No. 19-_____

IN THE
SUPREME COURT OF THE UNITED STATES

IRVIN JUNIOR PHILLIPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should consider the continuing validity of *Almendarez-Torres v. United States*, 523 U.S. 244 (1998), in light of the reasoning of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

2. Whether a prior conviction must be alleged in the indictment before a defendant may be subjected to enhanced punishment under 18 U.S.C. § 924(e).

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Court of Appeals entered judgment in Petitioner's case on April 11, 2019. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,… nor be deprived of life, liberty, or property, without due process of law …."

The Sixth Amendment to the U.S. Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to … trial, by an impartial jury …."

FEDERAL STATUTE INVOLVED

The text of Title 18 U.S.C. § 924(e) is reproduced in Appendix C.

STATEMENT

Irvin Junior Phillips was charged with the possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. § 922(g). He pled guilty. Under 18 U.S.C. § 924(e), certain prior convictions can result in the Armed Career Criminal enhancement. This increases the sentence for a firearm offense from a statutory maximum ten years, to a mandatory minimum term of fifteen years to life. Mr. Phillips was deemed to have three prior Tennessee convictions that qualified as violent felonies – two prior aggravated assault convictions and an attempted aggravated assault conviction. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Court held that such enhancement-qualifying convictions are sentencing factors, not elements of a separate offense. In accordance with *Almendarez-Torres*, no prior felonies were alleged in Phillips's indictment. App. B.

Mr. Phillips objected to the enhanced sentence imposed under § 924(e). The district court overruled the objection and sentenced Mr. Phillips to 180 months imprisonment and five years of supervised release.

Mr. Phillips appealed, arguing that at least one of the three prior convictions did not qualify as a violent felony. He further

argued that because none of the prior convictions were alleged in the indictment, they could not subject him to enhanced penalties. Counsel acknowledged that the argument was foreclosed by this Court's precedent, but said that recent decisions from the Court suggested the precedent may be reconsidered. The Court of Appeals, finding itself bound by *Almendarez-Torres*, affirmed the sentence. App. A at 10.

REASONS FOR GRANTING THE WRIT

The Court Should Grant Certiorari To Consider Whether To Overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

Title 18 U.S.C. § 924(a)(2) punishes the possession of a firearm by a previously convicted felon with a maximum term of ten years imprisonment and three years of supervised release. The district court determined, however, that Mr. Phillips was subject to enhancement under 18 U.S.C. § 924(e)(1), which increases the maximum penalty if the possession occurred after the defendant had incurred certain convictions. The district court's decision accorded with this Court's decision in *Almendarez-Torres v. United States*, which held that an enhancement penalty such as that found in § 924(e) is a sentencing factor, not a separate, aggravated offense. 523 U.S. 224, 235 (1998). This Court further ruled that such enhancement penalties do not violate due process; a prior conviction need not be treated as an element of the offense, even if it increases the statutory maximum penalty. *Id.* at 239–47.

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

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

Relying on *Apprendi*, and later indications from the Court and individual Justices that *Almendarez-Torres* should be reversed, defendants like Mr. Phillips have continued to preserve for possible review the contention that their sentences exceeded the punishment permitted by statute and should be reversed. The Court has not granted certiorari on this issue, and the Sixth Circuit has repeatedly made clear, including in this case (*see* App. A at 10-11), that a challenge to *Almendarez-Torres* is not open to further debate. *United States v. Martin,* 526 F.3d 926, 942 (6th Cir. 2008) ("Unless and until the Supreme Court takes the next step, this Court is bound to follow its current statement of the law on this subject." (quoting *United States v. Beasley*, 442 F.3d 386, 392 n.3 (6th Cir. 2006)).

However, since *Apprendi* the Court has still questioned *Almendarez-Torres*'s reasoning and suggested the Court would be willing to revisit its holding. *See Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013); *see also Mathis v. United States,* 136 S. Ct. 2243, 2258–59 (2016) (stating that *Almendarez-Torres* should be overturned) (citing *Descamps v. United States*, 570 U.S. 254, 281 (2013) (Thomas, J., concurring) (same)). These opinions reveal continuing concern that *Almendarez-Torres* is constitutionally flawed.

In *Alleyne*, the Court applied *Apprendi*'s rule to mandatory minimum sentences, holding that any fact that produces a higher sentencing range—not just a sentence above the mandatory maximum—must be pleaded in the indictment and either admitted by the defendant or proved to a jury beyond a reasonable doubt. *Alleyne*, 570 U.S. at 114–16. In its decision, the Court apparently recognized that *Almendarez-Torres* remained subject to Sixth Amendment attack. The Court characterized that decision as a "narrow exception to the general rule" that all facts that increase punishment must be alleged and proved beyond a reasonable doubt. *Id.* at 111 n.1. But because the parties in that case did not challenge *Almendarez-Torres*, the Court said it would "not revisit it for purposes of our decision today." *Id.*

The Court's reasoning in *Alleyne* strengthens any future challenge to *Almendarez-Torres*'s recidivism exception. *Alleyne* traced the treatment of the relationship between crime and punishment, beginning in the eighteenth century, repeatedly noting how "[the] linkage of facts with particular sentence ranges … reflects the intimate connection between crime and punishment." *Id.* at 109; *see also id.* ("[i]f a fact was by law essential to the penalty, it was an element of the offense."); *id.* (historically, crimes were defined as "the whole of the wrong to which the law affixes punishment … including any fact that annexes a higher degree of punishment") (internal citations omitted); *id.* at 111 ("the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted.") (quoting 1 J. Bishop, Criminal Procedure § 81 at 51 (2d ed. 1872)). The Court concluded that, because "the whole of the" crime and its punishment cannot be separated, the elements of a crime must include any facts that increase the penalty. *Id.* at 109, 114–15. The Court recognized no limitations or exceptions to this principle.

Alleyne's declaration that the elements of a crime include the whole of the facts for which a defendant is punished seriously undercuts the view, expressed in *Almendarez-Torres*, that recidivism is different from other sentencing facts. *Almendarez-Torres*, 523

U.S. at 243–44; *see also Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). *Apprendi* later tried to explain this difference by pointing out that, unlike other facts, recidivism "does not relate to the commission of the offense itself[.]" 530 U.S. at 496 (internal quotation marks and citation omitted). But the Court has since acknowledged that *Almendarez-Torres* might have been "incorrectly decided[.]" *Id.* at 489; *see also Shepard v. United States*, 544 U.S. 13, 26 n.5 (2005) (acknowledging that the Court's holding in that case undermined *Almendarez-Torres*); *Cunningham v. California*, 549 U.S. 270, 291 n.14 (2007) (rejecting invitation to distinguish between "facts concerning the offense, where *Apprendi* would apply, and facts [like recidivism] concerning the offender, where it would not," because "*Apprendi* itself … leaves no room for the bifurcated approach").

Three concurring Justices in *Alleyne* provide additional reason to believe that this Court should and will revisit *Almendarez-Torres*. *See Alleyne*, 570 U.S. at 118 (Sotomayor, Ginsburg, Kagan, J.J., concurring). These Justices noted that the viability of the Sixth Amendment principle set forth in *Apprendi* was initially subject to some doubt, and some justices believed the Court "might

retreat" from it. *Id.* at 120. Instead, *Apprendi*'s rule "has become even more firmly rooted in the Court's Sixth Amendment jurisprudence." *Id.* Reversal of even recent precedent is warranted when "the reasoning of [that precedent] has been thoroughly undermined by intervening decisions." *Id.* at 121.

The growing view among members of this Court that *Almendarez-Torres* was wrongly decided is good reason to clarify whether *Almendarez-Torres* is still the law. *Stare decisis* "is at its weakest" when the Court interprets the Constitution. *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996). When "there has been a significant change in, or subsequent development of, our constitutional law," *stare decisis* "does not prevent … overruling a previous decision." *Agostini*, 521 U.S. at 235–36. Even if the Court were ultimately to reaffirm *Almendarez-Torres*, review is warranted. As shown above, a majority of the Justices have stated that *Almendarez-Torres* is wrong as a matter of constitutional law. While lower court judges—as well as prosecutors, defense counsel, and criminal defendants—are forced to rely on the decision, they must speculate as to the ultimate validity of the Court's holding. "There is no good reason to allow such a state of affairs to persist." *Rangel-Reyes v. United*

States, 547 U.S. 1200 (2006) (Thomas, J., dissenting from denial of certiorari).

If, as Mr. Phillips argues, *Apprendi*, its progeny, and, most recently, *Alleyne*, undermine *Almendarez-Torres*, then his sentence of imprisonment improperly exceeds the correct statutory maximum. The indictment stated only the elements of the § 922 felon-in-possession offense. It did not include any allegation of a prior conviction. Because Phillips was charged only with the § 922 offense, he preserved for further review the argument that his maximum punishment was limited to ten years imprisonment.

The question of *Almendarez-Torres*'s validity can be resolved only in this forum. *Rangel-Reyes*, 547 U.S. at 1200 (Thomas, J., dissenting) (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)). *Almendarez-Torres* is a decision of the country's highest court on a question of constitutional dimension; no other court, and no other branch of government, can decide if it is wrong. Regarding the Constitution, it is ultimately the Court's responsibility "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Court should grant certiorari to say whether *Almendarez-Torres* is still the law.

CONCLUSION

For these reasons, this Court should grant certiorari in this case.

Respectfully submitted,

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