

No. 20-_____

IN THE

Supreme Court of the United States

TIMOTHY COURTNEY,

PETITIONER,

v.

UNITED STATES,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the holding in *Almendarez-Torres* creating an exception for not having to prove the existence of prior convictions when used to enhance a defendant's statutory sentence should be revisited and overruled.

PARTIES TO THE PROCEEDING

The petitioner is Timothy Courtney, defendant and defendant-appellant in the courts below. The respondent is the United States, the plaintiff and the plaintiff-appellee in the courts below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit upholding defendant's conviction and sentence, *United States v. Timothy Courtney*, 783 Fed. Appx. 444 (5th Cir. 2019), was issued on November 6, 2019.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Fifth Circuit had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291. Since its decision was rendered on November 6, 2019, this Court's jurisdiction for a petitioner seeking a writ of certiorari within 90 days is timely invoked pursuant to 28 U.S.C. § 1254(1) and Rule 13.1, Rules of the Supreme Court of the United States.

PETITION FOR A WRIT OF CERTIORARI: RULE 10 STATEMENT

This Court is now being asked to address a matter that was not directly before it when it decided Apprendi v. New Jersey: whether the existence of prior convictions must be charged in an indictment and proved to the jury beyond a reasonable doubt when such convictions will be used to enhance the statutory minimum of an offender at sentencing. In this case, Mr. Courtney was sentenced well beyond the 10-year mandatory maximum because of a series of burglaries adjudicated on the same day decades ago when he was a young man.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides the accused with the right to a jury trial. In Apprendi v. New Jersey, this Court required the Government prove beyond a reasonable doubt any sentencing enhancement that increased a mandatory penalty. That said, the decision did not address what is now considered to be an exception to the holding and that is the existence of prior convictions used for sentencing enhancements. That exception is addressed in Almendarez-Torres v. United States. Since *Apprendi*, the Circuit Courts, and even some justices on this Court, have noted the illogic between the two cases and yet, because that issue was not squarely presented in *Apprendi*, Courts of Appeal note the incongruence and their duty to apply binding precedent as they uphold sentences like Mr. Courtney's. Now is the time to address the issue and require the Government charge and prove this sentencing enhancement at trial.

STATEMENT OF CASE

On October 13, 2016, Mr. Courtney was indicted for possession of a firearm by a convicted felon in violation of 18 U.S.C. 922(g)(1). ROA. 23-24. The indictment alleged an offense date of August 9, 2016. Two weeks later, Mr. Courtney made his initial appearance, pled not guilty and stipulated to detention. ROA. 38-39. The basis for detention was, in essence, that he faced a potential life sentence and his alleged conduct involved a firearm.

On December 8, 2016, the Government filed a Superseding Indictment adding the second Count of Possessing Cocaine Base or Methamphetamine. ROA. 56-58. As before, Mr. Courtney pled not guilty and the Court maintained its previous Order of detention. ROA. 65-66.

The bulk of the pre-trial motion practice centered upon Mr. Courtney's motion for severance of counts and the Government's motion to use other crimes evidence. The Court granted Mr. Courtney's severance and would ultimately grant the Government's motion for other crimes evidence when the drug case proceeded to trial though, at trial, the Government did not offer any such evidence. ROA. 142-167 & ROA. 463-467.

As such, Mr. Courtney was exposed to two jury trials based upon the same operative facts. On September 12, 2017, he was convicted on Count 1 of the Superseding Indictment and on March 1, 2018, he was convicted on Count 2. ROA. 357-363 & ROA. 478-481. In the interim, his initial appointed counsel from the Federal Defender's Office withdrew at the defendant's request and after a contradictory hearing and the undersigned was appointed. ROA. 397-398.

On January 10, 2019, the defendant was sentenced to 210 months on Count 1 and 12 months on Count 2 to run concurrently. ROA 494-495.

The defense appealed. The issue presented before the Court was one of three raised in its brief. On November 6, 2019, the Fifth Circuit affirmed the defendant's

conviction and sentence. In so doing, noted that *Almendarez-Torres* was never overruled and remains with binding force.

The relevant facts for the Court to consider are either procedural or historical in nature. First, neither the Indictment nor the Superseding Indictment allege the defendant to be an Armed Career Criminal which would expose him to a mandatory minimum sentence of 15 years and a maximum sentence of life if convicted. 18 U.S.C. 924(e). As written, and without knowing more, one would think that Mr. Courtney was facing a maximum term of imprisonment of 10 years. Second, the “three” or more violent offenses concern multiple simple burglary of an inhabited dwelling and an attempted burglary of an inhabited dwelling convictions that were all adjudicated on October 29, 1996. The docket numbers and/or offense dates are referenced at ROA.1076,.1079-.1081. All allege a 1996 offense date when the defendant was 23 years old.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The defense believes that the Armed Career Criminal Act’s enhancement should not apply in this case because the matter was not resolved by the jury that convicted Mr. Courtney. In Apprendi v. New Jersey, The Supreme Court held that the due process clause required any fact whose determination authorizes the increase in the maximum prison sentence to be established before the jury with proof beyond a reasonable doubt. Apprendi v. New Jersey, 120 S.Ct. 2348 (2000). In counsel’s objection, the defense cited Alleyne v. United States, where the Court

held that “any fact” increasing the mandatory minimum sentence for a crime is an “an element” of the crime and not a sentencing factor. Alleyne v. United States, 133 S.Ct. 2151(2013). In doing so, counsel advised that footnote 1 of that opinion recognized a narrow exception to the rule when the “fact” in question is a prior conviction. However, that same footnote advised that such a challenge was not made in *Alleyne*.

As of now, the Fifth Circuit has declined to apply *Alleyne* to sentencing enhancements triggered by a judicial finding of prior convictions. See United States v. Wallace, 759 F.3d 486 (5th Cir. 2014). Counsel cites the *Wallace* case as an example because in that decision, the Fifth Circuit based it’s ruling on a footnote in *Alleyne*. The precise footnote is footnote 1 which reads:” *in Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed 2d. 350 (1998), we recognized 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 visit it for purposes of our decision today.” In *Wallace*, the Court of Appeals took the position that its decision in United States v. Akins, decided that *Alleyne* did not overrule *Almendarez-Torres*. See United States v. Akins, 786 F.3d 590 (5th Cir 2014).

However, counsel believes this case is distinguishable from both *Wallace* and *Akins*. In *Wallace*, the defense challenged the validity of a 21 U.S.C. 851 enhancement for prior drug convictions on appeal. Since the issue was not properly raised in the district court, this Court’s standard of review was “plain error.” Mr. Courtney has raised the issue with the district court. As such, he is not subjected to

the lesser standard of review and should have his issue regarding his objection on applying the sentencing enhancement reviewed de novo. United States v. Myers 772 F.3d 213 (5th Cir. 2014).

In *Akins*, defendant Gage contested the Career Criminal Enhancement under USSG 4B1.1 and defendant Akins challenged the district court's findings of drug quantities in connection with how those said amounts resulted in a life sentence based on his two prior drug convictions. More specifically, defendant Gage suggested that the Career Criminal enhancement should not apply because his two prior convictions were related though having different offense dates but adjudicated on the same day. For purposes of this section of the argument, it does not appear that defendant Gage raised the issue as to whether the guideline enhancement required the prior convictions be proven to the jury before it could be applied. As such, the *Akins* decision, as it pertains to defendant Gage, is not relevant on the issue as whether or not a statutory enhancement should be proven to the jury beyond a reasonable doubt.

Defendant Akins appears to have challenged the Court's finding that the defendant was convicted of certain drug quantities after having been convicted of two or more drug offense subjecting him to a mandatory life sentence pursuant to 21 U.S.C. 851. On Appeal, counsel suggested error occurred because the trial court held the defendant responsible for significantly higher amounts of crack cocaine than found by the jury on a special verdict form. In reading the opinion, it appears that counsel was hoping to couple this judicial error with another error suggesting

that there was insufficient evidence for attributing the defendant with 5kg or more of cocaine. It should be noted that either finding, coupled with the two prior convictions, would have resulted in a mandatory life sentence. Assuming this Court accepted both of counsel's drug quantity arguments, it is believed that Akins would have a sentencing range of 10 years to life. In the opinion, the Court of Appeals agreed that the trial judge was in error for attributing more quantities of crack cocaine than decided by the jury on its verdict form but, nevertheless, upheld the life sentence because that same jury verdict form found Akins responsible for 5kg or more of cocaine which, as noted above, when coupled with two prior drug offenses, mandated a life sentence under the enhancement. It does not appear that Akins was challenging the need to present the prior convictions before the jury based upon counsel's reading of the opinion. The same cannot be said for Mr. Courtney.

As such, the *Wallace* and *Akins* decisions really do not address the precise issue before this Court and that is whether *Apprendi* and *Alleyne*, taken together, require a statutory enhancement that increases mandatory sentences be proven before the jury when the enhancement is objected to prior to sentencing.

Other circuits have addressed the issue similarly to what the Fifth Circuit did when it affirmed Mr. Courtney's sentence. In essence, they find that *Apprendi* casts doubt as to the continued viability of *Almendarez-Torres* but express an obligation that they are bound to continue applying its holding until the issue is squarely presented to and resolved by this Court. See: United States v. Perez-Hernandez, 133 Fed. Appx. 475 (3rd Cir. 2005); United States v. Bullette, 854 F.3d

261 (4th Cir. 2017); United States v. Davis, 260 F.3d 965 (8th Cir. 2001); United States v. Hernandez-Abraham, 550 Fed. Appx. 849 (11th Cir. 2013). Some go as far as citing the opinions by Justice Thomas in suggesting that the Court is open to addressing its continued viability. See Shephard v. United States, 125 S. Ct. 1254 (2005) and Harris v. United States, 122 S.Ct. 2406 (2002).

Having a jury decide the validity of a prior conviction before depriving a person of his liberty is neither a novel issue of law nor is it an unduly burdensome requirement to impose upon the Government. Indeed, the very charge of possessing a firearm by a convicted felon requires the Government prove the existence of a crime punishable by more than one year as an element to the charge. This requirement is found as the “second element” in the pattern jury instruction. See *United States Fifth Circuit Criminal Jury Instruction 2.43 D* and United States v. Meza, 701 F.3d 411 (5th Cir. 2012). Mr. Courtney simply requests that the Government prove additional convictions in order to expose him to a potential life sentence. This approach is squarely in line with the Supreme Court’s *Apprendi* and *Alleyne* decisions.

As stated in the above referenced quote concerning *Alleyne* Footnote 1, the fact of a prior conviction was not the issue presented before the Court so that issue simply was not addressed. Counsel believes Mr. Courtney is in a far worse position than Mr. Alleyne:

- Mr. Alleyne merely got a 2 year increase to his mandatory minimum sentence whereas Mr. Courtney will receive 5 years more than his prior maximum sentence;
- Mr. Alleyne's new minimum sentence was within the original sentencing range for the crime he committed and Mr. Courtney's is not;
- Mr. Alleyne's maximum sentence was not bothered whereas Mr. Courtney faced life behind bars; and

It was fundamentally unjust to expose Mr. Courtney to life in jail for a series of burglaries adjudicated on the same day years ago. The logic that underlines *Apprendi* and *Alleyne* is simply that due process should place the accused upon notice that certain consequences flow from his choice of conduct. This was not done here.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted, the judgment of the Fifth Circuit Court of Appeals vacated, and the case remanded for resentencing.

Respectfully Submitted,

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Dated: February 4, 2020

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this date, the 4th day of February 2020, pursuant to Supreme Court Rules 29.3 and 29.4, the accompanying motion for leave to proceed *in forma pauperis* and petition for a writ of *certiorari* were served on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

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APPENDICES

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