IN THE
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2019

_____

No. _____

ALFREDO GONZALEZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

_____

*PETITION FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIRST CIRCUIT*

_____

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June 13, 2020

## QUESTIONS PRESENTED

I. Whether the definition of "felony drug offense" for the purposes of 21 U.S.C. §851 is void for vagueness after Johnson, Dimaya, and Davis.

II. Whether a defendant should be penalized – by the imposition of the plain error standard of review on appeal – where he failed to assert his §851 rights, if the court never informed him of those rights – **SPLIT IN CIRCUITS.**

III. Whether, assuming arguendo that the prior "felony drug offense" definition is not void for vagueness, Petitioner is nonetheless entitled to resentencing due to the court's failure to abide by the dictates of §851(b).

IV. Whether the inclusion of a juror who did not live in the judicial district or state where the offense occurred violated Petitioner's statutory and Sixth Amendment rights.

IV. Whether the use of Petitioner's prior conviction to increase the mandatory minimum sentence violated the Fifth and Sixth Amendments, where the indictment did not allege the prior conviction and the jury did not find it beyond a reasonable doubt.

VI. Whether Petitioner had been 'sentenced' within the meaning of the First Step Act before the appeals court affirmed his sentence.

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Petitioner, Alfredo Gonzalez, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the First Circuit Court of Appeals entered in this proceeding on January 31, 2020.

## OPINION BELOW

The decision of the First Circuit, United States v. Gonzalez, 949 F.3d 30 (1st Cir. 2020), appears in the Appendix hereto.

## JURISDICTION

The judgment of the First Circuit was entered on January 31, 2020. A Petition for Panel Rehearing/Rehearing En Banc was timely filed on February 12, 2020. The appeals court denied that Petition on March 26, 2020. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

## STATUTES INVOLVED

**21 U.S.C. §802(44):** The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

**21 U.S.C. §851: Proceedings to establish prior convictions**
**(a) Information filed by United States Attorney**
**(1)** No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States

attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

**(2)** An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

**(b) Affirmation or denial of previous conviction**

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

**(c) Denial; written response; hearing**

**(1)** If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1). The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

**(2)** A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response.

Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

**(d) Imposition of sentence**

**(1)** If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

**(2)** If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

**(e) Statute of limitations**

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

**28 U.S.C. §1861: Declaration of Policy**

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

## STATEMENT OF THE CASE

In October 2016, Petitioner was indicted for conspiracy to distribute, and possess with intent to distribute, heroin. In September 2017, an 'Information to Establish Prior Conviction Pursuant to 21 U.S.C. §851' was filed, asserting that Petitioner had a 1997 New Hampshire conviction for possession of a narcotic drug with intent to sell. A jury trial (Barbadoro, J., presiding) in November 2017 resulted in Petitioner's conviction as charged.

In December 2017, Petitioner filed a motion for a new trial after the court informed the parties that one of the jurors may not have been a resident of New Hampshire. After hearings in January and February 2018, the court denied the motion. In June 2018, the court sentenced Petitioner to the mandatory minimum 20 year sentence of imprisonment, to be followed by a ten year term of supervised release.

As part of an ongoing investigation into heroin trafficking in Lowell and Lawrence, Massachusetts, in June 2016, pursuant to warrant, the DEA had wiretapped phones of suspected conspirators (not including Petitioner), and placed a GPS device on a car used by Petitioner. On July 10, 2016, the police surveilled the Pollo Tipico restaurant in Lawrence, where intercepted phone calls had indicated a drug deal would take place. Petitioner, Mark

Gagnon, Alberto Guerrero Marte and Michell DeJesus met there, and at one point Gagnon went outside and transferred a bag from Marte's car into his own.

Gagnon was stopped driving north in New Hampshire, and a search of his vehicle pursuant to warrant uncovered 505 grams of heroin hidden in tomato cans. The heroin was packaged into 'fingers' of about ten grams each. While Gagnon's vehicle was stopped on the side of the road, Petitioner – in a separate vehicle – slowed down when passing the site of the stop, and then circled back and passed the traffic stop two or three more times. In a recorded call the following morning, Petitioner told Marte that he was "trembling."

DeJesus, who was cooperating with the authorities, testified that she was involved in the drug conspiracy led by herself and her husband, Marte. She answered the phone, interpreted, and relayed information to her husband, who would dispatch runners to deliver the drugs. Petitioner was a customer, who they would meet at different restaurants in the Lawrence/ Lowell area. Petitioner was recorded on wiretapped telephone lines arranging to buy heroin from the conspiracy.

Petitioner was never found in possession of drugs. Although ten controlled buys were made as part of the federal investigation, none involved him. A search of Petitioner's home in October 2016 revealed scales and a 'hide' (hidden storage compartment), but no drugs, cash or 'cut.'

## REASONS FOR GRANTING THE PETITION

**This case presents important questions of federal law that have not been, but should be, settled by this Court.**

I. The definition of "felony drug offense" for the purposes of 21 U.S.C. §851 is void for vagueness after Johnson, Dimaya, and Davis.

The government violates due process "by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes or so standardless that it invites arbitrary enforcement." Johnson v. United States, 135 S.Ct. 2552, 2556 (2015). "In our constitutional order, a vague law is no law at all." United States v. Davis, 139 S.Ct. 2319, 2323 (2019). The definition of 'felony drug offense' that led to the doubling of Petitioner's mandatory minimum sentence is just such a vague law.

21 U.S.C. §841(b)(1)(A) provides that if a person commits a drug offense after one prior conviction for a "felony drug offense," the mandatory minimum sentence increases from ten years to 20.[1] "Felony drug offense" is defined as:

> an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country

[1] The First Step Act changed this to "serious drug felony," and reduced the mandatory minimum sentence to 15 years.

> **that prohibits or restricts conduct relating to** narcotic drugs, marijuana, anabolic steroids, or depressant or stimulant substances.

21 U.S.C. §802(44) (emphasis added). Under the principles set forth in Johnson, 135 S.Ct. 2552, Sessions v. Dimaya, 138 S.Ct. 1204 (2018), and Davis, 139 S.Ct. 2319, this definition of 'felony drug offense' is void for vagueness.

In Johnson, this Court held that the residual clause of the definition of 'violent felony' in the Armed Career Criminal Act was void for vagueness. That clause defined violent felony as including any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. §924(e)(2)(B)(ii). This Court found this definition to be unconstitutionally vague because it forced courts to go beyond the elements of the crime and instead determine "whether the prior crime '*involves conduct*' that presents too much risk of physical injury." Johnson, 135 S.Ct. at 2557 (emphasis in original). The problem was the "indeterminacy of the wide-ranging inquiry." Id.

Here, too, the court is not asked to determine whether a defendant's prior offense has an element of drug trafficking or possession. Rather, although the court is not asked to assess the amount of risk posed by the prior crime, it must do something equally nebulous – that is, determine

whether the prior conviction is for a crime that prohibits or restricts "conduct relating to" drugs. The court is required to decide whether a certain type of "conduct," as a categorical matter, sufficiently "relates to" drugs such that it may serve to double the mandatory minimum.

In Dimaya, this Court concluded that the residual clause definition of "crime of violence" within the criminal code, 18 U.S.C. §16(b), was also void for vagueness. It noted that "references to a 'conviction,' 'felony,' or 'offense' … are read naturally to denote the crime as *generally* committed." Id., 138 S.Ct. at 1217 (citations and internal quotation marks omitted).

Determining whether a prior conviction was for a 'felony drug offense,' then, requires the same categorical approach that fatally flawed the statute at issue in Dimaya (and in Johnson and Davis as well). This is particularly true in light of "the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction," Johnson, 135 S.Ct. at 2562, as well as the "serious Sixth Amendment concerns" that would arise from having the judge make those factual determinations. Descamps v. United States, 570 U.S. 254, 269 (2013).

In Davis, this Court invalidated the residual clause of the definition of 'crime of violence' in 18 U.S.C. §924(c)(3)(B). It reiterated that "the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'" Id., 139 S.Ct. at 2326. In the context of 21 U.S.C. §841, of course, the judge is evaluating not the degree of risk posed, but the connection – that is, the relationship – between the defendant's 'conduct' and drugs. The same problems that sounded the death knell for the statutes at issue in Johnson, Dimaya, and Davis, require the definition of 'felony drug offense' in 21 U.S.C. §802(44) to be held void for vagueness as well.

The First Circuit here disagreed. It held that the definition of "felony drug offense" requires a court to ask three questions with objectively ascertainable answers: "(1) Was there a prior conviction? (2) Was that conviction for a felony (that is, for an offense punishable by a year or more in prison)? and (3) Was that conviction for an offense that 'prohibits or restricts conduct relating to' drugs?" Gonzalez, 949 F.3d at 38. The problem, of course, is that the answer to question (3) is not, in fact, objectively ascertainable, but rather requires a judge to subjectively evaluate the connection between the conduct and the drugs.

The definition of 'felony drug offense' – just like the invalidated definition of 'crime of violence' – does not reference the elements of the prior conviction. This stands in stark contrast with other drug-based sentencing enhancements, all of which refer to specific elements. For example, drug enhancements under the Armed Career Criminal Act, and now – after enactment of the First Step Act – under 21 U.S.C. §841, require a prior 'serious drug' conviction to be a federal Controlled Substances crime, or a state offense involving "manufacturing, distributing, or possessing with intent to manufacture or distribute" a controlled substance. 18 U.S.C. §924(e)(2)(A); 21 U.S.C. §802(57). Drug enhancements under the Sentencing Guidelines require a prior 'controlled substance offense' to prohibit "the manufacture, import, export, distribution, or dispensing" or "the possession of a controlled substance … with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. §4B1.2(b).

"Felony drug offense," then, is not limited to crimes involving the manufacture, import, distribution or possession of drugs. "Conduct relating to [illegal drugs]" is broader, and more nebulous, than that. 'Relating to' carries a broad meaning – "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with."

Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992), quoting *Black's Law Dictionary* 1158 (5th ed. 1979).

For example, in United States v. Rains, 615 F.3d 589 (5th Cir. 2010), *cert. denied sub. nom* Aldridge v. United States, 562 U.S. 1238 (2011), the defendant's prior 'felony drug offense' was a §924(c) conviction for carrying a firearm during a drug trafficking crime. Accord, United States v. Nelson, 484 F.3d 257, 261 (4th Cir.), *cert. denied*, 552 U.S. 1023 (2007). In United States v. Grayson, 731 F.3d 605 (6th Cir. 2013), *cert. denied*, 571 U.S. 1225 (2014), the prior was for 'maintaining a drug house' – that is, having knowledge of drug activity in a house over which the defendant had the ability to exercise control or management. In United States v. Huskey, 502 F.3d 1196, 1198-99 (10th Cir. 2007), the defendant's prior felony drug offense was under a Kansas statute prohibiting attempts to commit any crime. In United States v. Curry, 404 F.3d 316 (5th Cir.), *cert. denied*, 544 U.S. 1067 (2005), the court counted a prior state conviction for possession of contraband in a state correctional facility.[2]

[2] Assuming arguendo that Petitioner's alleged prior conviction would fall within the definition of 'felony drug offense,' the definition may nonetheless be void for vagueness. "[O]ur *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." Johnson, 135 S.Ct. at 2561

It is unclear how much of a defendant's 'conduct' must 'relate' to illegal drugs for a crime to qualify as a "felony drug offense" predicate. Is money laundering, where the "specified unlawful activity" is a drug crime? See 18 U.S.C. §1956(c)(7)(B)(i). Racketeering, or racketeering conspiracy, where the underlying racketeering acts include a drug crime? See 18 U.S.C. §1961(1). Lying to the government, in violation of 18 U.S.C. §1001, to cover up a drug manufacturing scheme? See United States v. Smith, 893 F.2d 1269, 1273 (11th Cir. 1990)(§1001 conviction for causing third party to falsely tell investigators marijuana farm was his). Robbery of a controlled substance from a pharmacy? See 18 U.S.C. §2118(a); United States v. Stile, 845 F.3d 425 (1st Cir. 2017). It was exactly this kind of indeterminacy, and the resultant unpredictability and arbitrariness, that was fatal to the statutory definitions at issue in Johnson, Dimaya, and Davis, and which warrants holding the definition of "felony drug offense" void for vagueness.

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(emphasis in original). See also Dimaya, 138 S.Ct. 1204 (defendant with prior convictions for first degree residential burglary allowed to challenge residual clause definition of 'crime of violence' without showing the statute was vague as applied to him).

II. A defendant should not be penalized – by the imposition of the plain error standard of review on appeal – where he failed to assert his §851 rights, if the court never informed him of those rights – **SPLIT IN CIRCUITS.**

No objection was made in the district court to that court's failure to follow the requirements of 21 U.S.C. §851. The First Circuit held that, consistent with the case law of the circuit, previously unraised claims regarding a district court's failure to conduct a section 851 colloquy must be reviewed for plain error. Gonzalez, 949 F.3d at 40; United States v. Curet, 670 F.3d 296, 300 (1st Cir. 2012); United States v. Dickerson, 514 F.3d 60, 65 (1st Cir. 2008). Accord, United States v. Craft, 495 F.3d 259, 265 (6th Cir. 2007); United States v. Mata, 491 F.3d 237, 244 (5th Cir. 2007).

This conflicts with decisions of other circuits, holding that a less stringent standard of review – harmless error review – applies in this situation. United States v. Baugham, 613 F.3d 291, 296 (D.C. Cir. 2010)(per curiam), *cert. denied*, 562 U.S. 1235 (2011); United States v. Henderson, 613 F.3d 1177, 1184 (8th Cir. 2010); United States v. Lopez-Guitierrez, 83 F.3d 1235, 1246 (10th Cir. 1996).

Because the dictates of the statute exist to "place the procedural onus on the district court to ensure defendants are fully aware of their rights," United States v. Espinal, 634 F.3d 655, 665-66 (2d Cir. 2011), it would

make no sense to penalize a defendant – by imposing a higher standard of review – for failing to assert the rights of which the court never informed him. "To penalize a defendant for not alerting the district court to its failure to alert him would pervert the statute and get it exactly backward." Baugham, 613 F.3d at 296. Accordingly, this Court should hold that where, as here, a court failed to conduct a section 851(b) colloquy, harmless error review applies.

III. Assuming arguendo that the prior "felony drug offense" definition is not void for vagueness, Petitioner is nonetheless entitled to resentencing due to the court's failure to abide by the dictates of §851.

21 U.S.C. §851 sets forth requirements to establish prior convictions used to increase sentences under the drug laws. To seek an enhanced penalty, the government must file, before trial, an information stating "the previous convictions to be relied upon." 21 U.S.C. §851(a)(1). Here, the government did so, alleging a 1997 New Hampshire conviction for possession of a narcotic drug with intent to sell. However, the court did not comply with the ensuing §851 requirements.

After conviction but before sentence is imposed, the court must inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as

alleged in the information. 21 U.S.C. §851(b). It also must "inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence." Id. These procedural safeguards are "mandatory prerequisites to obtaining a punishment based on the fact of a prior conviction." Carachuri-Rosendo v. Holder, 560 U.S. 563, 568 (2010). The court here engaged in neither of these prerequisites.

If a defendant denies any allegation of the information or claims that the conviction is invalid, he must file a written response, which triggers a hearing. 21 U.S.C. §851(c)(1). If any factual allegation concerning the prior conviction is challenged, the government bears the burden of proof beyond a reasonable doubt. If the defendant claims that the conviction alleged was obtained in violation of the Constitution, he bears the burden of proof by a preponderance of the evidence. 21 U.S.C. §851(c)(2). The court's failure to comply with §851(b) meant that there was no opportunity to deny or claim invalidity, and thus there was no hearing.

This case differs from Curet, where the defendant challenged the §851 information, but later affirmatively withdrew and explicitly waived this claim. As a result, the Court held that there was no requirement of a

hearing. While the court found that the district court should have conducted the §851(b) colloquy nonetheless, it found no reversible error. There were no specific problems related to the predicate conviction, but more to the point, "the typical basis for finding reversible error on the basis of a §851(b) violation is that such a violation prevented a defendant from filing a response under §851(c) which may have been successful." Curet, 670 F.3d at 301. In Curet, the fact that the defendant filed a response under §851(c) but later chose to withdraw it showed that he understood his rights under the statute. Id.

The same is not true in this case. Petitioner did not file a §851(c) response. In the absence of the §851(b) colloquy, there was no basis for the court to conclude "either that [the defendant] appreciated his ability to challenge the prior conviction for sentencing purposes or that any challenge to the prior conviction would have been futile." Id., *quoting* United States v. Ruiz-Castro, 92 F.3d 1519, 1536 (10th Cir. 1996), *overruled on other grounds by* United States v. Flowers, 464 F.3d 1127 (10th Cir. 2006).

The information here provided scant details. The information does not even expressly state it was a felony charge, referring to it only as a "drug offense." No details of the underlying offense were provided, and no

records substantiating the conviction were supplied. The use of this prior conviction doubled the mandatory minimum sentence – from ten years to 20 – that applied to Petitioner. "Considering that a ten-year sentencing enhancement turns on the outcome of the §851 procedure, the failure to comply fully with the statute's procedural requirements should not casually be deemed harmless error." Espinal, 634 F.3d at 667.

Here, the failure to engage in a §851(b) colloquy is even more problematic given the incomplete and inadvertently misleading information the court gave to Petitioner prior to the filing of the §851 notice. At a motion hearing concerning Petitioner's problems with his counsel, the defense informed the court that Petitioner erroneously believed that no conviction over 15 years old could be used as a §851 enhancement, and that Petitioner at least initially had wanted counsel to withdraw based on counsel's advice that there was no limitation on the use of a prior conviction based upon its age. The court then asked the government to address the §851 issue "in a very basic level so that the defendant can clearly understand exactly what we're talking about."

The government explained that if a person charged with a federal drug crime has a prior drug trafficking conviction, "the government, upon filing

an information providing notice to the defendant of that prior conviction, files that and then it has the effect of essentially doubling the mandatory minimum applicable – otherwise applicable." The court then told Petitioner that to the extent his displeasure with counsel was "based on a concern that your lawyer may be missing something important to you – for you about whether your prior conviction is countable, my legal assessment is that his position is correct."

Therefore, not only did the court fail to conduct the required inquiry after the §851 notice was filed, but this exchange shortly before that notice was filed may well have left Petitioner with an inaccurate impression – that is, that (1) the filing of the §851 notice alone would have "the effect of essentially doubling the mandatory minimum," and (2) the court's "legal assessment" was that his prior conviction was countable. Although the discussion centered on the issue of whether the age of the conviction mattered, Petitioner may have reasonably but wrongly concluded that he could not thereafter challenge the use of that prior conviction on another basis.

Finally, although §851(e) precludes a defendant from challenging the "validity" of a prior conviction which occurred more than five years prior,

that would not prevent Petitioner from challenging the prior conviction (which occurred some 20 years prior) on other bases notwithstanding its age. Under 21 U.S.C. §851(c)(1), a defendant may challenge the prior conviction by: (1) denying "any allegation of the information of prior conviction," or (2) claiming that "any conviction alleged is invalid" – that is, that it was "obtained in violation of the Constitution." 21 U.S.C. §851(c)(2). See also 21 U.S.C. §851(d)(2) ("If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law," court may impose sentence without the enhancement). It is only a challenge to the 'validity' of the prior conviction that may be time-barred; other challenges are not.

Had the court given him the opportunity, Petitioner could have challenged his prior conviction on the basis that it did not qualify as a 'felony drug offense' under the categorical approach. United States v. Aviles, 938 F.3d 503, 511 (3d Cir. 2019) (categorical approach to determining prior felony drug offense). Accord, United States v. Boleyn, 929 F.3d 932, 936 (8th Cir. 2019); United States v. Elder, 900 F.3d 491, 498-501 (7th Cir. 2018); United States v. Ocampo-Estrada, 873 F.3d 661,

667 (9th Cir. 2017). See also United States v. Burghardt, 939 F.3d 397, 406 (1st Cir. 2019)(categorical approach to determining prior "serious drug offense" under ACCA, 18 U.S.C. §924(e)(2)(A)(ii)).

Under the categorical approach, the court looks to the statutory elements under which a defendant was previously convicted, rather than the underlying conduct or facts giving rise to that conviction. If the statute underlying the prior conviction is broader, or covers more conduct than that covered in the definition 'felony drug offense,' then the prior conviction cannot be the basis for an increase in the mandatory minimum sentence.

The Information to Establish Prior Conviction alleged that Petitioner had been convicted of the following offense: "March 3, 1997 – Possession of a narcotic drug with intent to sell, Docket #96-S-609, in the Hillsborough County Superior Court, Manchester, New Hampshire." The range of drugs encompassed by New Hampshire statute of conviction[3] is greater than that within the definition of 'felony drug offense.' Accordingly, that prior conviction may not be used to increase the mandatory minimum sentence, and the Information could be challenged on that basis.

[3] Although the statute of conviction is not referenced in the Information, the definitional section of New Hampshire drug law, N.H. Rev. Stat. §318-B:1, applies to all state drug crimes.

N.H. Rev. Stat. §318-B:1(XVII) defines "narcotic drugs" as "cocaine-type and morphine-type drugs, and drugs other than cannabis-type regulated under the Comprehensive Drug Abuse Prevention and Control Act of 1970." "Cocaine-type drugs" are defined as "coca leaves, cocaine, ecgonin, and chemical compounds which are similar thereto in chemical structure or which are similar thereto in physiological effect and which show a like potential for abuse." N.H. Rev. Stat. §318-B:1(V). "Morphine-type drugs" means "morphine and chemical compounds which are similar thereto in physiological effect and which show a like potential for abuse." N.H. Rev. Stat. §318-B:1(XVI).

The New Hampshire statutory definition of 'narcotic drugs' is broader than the federal definition embodied in 21 U.S.C. §802(17), which does not include chemical compounds similar to cocaine "in physiological effect and which show a like potential for abuse," or chemical compounds similar to morphine "in physiological effect and which show a like potential for abuse." There would have been no need to additionally specify "cocaine-type drugs' and 'morphine-type drugs' if these were regulated under the Comprehensive Drug Abuse Prevention and Control Act of 1970. It is a "cardinal rule of statutory interpretation that no provision should be

construed to be entirely redundant." Nielsen v. Preap, 139 S.Ct. 954, 969 (2019)(citation omitted).

The bottom line here is that the court failed to follow the procedure required by 21 U.S.C. §851, and as a result Petitioner did not have the opportunity to deny any allegation of the §851 Information. This Court therefore should hold that this error was not harmless, vacate Petitioner's sentence, and remand for §851 proceedings and resentencing.

IV. The inclusion of a juror who did not reside in the District of New Hampshire, where the trial took place, violated the Jury Selection and Service Act as well as the Sixth Amendment.

After the trial had concluded, the court informed the parties that an issue had arisen concerning the qualifications of a juror. Petitioner filed a Motion for New Trial pursuant to Fed. R. Crim. P. 33, raising claims under both the Jury Selection and Service Act of 1968 ["the Act"], 28 U.S.C. §1861 et seq., and the Sixth Amendment. After hearing, the court denied the motion.

The Act provides that a person is ineligible to serve on a federal jury unless, inter alia, he has "resided for a period of one year within the judicial district." The residency requirement guarantees "some substantial nexus between a juror and a community whose sense of justice the jury as a whole

is expected to reflect." 1968 U.S. Code Cong. and Admin. News, pp. 1792, 1796. The Sixth Amendment guarantees a criminal defendant the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." Both were violated in this case.

The juror had completed the Qualification Questionnaire, Juror Information Form, and the Supplemental Attorney Questionnaire with conflicting information concerning his residency: he listed his 'permanent' address as in Derry, New Hampshire, but indicated his current and prior address were both in Massachusetts. The juror raised the issue with court staff in advance, during juror orientation, stating that he "kind of lives in New Hampshire and kind of not." He was told that he needed to raise the issue with the judge, if his name was called during jury selection.

Later, he told the Jury Administrator that he was "all set" with what he had been talking with the staff member about, and that he was "keeping his New Hampshire residence." He was not instructed to take any additional steps with respect to the residency issue, and he did not raise the issue with the judge when his name was called. He was seated on the jury without objection from either side. The issue came to the court's attention after the

verdict, when the juror complained to court personnel that his car had been towed because parked in a resident-only spot.

The court found that the juror should have been disqualified from jury service because he did not reside in the state. The court further found, however, that Petitioner's failure to review the Supplemental Attorney Questionnaire ['the Questionnaire], "which should have alerted [Petitioner] to the residency issue," barred him from raising the claim post-trial. See 28 U.S.C. §1867(a)(challenges to jury selection must be made before voir dire, or within seven days after a party discovers or could have discovered the grounds for disqualification, whichever is earlier). It concluded that, even if the failure to earlier raise this issue was excusable, Petitioner had to, and could not, show prejudice. The court rejected Petitioner's Sixth Amendment claim for the same reasons.

The First Circuit agreed with this analysis. It held that the failure to read the Questionnaire amounted to waiver of the issue. Gonzalez, 949 F.3d at 35. It held that Petitioner's failure to comply strictly with the Act's requirements precluded any challenge to the process, even if there may have been some "idiosyncratic circumstance." Id. at 36. It further held that, even had there been no waiver, Petitioner had an obligation to show ensuing

prejudice from the seating of the unqualified juror, and this Petitioner was unable to do. Id. The First Circuit was wrong on all accounts.

Here, the parties had been provided with a jury selection list ["the List"] compiled from the Juror Information Form, that set forth demographic information about each juror. This included 'City and State,' taken from the 'permanent address' supplied by the juror (here, Derry, NH). There was no indication on the List that the juror's residence was outside of the state. The parties were also provided with a printout of each juror's responses to the Questionnaire, which showed that this juror was currently living in Jamaica Plain for three months, and before that had lived in Quincy for one year. Defense counsel reviewed the List, but did not cross-check it against the Questionnaire.

Petitioner had good cause for failing to earlier challenge this juror's qualifications – that is, the actions of the court itself. The court supplied the parties with the List, which gave incorrect information about the juror's residency. It is evident that the court – as well as Petitioner – did not review the Questionnaire before voir dire, because otherwise the court would have excused this juror as unqualified for jury service. This is true even though the court chastised the defense for relying solely on the List because it did

not "reveal whether [the juror] had been a resident of the district for at least a year, as the Act requires."

By specifying "City and State," the List certainly suggests that the Act's residency requirement has been met. After all, it would be reasonable to expect that the court, which compiled this information, had already culled those respondents who did not meet the residency requirement. There is no one on the List with an out-of-state address, just as there is no one on the List under the age of 18, another requirement of the Act.

Moreover, the record shows that the court had additional information not shared with the parties – that is, the discussion between the juror and court staff in advance of voir dire concerning the juror's admission that he "kind of lives in New Hampshire and kind of not." The court not only failed to bring this to the parties' attention, but failed to take any action other than putting the onus on the juror to raise it again with the judge. And when he reported for jury duty, in response to the juror's statement that he was "all set" and that he was "keeping his New Hampshire residence," the jury administrator did not even reiterate that the juror should raise the residency question with the judge if his name was called.

In United States v. Uribe, 890 F.2d 554 (1st Cir. 1989), a juror failed to disclose a past felony conviction. The Court declined to order retrial. That requirement – no felons on federal juries – is only statutorily based, and does not appear in the constitution. As the Court found, the Act "does not implement a constitutional bar to jury service, but establishes a statutory impediment." Id. at 561. In contrast, in the case at bar, the residency requirement at issue is expressly set forth in the Sixth Amendment (although the duration of that residency is not). In that case, too, the Court found waiver, but unlike here, there were no actions of the district court that mitigated counsel's failure to earlier spot the problem.

The Uribe Court also found that the defense failed to show any prejudice from the seating of this juror, because the statutory violation of allowing a convicted felon to serve did not implicate either the fundamental fairness of the trial or the defendants' constitutional rights and, accordingly, could not be said to be a 'substantial' violation of the Act. "Short of constitutional error or some more substantial violation of the [Act], there must be at least a plausible link between the predicate facts and the prejudice claimed before retrial can be ordered." Id. at 562.

Here, a different situation presents: the seating of a juror who did not reside in the state violated Petitioner's Sixth Amendment right to a jury 'of the States and district wherein the crime shall have been committed,' so there was, in fact, constitutional error. Allowing a non-resident to serve did, in fact, implicate Petitioner's constitutional rights. Accordingly, no showing of prejudice beyond the lack of a jury drawn from the community needs be made.

In United States v. Novod, 923 F.2d 970, 978 (2d Cir.), *cert. denied*, 500 U.S. 919 (1991), relied upon by the district court here, the Second Circuit rejected a Sixth Amendment challenge based upon a juror's non-resident status. The juror resided in state, but in another judicial district. The juror disclosed her residence, but the defense did not realize it was in another district. Before the jury got the case, however, the court and the parties were informed that the juror's county of residence was outside the court's judicial district. Neither side objected, but after conviction, the defense filed a motion for a new trial on this basis, claiming there was no waiver because he didn't realize the boundaries of the district.

In these circumstances, the Second Circuit held that there was waiver. The defense did not object even once it was informed of the district's

boundaries, which was at a point where an alternate juror could have been substituted. The Court held that, absent some showing of prejudice, failure to make a timely objection prevents a defendant from raising the issue after verdict.

In the case at bar, there was no waiver. "A party waives a right when he intentionally relinquishes or abandons it." United States v. Rodriguez, 311 F.3d 435, 437 (1st Cir. 2002), *cert. denied*, 538 U.S. 937 (2003) (citations omitted). As previously discussed, because of the defense's justifiable reliance on the List, the court's failure to bring to the parties' attention the juror's statements about 'kind of' not living in New Hampshire, and the fact that the juror was tasked with the responsibility to bring the residency problem to the judge's attention, the defense's failure to learn of the qualification issue did not amount to waiver. And because there was no waiver, there is no requirement that Petitioner show prejudice. Petitioner did not waive, implicitly or explicitly, his Sixth Amendment right to a jury composed of residents of the district, and accordingly, he is entitled to a new trial.

V. The use of Petitioner's prior conviction to increase the mandatory minimum sentence violated the Fifth and Sixth Amendments, where the indictment did not allege the prior conviction and the jury did not find it beyond a reasonable doubt.

21 U.S.C. §841(b)(1)(A) provided[4] that the mandatory minimum sentence for drug crimes involving one kilogram or more of heroin was ten years, unless the defendant had a prior felony drug conviction, in which case the mandatory minimum sentence was 20 years. Prior to trial, the government filed an 'Information to Establish Prior Conviction pursuant to 21 U.S.C. sec. 851.' It alleged that Petitioner had been convicted on March 3, 1997 of the state crime of possession of a narcotic drug with intent to sell. The court held that Petitioner was subject to the 20-year mandatory minimum sentence.[5]

Under the Fifth and the Sixth Amendments, Petitioner should not have been subject to the enhanced mandatory minimum sentence of 20 years without an indictment charging, and a jury finding beyond a reasonable doubt, that he had a qualifying prior felony drug conviction. Although

[4] The First Step Act has since changed this provision in significant ways, including lowering the mandatory minimum sentence for those with one prior serious drug felony from 20 years to 15 years.

[5] The court determined that Petitioner's total offense level was 32, with a Criminal History Category of IV. This would have put Petitioner in a sentencing range of 168-210 months.

Almendarez-Torres v. United States, 523 U.S. 224 (1998), held that prior convictions used to support recidivist enhancements need not be set forth in an indictment or proved beyond a reasonable doubt, the continuing validity of that decision has been called into doubt.

In Apprendi v. New Jersey, 530 U.S. 466, 489-90 (2000), this Court expressly acknowledged "it is arguable that Almendarez-Torres was incorrectly decided." This Court referred with approval to Justice Scalia's dissent in Almendarez-Torres, stating that it was "clear beyond peradventure" that "due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." Apprendi, 530 U.S. at 589, n.15 (citation omitted).

The Apprendi Court noted as well the 'pedigree' of the pleading requirement, ignored by Almendarez-Torres, quoting Justice Clifford's "succinct" statement of the age-old rule in United States v. Reese, 92 U.S. 214, 232-33 (1876): "[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." Apprendi, 530 U.S. at 489, n.15. See also Dretke v. Haley, 541 U.S. 386, 395 (2004)

(characterizing Apprendi as "reserving judgment as to the validity of Almendarez-Torres").

Moreover, Justice Thomas, who joined in the 5-4 majority opinion in Almendarez-Torres, subsequently repudiated that holding. In his concurring opinion in Apprendi, Justice Thomas acknowledged that Almendarez-Torres was wrongly decided:

> If a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element. (To put the point differently, I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment). When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute.

Apprendi, 530 U.S. at 521 (Thomas, J., concurring). In Shepard v. United States, 544 U.S. 13, 27 (2005)(Thomas, J., concurring), Justice Thomas noted that Almendarez-Torres "has been eroded by [the] Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that Almendarez-Torres was wrongly decided."

In Alleyne v. United States, 570 U.S. 99 (2013), this Court held that any fact that increases the mandatory minimum sentence is an element of the crime that must be submitted to the jury and found beyond a reasonable doubt (overruling Harris v. United States, 536 U.S. 545 (2002)). In so

doing, the Court expressly noted that the parties did not contest the Almendarez-Torres prior conviction exception to the rule set forth in Apprendi that "facts which increase the prescribed range of penalties to which a criminal defendant is exposed" are elements. For that stated reason, the Court did not revisit it. Id. at 111, n.1.

Alleyne is one in a long line of Supreme Court cases emphasizing the importance of a jury finding beyond a reasonable doubt of every fact legally essential to a sentence. Most recently, in United States v. Haymond, 139 S.Ct. 2369 (2019), this Court held that the Fifth and Sixth Amendments were violated where an enhanced mandatory minimum sentence on revocation of supervised release was imposed based on facts found by a judge. This Court again emphasized that "[a] judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct." Id. at 2376. "[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." Id., *quoting* Blakely v. Washington, 542 U.S. 296, 304 (2004).

In sum, "[i]t is genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the

evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject…" Almendarez-Torres, 523 U.S. at 251 (Scalia, J., dissenting). Therefore, the court should not have applied the 20-year mandatory minimum sentence here, because this was not alleged in the indictment against Petitioner, and because the prior qualifying drug felony was not found by the jury beyond a reasonable doubt.

VI. Petitioner was not yet 'sentenced' within the meaning of the First Step Act until the Court of Appeals affirmed his sentence, and accordingly this case should be remanded to the district court so that the provisions of the First Step Act can be applied.

On December 21, 2018, while this appeal was pending, the First Step Act was enacted. Before the First Step Act, 21 U.S.C. §841 provided that the mandatory minimum sentence for offenses involving the quantity of drugs involved here was 20 years if the violation came "after a prior conviction for a felony drug offense." The court found that the 20 year mandatory minimum applied here.

Under the First Step Act, §841 now provides that the mandatory minimum sentence for those with one prior "serious drug felony"[6] is 15

[6] A "serious drug felony" is more limited than "felony drug offense." "Felony drug offense" meant an offense punishable by imprisonment for

years, rather than 20 years. This change applies where "a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018]."

Although the district court imposed its sentence prior to that, where, as here, a defendant is appealing the sentence, it cannot yet be considered final.

> A case is not yet final when it is pending on appeal. The initial sentence has not been finally 'imposed' within the meaning of the … statute because it is the function of the appellate court to make it final after review or see that the sentence is changed if in error.

United States v. Clark, 110 F.3d 15, 17 (6th Cir. 1997)(superseded by regulation on other grounds).

Just as with plain error analysis, Henderson v. United States, 568 U.S. 266, 278-79 (2013), the Court of Appeals should have applied the law at the time of the appeal – that is, §841 as amended. Under the First Step Act, application of the 20 year mandatory minimum sentence was clear error.

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more than one year. 21 U.S.C. §802(44). "Serious drug felony," among other limitations not relevant here, means an offense for which a maximum term of imprisonment of ten years or more is prescribed by law. 21 U.S.C. §802(57); 18 U.S.C. §924(e)(2)(A). It is not clear from the record whether Petitioner's prior drug conviction would meet this definition. If it did not, the mandatory minimum term of imprisonment would be ten years.

There can be no question that the erroneous imposition of the 20 year mandatory minimum adversely affected Petitioner's substantial rights and adversely impacted the fairness of the proceedings. The guideline range for Petitioner was 168-210 months. This Court should hold that a sentence has not been 'imposed' for the purposes of the First Step Act until it is affirmed on appeal.

## Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

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