No. _____

In the

Supreme Court of the United States

_____

Clinton Devone Hicks,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

I. Whether 18 U.S.C. § 924(a) provides for criminal penalties for felons who possess firearms in interstate commerce absent proof that they knew of their felony status, or of the firearms movement in interstate commerce?

II. Whether all facts—including the fact of a prior conviction—that increase a defendant's statutory maximum must be pleaded in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt?

III. Whether the definition of "delivery" in the Texas controlled substances statute, which includes an offer to sell includes conduct that does not qualify as a "serious drug offense"?

PARTIES TO THE PROCEEDING

Petitioner is Clinton Devone Hicks, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Clinton Devone Hicks seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Hicks*, No. 18-11352, 770 Fed. Appx. 215 (5th Cir. May 15, 2019) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on May 15, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

18 U.S.C. § 922(g) provides in relevant part:

> It shall be unlawful for any person – (1) who has been convicted in any court of, a crime punishable for a term of imprisonment exceeding one year... to ship or transport in interstate or foreign commerce, or possess in or effecting commerce, any firearm or ammunition....

18 U.S.C. § 924(a) provides in relevant part:

> (2) Whoever knowingly violates subsection...(g)... of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924(e)(1) provides in relevant part:

> In the case of a person who violates sections 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under

this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

STATEMENT OF THE CASE

Petitioner Clinton Devone Hicks pleaded guilty to two counts of possession of a firearm in interstate commerce after having sustained a felony conviction, and received a 180 month sentence of imprisonment. In pleading guilty, however, he admitted neither that he knew of his felon status, nor that he knew the firearm had moved in interstate commerce. The district court nonetheless accepted the plea.

On appeal, Petitioner argued that his conviction under 18 U.S.C. § 922(g) was unconstitutional because it did not require knowledge of the defendant's status as a felon and did not require knowledge of the interstate commerce element. The Petitioner also argued that his sentencing enhancement under 18 U.S.C. 924(e) was unconstitutional because it did not require a grand jury indictment and proof to a jury beyond a reasonable doubt in order to raise the statutory minimum and maximum sentence. Hicks argued that *Almendarez-Torres*, 523 U.S. 224, 226-27 should be over turned. Hicks also argued that his prior convictions for delivery and possession with intent to deliver do not qualify as "serious drug offenses" for the purposes of ACCA because the Texas definition of "delivery" includes an offer to sell.

The court of appeals rejected all of these arguments and affirmed. *See* [Appx. A].

REASONS FOR GRANTING THIS PETITION

I. This Court should grant certiorari, vacate the sentence and remand to the Fifth Circuit for reconsideration in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

Petitioner Clinton Devone Hicks pleaded guilty to two counts of possession of a firearm in interstate commerce after having sustained a felony conviction, and received a 180 month sentence of imprisonment. In pleading guilty, however, he admitted neither that he knew of his felon status, nor that he knew the firearm had moved in interstate commerce. The district court nonetheless accepted the plea.

On appeal, Petitioner argued that his conviction under 18 U.S.C. § 922(g) was unconstitutional because it did not require knowledge of the defendant's status as a felon and did not require knowledge of the interstate commerce element. The Petitioner also argued that his sentencing enhancement under 18 U.S.C. 924(e) was unconstitutional because it did not require a grand jury indictment and proof to a jury beyond a reasonable doubt in order to raise the statutory minimum and maximum sentence. Hicks argued that *Almendarez-Torres*, 523 U.S. 224, 226-27. Hicks also argued that his prior convictions for delivery and possession with intent to deliver do not qualify as "serious drug offenses" for the purposes of ACCA because the Texas definition of "delivery" includes an offer to sell.

The court of appeals rejected all of these arguments and affirmed. *See* [Appx. A].

Section 922(g) of Title 18 makes it "unlawful" for certain disfavored populations to possess firearms in interstate commerce. People who have been convicted of a prior felony are one such population. 18 U.S.C. §922(g)(1). Aliens illegally in the United States are another such population. 18 U.S.C. §922(g)(5).

Section 924(a) of Title 18 provides for criminal punishment to anyone who "knowingly violates subsection ... (g)." In *Rehaif v. United States*, No. 17-9560, __U.S.__, 139 S.Ct. 2191 (June 21, 2019), this Court held:

> We conclude that in a prosecution under 18 U.S.C. §922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm. We express no view, however, about what precisely the government must prove to establish a defendant's knowledge of status in respect to other § 922(g) provisions not at issue here.
>
> *Id*. at 2200.

Of course, the Fifth Circuit, when it entered the opinion in the Petitioner's case on May 15, 2019, did not have the benefit of this Court's opinion in *Rehaif*, which was entered on June 21, 2019. *See* Appendix A. However, Petitioner did specifically raise the above argument in his direct appeal, and the Fifth Circuit, based on it's own precedent, rejected Petitioner's argument and affirmed the sentence. *See* Appendix A.

Accordingly, this Court should grant certiorari, vacate and remand (GVR) for reconsideration by the lower court in light of *Rehaif*. Ultimately, a GVR is appropriate where intervening developments reveal a reasonable probability that the

outcome below rests upon a premise that the lower court would reject if given the opportunity for further consideration. *See Lawrence*, 516 U.S. at 168.

As a part of his guilty plea, the Petitioner was advised of the elements of this offense, but he was not advised that knowledge of his status as a person prohibited from possessing a firearm was an element. *See* (ROA.33). In fact, a complete reading of the elements as described shows that the Petitioner was advised the elements do not require knowledge of the prohibited status. *See id.* In his factual resume, the Petitioner specifically stipulated that he "Knowingly possessed a Clerke Technicorp, Model Clerke 1st .32 caliber revolver, bearing serial number 157810 after he had been convicted of a felony." (ROA.36). Accordingly it is not clear from the stipulated facts that the Petitioner stipulated he knew he was a convicted felon. In any event, the record does not show that his plea was knowingly and voluntarily entered because he was not properly advised of the elements of the offense.

GVR is not a decision on the merits. *See Tyler v. Cain*, 533 U.S. 656, 665, n.6 (2001); *accord State Tax Commission v. Van Cott*, 306 U.S. 511, 515-516 (1939). Any possible or arguable procedural obstacles to reversal – such as the consequences of non- preservation or harmless error analysis – should be decided in the first instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964)(*per curiam*)(GVR "has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent"); *Torres-Valencia v. United States*, 464 U.S. 44 (1983)(*per curiam*)(GVR utilized over government's objection where error was conceded; government's harmless error

argument should be presented to the Court of Appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990)(Stevens, J., dissenting)(speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945)(remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the Court of Appeals).

In the present case, in which the Petitioner did raise this issue in the Court of Appeals, but the lower court rejected the argument without the benefit of this Court's recent decision precisely on point, this Court should vacate and remand for re-consideration in light of *Rehaif v. United States*, 139 S.Ct. at 2200. Alternatively, the Petitioner requests this Court to grant certiorari to decide the issue whether the knowledge element should apply to the interstate commerce element, which was not decided in *Rehaif*. *See id*.

II. This Court should reconsider *Almendarez-Torres v. United States.*

Petitioner was subjected to an enhanced statutory maximum under 18 U.S.C. § 924(e) because the district court found that his prior controlled substances convictions subjected Hicks to the Armed Career Offender Act (ACCA), which enhances the statutory range of punishment from 0-to-10 years to a mandatory minimum 15 years to any number of years. Petitioner's sentence thus depends on the judge's ability to

find the existence and date of a prior conviction -- as well as whether that prior conviction qualified as a "serious drug offense" -- and to use that conviction to increase the statutory maximum. This power was affirmed in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that the enhanced maximums of 8 U.S.C.§ 1326 represent sentencing factors rather than elements of an offense, and that they may be constitutionally determined by judges rather than juries. *See Almendarez-Torres*, 523 U.S. at 244. The ruling in *Almendarez-Torres*, has been applied to the sentencing enhancements in 18 U.S.C. § 924(e) despite the fact that Justice Thomas pointed out the ACCA enhancement runs afoul of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See United States v. Descamps*, 570 U.S. 254, 280 (2013) ("The only reason Descamp's ACCA enhancement is before us is 'because this Court has not yet reconsidered *Almendarez-Torres v. United States* (citation omitted), which draws an exception to the *Apprendi* line of cases for judicial fact finding that concerns a defendant's prior convictions.").

This Court, has repeatedly limited *Almendarez-Torres*. *See Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013) (characterizing *Almendarez-Torres* as a narrow exception to the general rule that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt); *Descamps v. United States*, 570 U.S. at 280 (Thomas, J., concurring) (stating that *Almendarez-Torres* should be overturned); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (stressing that *Almendarez-Torres* represented "a narrow exception" to the prohibition on judicial fact-finding to increase a defendant's sentence); *United States*

v. Shepard, 544 U.S. 13 (2005) (Souter, J., controlling plurality opinion) ("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."); *Dretke v. Haley*, 541 U.S. 386, 395-396 (2004) (concluding that the application of *Almendarez-Torres* to the *sequence* of a defendant's prior convictions represented a difficult constitutional question to be avoided if possible); *Nijhawan v. Holder*, 129 S.Ct. 2294, 2302 (2009) (agreeing with the Solicitor General that the loss amount of a prior offense would represent an element of an 8 U.S.C. §1326(b) offense, to the extent that it boosted the defendant's statutory maximum).

Further, any number of opinions, some authored by Justices among the *Almendarez-Torres* majority, have expressed doubt about whether it was correctly decided. *See Apprendi*, 530 U.S. at 490; *Haley*, 541 U.S. at 395-396; *Shepard*, 544 U.S. at 26 & n.5 (Souter, J., controlling plurality opinion); *Shepard*, 544 U.S. at 26-28 (Thomas, J., concurring); *Rangel-Reyes v. United States*, 547 U.S. 1200, 1201 (Stevens, J., concurring in denial of certiorari); *Rangel-Reyes*, 547 U.S. at 1202-1203 (Thomas, J., dissenting from denial of certiorari); *James v. United States*, 550 U.S. 192, 231-232 (2007) (Thomas, J., dissenting). And this Court has also repeatedly cited authorities as exemplary of the original meaning of the constitution that do not recognize a distinction between prior convictions and facts about the instant offense. *See Blakely v. Washington*, 542 U.S. 296, 301-302 (2004) (quoting W. Blackstone,

Commentaries on the Laws of England 343 (1769), 1 J. Bishop, Criminal Procedure § 87, p 55 (2d ed. 1872)); *Apprendi*, 530 U.S. at 478-479 (quoting J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862) , 4 Blackstone 369-370).

In *Alleyne*, this 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 proved to a jury beyond a reasonable doubt. 133 S. Ct. at 2162–63. In its opinion, the Court apparently recognized that *Almendarez-Torres*'s holding remains subject to Fifth and Sixth Amendment attack. *Alleyne* characterized *Almendarez-Torres* as a "narrow exception to the general rule" that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt. *Id.* at 2160 n.1. But because the parties in *Alleyne* did not challenge *Almendarez-Torres*, this Court said that it would "not revisit it for purposes of [its] decision today." *Id.*

The Court's reasoning nevertheless demonstrates that *Almendarez-Torres*'s recidivism exception may be overturned. *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 2159 ("[i]f a fact was by law essential to the penalty, it was an element of the offense"); *see id.* (historically, crimes were defined as "the whole of the wrong to which the law affixes [ ] punishment … include[ing] any fact that annexes a higher degree of punishment") (internal quotation marks and citations omitted); *id.* at 2160 ("the indictment must

contain an allegation of every fact which is legally essential to the punishment to be inflicted") (internal quotation marks and citation omitted). This 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. The Court recognized no limitations or exceptions to this principle.

Alleyne's emphasis 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. *See 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* 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 (quoting *Almendarez-Torres*, 523 U.S. at 230). But this Court did not appear committed to that distinction; it 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 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 the time is ripe to revisit *Almendarez-Torres*. *See Alleyne*, 133 S. Ct. at 2164 (Sotomayor, Ginsburg, Kagan, J.J., concurring). Those 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 2165. Instead, *Apprendi*'s rule "has become even more firmly rooted in the Court's Sixth Amendment jurisprudence." *Id*. Reversal of precedent is warranted when "the reasoning of [that precedent] has been thoroughly undermined by intervening decisions." *Id.* at 2166.

The validity of *Almendarez-Torres* is accordingly subject to reasonable doubt. If *Almendarez-Torres* is overruled, the result will obviously undermine the use of Petitioner's prior convictions to increase his statutory maximum. His sentence of 180 months imprisonment and a three-year term of supervised release would exceed the statutory maximum of ten years which would have applied absent the court-found enhancement.

III. This Court should grant review to determine whether the definition of "delivery" on the Texas Controlled Substance statute, which includes an offer to sell includes conduct that does not qualify as a "serious drug offense"

In the alternative, this Court should grant review to determine whether the definition of "delivery" under the Texas controlled substance statute, by including the term "offer to sell" is too broad to qualify as "serious drug offense.

ACCA provides for an enhanced penalty – a 15 year mandatory minimum and a maximum of life imprisonment – when the defendant has committed three or more

"serious drug offenses." 18 U.S.C. §924(e). It defines the term "serious drug offense" as either: (1) an offense prosecuted under one of three specified federal drug statutes or (2) "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. §924(e)(2)(A). The Petitioner raised this issue in the district court and the court overruled the objection. *See* (ROA.101).

The statute defining two of Petitioner's prior drug offenses prohibits "possess[ion] with intent to deliver a controlled substance." *See* Tex. Health & Safety Code §481.112(a). The same statute prohibits the "delivery" of a controlled substance – two more of Appellant's convictions arose from an allegation and admission of "delivery." *See* Tex. Health & Safety Code §481.002(a). The word "deliver," however, is further defined by §481.002(8) of the Texas Health and Safety Code to include "offering to sell a controlled substance." *See* Tex. Health & Safety Code §481.002(8). Thus, Petitioner's statute of conviction authorized a guilty verdict upon proof that he merely possessed a controlled substance with intent to offer it for sale, or that he offered it for sale. That conduct does not satisfy the definition of a "serious drug offense."

On its face, ACCA identifies only four acts that will trigger its provisions: manufacturing, distributing, possession with intent to distribute, and possession with intent to manufacture. It does not name offers for sale, nor possession with

intent to offer a drug for sale. Because ACCA requires a "categorical approach" that evaluates the breadth of the defendant's statute of conviction rather than his conduct (*see United States v. Allen*, 282 F.3d 339, 342 (5th Cir. 2002)), the provision may be applied only if the statute's "least culpable means" of commission fall within the definition of a "serious drug offense." *United States v. Houston*, 364 F.3d 243, 246 (5th Cir. 2004).

In *United States v. Vickers*, 540 F.3d 356 (5th Cir. 2008), the Fifth Circuit held that the Texas offense of delivering a controlled substance by offering it for sale constituted a "serious drug offense" under ACCA. Citing *United States v. Winbush*, 407 F.3d 703 (5th Cir. 2005), the *Vickers* panel defined the term "involving" to mean "related to or connected with." *See Vickers*, 540 F.3d at 365–366. It reasoned that the breadth of this term reflected a Congressional intent to reach certain acts of trafficking that do not equate precisely to distribution, manufacture, or possession with intent to distribute or manufacture. *Id.* Specifically, the Fifth Circuit understood the provision to "reach those who intentionally enter the highly dangerous drug distribution world." *Id.* A defendant who offers drugs for sale, the panel reasoned, enters the drug marketplace as a purported seller, even if he does not actually possess any drugs. *See id.* The panel reasoned that such people show a propensity for violence that makes them an appropriate target for enhanced punishment when they later possess guns. *See id.*

Notably, *Vickers* cited *Begay v. United States*, 553 U.S. 137 (2008), for the proposition that offenses qualify for ACCA based on their capacity to identify "the

kind of person who might deliberately point the gun and pull the trigger." *Vickers*, 540 F.3d at 365 (quoting *Begay*, 553 U.S. at 146). That reasoning has been dramatically undermined by *Johnson v. United States,* 135 S.Ct. 2551 (2015), which dispensed entirely with the *Begay* framework, finding that the difficulties in applying it rendered ACCA's residual clause unconstitutionally vague. *See Johnson*, 135 S.Ct. at 2559, 2563. Specifically, the Court did not believe it possible to identify the typical case committed under a given prior statute of conviction. *See id*. at 2557-2558. And given the difficulties in identifying the typical case of a prior offense, it was impossible reliably to determine whether that offense presented the kind of risk that should qualify its offenders for the dramatically enhanced punishments of ACCA. *See id.* Similarly, a lower court cannot reliably decide whether the typical "offer for sale" is "the kind of person" likely to shoot people, as the Fifth Circuit tried to do in *Vickers*. Rather, the lower courts should insist that the defendant's drug offenses consist entirely of acts named in ACCA's definition of "serious drug offenses."

This Court should grant review to determine whether the Fifth Circuit has misapplied ACCA's definition of "serious drug offense" to include offers to sell.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit, and in the alternative, should grant certiorari, vacate the judgment and remand for reconsideration in light of *Rehaif v. United States*, No. 17-9560, __U.S.__, 139 S.Ct. 2191 (June 21, 2019),

Respectfully submitted this 13th day of August, 2019.

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