*Booker* Guidelines system." *Id.* See *Booker*, 543 U.S. at 312-13 (Scalia, J., dissenting in part) (stating that *Booker* remedial opinion may convey message that "little has changed" from mandatory Guidelines system).

true today. The district court must begin with the correctly-calculated Guideline range "remain cognizant of [the Guidelines] throughout the sentencing process." *Gall v. United States*, 552 U.S. 38, 50 n.6, 128 S. Ct. 586 (2007). As a matter of law, a sentence within the Guidelines range is presumptively reasonable and lawful, and any "major departure" from that range requires "significant justification." *Id.* at 50, 51.

The Guidelines are a "lodestone of sentencing." see *Peugh*, 133 S. Ct. 2072, at 2084 (2013). Although advisory, sentences are still "anchored by the Guidelines." *Id.* at 2083-84. Even after the Guidelines became advisory, the Court has found that the Guidelines are "law" for the purposes of sentencing. *Id.* at 2072, 2084, 2085-87. They have "force as the framework for sentencing." *Id.* at 2083. They "represent the Federal Government's authoritative view of the appropriate sentences for specific crimes." *Id.* at 2085. Even though no longer mandatory, "the [Guideline] range is intended to, and usually does, exert controlling influence on the sentence that the court will impose." *Id.* And because, in the usual case, "the judge will use the Guidelines range as the starting point in the analysis and impose a sentence within the range," *Freeman v. United States*, 564 U.S. 522, 131 S. Ct. 2685, 2692 (2011), "the Guidelines demark the de facto boundaries of a legally authorized sentence in the mine run of cases." *Bell*, 808 F.3d at 931 (Millett, J., concurring in the denial of rehearing en banc).

"[N]o logical distinction exists between the elements of a crime and so-called sentencing facts that are used to increase a sentence." *Henry*, 472 F.3d at 920 (Kavanaugh, J., concurring). "Because the Constitution requires that the Government prove the elements of a crime to a jury beyond a reasonable doubt, the Constitution also requires that the Government prove substantively similar sentencing facts (such as carrying a weapon during commission of a drug

crime) to a jury beyond a reasonable doubt." *Id.* "To do otherwise," would "elevate form over substance and allow legislatures to evade the constitutional requirement that the prosecutor prove the elements of the crime to a jury beyond a reasonable doubt simply by re-labeling elements of the crime as sentencing factors." *Id.* at 920-21.

Under this approach, it is not up to the legislature to label a fact as a sentencing factor rather than an element of the crime. See *Booker*, 543 U.S. at 226-44 (Stevens, J., joined by Scalia, Souter, Thomas, and Ginsburg, JJ.); *Harris v. United States*, 536 U.S. 545, 572-83, 122 S. Ct. 2406 (2002) (Thomas, J., dissenting); *Apprendi*, 530 U.S. at 498-99 (Scalia, J., concurring). Instead, it is up to the government to charge and prove the "truth of every accusation" "which the law makes essential to the punishment." *Blakely*, 542 U.S. at 301-02. The Guidelines contain that "law" that establishes punishment. In the same way that the State of Washington's sentencing scheme was unconstitutional, the Guidelines violate "the defendant's right to have the jury find the existence of 'any particular fact' that the law makes essential to his punishment." *Booker*, 543 U.S. at 232 (quoting *Blakely*, 542 U.S., at 301).

Though an increase in the Guidelines range for prison time does not require a higher sentence, it does create a "sufficient risk of a higher sentence." *Peugh*, 133 S. Ct. at 2084, 2088. Accordingly, as "law" that can "increase the penalty for a crime," factors of the Guidelines that increase the offense level must go to the jury. See *Alleyne*, 133 S. Ct. at 2155. "Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime * * *." *Id.* at 2160. "[I]t follows that a fact increasing either end of the [sentencing] range produces a new penalty and constitutes an ingredient of the offense. *Id.* (citing *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring)).

End the end, there is no "principled basis" for treating the Guidelines range, which is overwhelmingly the range for the final sentence imposed upon a defendant, and the Guideline sections that create that range, differently than statutory ranges and the elements of a crime. *Apprendi*, 530 U.S. at 476. Just like before *Booker*, federal sentences are imposed within the Guidelines range "[e]xcept in limited circumstances." See *Dillon*, 560 U.S. at 820. Accordingly, the Guidelines today—very much like statutory ranges—represent the de facto top and bottom of a legally authorized sentence in most cases. For the same reasons that the *Booker* Court found the Guidelines to be unconstitutional, the Guidelines are constitutional only with application of the rule of *Apprendi*. Each accusation that leads to the calculated Guidelines range must be charged and proved to the jury beyond a reasonable doubt or knowingly admitted by the defendant.

C. In this Case, Figueroa was Unconstitutionally Sentenced, as the Guideline Factors that Increased the De Facto Range of Punishment—Facts of Prior Convictions—were Not Charged in the Indictment or Knowingly Admitted.

Figueroa pleaded guilty to all 13 charges (which did not allege prior convictions). Without reference to his prior convictions, the advisory guideline range of punishment would have been 78 to 97 months. But with three prior convictions and nine criminal history points, the district court calculated Figueroa's guideline range to be 110 to 137 months. Figueroa did not admit being the defendant in those cases with an understanding that the fact of prior conviction was an element that must be charged in the indictment and proved to the jury. And yet the district court made those findings of fact that "increased the penalty" for the crime to which he pleaded guilty. See *Alleyne*, 133 S. Ct. at 2155. Thus, his Fifth and Sixth Amendment rights have been violated. For these reasons, Figueroa asks the Court to grant certiorari and set the matter for briefing on the merits.

II. The Court Should Grant Certiorari to Resolve that the "Fact of Prior Conviction" Exception to the Rule of *Apprendi* is Unconstitutional.

A. The Creation of the Exception for the "Fact of Prior Conviction"

As noted above, the *McMillan* Court, "for the first time, coined the term 'sentencing factor' to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge." *Apprendi*, 530 U.S. at 485 (construing *McMillan*). Consistent with longstanding constitutional principles, *McMillan* held that a "sentencing factor" must at times be found by a jury because "(1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense, and (2) * * * a state scheme that keeps from the jury facts that 'expos[e] [defendants] to greater or additional punishment,' may raise serious constitutional concern[s]." *Apprendi*, 530 U.S. at 486 (quoting *McMillan*, 477 U.S. at 85-88) (internal citations omitted).

A decade later, in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998), the Court found that the fact of the petitioner's prior convictions did not have to be charged to the jury because the constitutional limitations articulated in *McMillan* did not apply. *Almendarez-Torres*, 523 U.S. at 228, 242-43. Importantly, the petitioner in *Almendarez-Torres* in "did not challenge the accuracy of that 'fact' [of prior conviction] in his case." *Apprendi*, 530 U.S. at 488.

In *Apprendi*, the Court held that this same right applies to a sentencing factor that would increase a defendant's sentence beyond the statutory maximum because, like an element of a separate crime, such a sentencing factor results in a higher sentence than that which could be prescribed for the original crime. *Apprendi*, 530 U.S. at 476, 490. But the *Apprendi* Court carved

out an exception to recognize its recent decision in *Almendarez-Torres*. Despite the Fifth and Sixth Amendments, the *Apprendi* Court found that the district court *may* increase the sentence beyond the statutory maximum based on "the fact of a prior conviction" because a prior conviction has already been established through the procedural safeguards in place. *Id.* at 488-90; *Jones*, 526 U.S. at 249 ("[A] prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.").

B. Since *Apprendi*, the Court has Appeared to Back Away from the *Almendarez-Torres* Exception; No Rational Basis Exists for the Exception.

In *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254 (2005), the Court held that a sentencing judge may not use the entire record of a prior conviction (e.g., including things like police reports) to determine whether a prior conviction that resulted from a guilty plea is one that can be considered in assessing whether the defendant must receive an increased sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"). *Shepard*, 544 U.S. at 20. Instead, the inquiry into whether a prior conviction that resulted from a guilty plea includes the facts necessary to render it an ACCA prior "is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Id.* at 26.

Although *Shepard* is based on the Court's assessment of Congressional intent, a plurality of the Court in *Shepard* expressed the view that the Court's holding is also required by constitutional concerns regarding due process and the right to trial by jury. In part III of his plurality opinion, Justice Souter explained that allowing the sentencing court to use additional

facts (i.e., evidence reflecting facts in addition to those necessarily found by the jury or admitted by the defendant) to determine the nature of a prior conviction would "raise[] the concern underlying *Jones* and *Apprendi*:" that the right to due process and the Sixth Amendment "guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence." *Shepard*, 544 U.S. at 25. The Court reasoned that its holding was necessary to protect the defendant's constitutional rights notwithstanding the Court's prior holding in *Almendarez-Torres*:

> 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 *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. The rule of reading statutes to avoid serious risks of unconstitutionality [citation] therefore counsels us to limit the scope of factfinding on the disputed generic character of a prior plea, just as *Taylor* [*v. United States*, 495 U.S. 575, 110 S. Ct. 2143 (1990)] constrained judicial findings about the generic implication of a jury's verdict.

Shepard, 544 U.S. at 25.

Justice Souter's opinion in *Shepard* was joined by Justices Stevens, Scalia and Ginsburg. Justice Thomas concurred in the result and in all parts of the opinion except part III. But it appears the reason Justice Thomas did not join in part III of the opinion is that, in his view, it does not go far enough in explaining the constitutional infirmity of the ACCA and of *Almendarez-Torres* in the wake of *Jones* and *Apprendi*.

As Justice Thomas noted in his concurring opinion in *Shepard*, "*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." *Shepard*, 544 U.S. at

27 (Thomas, J., concurring in part and concurring in the judgment) (citing *Almendarez-Torres*, 523 U.S., at 248-249 (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); *Apprendi*, 530 U.S. at 520-521 (Thomas, J., concurring)). "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.'" *Shepard*, 544 U.S. at 28 (quoting *Harris v. United States*, 536 U.S. 545, 581-582, 122 S. Ct. 2406 (2002) (Thomas, J., dissenting)).

In sum, *Almendarez-Torres* was wrongly decided, and it is inconsistent with the reasoning of the Court's subsequent opinion in *Shepard*. Because no rational ground exists for continuing to recognize the exception, it should not be followed. Because confusion exists as to whether the *Almendarez-Torres* exception continues to be valid, and because it appears a majority of justices of the Court now believe *Alemandarez-Torres* was wrongly decided, the Court should grant the petition and address the exception head on.

For these reasons, Figueroa asks the Court to grant his petition and grant full briefing in this important matter to address and resolve that "the fact of prior conviction" is an element of an offense, when the government seeks an increased statutory maximum sentence, that must be charged and either admitted by the defendant or proved to the jury beyond a reasonable doubt.

CONCLUSION

Petitioner Nelson Figueroa's petition for writ of certiorari should be granted for the compelling reasons noted above. He respectfully asks the Court to grant his petition and order that the matter proceed to briefs on the merits of these two constitutional issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing petition for writ of certiorari, motion for leave to proceed in forma pauperis, and the following appendix were served upon by U.S. Priority Mail on the date reported below upon Margaret A. Sweeney, Assistant U.S. Attorney, 801 West Superior Avenue, Suite 400, Cleveland, OH 44112; and the Solicitor General's Office, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001 and by email to SupremeCtBriefs@USDOJ.gov.

Dated: 12 December 2018

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