No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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TRAVIS JOB,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court should overrule the holding of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which provides an exception to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for sentencing provisions that raise a criminal defendant's otherwise applicable statutory maximum and minimum sentences based on prior criminal conduct?

STATEMENT OF RELATED CASES

United States v. Travis Job, 3:13-cr-1128-BEN-11, United States District Court for the Southern District of California. District court proceeding in which the sentence that is the subject of this petition was imposed on February 21, 2018. Judgment was entered on March 5, 2018.

United States v. John Patrick Vescuso, No. 18-50066, United States Court of Appeals for the Ninth Circuit. Direct appeal deciding issue raised in this petition. Judgment was entered on January 9, 2020.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

SENTENCING GUIDELINES

SUPREME COURT RULES

ORDERS AND OPINION BELOW

On February 21, 2018, the district court sentenced Travis Job to 260 months for conspiring to distribute methamphetamine. *See* 21 U.S.C. §§841 & 846; 2/21/18 Reporter's Transcript (RT) at 75-79 (attached in appendix).

On January 9, 2020, the Ninth Circuit filed an unpublished opinion affirming that sentence, and held that the district court appropriately found that Job's mandatory minimum sentence was twenty years (instead of ten) because he had previously been convicted for "a felony drug offense." *See* 21 U.S.C. §841(a)(1)(A)(viii); *United States v. Job*, 798 Fed. App'x 98, 101-02 (9th Cir. 2020) (attached in appendix).

On March 20, 2020, the Ninth Circuit denied Job's petition for panel rehearing. *See* 3/20/20 Order (attached in appendix).

JURISDICTION

The Ninth Circuit's opinion was filed on January 9, 2020, and Job's petition for rehearing was denied on March 20, 2020. Accordingly, this Petition is timely, and the Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution states, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property without due process of law . . . ."

The Sixth Amendment to the Constitution states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

STATEMENT OF THE CASE

After a jury trial, Job was convicted of conspiring to distribute, and possessing with intent to distribute, methamphetamine. *See* 21 U.S.C. §§841(a)(1) & 846. The jury found that both offenses involved at least 50 grams of methamphetamine, which normally would have exposed a defendant to a mandatory minimum sentence of ten years. *See* 21 U.S.C. §841(a)(1)(A)(viii) (2013). However, because the government filed an information charging that Job had a prior conviction for "a felony drug offense," Job's mandatory minimum sentence was increased to twenty years. *See id.*; 21 U.S.C. §851.[1] That is, the prior conviction, coupled with the drug quantity finding, led to a mandatory minimum sentence of twenty years.

On appeal, the Ninth Circuit reversed (1) the possession with intent to distribute count, (2) the district court's application of three upward adjustments to the Sentencing Guidelines, and (3) Job's 365-month sentence. *See United States v. Job*, 871 F.3d 852 (9th Cir. 2017).

On remand for re-sentencing, Job challenged the jury's finding that his offense conduct involved at least 50 grams of methamphetamine, and asserted that the twenty-year mandatory minimum sentence did not apply. The district court rejected those challenges and calculated Job's Sentencing Guidelines range as 235-293 months. However, because of the 240-month (*i.e.*, twenty-year) mandatory minimum sentence, the Guidelines range became 240-293 months. *See* U.S.S.G. §5G1.1. The court imposed a mid-range sentence of 260 months. *See* 2/21/18 Sent. Tr. at 75-79 (attached in appendix).

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[1] In December 2018, section 841(b)(1)(A) was amended such that a qualifying prior must be a "serious drug felony," and the mandatory minimum sentence involved here was reduced from twenty to fifteen years.

In his second appeal, to which this petition relates, Job argued that he should not have been subject to a 240-month mandatory minimum sentence, and the floor of his Sentencing Guidelines range should not have been increased to that point, because his prior drug felony conviction had not been charged in the indictment nor found by the *petit* jury. The Ninth Circuit rejected that argument, stating:

> Job argues that the entire sentencing enhancement regime in §851, which increased his mandatory minimum sentence from ten to twenty years based on his prior felony drug conviction, violates his constitutional rights under the Fifth and Sixth Amendments for the reasons stated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). But "[w]e have repeatedly acknowledged that *Apprendi* carves out an exception for the fact of a prior conviction," *United States v. Quintana-Quintana*, 383 F.3d 1052, 1053 (9th Cir. 2004), and Job recognizes that his requested relief is foreclosed by the Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Therefore, we reject this argument.

Job, 798 Fed. App'x at 101-02 (attached in appendix).

REASONS FOR GRANTING THE PETITION

Under our Constitution, a person accused of a crime is entitled to "trial, by an impartial jury of the State and district wherein the crime shall have been committed," Amdt. VI, pursuant to an indictment for that offense by a grand jury, Amdt. V. *See also* Art. III, §2, cl. 3 ("[t]he Trial of all Crimes . . . shall be by Jury"). This Court has qualified those protections, holding that "[*o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (emphasis added). The exception to trial by jury for establishing "the fact of a prior conviction" finds its basis not in the Constitution, but in this Court's opinion in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Notably, within a few years of issuing that opinion, the majority of the Justices involved in that case concluded that it was wrongly decided. *See Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring

in part and concurring in judgment); *see also Almendarez-Torres*, 523 U.S. at 248-249 (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); *Apprendi*, 530 U.S. at 520-521 (Thomas, J., concurring).

The reasons for the relatively quick shift by the majority of Justices involved in that case are compelling. As the Court explained in *Apprendi*, the rule announced in that case was based on the historical common law practice, particularly at the time the Bill of Rights was drafted. *See Apprendi*, 530 U.S. at 478-80. And as Justice Thomas explained at length in his concurrence in *Apprendi*, from the founding of this country throughout nearly its entire history, the uniform practice was to treat any factor that increased a defendant's available sentence – including recidivist provisions – as elements that had to be charged in an indictment and proved to a jury beyond a reasonable doubt. *See id.* at 502-18 (Thomas, J., concurring). Given this, there is no historical or principled reason to continue to adhere to *Almendarez-Torres*, and it should be overruled. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (stating that the doctrine of *stare decisis* is "at its weakest when we interpret the Constitution because a mistaken judicial interpretation of that supreme law is often practically impossible to correct through other means," and key considerations in that context are "the quality of the [prior] decision's reasoning," "its consistency with related decisions," and "legal developments since the decision") (quotations and citations omitted).

The government may argue that case this is not a good vehicle for addressing the question presented, because Job received a sentence above the applicable twenty-year mandatory minimum sentence, and within the applicable Sentencing Guidelines range, thus the constitutional error is harmless. There are two answers to that. The first is expressed in Justice Thomas's concurrence in *Apprendi*, in which he stated:

> I think it clear that the common-law rule would cover the *McMillan* situation of a mandatory minimum sentence . . . . No doubt a defendant could, under such a scheme, find himself sentenced to the same term to which he could have been sentenced absent the mandatory minimum. The range for his underlying crime could be 0 to 10 years, with the mandatory minimum of 5 years, and he could be sentenced to 7. (Of course, a similar scenario is possible with an increased maximum.) But it is equally true that his expected punishment has increased as a result of the narrowed range and that the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum "entitl[es] the government" . . . to more than it would otherwise be entitled (5 to 10 years, rather than 0 to 10 and the risk of a sentence below 5). Thus, the fact triggering the mandatory minimum is part of "the punishment sought to be inflicted," Bishop, Criminal Procedure 50; it undoubtedly "enters into the punishment" so as to aggravate it, *id.*, §540, at 330, and is an "ac[t] to which the law affixes . . . punishment," *id.*, §80, at 51. Further, just as in *Hobbs* and *Searcy*, *see supra*, at 2374-2375, it is likely that the change in the range available to the judge affects his choice of sentence. Finally, in numerous [historical] cases . . . the aggravating fact raised the whole range – both the top and bottom. Those courts, in holding that such a fact was an element, did not bother with any distinction between changes in the maximum and the minimum. What mattered was simply the overall increase in the punishment provided by law.

Apprendi, 530 U.S. at 521-22 (Thomas, J., concurring). All of the considerations enumerated by Justice Thomas in this regard apply to Job. And the upward pressure inherent in the fact that Job's minimum sentence was twenty years is a cause for particular concern here because the district court imposed a sentence just twenty months (or 8.33%) above that minimum.

Furthermore, the twenty-year mandatory sentence elevated Job's Sentencing Guidelines range from 235-293 to 240-293 months, *see* U.S.S.G. §5G1.1, and this Court has held that "[w]hen a defendant is sentenced under an incorrect Guidelines range – whether or not the defendant's ultimate sentence falls within the correct range – the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016).

"Innumerable criminal defendants have been" – and continue to be – "unconstitutionally sentenced under the flawed rule of *Almendarez–Torres*, despite the fundamental 'imperative that the

Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.'" *Shepard v. United States*, 544 U.S. 13, 26 (2005) (Thomas, J., concurring in part and concurring in the judgment) (quoting *Harris v. United States*, 536 U.S. 545, 581-582 (2002) (Thomas, J., dissenting)). Accordingly, the question presented raises an important issue of federal law that should be settled by this Court. *See* S. Ct. Rule 10(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Todd W. Burns

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