IN THE SUPREME COURT OF THE UNITED STATES

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JUAN GARCIA HERRERA,

PETITIONER,

- vs -

UNITED STATES OF AMERICA,

RESPONDENT.

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ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Questions Presented for Review

Petitioner is serving a mandatory, 20-year sentence based upon facts that were not submitted to a jury for proof beyond a reasonable doubt: an enhancement for a prior conviction under the previous version of 21 U.S.C. §§ 841(a)(1) and 851. This petition presents the following questions.

1. The enhanced-penalty provisions of 21 U.S.C. §§ 841(b) and 851 expressly require that the district court, not a jury, make factual findings which increase the mandatory-minimum sentence. Specifically, the district court is directed to determine whether the defendant has suffered a prior conviction *and* whether that conviction qualifies as a "felony drug offense," as defined in 21 U.S.C. § 802(44). Is this sentencing scheme – which requires judicial factfinding as to the facts *about* a prior conviction, as opposed to the fact *of* a prior conviction, in order to increase the mandatory-minimum sentence – unconstitutional in violation of the principles set forth in *Alleyne v. United States* and *Apprendi v. New Jersey*?

2. If the judicial factfinding required by 21 U.S.C. §§ 841(b) and 851 is not deemed unconstitutional under *Alleyne* and *Apprendi*, because it falls within the "fact of a prior conviction" exception created in *Almendarez-Torres v. United States*, should the Court overrule that decision?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Juan Garcia Herrera, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinion Below

The Ninth Circuit, in an unpublished memorandum, affirmed Herrera's conviction and sentence for conspiracy and distribution of methamphetamine.[1] The sentence was based on the district court's finding that Herrera had suffered a

[1] A copy of the memorandum is attached as Appendix A.

prior felony drug conviction, which increased the mandatory-minimum sentence from ten years to twenty.

Jurisdiction

On December 10, 2018, the Ninth Circuit affirmed Petitioner's sentence. On January 22, 2019, the Ninth Circuit denied his petition for rehearing en banc. The Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional & Statutory Provisions

Fifth Amendment to the United States Constitution:

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

Sixth Amendment to the United States Constitution:

> 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 defence.

21 U.S.C. §§ 841(a)(1); 851.

Statement of the Case

On December 30, 2015, the grand jury for the Central District of California returned an indictment alleging, *inter alia,* conspiracy to deal firearms without a license and distribution of methamphetamine. On January 13, 2016, the government filed an information alleging four prior convictions for felony drug offenses for purposes of 21 U.S.C. §§ 841(a)(1) & 851.

On October 14, 2016, Herrera pleaded guilty pursuant to a plea agreement. Under the terms of that agreement, he pleaded to the conspiracy to sell firearms alleged in Count 1 and the distribution of methamphetamine in Count 9, while the government agreed to dismiss the remaining counts, as well as three of the four convictions alleged in the § 851 information.

On February 27, 2017, the district court sentenced Herrera to the mandatory-minimum sentence of 240 months. It did so with misgivings, noting that "if it was not a mandatory minimum[,] [the sentence] would be lower. . . . But it's a mandatory minimum and I will enforce it."

The Ninth Circuit affirmed Herrera's convictions and sentence on December 10, 2018, and his petition for rehearing en banc on January 22, 2019. This petition for a writ of certiorari follows.

Reasons for Granting the Petition

I.

Review is warranted to determine whether the sentencing scheme set forth in 21 U.S.C. §§ 841(b) and 851 is unconstitutional under the principles of *Alleyne* and *Apprendi* because it requires judicial factfinding to raise the mandatory-minimum sentence.

Under 21 U.S.C. § 841(b)(1)(A), anyone convicted of distributing at least 50 grams of methamphetamine – as well as other specified quantities of other drugs – is subject to a mandatory-minimum custodial sentence of not "less than 10 years." But that mandatory minimum doubles to "not [] less than 20 years," if the person has suffered "a prior conviction for a felony drug offense."[2] *Id.* A prior "'felony drug offense' means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44).

In order for this enhanced, mandatory-minimum penalty to apply, the government must, "before trial, or before entry of a plea of guilty . . . file[] an information with the court (and serve[] a copy of such information on the person or

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[2] Section 841(a) was amended in 2019 by the First Step Act. If Herrera were sentenced today, he would be subject to a mandatory-minimum sentence of 15 years, rather than 20.

counsel for the person) stating in writing the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1). When the defendant "denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid," the district court is directed to hold a hearing "without jury." 21 U.S.C. § 851(c)(1). And the ultimate determination as to whether the defendant has been convicted of the alleged, felony drug offense (i.e., whether the government has proven the fact which increases the mandatory minium) is made by the court rather than a jury. 21 U.S.C. § 851(d).

Thus, by its clear statutory terms, section 851 (in conjunction with section 841) increases the applicable mandatory-minimum sentence based on a fact – whether the defendant has a prior conviction that meets the definition of a "felony drug offense" – that is neither pleaded in the indictment (and thus not passed upon by a grand jury) nor proven beyond a reasonable doubt to a jury. This sentencing scheme, based on judicial factfinding, runs afoul of the Constitution. As this Court recently explained in *Alleyne*: "Any 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. Mandatory-minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an

'element' that must be submitted to the jury." *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) (citations omitted).

In *Alleyne*, this Court applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) – that any fact that increases the statutory maximum sentence is an element of the crime that must be proven to a jury beyond a reasonable doubt – to mandatory-minimum sentences. Specifically, the Court held: "[f]acts that increase the mandatory-minimum sentence are [] elements and must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 133 S. Ct. at 2158. In support of its holding, this Court explained "[i]t is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Id.* at 2160. And "it is impossible to dispute that facts increasing the legally prescribed floor aggravate the punishment." *Id.* at 2161. Thus, "[a] fact that increases a sentencing floor, [] forms an essential ingredient of the offense." *Id.*

The Court further elaborated, "[t]his reality demonstrates that the core crime and the fact triggering the mandatory-minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." *Id.* In addition to honoring the defendant's right to have a jury determination on each element of the alleged crime, "[d]efining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the

legally applicable penalty from the face of the indictment [because each element must be charged in the indictment]." *Id*.

Alleyne compels the conclusion the enhanced penalty provisions in sections 841 and 851 – and thus the increased mandatory-minimum sentence in this case – violate the Sixth Amendment. Absent the judicial factfinding required by section 851, a defendant such as Herrera is subject to a ten-year mandatory minimum, under section 841(b)(1)(A). But once the district court determines that the defendant has been convicted of a prior crime that qualifies as a predicate "felony drug offense," the mandatory minimum doubles to 20 years. 21 U.S.C. §§ 841(b)(1)(A), 851(d). In other words, the district court's finding about the prior conviction – that it is a "felony drug offense" – is a "fact that increases the mandatory minimum." *Alleyne*, 133 S.Ct. at 2155. Thus, it "is an 'element' that must be submitted to the jury." *Id.*

Under section 851, however, that cannot happen. Instead, the statute requires that the district court make the finding. Thus, because the judicial factfinding mandated by sections 841(b)(1)(A) and 851 is in direct conflict with the Sixth Amendment jury requirement set forth in *Alleyne*, it cannot survive.

The government, however, will likely respond that there is no problem under *Alleyne*, because the factfinding at issue here is limited to "the fact of a prior

conviction," a general exception to the *Apprendi*/*Alleyne* rule. Indeed, that was the conclusion reached by the Ninth Circuit panel in this case. But it is wrong.

The judicial factfinding required by sections 841(b)(1)(A) and 851 is not limited to the fact *of* a prior conviction; it extends to facts *about* the details of the criminal conduct. The court must inquire into whether the defendant has suffered a conviction *and* whether that conviction was for "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44). Depending on the statute of conviction, therefore, the court can be required to examine the defendant's underlying conduct to determine if it related "to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." *Id.*

On this point, *United States v. Curry*, 404 F.3d 316 (5th Cir. 2005), is illustrative. There, as here, the government sought an enhanced penalty under 21 U.S.C. §§ 841(b)(1)(A), 851. *See id.* at 317-18. According to the government, the defendant's predicate "felony drug offense" was a violation of La. Rev. Stat. Ann. § 14:402(B), which states, "[n]o person shall possess contraband upon the grounds of any state correctional institution." *Id.* at 320. The Fifth Circuit acknowledged

that "[t]he law does not specifically regulate, or 'relate to,' drugs." *Id.* Nevertheless, the court looked beyond the statute of conviction to a "Bill of Information, [which] identified marijuana as the contraband." From there, the court determined that the defendant's "state conviction required the jury to find that he was in possession of a controlled substance within a penal institution[.]" *Id.* And based on its finding about the actual facts of the defendant's conduct, as found by the jury at trial, the Fifth Circuit determined that "the prior state conviction meets the [definition of a felony drug offense] under § 802(44)." *Id.*

Similarly, here, one of the statutes of conviction for Mr. Herrera's predicate crimes does not, on its face, establish the substance involved. It provides:

> Except as otherwise provided in subdivision (b) and in Article 7 (commencing with *Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code*, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any controlled substance which is (1) classified in Schedule III, IV, or V and which is not a narcotic drug, except subdivision (g) of Section 11056, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20), (21), (22), and (23) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d) or (e), except paragraph (3) of subdivision (e), or specified in subparagraph (A) of paragraph (1) of subdivision (f), of Section 11055, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished by imprisonment pursuant to subdivision (h) of

> *Section 1170 of the Penal Code* for a period of two, three, or four years.

California Health & Safety Code § 11379(a) (emphasis in original).

Accordingly, by looking at the conviction alone, it is not possible to determine whether the substance possessed was a "narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant," 21 U.S.C. § 802(44), or whether it was some other substance, "which is not a narcotic drug." California Health & Safety Code § 11377(a). Thus, it is not possible to determine with certainty whether the defendant's conviction qualifies as a "felony drug offense." 21 U.S.C. § 802(44). Instead, the sentencing court is required to inquire beyond the statute of conviction to determine the conduct underlying the offense. This type of judicial factfinding clearly extends beyond the fact of the prior conviction and is prohibited by the Sixth Amendment. As this Court recently explained *Descamps v. United States*, 133 S.Ct. 2276 (2013), the permissible inquiry into the fact of a prior conviction is highly limited. Any factual finding that goes "beyond merely identifying a prior conviction" would "raise[] serious constitutional concerns." *Id.* at 2288. And these concerns "counsel against allowing a sentencing court to 'make a disputed' determination 'about what the defendant and state judge must have understood as the factual basis of the prior plea,' or what the jury in a prior trial

must have accepted as the theory of the crime." *Id.* (citation omitted). Accordingly, to "extend[]" judicial factfinding beyond the recognition of a prior conviction[,]" is to extend it beyond what "the Sixth Amendment permits." *Id.*

Sentencing courts, therefore, in determining whether a prior offense qualifies as a predicate for a federal enhancement, can look to the statute of conviction, but cannot "try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct," because "[t]he Sixth Amendment contemplates that a jury--not a sentencing court--will find such facts, unanimously and beyond a reasonable doubt." In other words, under *Descamps*, the "fact of a prior conviction" exception cannot extend to judicial findings about the defendant's conduct or what was proven at a trial. But, as *Curry* demonstrates, this is exactly what is called for by enhanced penalty provisions of sections 841 and 851.

Together, these statutes require judicial factfinding that looks past the fact *of* the conviction to facts *about* the conviction. They direct the sentencing court to make findings about the conduct underlying the prior conviction (prohibited by *Descamps*) that it then uses to increase the mandatory minium (prohibited by

Alleyne).[3] Thus, the sentencing scheme in 21 U.S.C. §§ 841(b)(1)(A), 851 is unconstitutional. This Court should grant the petition to prevent the continued, nationwide violation defendants' Sixth Amendment rights.

II.

Review is warranted to determine whether the "fact of a prior conviction" remains a valid exception to the rule of *Alleyne* and *Apprendi*.

Even if this Court disagrees, however, and concludes that finding a "felony drug offense" falls within the "fact of a prior conviction" exception, certiorari is appropriate. As Justice Thomas suggested in his *Descamps* concurrence, federal sentencing enhancements based on prior convictions continue to create significant constitutional problems, "'because this Court has not yet reconsidered *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which draws an

[3] It is no answer to say that the court can be directed not to conduct such a searching inquiry, but instead limit itself to the elements-based analysis discussed in *Descamps*. Unlike the other enhanced-penalty provisions in federal law, Congress has specifically directed the requisite procedure the district court must follow under 21 U.S.C. § 851. It assigns to the court the task of "determin[ing] *any* issues . . . which would except the person from increased punishment." *Id.* at § 851(c) (emphasis added). In other words, by its plain language, section 851 requires the court to do what *Alleyne* and *Descamps* prohibit. And the Court cannot rewrite the statute to avoid the constitutional violation. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001) ("the canon of constitutional avoidance has no application in the absence of statutory ambiguity.").

exception to the *Apprendi* line of cases for judicial factfinding that concerns a defendant's prior convictions.'" *Descamps v. United States*, 133 S.Ct. at 2295. It is time for that reconsideration, so the Court can end the practice of "judicial factfinding increas[ing] the statutory maximum [or minimum] in violation of the Sixth Amendment." *Id.* Indeed, the weight of this Court's post-*Apprendi* authority strongly suggests that *Almendarez-Torres* should be reexamined and overruled.

Justice Thomas made this point explicitly in *Shepard v. United States*, 544 U.S. 13, 27 (2005), explaining that "*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." And following *Shepard*, the doctrinal underpinnings of *Almendarez-Torres* were further undermined by *United States v. O'Brien*, 130 S. Ct. 2169, (2010). There, the issue was whether use of a machine gun to require a 30-year mandatory-minimum sentence in 18 U.S.C. § 924(c) was an element that must be proved to the jury or a sentencing factor subject to judicial fact-finding, precisely the abstract issue addressed in *Almendarez-Torres*. *Id.* at 2172-73. Employing a set of factors mirroring those considered in *Almendarez-Torres* (structure, tradition, fairness, severity of sentence, and legislative history), *O'Brien* held that the machine gun

factor was an element of the offense, not a sentencing factor. *See id*. at 2178-80. Thus, it had to be pleaded and proved to a jury beyond a reasonable doubt.

Most recently, in *Alleyne*, this Court considered whether, under 18 U.S.C. § 924(c)(1)(A) (carrying a firearm in relation to a crime of violence), the fact of "brandishing" a firearm during a crime – which increases the mandatory minimum – needed to be pleaded and proven to a jury, or could be simply found by a judge at sentencing (like the fact of a prior conviction). *Alleyne*, 133 S.Ct. at 2156. The Court explained that, "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Id.* at 2162. Thus, "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.* This analysis should be the death knell for *Almendarez-Torres.*

There is simply no constitutionally meaningful distinction between whether the defendant's current crime involved a machine gun (*O'Brien*) or brandishing a weapon (*Alleyne*) and whether his prior crime involved drugs. All are facts alleged by the government for the sole purpose of increasing the defendant's sentence. And thus, under the Sixth Amendment, a jury finding should be required. Because

Almendarez-Torres currently stands in the way of this commonsense result, it should be reconsidered. And this case provides an excellent vehicle.

Again, the district court believed that the mandatory, 20-year sentence it was forced to impose was unjust. Basic principles of justice thus support further review in this case.

In addition, the legal issues regarding the "fact of the prior conviction" are presented in a straightforward manner here. Sections 841 and 851 expressly assign to the district court the task of making factual findings that increase the mandatory-minimum sentence. If, as Justice Thomas argues, the Sixth Amendment prohibits all judicial factfinding (even about prior convictions) that increases the statutory maximum or minimum sentence, the enhanced penalty provisions at issue are plainly unconstitutional and Herrera's sentence cannot stand. Hence, this Court should grant the petition, overrule *Almendarez-Torres*, and vacate Herrera's unjust sentence.

Conclusion

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: April 15, 2019

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