No. .....

IN THE SUPREME COURT OF THE UNITED STATES

Robert Marcelis,
petitioner,

v.

Commonwealth of Pennsylvania.

On petition for a writ of *certiorari*
to the superior court of Pennsylvania

Petition for a writ of *certiorari*

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QUESTION PRESENTED

Does the sixth amendment require a jury finding beyond a reasonable doubt that a criminal defendant has one or more prior convictions before an increased sentence can be imposed on that defendant?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

RELATED CASES

Commonwealth of Pennsylvania v. Robert Marcelis, CP-51-CR-10-0131-1--2000, court of common pleas of Philadelphia county, Pennsylvania. PCRA relief denied by order entered June 8, 2018.

Commonwealth of Pennsylvania v. Robert Marcelis, 2054 EDA 2018, superior court of Pennsylvania. Judgment entered July 22, 2019, affirming common pleas order.

Commonwealth of Pennsylvania v. Robert Marcelis, 421 EAL 2019, supreme court of Pennsylvania. Petition for allowance of appeal denied by order entered January 28, 2020.

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CASES:

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at appendix A to the petition and is unpublished. *Commonwealth of Pennsylvania v. Robert Marcelis*, no. 2054 EDA 2018 (Pa. Super. Ct., July 22, 2019).

The opinion of the trial court appears at appendix B to the petition and is unpublished. *Commonwealth of Pennsylvania v. Darryl Allen*, no. CP-51-CR-0002310-2016 (Pa. C.P. Phila. county, Jan. 17, 2018).

The order of the state court of last resort, denying discretionary review, appears at appendix C to the petition and is unpublished. *Commonwealth of Pennsylvania v. Robert Marcelis*, no. 421 EAL 2019 (Pa. Jan. 28, 2020).

JURISDICTION

The date on which the highest state court decided this case was January 28, 2020. A copy of that decision appears at appendix C. By a miscellaneous order dated March 19, 2020, this court extended the deadline for this category of petitions to 150 days. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right to . . . a trial, by an impartial jury . . . ." U.S. Const. amend. VI; *see also* U.S. Const. amend XIV.

STATEMENT OF THE CASE

This is a timely petition for *certiorari* of a July 22, 2019, merits decision after the January 28, 2020, denial of a timely petition (filed August 21, 2019) to the state

supreme court for allowance of appeal. The intermediate state court was acting on a timely direct appeal (filed July 5, 2018) from a June 8, 2018, order of a Philadelphia trial court denying relief under Pennsylvania's Post-Conviction Relief Act ("PCRA").

The petitioner here, Robert Marcelis, was sentenced because a judge (rather than a jury) found as a fact that Mr. Marcelis had a prior conviction. Mr. Marcelis petitioned the common pleas court to vacate his judgment of sentence because it is now understood that the sixth amendment (and Pennsylvania constitutional) right to a jury trial was violated by that statutory scheme.

Robert Marcelis was sentenced pursuant to 42 Pa. C.S.A. § 9714(a)(2) (the "three-strikes law") on May 4, 2001, to twenty-five (25) to fifty (50) years on the robbery charge at the case now docketed at CP-51-CR-1001311-2000. Various appellate and collateral relief was sought, not relevant to the present appeal. The conviction or sentence resulted from one or more of the circumstances defined in 42 Pa. C.S.A. § 9543(a), to wit: (2)(i) – a violation of the jury-trial right protected by the sixth amendment to the federal constitution and article I, §§ 6 and 9 of the Pennsylvania constitution, and (2)(vii) – unlawfully long sentence, given that the longest lawful sentence without a jury determination would have been ten (10) to twenty (20) years.

Common pleas denied relief on June 8, 2018, and a notice of appeal was filed on July 5, 2018. On July 22, 2019, the superior court affirmed the order. On January 28, 2020, the state's court of last resort denied discretionary relief. This petition is being electronically filed within 150 days thereafter.

REASONS FOR GRANTING THE PETITION

For more than a century, courts in this country understood and stated that defendants had the right to a jury trial before the government could impose an increased penalty for recidivism. In 1826, Pennsylvania's highest court held that a 1794 statute mandating life imprisonment at hard labor "if a man shall commit burglary a second time" could not be applied where the second indictment did not set forth what the prior judgment was. *Smith v. Commonwealth*, 14 Serg. & Rawle 69, 70 (Pa. 1826) (court examined what "appeared on the face of the indictment" and what "appear[s] by this record," implying that prior convictions are elements that must be pled and proved to a jury) . Fifty years later, that same court cited *Smith v. Commonwealth*, echoed the "appear by this record" language, made explicit what in *Smith* was implicit, and held that the same principle applied to misdemeanors as to felonies:

> On every principle of personal security and the due administration of justice, the fact which gives rightfulness to the greater punishment should appear in the record. To leave to a judge to determine it outside of the record is to subject the defendant to an *unconstitutional* mode of trial. *The right to a trial* of a material fact, to constitute his offence, *by his peers*, is one of the fundamental rights of the citizen, *excepted out of the power of the legislature to impair or destroy*.

Rauch v. Commonwealth, 78 Pa. 490, 494-95, 2 W.N.C. 146, 28 P.F. Smith 490 (1876) (emphasis added). The italicized language "*right to a trial . . . by his peers*" makes clear this is a jury trial right; the italicized words "*unconstitutional*" and "*excepted out of the power of the legislature to impair or destroy*" explain that this is a constitutional holding limiting the power of any act of assembly.

Sixty-four years later, in discussing a bifurcated-trial approach in order to avoid prejudicing a defendant who was alleged to have a prior conviction, a common pleas court (also in Philadelphia) explicitly deduced that

> Three principles have, however, been laid down by our Supreme Court: (1) The heavier penalty *cannot* be imposed unless the former conviction appears somewhere in the record; (2) defendant is entitled to a jury trial on the questions of identity and prior conviction; (3) if these facts *are averred* in the indictment an attack thereon will fail.

Commonwealth v. Boyer, 37 Pa. Dist. & County R. 81, 86 (C.P. Phila. county 1940).

As time went on, courts across the country wrestled with statutes increasing penalties for various subclasses of defendants or crimes (involving guns, drugs, elderly victims, etc., and different kinds of recidivists); after some to-ing and fro-ing, this court held on jury-trial and due-process grounds that "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 v. New Jersey*, 530 U.S. 466, 490 (2000). Mr. Marcelis must here acknowledge that the *Apprendi* holding was prefaced by the phrase "[o]ther than the fact of a prior conviction," and extensive discussion of a case two years earlier approving a federal recidivist statute. *Apprendi*, 530 U.S. 466, at 472-74, 487-90 (citing *Almendarez-Torres v. United States,* 523 U.S. 224 (1998)). But *Apprendi* took pains to distance itself from *Almandarez-Torres*, using such phrases as "represents at best an exceptional departure from the historic practice that we have described," 530 U.S. at 487, and "Even though it is arguable that *Almendarez-Torres* was incorrectly decided," 530 U.S. at 489, and dropping a footnote

citing an 1875 case once again (in an echo of Pennsylvania's 1826 *Smith v. Commonwealth*) emphasizing the necessary connection between the contents of an indictment and whatever punishment the state seeks to inflict. 530 U.S. at 489 n.15. Furthermore, two members of this court (Justices Thomas and Scalia) concurred in *Apprendi* but advocated an even broader rule – that would eliminate the "prior conviction" exception, and specifically cited Pennsylvania's 1826 decision in support of the proposition that the "'tradition of treating recidivism as an element' stretches back to the earliest years of the Republic." *Apprendi*, 530 U.S., at 499 (Thomas, J., concurring) (citing *Almendarez-Torres,* 523 U.S., at 256-257, 261, (Scalia, J., dissenting opinion), and collecting many other early cases clearly treating prior convictions as elements of subsequent enhanced penalty offenses). Justice Thomas then devoted an entire paragraph to explicating Pennsylvania's 1876 decision:

> Similarly, in *Rauch v. Commonwealth,* 78 Pa. 490 [1876], the court applied its 1826 decision in *Smith v. Commonwealth,* 14 Serg. & Rawle 69, and reversed the trial court's imposition of an enhanced sentence "upon its own knowledge of its records." 78 Pa., at 494. The court explained that "imprisonment in jail is not a lawful consequence of a mere conviction for an unlawful sale of liquors. It is the lawful consequence of a second sale only after a former conviction. On every principle of personal security and the due administration of justice, the fact which gives rightfulness to the greater punishment should appear in the record." *Ibid.* See also *id.,* at 495 ("But clearly the substantive offence, which draws to itself the greater punishment, is the unlawful sale after a former conviction. This, therefore, is the very offence he is called upon to defend against").

Apprendi, 530 U.S., at 517 (Thomas, J., concurring). At this juncture, Mr. Marcelis should acknowledge a 2002 decision from Pennsylvania's superior court that, the petitioner respectfully submits, completely misunderstood or mischaracterized the 1826

and 1876 decisions by Pennsylvania's supreme court. Perhaps because Justices Thomas and Scalia had in the year 2000 shone new light on *Smith* and *Rauch*, a criminal defendant challenged his prior-conviction enhancement based on those two cases. The superior court asserted – completely ignoring the state supreme court's 1876 "*right to a trial . . . by his peers*" language and completely ignoring the common pleas court's 1940 depiction and completely ignoring Justices Thomas and Scalia's historical survey – that "*Smith v. Commonwealth,* 14 Serg. & Rawle 69 (1826), does not stand for the proposition that a jury must decide whether a defendant is a recidivist." *Commonwealth v. Griffin*, 2002 Pa. Super. Ct. 203, at ¶ 46, 804 A.2d 1 (mischaracterizing *Smith* as involving just a faulty indictment), appeal denied, 582 Pa. 671, cert. denied, 545 U.S. 1148 (2005).

In the very next paragraph, the superior court (again ignoring the "by his peers" language in the case itself and the 1940 and 2000 decisions above), misunderstood *Rauch* as involving merely "facts *dehors* the record in contradiction to the indictment." Id. at ¶ 47. This is just (the petitioner respectfully submits) wrong. When the *Smith* opinion used the phrase "appear[s] by this record" and the *Rauch* opinion used the phrases "appear in the record" or "outside of the record," and when both decisions examined what facts were alleged in the indictments, they were using the vocabulary of their times to require that every fact (including prior convictions) that would support a penalty be pled and proved to a jury, as amply demonstrated by the historical survey by Justices Thomas and Scalia. This is what *Smith* meant, this is what *Rauch* explicitly

said in 1876 it understood *Smith* to have said in 1826, this is what *Boyer* explicitly said in 1940 was the law of Pennsylvania, and this is what Justices Thomas and Scalia showed a wide variety of American cases to say throughout our history.

As recently as 1970, all seven justices of Pennsylvania's supreme court explicitly affirmed this longstanding principle of Pennsylvania and federal law. *Commonwealth.v. Moses*, 441 Pa. 145 (1970) (where indictment did not allege prior convictions, recidivist penalty could not apply) (citing with approval *Rauch* and *Boyer*). The superior court opinion in *Griffin* did not acknowledge nor attempt to distinguish *Moses*.

Alleyne finally overrules *Harris*, and *Almendarez-Torres* is inconsistent with all other current sixth-amendment jurisprudence[1]

In parallel with the abandonment of *Almendarez-Torres* and helping to explain its isolation, it may be useful to review three other important cases. This court first recognized "sentencing factors" as distinct from "elements" and held that "sentencing factors" not found by a jury beyond a reasonable doubt could nevertheless be found by a sentencing judge by a lesser standard of "preponderance of the evidence" and used to increase a defendant's punishment, in a case arising from a similar Pennsylvania mandatory sentencing statute. *McMillan v. Pennsylvania*, 477 U.S. 79, 86

[1] In the present case, the superior court memorandum, at 6-7 n.9, cited part of the recent case of *United States v. Haymond,* No. 17-1672 (U.S. June 26, 2019), for the continuing viability of *Almendarez-Torres.* But the citation given by the superior court was to the four-justice opinion in favor of declaring unconstitutional a federal supervised-release statute, not to Justice Breyer's controlling opinion, and the cited footnote in the four-justice opinion made clear that it was *obiter dicta*, as describing "two narrow exceptions . . . neither of which is implicated here." *Haymond*, slip op. at 9, n.3.

(1986) (since overruled). Next, two years after *Apprendi* held that the maximum sentence could not be increased without a jury finding, this court held that non-jury judicial factfinding was permissible if it increased a mandatory minimum (but not maximum) sentence. *Harris v. United States*, 536 U.S. 545 (2002) (since overruled). About a decade later, this court recognized that *Harris* could not be reconciled with *Apprendi* and held that a jury must find (beyond a reasonable doubt) any fact that increases either the mandatory minimum or maximum punishment a defendant may receive. *Alleyne v. United States*, 570 U.S. —, 133 S.Ct. 2151 (2013) (overruling *McMillan* and *Harris)*.

Almendarez-Torres has been recognized as wrong by five members of this court. *Commonwealth v. Hale*, 85 A.3d 570, 585 n.13 (Pa. Super. Ct. 2014) ("However, the viability of this holding has been questioned . . . and five Justices appear to disagree with the *Almendarez* holding . . . namely, Justices Scalia, Thomas, Ginsburg, Sotomayor, and Kagan."). The Hon. Neil M. Gorsuch on April 8, 2017, received his commission to take the seat of the late Justice Scalia, and Justice Gorsuch has not yet stated his views on this issue (as a justice).[2] It is known that he wrote at least one opinion as a federal appellate judge explicitly noting the weakness of *Almendarez-Torres*. *United States v. Adame-Orozco*, 607 F.3d 647, 651 n.6 (10th Cir. 2010) ("Whether and to what degree *Almendarez-Torres* remains good law . . . is not before us." Then-Judge Gorsuch next quoted Justice Thomas: "*Almendarez-Torres* 'has been eroded by [the supreme] Court's

[2] Justice Gorsuch wrote the plurality opinion in *Haymond* holding the supervised release statute to be unconstitutional, and including the *obiter dicta* in that opinion's footnote 3.

subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that [it] was wrongly decided.'"). Similarly, the Hon. Brett M. Kavanaugh on October 6, 2018, received his commission to take the seat of the retired Justice Kennedy, and Justice Kavanaugh has not yet stated his views on this issue (as a justice). It is known that he wrote at least one opinion as a federal appellate judge on the topic, acknowledging the problem: *United States v. Smith*, 640 F.3d 358 (D.C. Cir. 2011) ("Smith protests that the reasoning of *Almendarez-Torres* is in tension with the reasoning of later sentencing cases from the Supreme Court [including *Apprendi*]. Perhaps so.").

Recent cases, including those decided shortly before the PCRA petition was filed below on May 1, 2017, continue to emphasize the weakness of *Almendarez-Torres v. United States,* 523 U.S. 224 (1998), even if they would wait for this court to say the final word in a single published opinion. *United States v. Young*, 847 F.3d 328 (6th Cir. 2017) (". . . *Almendarez-Torres* may stand on shifting sands . . ."); *Jackson v. State*, 2017 WL 1090546 (Fla. March 23, 2017) (". . . the Supreme Court has since suggested that the continued vitality of *Almendarez-Torres* may be questionable . . ."); *Dorsey v. United States*, 154 A.3d 106, 123 n.20 (D.C. February 23, 2017) (". . . the Supreme Court has at least twice questioned the continued validty of *Almendarez-Torres* . . ."); *Commonwealth v. Rosario*, 2015 WL 7587244 (Pa. Super. Ct. 2015) (unpublished) ("The *Alleyne* Court's referencing of *Almendarez-Torres* does not appear to be an enthusiastic endorsement of the prior-conviction exception."); *United States v.*

Jimenez-Banegas, 790 F.3d 253 (1st Cir. 2015) (supreme court has cast doubt on *Almendarez-Torres*); *United States v. Gonzalez-Martinez*, 612 Fed. App'x 587 (11th Cir. 2015) (recognizing tension between *Almendarez-Torres* and *Alleyne* and *Apprendi*).

Three other sources that simultaneously illustrate that this is an important and recurring question, and contain unusually thorough research on the number of courts that have identified the inconsistency of *Almendarez-Torres* with this court's other cases, are three unsuccessful petitions. *Fox v. United States*, no. 17-1338 (pet'n filed Mar. 22, 2018); *Scott v. Maryland*, no. 17-554 (pet'n filed Oct. 10, 2017); and *Jones v. Illinois*, no. 16-965 (pet'n filed Jan. 31, 2017).

CONCLUSION

For all these reasons, the petitioner respectfully asks that this court grant his petition for a writ of *certiorari* and order the Pennsylvania courts to reverse the denial of PCRA relief and vacate his judgment of sentence; he also seeks such other relief as is just.

Respectfully submitted,

/s/ *Richard T. Brown, Jr.*

Richard T. Brown, Jr.

Counsel of record for the petitioner