No. 19-5723

IN THE

SUPREME COURT OF THE UNITED STATES

MELVIN B. THOMPSON – PETITIONER

Vs.

MARK S. INCH – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Can a Florida Law permit a trial court to exercise judicial discretion to make new findings of fact of an escalating pattern of criminal conduct by the preponderance of the evidence standard of proof to impose an upward departure sentence beyond the sentencing guideline permitted range without violating a criminal defendant's Sixth and Fourteenth Amendment Constitutional Rights.

2. Has this Court's Sixth and Fourteenth Amendment jurisprudence announced in its *Apprendi v. New Jersey* line of cases over the last two decades, effectively eroded the underpinnings of *Almendarez-Torres*, 118 S. Ct. 1219 (1998), Stare Decisis vitality, and viability, rendering the fact of a prior conviction an element of the offense that must be found by a jury beyond a reasonable doubt standard of proof?

3. Did the United States District Court of Florida and the Eleventh Circuit Court of Appeals improperly apply the *Ritcher* presumption to Mr. Thompson's Habeas Claims of constitutional violations; when those courts failed to look through the appellate decision to the last reasoned opinion to the state post conviction court, to make a determination de novo whether Mr. Thompson constitutional claims were properly adjudicated on the merits.

LIST OF PARTIES

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

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[√] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B – C to the petition and is

[√] reported at unknown; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix D – E to the petition and is

[√] reported at 2017 U.S. Dist. LEXIS 216202; or,
[ ] has been designated for publication but is not yet reported; o,
[ ] is unpublished.

[√] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix G – I to the petition and is:

[√] reported at Thompson v. State, 158 So.3d 571 (Fla. 1st DCA 2015) (table)
Thompson v. State, 162 So.3d 994 (Fla. 1st DCA 2015) (Table)

The opinion of the De Novo Resentencing court appears at Appendix F – H to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[√] is unpublished.

JURISDICTION

[√] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was March 27, 2019.

[ ] No petition for rehearing was timely filed in my case.

[√] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 27, 2018, and a copy of the order denying rehearing appears at Appendix C.

[√] An extension of time to file the petition for a writ of certiorari was granted to and including August 24, 2019 on June 20, 2019 in Application No. 18- A- 1331.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides:

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 shall have been previously ascertained by the law and to be informed of the witness against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section One of the Fourteenth Amendment specifies:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 921.001(6), Florida Statute in effect at the time of Thompson's crimes provide:

(6) A court may impose a departure sentence outside the sentencing guidelines based upon circumstances or factors, which reasonably justify the aggravation or mitigation of the sentence in accordance with § 921.0016. The level of proof necessary to establish facts supporting a departure from a sentence under the guidelines is a preponderance of the evidence.

§ 921.001(8) in effect at the time of Thompson's crimes provide:

(8) A sentence may be imposed outside the guidelines on credible facts proven by a preponderance of the evidence, which demonstrates that the defendant's prior record including offenses for which adjudication was withheld and the current criminal offense for which the defendant is being sentenced indicate an escalating pattern of criminal conduct. The escalating pattern of criminal conduct may be evidenced by a progression from nonviolent to violent

crimes, a progression of increasingly violent crimes, or a pattern of increasingly serious criminal activity.

§ 921.0016(3) (p) in effect at the time of Thompson's crimes provide:

(3) Aggravating circumstances under which a departure from the sentencing guidelines is reasonably justified include but are not limited to:

(p) The defendant is not amenable to rehabilitation or supervision as evidenced by an escalating pattern of criminal conduct as described in § 921.001(8).

STATEMENT OF THE CASE

The State of Florida charged in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida that on August 30, 1995, Mr. Thompson committed the following offenses:

Count 1 – Sexual Battery with a Deadly Weapon;
Count 2 – Burglary of a Dwelling while Armed with a Deadly Weapon;
Count 3 – Aggravated Assault with a Deadly Weapon; and
Count 4 – False Imprisonment. **(Appendix J)**

Mr. Thompson entered a plea of not guilty to all charges and exercised his right to a jury trial. The jury found Mr. Thompson guilty as charged in all four counts. **(Appendix K)**

On September 17, 1997, the trial court conducted a sentencing hearing. Mr. Thompson's Guideline Sentencing Points, calculated under the guidelines reflected a permitted prison sentence of 122.5 months to 204.2 months.

The laws of Florida permits a trial court the discretion to impose a departure sentence if the trial court found that aggravating circumstances existed that justified an upward departure sentence. The trial court found aggravating circumstances, based on the preponderance of the evidence standard of proof, and imposed the following upward departure sentences:

Count 1 – a prison sentence of natural life;
Count 2 – a term of probation to run consecutive to the prison sentence in Count 1;
Count 3 – a prison term of five-years to run concurrent with the prison sentence in Count 1;
Count 4 – a prison term of five-years to run concurrent with the prison sentence in Count 1. **(Appendix L)**

Mr. Thompson appealed his convictions and sentences to the First District Court of Appeal. In a decision with a written opinion, the First District Court of Appeal affirmed Mr. Thompson's conviction and sentences. *Thompson v. State*, 764 So. 2d 630 (Fla. 1st DCA 2000).

On May 28, 2002, Mr. Thompson filed his first Pro Se **Fla. R. Crim. P. 3.850** motion for postconviction relief attacking his first conviction and sentence. The court then appointed special public defender to represent Mr. Thompson.

The Postconviction court denied the amended motion for postconviction relief on December 09, 2005. The First District Court of Appeal in a decision with a written opinion affirmed the Postconviction court's denial of the Amended Motion for Postconviction relief. *Thompson v. State*, 949 So. 2d 1169 (Fla. 1st DCA 2007).

Mr. Thompson then sought discretionary review in the Florida Supreme Court of the First District Court of Appeals decision affirming the denial of his amended postconviction motion. The Florida Supreme Court granted review, quashed the decision of the First District Court of Appeal, and remanded with instructions to grant Mr. Thompson a new sentencing hearing. *Thompson v. State*, 990 So. 2d 482 (Fla. 2008).

On remand, the First District Court of Appeal instructed the Postconviction Court to grant Mr. Thompson a new sentencing hearing. *Thompson v. State*, 18 So. 3d 561 (Fla. 1st DCA 2008).

The trial court scheduled a second de novo sentencing hearing for October 12, 2011. Prior to the second sentencing hearing, the state of Florida filed a notice

that it would seek an upward departure sentence. The state sought an upward departure sentence because Mr. Thompson was not "amenable to rehabilitation or supervision as evidenced by an escalating pattern of criminal conduct, as this enhancement factor is set forth is § 921.0016 (3) (p) Florida Statutes (1995) **(Appendix M)**

Mr. Thompson motioned the de novo resentencing court to resentence him pursuant to his Sixth Amendment jury trial rights, and empanel a jury to find the factors set forth in § 921.0016 (3) (p) beyond a reasonable doubt of standard of proof. **(Appendix N and P)**

The scoresheet used at the second sentencing hearing again reflected that the permitted prison sentence range was from 123.9 months to 206.5 months. **(Appendix O)**

Florida law permits the de novo resentencing court to resentence Mr. Thompson to a departure sentence at the discretion of the resentencing court if it finds aggravating circumstances that justified an upward departure sentence, by the preponderance of the evidence. See § 921.0016 (6) Fla. Statute (1995).

The de novo resentencing court so found additional facts and imposed an upward departure sentence without a jury, based on the preponderance of the evidence **(Appendix P)** and sentenced Mr. Thompson to:

Count 1 – prison sentence of natural life.
Count 2 – prison sentence of natural life; to run concurrent to the sentence in Count 1.
Count 3 – five year prison sentence to run concurrent to the prison sentence in Count 1.

Count 4 – five year prison sentence to run concurrent to the prison sentence in Count 1. **(Appendix Q)**

The de novo resentencing Court prepared and filed a document setting forth its reasons for imposing an upward departure sentencing, citing to this Court's, precedents: *James v. U.S.*, 550 U.S. 192, 194 (2007), and *Almendarez Torres,* 118 S.Ct. 1219 (1998) as authority to impose an upward departure without violating the Rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). **(Appendix R)**

The de novo resentencing Court did not rely on Fla. Statute § 921.0016 (3) (p) in total, to justify the upward departure sentence, (which was one of the reasons for an enhanced sentence the state of Florida alleged in its notice, where Mr. Thompson, successfully refuted and contested, with evidence that Mr. Thompson was amenable to rehabilitation and supervision.) **(Appendix N and P)** Also see **(Appendix W's exhibits)**(*Certificates, Diploma...attesting acts of Rehabilitation, etc.*)

If the de novo resentencing had relied on Fla. Statute § 921.0016 (3) (p), then the court would have been required to find Mr. Thompson was not amenable to rehabilitation or supervision due to a pattern of escalating criminal conduct.

Instead, the de novo resentencing stated that it imposed an upward departure sentence because Mr. Thompson had engaged in a pattern of escalating criminal conduct as allowed Fla. Statute § 921.001(8) – a ground not set forth in the State's notice of intent to seek an enhanced sentence, but incorporated within Fla. Stat. 921.0016(3) (p). **(Appendix N and P)** Mr. Thompson refuted and contested § 921.0016(3) (p), Florida Statutes (1995).

Mr. Thompson appealed his de novo resentencing to the First District Court of Appeal. The First District Court of Appeal affirmed Mr. Thompson's new sentences in a per curiam decision without an opinion. *Thompson v. State*, 102 So. 3d 714 (Fla. 1st DCA 2012) (citing *Ross v State*, 88 So. 3d (Fla. 1st DCA 2012)). **(Appendix S)**

Mr. Thompson filed a petition for a writ of Certiorari to the United States Supreme Court to review the decision of the First District Court of Appeal. The United States Supreme Court denied the petition. **(Appendix T and U)**

On September 25, 2014, Mr. Thompson filed a motion to correct illegal sentence under **Fla. R. Crim. P. 3.800(a) (Appendix V)** raising the following arguments:

1. Florida Statute § 921.001 (8) is unconstitutional, and permits a trial court to impose an upward departure sentence based on facts found by the trial court by a preponderance of the evidence standard of proof instead of by a jury using a beyond a reasonable doubt standard. This procedure is unconstitutional under the United States Supreme Court's decision in *Apprendi v. New Jersey* supra, and *Blakely v. Washington*, 542 U.S. 296 (2004).

2. The trial court erred by applying federal sentencing decision to a state sentence. Namely, the trial court applied the decision of the United States Supreme Court in *Almendarez-Torres v. United States* supra, and *James v. United States* supra. **(Appendix V: pg. 8-11; 16-18)**.

3. The state, in seeking to prove that Mr. Thompson [had] engaged in an escalating pattern of criminal conduct, used inadmissible evidence. **(Appendix E)**

The postconviction court denied the motion on November 05, 2014 **(Appendix E)**. Mr. Thompson filed an appeal of denial to the First District Court of Appeal. The First District Court of Appeal affirmed the denial of the motion in a per curiam decision without an opinion. *Thompson v. State*, 158 So. 3d 571 (Fla. 1st DCA 2014) **(Appendix G)**

On November 25, 2014, while the appeal of the Postconviction Court's denial of Mr. Thompson first: **Fla. R. Crim. P. 3.800(a)** motion was pending Mr. Thompson filed a second: **Fla. R. Crim. P. 3.800(a)** motion to correct illegal sentence. **(Appendix W)**

In the second **Fla. R. Crim. P. 3.800(a)** motion, Mr. Thompson argued that *Florida laws 93-406* that established the sentencing guidelines, commonly known as the "1994" sentencing guidelines is facially unconstitutional. Specifically, Mr. Thompson argued that under the decisions of the United States Supreme Court in *Apprendi v. New Jersey* supra, and *Blakely v. Washington* supra, the following portions of the 1994 sentencing guidelines violated a criminal defendant's rights to due process under the Fifth and Fourteenth Amendments, and the right to a jury trial under the Sixth Amendment to the United States Constitution: § 921.001 (6), 921.001 (8), 921.001 (3) (a) through (s), as these laws permit a Florida trial court to use a preponderance of the evidence standard of proof to find a fact used by the trial court to impose an upward departure sentence, beyond the relevant statutory maximum.

Mr. Thompson also argued in the Second **Rule 3.800(a)** motion that the *Apprendi* and *Blakely* sentencing error was not harmless, and Mr. Thompson contested the vitality of *Almendarez-Torres* supra state decision, authority, and it

being a violation of his Sixth and Fourteenth Amendment rights. (**Appendix W: see footnote 1 and pages 10-28**).

The post conviction court did not consider the second **Fla. R. Crim. P. 3.800(a)** motion on its merits. Instead, the postconviction court denied the second **Fla. R. Crim. P. 3.800(a)** motion ruling that it did not have jurisdiction to consider the motion because the appeal of Mr. Thompson's first **Fla. R. Crim. P. 3.800(a)** motion was pending in the First District Court Appeal at the time. **(Appendix H)**

Mr. Thompson appealed and briefed the denial of the Second **Fla. Rule Crim. P. 3.800(a)** motion **(Appendix X: pg. 3, and pages 16-21)** and in a per curiam decision without an opinion, the First District Court of Appeal affirmed the denial. **(Appendix I)**

Mr. Thompson filed a pro se petition for a writ of certiorari to the United States Supreme Court. The United States Supreme Court denied the petition. **(Appendix Y: pg. i, and pages 9-33)** *Thompson v. Florida*, 135 S.Ct. 2905 (2015)

Mr. Thompson then filed a 28 U.S.C. § 2254 Petition for a Writ of Habeas Corpus in the District Court. **(Appendix Z)**

The Habeas Petition raised the following:

1. The de novo resentencing court violated Mr. Thompson's rights under due process of the Fifth and Fourteenth Amendments, and Mr. Thompson's jury trial rights under the Sixth Amendment, by imposing a departure sentence based on facts not found by a jury beyond a reasonable doubt.

2. The entire body of Florida law known as the 1994 sentencing guidelines is facially unconstitutional because it allows a trial court to exceed the permitted range of prison sentence based on factual findings made by a trial court by a preponderance of evidence instead of by a jury beyond a reasonable doubt.

3. That an escalating pattern of criminal conduct is not a recidivism enhancement statute, but are elements of a separate aggravated crime, and the state of Florida's erroneous reliance upon Almendarez-Torres's authority is meritless, as *Almendarez-Torres's* underpinnings have been eroded by United States Supreme Court's subsequent Sixth Amendment Jurisprudence.

(Appendix Z: pages 8-9)

The District Court referred the Habeas Petition to U.S. Magistrate Judge Hon. Gary R. Jones. The State of Florida filed its answer **(Appendix AA)**, and Mr. Thompson filed his Traverse. **(Appendix BB: pages 14-23)** On November 07, 2017, Magistrate Judge Jones issued a Report and Recommendation that the District Court deny the Habeas Petition and that the District Court deny Mr. Thompson a COA. **(Appendix E: pages 21-33)** (Holding Mr. Thompson had properly exhausted his claim contesting *Almendarez-Torres* in State courts).

Mr. Thompson filed objections to the Magistrate Judge's Report and Recommendation. **(Appendix CC: pages 43-48)** (Arguing *Almendarez-Torres* demise).

On January 26, 2018, the District Court entered an order that adopted the Magistrate Judge's report and recommendation, denied the Habeas Petition and denied Mr. Thompson a COA. **(Appendix D)**

Mr. Thompson filed a timely notice of appeal of the District Court's order **(Appendix DD)** and Mr. Thompson, sought extensions of time to file his certificate of Appealability. **(Appendix EE)**

On July 19, 2018, Mr. Thompson filed his petition for certificate of appealability with the Eleventh Circuit Court of Appeals **(Appendix FF)**; appealing all issues raised in his state postconviction **Fla. R. Crim. P. 3.800(a)** motions. **(Appendix V** and **W)**

On October 2, 2018, the Eleventh Circuit Judge Stanley Marcus denied Mr. Thompson's certificate of appealability. **(Appendix B)**

Mr. Thompson sought multiple extensions of time to file Motion for Reconsideration, and the extension of time motions were granted. **(Appendix GG)**

On March 18, 2019 Mr. Thompson, filed his first Motion for Reconsideration **(Appendix HH)** and Eleventh Circuit Judges Grant and Marcus denied the motion on March 27, 2019. **(Appendix C)**

On April 29, 2019 Mr. Thompson filed Motion in the Eleventh Circuit Court, advising of clerical filing and mailing errors and never received a reply. Mr. Thompson now files this timely Writ of Certiorari. On June 7, 2019, Mr. Thompson filed an Application to Justice Clarence Thomas for an Application for Extension of Time to File a Writ of Certiorari, and on June 20, 2019, The Honorable Justice Clarence Thomas granted the application to and including August 24, 2019. **(Appendix A)**

[On June 25, 2019, Mr. Thompson filed a Motion to Reopen Case in the Eleventh Circuit. No reply as of August 14, 2019.] **(Appendix II)**

Mr. Thompson now files this timely Writ of Certiorari.

REASON FOR GRANTING THE WRIT

Question One:

FLORIDA SENTENCING STATUTE § 921.001 (8) PERMITS A TRIAL COURT TO EXERCISE JUDICIAL DISCRETION TO MAKE NEW FINDING OF FACT OF AN ESCALATING PATTERN OF CRIMINAL CONDUCT BY THE PREPONDERANCE OF THE EVIDENCE TO IMPOSE A UPWARD DEPARTURE SENTENCE VIOLATING A CRIMINAL DEFENDANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT CONSTITUTIONAL RIGHTS?

The Eleventh Circuit decision to deny Petitioner's certificate of appealability *(hereafter referred to as COA)* based upon the Court's alleging the Petitioner failed to make a substantial showing of denial of a constitutional right," which is in square conflict with this Court's precedents in *Apprendi v. New Jersey* supra; *Blakley v. Washington* supra; *Cunningham v. California*, 549 U.S. 270 (2007); *U.S. v. Haymon,* 27 Fla. Law Weekly Fed. S1079 (June 2019); and Supreme Court Rule 10 (a) (c).

Petitioner's case was pending in the Eleventh Circuit Court of Appeal and time to file writ of certiorari extended when this Court issued its decision in *U.S. v. Haymond* supra, wherefore, under the pipeline doctrine announced in *Griffin v. Kentucky*, 479 U.S. 314 (1987), the holding in *Apprendi* progeny: *U.S. v. Haymond* supra applies to Petitioner's claim.

The Eleventh Circuit's order denying Petitioners COA is in conflict with the Tenth Circuit Court of Appeals, where in *Haymond* the Tenth Circuit concluded that the facts of criminal conduct, found by a judge by a preponderance of the

evidence violated *Haymond's* right to jury trial, also see: *Isaac v. State*, 911 So. 3d 813 (Fla. 1st DCA 2005); and *State v. Isaac*, 66 So. 3d 912 (Fla. 2011), cert den, 2012 WL 538334 (U.S. Feb 21, 2012) appeal after remand at 989 So. 2d 1217 (Fla. 1st DCA 2008). There the Appellate Court held that escalating pattern of criminal conduct does violate an appellant's sixth amendment rights, and then finding that § 921.001(8) was harmless error in relation to the facts of *Isaac's* case.

Justice Gorsuch held, "Only a jury acting on proof beyond a reasonable doubt may take a person's liberty. That promise stands as one of the constitutions most vital protections against arbitrary government." *U.S. v. Haymond,* 27 Fla. Weekly Fed. S1079 at S1080.

The Petitioner states that the Framers of the constitution intended for the constitution to protect the people's rights, and preserves the jury's historic role as an intermediary between the state and criminal defendants. *United States v. Gaudin*, 515 U.S. 506, at 510-511 (1995).

"Towards that end the Framers adopted the sixth amendments' promise that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury." In the fifth amendment, they added that no one may be deprived of liberty without "due process of law." Together these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has extended down centuries, *Apprendi v. New Jersey* supra (quoted in *Haymond*, 27 Fla. Weekly Fed. S1079 at S1080)

... Consistent with these understandings juries in our constitutional order exercise supervisory authority over the judicial function by limiting the judges power to punish. A judge's authority to issue a sentence derives form, and is limited by the

jury's factual finding of criminal conduct. In the early Republic, if an indictment or "accusation... lack[ed] any particular fact which the laws ma[d]e essential to the punishment" it was treated as "no accusation" at all. *1 Bishop 87, at 55*; see also *2 M. Hale, Pleas of the Crown *170 (1736)*; *Archbold *106*. And the "truth of every accusation" that was brought against a person had to "be confirmed by the unanimous suffrage of twelve of his equals and neighbors." *4 Blackstone 343*... (*Haymon supra*)

...[B]ecause the constitution's guarantees cannot mean less today than they did the day they were adapted, it remains the case today that a jury must find beyond a reasonable doubt every fact "which the law makes essential to [a] punishment" that a judge might later seek to impose. Blakely 542 U.S., at 304 (quoting 1 Bishop §87, at 55" (*Haymond* supra)

In the case at bar, the Petitioner was charged by information with count 1: sexual battery with a deadly weapon; count 2: burglary of a dwelling while armed with a person assaulted; count 3: aggravated assault with a deadly weapon: and count 4: false imprisonment. **(Appendix J)**

A jury convicted Petitioner of all four counts, utilizing a sentencing guideline score sheet; the jury's verdict rendered a sentence point range of 206.5 prison months.[1]

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[1] The scoresheet used in 1997 score out to 204.5 months, the scoresheet used in 2011 206.5 months, apparently there exists scoresheet error that has to be corrected latter date.

At a 2011, De Novo resentencing hearing, the jury's verdict form remained unchanged, and a guideline score sheet was recalculated and rendered a sentence point range of 123.9 to 206.5. **(Appendix O)**

Florida law permits a judge to impose a departure from the sentence point range, if the de novo sentencing court finds aggravating circumstances, by the preponderance of the evidence, justifying an upward departure sentence.

The de novo resentencing court stated on the record:

> "I have found reasons for an upward departure, and the memo will be placed in the court file for your reading based on the 'pattern of conduct' in accordance with Florida statute 921.001(8), and I will sentence him to life on count 1, and concurrent life on count 2... and he is sentenced to that term of life under the guidelines at that point..." **(Appendix P: pg. 1615: line 22 through pg. 1616: line 1-7, and pg. 1617: line 9-11**; and **Appendix Q and R)**

At this de novo resentencing proceeding, the same information and jury verdict forms were used to calculate the guideline sentencing range.

Nowhere within the "accusation" against Petitioner was the fact that Petitioner had an escalating pattern of criminal conduct. ***(Appendix J)*** This fact according to the constitution must have been charged in the information, because *the fact* was essential to Petitioner's punishment. *1 Bishop 87, at 55; see 2M. Hale, Pleas of the Crown *170 (1736); Archbold *106.*

Moreover, the jury never found Petitioner guilty beyond a reasonable doubt, that Petitioner had an escalating pattern of criminal conduct. See jury verdict forms: **(Appendix K)** The constitution promised to protect the people, and the "*truth of every accusation*" that was brought against a person had to "be confirmed by the unanimous suffrage of twelve of his equals and neighbors" *(4 Blackstone 343).*

Petitioner was not afforded the Fifth, Sixth, and Fourteenth Amendment Constitutional protections guaranteed by the Framers, and his counsel argued vehemently that the de novo resentencing judge empanel a jury to find any facts to enhance Petitioner's sentence. **(Appendix N: pg. 1515 through 1607)**

Florida Statute § 921.001(8) (1995), is a state legislative enacted statute that compelled a state judge to send Petitioner to prison for the remainder of his natural life without the possibility of parole, based upon a judge's findings, that Petitioner had an "escalating pattern of criminal conduct by the preponderance of the evidence," where another state law calculated the crimes Petitioner was convicted of by a jury, beyond a reasonable doubt establishing a relevant statutory maximum sentence that could be imposed of 204.2 months in prison.[1]

The court held in *Haymond* that: "A judge's authority to issue a sentence derives from, and is limited by, the jury's factual finding of criminal conduct" *1 Bishop, and M. Hale, Pleas of the Crown, supra.* Additionally, this court held in *Haymond,* 27 Fla. Weekly Fed. S1079 at S1080: "At common law, crimes tended to carry with them specific sanctions," and "once the facts of the offense were determined by the jury, the judge was meant simply to impose the prescribed sentence" *Alleyene v. United States, 570 U.S. 99, 108 (2013).*

Even when judges did enjoy discretion to adjust a sentence based on judge-found aggravating or mitigating facts they could not "swell the penalty above what the law ha[d] provided for the acts charged" and found by the jury. *Apprendi, 530 U.S., at 519 (Thomas, J. concurring) (quoting 1 Bishop § 85, at 54); see also 1 J. Bishop, Criminal Law § 933.934 (1), p. 690 (9th ed. 1923)* "[T]he court determines in each case what within the limits of the law shall be the punishment." *Haymond,* 27 Fla. Weekly Fed. S1079 at S1080.

However, in Petitioner's case, the lawful sentence to be imposed was 204.2 prison months,[1] based on the charged accusation, and the jury's verdict, but the judge-found facts, swelled the punishment to two natural life sentences, based upon a finding made by the preponderance of the evidence standard of proof **(Appendix N: pg. 1572 lines 1-17)** This court has not hesitated to strike down other state laws and statutes that fail to respect the jury's supervisory function *(Haymond supra)*.

The facts in this Court's decision in *Cunningham v. California supra* are similar if not identical to Petitioner's case. In *Cunningham* this Court struck down California's Determinate Sentencing Laws (DSL) as unconstitutional, where there a similar statute (as, Florida's statute § 921.001(8)) allowed the judge to find facts with the preponderance of the evidence to enhance a criminal defendant's sentencing range beyond the facts found by the jury's verdict.

Justice Ginsberg held:

"Because circumstances in aggravation are found by the judge not the jury and need only be established by a preponderance of the evidence, not beyond reasonable doubt, the DSL violates *Apprendi's* Bright-Line Rule.... [F]act finding to elevate a sentence from 12 to 16 years our decision makes plain, falls within the province of the jury employing a beyond a reasonable doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies."

"The system (DSL) cannot stand measurement against our Sixth Amendment precedents." *Cunningham, 127 S. Ct. at 860-862, 866 III, and 870-872, Also see* **(Appendix W: pages 12-15)**

In *Hurst v. Florida*, 136 S.Ct. 616 (2016) this Court held: "*Florida Sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance is therefore unconstitutional.*"

The facts and laws asserted by Petition provide this Court the jurisdiction to strike down another Florida Statute § 921.001(8), as unconstitutional and in violation of *Apprendi's* Bright-Line Rule. As Florida statute § 921.001(8) cannot stand measurement against this Court's Sixth Amendment precedents, announced in its *Apprendi*, line of case. *See* **(Appendix JJ)**

REASON FOR GRANTING WRIT OF CERTIORARI

Question Two:

THIS COURT'S FIFTH SIXTH AND FOURTEENTH AMENDMENT JURISPRUDENCE IN ITS APPRENDI V. NEW JERSEY LINE OF CASES HAS ERODED THE VITALITY VIABILITY AND VALIDITY OF ALMENDAREZ-TORRES STARE DECISIS AUTHORITY

This Court should grant this Writ based upon the importance and recurring constitutional question on the continuing vitality of the exception carved out in *Apprendi v. New Jersey* holding: "other than the fact of a prior conviction," any fact that increases the maximum penalty for a crime must be charged in an indictment submitted to a jury and proved beyond a reasonable doubt.

The question is: whether the fact of a prior conviction is to be treated as a *sentencing factor* or an *element* of the offense?, and whether *Almeendarez-Torres* was wrongly decided.

The answer to this question, has far reaching policy concerns nationwide, and could preserve the Fifth, Sixth, and Fourteenth U.S.C.A. rights of untold numbers of criminal defendants. The Founding fathers of this nation promised the people the right to due process of law before being deprived of liberty, and promised that we would have the right to a jury trial, by our peers to prove beyond a reasonable doubt every accusation against us, prior to imposition of a sentence. U.S.C.A. amends 5th, 6th, and 14th.

The "Certworthiness" of this question, has been established, by members of this very court, and various United States Circuit Courts of Appeal, Commentaries, and Law Reviews.

Petitioner argues that the fact of a prior conviction is an "*element*" of a separate offense that must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt.

Petitioner respects this Court's precedent in *Almendarez-Torres*, however, petitioner asks this court to allow him to show the court why it should not rely upon the doctrine of *Almendarez-Torres* any longer, as controlling authority.

This Court's subsequent development of Sixth Amendment Jurisprudence has made *Amendarez-Torres* an anomaly. It cannot stand measure with the Bright line Rule of *Apprendi*. In a dissenting opinion, Justice Scalia, J., stated:

In a dissenting opinion, Justice Scalia, J., stated:

[A]t Common Law the fact of a prior conviction had to be charged in the indictment charging the underlying crime and submitted to the jury for determination along with that crime. Id at 258

In 2005 Justice Thomas, joined by four members of this court held: "The parties do not request it here, but in an appropriate case this court should consider *Almendarez-Torres* continuing viability. Innumerable criminal defendant's have been unconstitutionally sentence under the flawed Rule of *Almendarez-Torres*." *Shepard v. United States* 524 U.S. 13 at 28 (2005)

In 2014 this court decided *Alleyene v. United States*, 133 S. Ct. 2151 (2013). Justice Thomas writing for the majority overrules precedents: *Harris v. United States*, 536 U.S. 546 (2002), and *McMillian v. Pennsylvania*, 477 U.S. 79 (1986) ("*McMillian* initially invoked the distinction between "*elements*" and "*sentencing factors*" that allowed judges to make findings of fact by the preponderance of evidence, to enhance criminal defendants sentence....") *Alleyene*, 133 S. Ct. at 2156-2157

The *Alleyene* Court amended the language of the Rule of *Apprendi* from "other than the fact of the prior conviction..." to: "Any fact"... that increase a criminal defendant's sentence must be found by a jury and proved beyond a reasonable doubt. Id at 2155

The *Alleyene* Court effectively overruled the doctrine in *McMillian v. Pennsylvania* that made the distinction between "elements" that must be submitted to a jury, and sentencing factors that can be found by the judge. The Court made clear, that "any fact," that increases a criminal defendant's sentence beyond the

lawfully prescribed sentence, must be treated as an "*element*" of a separate offense and submitted to the jury to be proved beyond a reasonable doubt. Id at 2155

This same legal Rule was the underpinnings of *Almedarez-Torres*, that gave it its Stare Decisis authority, on Recidivist (prior conviction) sentence enhancer status:

> "... finally the remaining *McMillian* factors support the conclusion that congress has the constitutional power to treat the features before us – prior conviction of an aggravated felony – as a sentencing factor... for these reason we cannot find in *McMillian*... significant support for the proposition that the constitution forbids a legislature to authorize a longer sentence for recidivism. *Almendarez-Torres* 523 U.S. 224, at 246

Albeit the holding in *Alleyene*, negated, the Rule in *McMillian*, distinguishing "*elements*" from "*sentencing factors*," and as such, that holding in *Almendarez-Torres* – "*treating prior convictions as sentencing factors*," is now nullified by this Courts's Sixth Amendment Jurisprudence.

This Court however did not expressly overrule *Almendarez-Torres*, this Court made it known why it did not revisit this issue of "*elements*" and "*sentencing factors*," in relation to *Almendarez-Torres*, Justice Thomas explained:

> "In *Amendarez-Torres* we recognize a narrow exception to this general rule for the fact of a prior conviction. *Because the parties do not contest that decision's vitality, we do not revisit it for the purpose of our decision today*. *Alleyene*, 133 S. Ct. at 2173 n.1

The Court only decided to not address the issue of treating prior convictions as elements or sentencing factors, solely because – the parties did not contest *Almendarez-Torres*' vitality.

In the case at bar, Petitioner has, contested the continuing vitality, viability, and validity of Almendarez-Torres, in all State and Federal Courts in the State of Florida, and the Eleventh Circuit Court of Appeals. **(Appendix M (1): pages 1-13, N, V, V1, W, X, Y, Z, BB, CC, FF)**

The State of Florida has taken the legal posture that 921.001(8) Florida Statute is a recidivist sentencing factor enhancement statute, exempt from Sixth Amendment challenge of Apprendi v. New Jersey. **(Appendix M (1): pg. 3 paragraph 3, and p. 2 paragraph 8; N: pg. 1519: line 6 through, pg. 1607; S (2): pg. 5-11)**

The de novo resentencing court has taken the position that *James v. United States* 550 U.S. 192, at 224 no. 8, which was overruled by this court in *Johnson v. United States*, 135 S. Ct. at 2563 2015, supports the imposition of an enhanced sentence based upon "prior conviction is not an element" that must be submitted to a jury and proved beyond a reasonable doubt. **(Appendix Q)**

The foregoing procedural history unequivocally establishes that: **(1)** Petitioner has standing to challenge the Rule announced in *Almendarez-Torres*, as that rule directly affects petitioner's case, and **(2)** *This is the appropriate case to revisit this issue, for the purpose of deciding this case*.

Moreover, Florida Statute 921.001(8) presents factors that go way beyond the simple (or mere) fact of the prior conviction. **(Appendix S (1): pages 5, 9-15; S (3): pages 1-8, V: pages 8-9)**

Justice Thomas held in *Alleyene*:

> [C]onsistent with common-law and early American practice, *Apprendi* concluded that "any fact" that increases the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime...

Florida Statute § 921.001(8) involves multiple factors to be determined by the judge based on by the standard of by the preponderance of the evidence... involving "prior criminal conduct"

In *Mathis*, Justice Kagan held:

> This court has held that only a jury not a judge may find facts that increase a maximum penalty except for the simple fact of a prior conviction... That means a judge cannot go beyond identifying the crime of conviction to explore the manners in which the defendant committed the offense... Justice Thomas, stating: (that such an approach would amount to "constitutional error"). *Mathis v. United States*, 136 S.Ct. 2243 (2016).

In the instant case, treating Florida Statute § 921.001(8) as only a *sentencing factor, and not an element*, is contrary to this court's Sixth Amendment Doctrine.

THE UNCERTAINTY AMONG THE CIRCUIT COURTS OF APPEALS OVER THE CONTINUING VITALITY OF ALMENDAREZ-TORRES

"...Moreover the Supreme Court's recent characterization of the Sixth Amendment are difficult if not impossible to reconcile with *Almendarez-Torres's* lonely exception to the Sixth Amendment protections... This powerfully testifies why reconsideration of *Almendarez-Torres* exception may be warranted." *United States v. McDowell,* 760 F.3d 485 (4th Circuit 2014);

"Although *Almendarez-Torres* may stand on the shifting sands... we must follow it until the Supreme Court expressly overrule it...." *United States v. Mack,* 729 F. 3d 599, 609 Sixth Circuit (2013),

"We are not authorized to disregard the Court's decision even when it is apparent that they are doomed." This case powerfully shows why reconsideration of Almendarez-Torres is required and much needed by this court. *United States v. Abrahamson*, 731 F. 3d 751 Eight Circuit (2014),

"[A]lthough *Almendarez-Torres* has been widely criticized and is vulnerable to being overruled that is for the Supreme Court to decide." *United States v. Carr* et. al., 770 F. 3d 740 Ninth Circuit (2014),

"[W]e recognize that there is some tension between *Almendarez-Torres* on the one hand and *Alleyene* on the other..." *United States v. Harris*, 741 F. 3d 1245 Eleventh Circuit (2014).

Ironically, and recently five members on the Eleventh Circuit in a concurring opinion revisited the issue(s) that Recidivist Prior Conviction sentence enhancements should be submitted to a jury to be proved beyond a reasonable doubt – to restore the common law role of the jury trial rights.

Justice William Prior held:

"... although [this court] decision involves contemporaneous crime, and not prior conviction that a jury just make finding about a defendant's violent conduct applies with equal force to recidivist statutes. Indeed the modern abandonment of jury's traditional role of making finding about prior convictions has created more problems than it should. (emphasis added) (*Ovalles v. United States*, 905 F. 3d 1231, at 1254 (2019); also see Id no. 39-67, various commentaries ,and Law Reviews, advocating for the... demise of the prior conviction exception to *Apprendi*, and reinstituting common-law practice of empanelling juries to find the facts of prior conviction).

Justice Thomas J., held:

> "...In my view if the government wants to enhance a defendant's sentence based on his prior conviction it must put those convictions in the indictment and prove them to a jury beyond a reasonable doubt. *Sessions v. Dimaya*, 138 S. Ct. 1204 at 1254 (2017)

Justice Thomas also held in *Mathis*:

> "... I continue to believe that the exception in Apprendi was wrong, and I have urged that *Almendarez-Torres* be reconsidered. See *DeScamp v. United States*... (citation omitted) quoted in *Mathis v. United States* supra.

The only thing that stands between the jury and the petitioner is the Rule in *Almendarez-Torres*, and no one can overrule this Rule, but this Court. "It is the prerogative of this Court of overruling its own precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997)

Due to this court's subsequent Sixth Amendment jurisprudence, this Court should not continue to adhere to *Almendarez-Torres* as a Stare Decisis, as the exception in *Almendarez-Torres* has lost its weight as authority due to this court's intervening decisions on the Sixth Amendment. *Alleyene* 133 S. Ct. at 2164-2165 (2013) citing *Gaudin*, 515 U.S. 506, at (1995).

Question Three:

THE DISTRICT COURT IMPROPERLY APPLIED THE PRESUMPTION IN *HARRINGTON V. RICHER* TO FIRST DISTRICT COURT OF APPEAL PER CURIAM DECISIONS WITHOUT AN OPINION THAT AFFIRMED THE POST CONVICTION COURT'S DENIAL OF PETITIONER'S CONSTITUTIONAL CLAIMS INSTEAD OF "LOOKING THROUGH" THE APPELLATE DECISION TO THE LAST REASONED OPINION OF THE POST CONVICTION COURT.

REASON FOR GRANTING WRIT OF CERTIORARI

The District Court, and the Eleventh Circuit Court of Appeals denial of Petitioner's constitutional claim in the habeas petition ground two, is in square conflict with the decisions of this Court announced in: *Wilson v. Sellers*, 138 S.Ct. 1188 (2018) and *Cone v. Bell*, 535 U.S. 685 (2002) [2]

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[2] The Eleven claims within the COA, are complex and intertwined. Petitioner objected to the magistrate's recommendations on the grounds that Claim Two of the habeas petition had never been adjudicated on the merits in state courts. Petitioner argued that his habeas claims was in the same legal posture as Cone v. Bell supra, and should have been reviewed de novo. **(Appendix CC: pages 36-42, and Appendix FF: pages 29-33)**

In *Harrington v. Richter* the United States Supreme Court established a presumption that the state court adjudicated a claim on its merits in certain circumstances where the highest state court to review the claim issued a decision without an opinion. *Harrington v. Richter*, 502 U.S. 86, 131 S. Ct. 770, 784-785, 178 L. Ed. 2d 624 (2011).

In the past, this Court applied the *Richter* presumption in cases where the highest state appellate court to review a claim issued a *per curiam* decision without an opinion, regardless whether the lower court issued a written opinion on the same issue. *Pittman v. Fla. Dept. of Corrections*, 871 F.3d 1231 (11th Cir. 2017).

In *Wilson v. Warden*, the Eleventh Circuit Court of Appeals, *en banc*, considered the procedure to be used by a District Court if a Habeas petitioner's constitutional claim was denied by a lower state court and subsequently the last state appellate court to review the denial affirmed the decision in a per curiam decision without an opinion. See *Wilson v. Warden*, 834 F.3d 1227 (11th Cir 2016). Therein *Warden* held that if the last state appellate court decision denying relief "is unaccompanied by an explanation", the United States District Court was required to apply the *Richter* presumption that the appellate court considered the claims on their merits. Furthermore, in such circumstances, in order to obtain relief, the habeas petitioner was required to show that "there was no reasonable basis for the state court to deny relief." *Id.* at 231

This Court's decision in *Wilson v. Sellers* overruled *Warden. Wilson v. Sellers*, 138 S. Ct. 1188, 200 L. Ed. 2d 530, 27 Fla. Fed. L. Weekly S183 (April 17, 2018). *Sellers* considered the question of whether the *Richter* presumption applies when a lower court issues a reasoned opinion as to why it denied a claim and later, the highest appellate court to consider the claim affirm the denial in a decision

without an opinion. *Sellers* held that *Richter* presumption does not apply in those circumstances. Instead, the District Court should "*look through*" the state appellate court decision without an opinion to the last reasoned opinion state court decision denying the claim. *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). In doing so, the District Court should apply another presumption – that the highest state appellate court to review the claim denied it for the same reason(s) that the last lower court to issue a reasoned opinion gave in denying the claim.

The state may rebut this presumption only if the state can show that the unexplained appellate decision "most likely" relied on different grounds in affirming the denial of a constitutional claim. *Id.*

Thus, to determine the reasons the highest appellate state court denied a constitutional claim in a decision without an opinion, Sellers requires a district court to "*look through*" the unexplained appellate decision to the last reasoned state court opinion. *Id.* (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)).

In denying Ground One of the Habeas Petition, the report stated:

The *First DCA per curiam affirmed without written opinion. The state court adjudicated Petitioner's claim on the merits, so the judgment is entitled to deference under AEDPA.* See **(Appendix E: page 14)**

In denying Ground Three, the Report stated:

The First DCA, however, per curiam affirmed the trial court's ruling without opinion. The state court's decision is entitled to deference. See **(Appendix E: page 21)**

Thus, in denying Grounds One and Three of the Habeas Petition, The District Court, relying on the Eleventh Circuit's decision in *Warden* improperly applied the *Richter* presumption. The District Court failed to "*look through*" the First District Court of Appeal's *per curiam* decisions without an opinion to the last reasoned opinions from the Postconviction Court to determine why the claim was denied as required by *Seller*. This procedure improperly required Mr. Thompson to show that there was no reasonable basis for the First District Court of Appeal to deny him relief. *Wilson v. Sellers* supra

As argued below, if the district court had looked through the First District Court of Appeal's *per curiam* decisions without an opinion to the last reasoned opinions from the postconviction court to determine why each claim was denied, the District Court would have been duty-bound to find that deference to the decision of the First District Court of Appeal was not required under 28 U.S.C. §2254 (d). **(See Appendices: V, F, G, W, H, I, X, E, and FF: pages 22-47)** respectfully.

It is apparent that reasonable jurists could debate whether, or even agree that the district court committed a procedural error by applying the *Richter* presumption instead of "*look[ing] through*" the unexplained decisions of the First District Court of Appeal to the last reasoned opinion of the postconviction court as required by *Sellers*. Because reasonable jurists could debate whether, or even agree, that the habeas petition should have been resolved in a different manner by the district court using the procedure set forth in *Sellers*, Mr. Thompson is therefore entitled to

a COA on this issue. *Slack v. McDaniel*, 529 U.S. 473, 483 -484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

CONCLUSION

In conclusion, Petitioner states, at every juncture in this litigation he has sought to exercise his jury trial rights, to have a jury make a determination, if, petitioner was not amenable to rehabilitation *as evidenced by an escalating pattern of criminal conduct.* **(Appendix W and BB: pages 7-18)** Petitioner is not blaming any one for the adversity in his life, he takes full responsibility for his action **(Appendix N: pages 1589 through 1608)**, no-one but petitioner is at fault for his crimes, yet the facts of 921.001(8) and 921.0016(3) (p) that enhanced his sentence should have been found by a jury – not a judge, Petitioner never admitted to any facts the Court used to enhance his relevant statutory maximum sentence.

The Eleventh Circuits denial of Petitioner's COA, on this issue is in direct conflict with this Court's decision in *Slack v. McDaniels* supra. This Court having previously granted Certiorari in *Wilson v. Sellers* supra to certworthiness of this question.

This Court has the power to Grant, Vacate, and Remand (GVR) the question in this petition in light of its decision in *Wilson v. Sellers* supra, pursuant to Title 28 U.S.C. § 2106.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Melvin Thompson

Melvin Thompson, Pro se

Date: August 15, 2019