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No.

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IN THE
SUPREME COURT OF THE UNITED STATES

LARON J. WAINWRIGHT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

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

_____

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QUESTIONS PRESENTED

Most circuits agree that when increasing a defendant's sentence beyond the normal statutory maximum pursuant to the Armed Career Criminal Act (ACCA), the modified categorical approach is used to determine whether a defendant has three prior convictions for a violent felony or a serious drug offense, or both, that were "committed on occasions different from one another." These courts, however, do not strictly apply the modified categorical approach as set forth in this Court's jurisprudence. Instead, they permit a sentencing court to find facts contained in certain judicial records—charging documents, plea colloquies, jury instructions, judgments—even if those facts were not necessarily established beyond a reasonable doubt at a jury trial or admitted by the defendant in a guilty plea. This raises the following important questions:

1. Does the Sixth Amendment permit a sentencing court to find that a defendant's prior convictions were committed on different occasions based on non-elemental facts contained in judicial records even if those facts were not proven at a jury trial or admitted in a guilty plea?

2. Should this Court overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)?

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Petitioner, Laron Wainwright, respectfully asks this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered on June 4, 2020, affirming the district court's judgment.

OPINION BELOW

The Eighth Circuit's opinion affirming the judgment of the district court is not published in the federal reporter. It is can be found online at *United States v. Wainwright*, 807 Fed. Appx. 601 (8th Cir. 2020), and is attached as Appendix A.

A copy of the order denying the petition for rehearing is attached as Appendix B.

JURISDICTION

Jurisdiction in the United States District Court for the Western District of Missouri was under 18 U.S.C. § 3231, because Mr. Wainwright was charged and convicted of an offense against the United States, i.e., unlawful possession of a firearm having previously been convicted of a felony offense, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1).

Mr. Wainwright appealed from his conviction and sentence to the United States Court of Appeals for the Eighth Circuit. Jurisdiction in that court was established by 28 U.S.C. § 1291. The Eighth Circuit denied the appeal on June 4, 2020. The Eighth Circuit denied rehearing on July 16, 2020.

Under Sup. Ct. R. 13.3, this petition is filed within ninety days of the date on which the Court of Appeals entered its order denying Mr. Wainwright's petition for rehearing. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment guarantees every criminal defendant a jury trial:

> "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 wherein the crime shall have been committed, which district shall have been previously

> ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

U.S. Const., Amend. VI.

The ACCA permits increased punishment for defendants with certain prior convictions:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years; and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(1).

STATEMENT OF THE CASE

A. District Court Proceedings

Mr. Wainwright was indicted on two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1) (DCD 10, Indictment at 1-2).[1] A jury acquitted Mr. Wainwright on count one of the

[1] The district court docket will be referenced as DCD.

Indictment but convicted him on count two (DCD 80, Verdict Forms at 1-2).

The United States Probation Office prepared a Presentence Investigation Report (PSR) that recommended a base offense level of 33 (DCD 91, PSR at p. 7, ¶ 27). The PSR said that Mr. Wainwright had three prior convictions for serious drug offenses, which were committed on different occasions (DCD 91, PSR at p. 7, ¶ 27). In the Circuit Court of Jackson County, Missouri, case number 0816-CR01404-01, Mr. Wainwright was convicted in 2008 of sale of a controlled substance (DCD 91, PSR at p. 7, ¶ 27; p. 12, ¶ 39). In the Circuit Court of Jackson County, Missouri, case number 0716-CR03611-01, Mr. Wainwright was convicted in 2007 of two counts of sale of a controlled substance (DCD 91, PSR at p. 7, ¶ 27; p. 11, ¶ 38). With respect to the latter case, the PSR stated:

> The charging document for this case indicates that the defendant, in violation of RSMo. 195.211, committed the felony of sale of a controlled substance, punishable upon conviction under RSMo. 558.011.1(2), in that on or about April 20, 2006, and April 24, 2006, the defendant knowingly sold cocaine base, a controlled substance, to a detective, knowing that it was a controlled substance.
>
> Court records indicate that on April 20, 2006, the defendant sold approximately .2 gram of crack cocaine to an undercover detective. On April 24, 2006, the defendant sold approximately .7 gram of crack cocaine to the same detective. The defendant then sold the detective crack cocaine on three additional occasions between May 2, 2006, and May 8, 2006. Laboratory analysis later confirmed that the substances from all five transactions,

weighing a total of 1.4 grams, contained cocaine.

(DCD 91, PSR at p. 11, ¶ 38).

Mr. Wainwright objected to imposition of any sentence pursuant to the ACCA, arguing that application of the ACCA would violate his Sixth Amendment right to a jury trial (DCD 91, PSR Addendum at p. 24). Mr. Wainwright contended that a jury had to decide whether his prior convictions for sale of a controlled substance occurred on occasions different from one another (DCD 91, PSR Addendum at p. 24). Defense counsel acknowledged that "the Eighth Circuit has previously held that the determination of whether prior crimes occurred on separate occasions is properly made by the court rather than a jury" (DCD 91, PSR Addendum at p. 24).

At sentencing, the district court overruled the objection, indicating that the court was bound by Eighth Circuit precedent (DCD 104, Sent. Tr. at 10). The court calculated a guideline range of 235 to 293 months' imprisonment and sentenced Mr. Wainwright to 240 months' imprisonment and three years of supervised release (DCD 104, Sent. Tr. at 37). Mr. Wainwright appealed.

B. Eighth Circuit's Ruling

The United States Court of Appeals for the Eighth Circuit summarily denied the appeal, holding that Mr. Wainwright's argument was foreclosed by the court's

precedent holding that "whether prior offenses were committed on different occasions is among the recidivism-related facts that may be determined by a district court at sentencing" (Appendix at 2).[2] By citation to extra-circuit authority, the Eighth Circuit panel indicated that its precedents were in accord with most other circuits (Appendix at 3).[3]

The Honorable David R. Stras, Circuit Judge, concurred, acknowledging that he was bound by circuit precedent, but saying that "allowing judges, rather than juries, to find these facts [that offenses were committed on occasions different from one another], runs afoul of fundamental Sixth Amendment principles and what the Supreme Court has said about them" (Appendix at 3).[4]

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[2] The court cited *United States v. Evans*, 738 F.3d 935, 936-37 (8th Cir. 2014); *United States v. Jones*, 934 F.3d 842, 843 (8th Cir. 2019); *United States v. Wyatt*, 853 F.3d 454, 458-59 (8th Cir. 2017); and *United v. Harris*, 794 F.3d 885, 887 (8th Cir. 2015) (Appendix at 2-3).

[3] *United States v. Longoria*, 874 F.3d 1278, 1283 (11th Cir. 2017) (per curiam); *United States v. Blair*, 734 F.3d 218, 226-28 (3d Cir. 2013); *United States v. Elliott*, 703 F.3d 378, 382-83 (7th Cir. 2012); *United States v. Thomas*, 572 F.3d 945, 952 n.4 (D.C. Cir. 2009); *United States v. White*, 465 F.3d 250, 254 (5th Cir. 2006) (per curiam); *United States v. Michel*, 446 F.3d 1122, 1133 (10th Cir. 2006); *United States v. Thompson*, 421 F.3d 278, 285-86 (4th Cir. 2005); *United States v. Burgin*, 388 F.3d 177, 186 (6th Cir. 2004); *United States v. Santiago*, 268 F.3d 151, 156-57 (2d Cir. 2001).

[4] Judge Stras referenced an earlier concurring opinion in which he fully set forth his reasoning for finding a Sixth Amendment violation. *United States v. Perry*, 908 F.3d 1126, 1134 (8th Cir. 2018) (Stras, J. concurring).

REASONS FOR GRANTING REVIEW

This Court has issued multiple opinions on the interpretation and application of the ACCA to increase the sentences of criminal defendants who have prior convictions for violent felonies and serious drug offenses. See, *Taylor v. United States*, 495 U.S. 575, 600-01 (1990) (categorical approach requires a sentencing court to determine whether the elements of a prior conviction match the elements of a generic offense while ignoring the facts related to the defendant's prior conduct); *Shepard v. United States*, 544 U.S. 13, 26 (2005) (the modified categorical approach permits a sentencing court to consult a limited class of documents, such as an indictment, jury instructions, plea colloquy, to determine what alternative elements a defendant was convicted of); *Descamps v. United States*, 570 U.S. 254, 258 (2013) (the modified categorical approach does not apply to statutes that contain a single, indivisible set of elements that sweep more broadly than the corresponding generic offense); *Mathis v. United States*, 136 S.Ct. 2243, 2253 (2016) (the modified categorical approach cannot be used to discern the alternative means used by a defendant to commit a single element of an offense such that the ACCA may be applied if the specific means matches the generic offense, even though the broader element would not).

This Court has not spoken on whether the modified categorical approach

permits a sentencing court to consult *Shepard*-approved documents to determine whether a defendant committed a prior violent felony or serious drug offense on "occasions different from one another." If the modified categorical approach can be used, a second question arises, i.e., can a sentencing court use facts—including facts not necessarily found by a jury or admitted in a guilty plea—culled from *Shepard*-approved documents to determine whether prior offenses were committed on different occasions.

Most circuits agree that modified categorical analysis applies to the different-occasions issue and expand that tool to permit the consideration of non-elemental facts that were not necessarily found by a jury or admitted in a guilty plea. See, *United States v. Hennessee*, 932 F.3d 437, 442 (6th Cir. 2019) (Second, Fourth, Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits have said that "only *Shepard* documents may be examined when conducting a different-occasions analysis," but these circuits have not "imported an elemental-facts-only limitation").

The doctrinal underpinnings for this conclusion are not clear. Some circuits have simply declared it to be so, even though none of this Court's opinions cited above permit this conclusion. *Id*. at 449-452 (Cole, C.J. dissenting) (explaining why Supreme Court precedent does not permit judicial fact-finding in different-

occasions analysis); *United States v. Perry*, 908 F.3d 1126, 1134-36 (8th Cir. 2018) (Stras, J. concurring) (same). Judicial fact-finding must be permitted, say some courts, because the different-occasions question cannot be determined without it. *Hennessee*, 932 F.3d at 443 ("A sentencing judge would be hamstrung, however, in making most different-occasions determinations if he or she were only allowed to look to elemental facts in *Shepard* documents which rarely involve date, time, or location").

Some circuits rely on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), to permit judicial fact-finding. See e.g., *United States v. Blair*, 734 F.3d 218, 227 (2013) (*Almendarez-Torres* remains good law and permits the consideration of facts such as the date or location of a crime to conclude whether crimes were committed on different occasions); *United States v. Dantzler*, 771 F.3d 137, 144 (2d Cir. 2014) ("the separateness of predicate offenses is intertwined with the fact of conviction" and facts, such as the date of the prior offense, may be considered if found in *Shepard*-approved documents). These courts rely on the notion that certain facts, such as the date of an offense, are "integral to the fact of a prior conviction," and thus can be relied upon to increase a defendant's punishment. *Blair*, 734 F.3d at 228.

The Eighth Circuit relies on *Almendarez-Torres* but takes an even more

expansive position. *United States v. Kempis-Bonola*, 287 F.3d 699, 703 (8th Cir. 2002), citing *United States v. Santiago*, 268 F.3d 151, 156 (2d Cir. 2001) (We agree with the Second Circuit that it is entirely appropriate for judges to have 'the task of finding not only the mere fact of previous convictions *but other related issues as well*'"); also see *United States v. Marcussen*, 403 F.3d 982, 984 (8th Cir. 2005) ("we have previously rejected the argument that the nature of a prior conviction is to be treated differently from the fact of a prior conviction").

This Court should grant certiorari to provide guidance to the circuit courts on whether judges may find non-elemental facts and use them to conclude that a defendant's prior offenses were committed on different occasions and, thus, sentence a defendant to an increased punishment.

ARGUMENT

A. The circuit courts that permit reliance on non-elemental facts to decide the different-occasions question, rely on modified categorical analysis without explicitly concluding that such analysis is permitted.

Under the ACCA, a "court's finding of a predicate offense indisputably increases the maximum penalty," and such a finding would "raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction." *Descamps v. United States*, 570 U.S. 254, 269 (2013). When a statute contains "a

single, 'indivisible' set of elements sweeping more broadly that the corresponding generic offense," the modified categorical approach does not apply. *Id*. at 260. The approach has no function other than to determine what elements "played a part in the defendant's conviction" when the statute of conviction is divisible into multiple, alternative versions of the crime. *Id*. at 260, 262. The modified categorical approach aids a court only in determining what "statutory phrase was the basis of conviction" and that, the Court said, "is the only way we have ever allowed." *Id*. at 263.

Nevertheless, circuit courts seem to rely on an unstated assumption that the modified categorical approach can always be used when determining whether a defendant's prior convictions were committed on occasions different from one another, even though *Descamps* limits its use to determining what elements of a divisible statute were the basis for the defendant's prior conviction. See e.g., *United States v. King*, 853 F.3d 267, 273-74 (6th Cir. 2017) (citing cases from other circuits applying modified categorical analysis). This may be due in part to the fact that defendants have argued that modified categorical analysis is appropriate for the different-occasions analysis. See, *United States v. Dantzler*, 771 F.3d 137, 143 (2d Cir. 2014). The circuit courts do not offer a cogent analysis as to why the different-occasions question calls for the modified categorical

approach as opposed to the categorical approach. See, *United States v. Span*, 789 F.3d 320, 331-332 (4th Cir. 2015) (speculating that the strictures of *Descamps* do not apply to the different-occasions analysis).

B. These circuits use a circumstance-specific approach under the guise of modified categorical analysis to glean non-elemental facts, i.e., date, time of day, location, from *Shepard* documents to decide the different-occasions question.

To further complicate matters, circuits that claim to apply modified categorical analysis nonetheless use a circumstance-specific approach to make factual findings to determine whether a defendant's prior offenses occurred on different occasions. *Hennessee*, 932 F.3d at 442 (clarifying that its decision in *King* adopted the evidentiary source restrictions of *Shepard* for different-occasions analysis, but concluding there is no limitation on a sentencing court's consideration of non-elemental facts contained within *Shepard* documents); *Dantzler*, 771 F.3d at 145 (where two predicate offenses occurred on the same date, sentencing court was compelled to use *Shepard* documents "to look to facts such as the identities of the victims, and the times and locations of the offenses" to make the different-occasions determination); *Kirkland v. United States*, 687 F.3d 878, 889 (7th Cir. 2012) (citing Seventh Circuit precedent drawing circumstance-specific facts such

as location, time of day, different victims from the record); *United States v. Thompson*, 421 F.3d 278, 285 (4th Cir. 2005) (relying on presentence investigation report which indicated that defendant's prior burglary convictions involved seven different home owners living in three different towns on six different days, yet proclaiming "there is no way that our conclusion as to the separateness of the occasions here can be seen to represent impermissible judicial factfinding").

In *Thompson*, the Fourth Circuit justified this analysis saying, "The data necessary to determine the 'separateness' of the occasions is inherent in the fact of the prior convictions." 421 F.3d at 285. The Sixth Amendment is violated if a judge finds facts and uses those facts to enhance punishment beyond the maximum allowed by jury findings alone, but *Almendarez-Torres* excludes "the fact of a prior conviction" from this general rule. *Id*. at 281. "The fact of a prior conviction" is not to be narrowly read as referring to the mere existence of a conviction but includes facts inherent to the conviction. *Id*. at 282-83. Thus, with respect to the different-occasions question, *Almendarez-Torres* permits a court to increase a defendant's sentence beyond the maximum allowed by the jury findings alone by considering facts such as the date of the offense and the identities of the victims. *Id*. at 285.

In *Dantzler*, the Second Circuit said, "the question of the separateness of

predicate offenses is intertwined with the fact of conviction, and because a sentencing judge was authorized to find the fact of conviction under *Almendarez-Torres* and *Apprendi*, he could also find that such convictions were separate." 771 F.3d at 144.[5] The Third Circuit offered similar analysis in *United States v. Blair* to permit application of the ACCA where a defendant had three prior robbery convictions that, according to charging documents, were committed "on or about" three different dates:

> Although the dates charged were not elements of the offenses, the charging documents nonetheless contained factual matter that was sufficient for the District Court to conclude that Blair's 1991 convictions were for at least three robberies that occurred on separate occasions. Indeed, the date of an offense is integral to the fact of a prior conviction, and is customarily reflected in the kinds of documents that courts may, under *Shepard* and *Taylor*, use to determine whether a prior conviction exists.

734 F.3d 218, 228 (3d Cir. 2013).

The court in *Blair* claimed that its analysis was supported by *Almendarez-Torres* which had not been narrowed by any of this Court's ACCA jurisprudence. *Id*. at 227. "Had the Supreme Court meant to say that all details related to prior convictions are beyond judicial notice, it would have said so plainly, as that would have been a marked departure from existing law." *Id*. at 227-28.

[5] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

C. *Mathis v. United States* is inconsistent with the analysis employed in *Hennessee, Dantzler, Kirkland, Thompson, Blair* and similar cases.

In *Mathis v. United States*, this Court plainly stated what the Third Circuit said was missing in *Blair*:

> This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the fact of a prior conviction. That means ***a judge cannot go beyond identifying the crime of conviction*** to explore the manner in which the defendant committed that offense. He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about 'what the defendant and state judge must have understood as the factual basis of the prior plea' or 'what the jury in a prior trial must have accepted as the theory of the crime.' ***He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.***

Mathis v. United States, 136 S.Ct. 2243, 2252 (2016) (internal citations omitted) (emphasis added).

The Court went further, providing a specific example as to the location of an offense:

> Consider if Iowa defined burglary as involving merely an unlawful entry into a 'premises'—without any further elaboration of the types of premises that exist in the world (e.g. a house, a building, a car, a boat). Then, all agree, ACCA's elements-focus would apply. No matter that the record of a prior conviction clearly indicated that the defendant burgled a house at 122 Maple Road—***and***

> ***that the jury found as much***; because Iowa's (hypothetical) law included an element broader than that of the generic offense, the defendant could not receive an ACCA sentence.

Id. at 2255 (emphasis added).

If a particular street address found in a record of conviction cannot be used to conclude that a defendant committed generic burglary because he unlawfully entered a house, rather than a car or boat, then an address cannot be used to determine that two prior ACCA predicates occurred on different occasions because each was committed at a different location. The same reasoning used to reach the former proposition supports the latter proposition.

"Statements of 'non-elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary." *Id*. at 2253. Non-elemental facts are not likely to be contested by defendant at trial or at a plea hearing, thus they cannot be used to "come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence." *Id*. *Mathis* made clear that the ACCA "treats such facts as irrelevant: Find them or not, by examining the record or anything else, a court still may not use them to enhance a sentence." *Id*. Only elements determine what a jury necessarily found or what a defendant necessarily admitted; "a means, or (as we have called it) 'non-elemental fact,' is 'by definition[] *not* necessary to support a conviction." *Id*. at 2255, quoting

Descamps, 133 S.Ct. at 2286, n. 3, 2288 (emphasis in the original).

Thus, cases that treat a specific address or the time of day as a fact inherent in, integral to, or inseparable from "the fact of a prior conviction" are wrong. Non-elemental facts cannot support an ACCA sentence. Only elements are inherent in, integral to, or inseparable from a conviction.

D. This Court should clarify or overrule *Almendarez-Torres*.

In Mr. Wainwright's case, the Eighth Circuit upheld his ACCA sentence saying, "whether prior offenses were committed on different occasions is among the recidivism-related facts that may be determined by a district court at sentencing" (Appendix at 2). It cited opinions from several other circuits, among them *Blair* and *Thompson*. *Id*. at 3. Even after this Court's decision in *Mathis*, the Eighth Circuit contends that it is bound by *Almendarez-Torres*, which the Eighth Circuit reads as permitting a judge to find "recidivism-related facts." *United States v. Wyatt*, 853 F.3d 454, 459 (8th Cir. 2017), citing *United States v. Harris*, 794 F.3d 885, 887 (8th Cir. 2015). As discussed above, many circuits interpret *Almendarez-Torres* similarly.

These cases do not draw a distinction between "the fact of a prior conviction" and "recidivism-related facts." The former refers to the existence of a prior conviction, while the latter refers to any fact related to recidivism, which,

according to these cases, includes whether prior offenses were committed on different occasions. *Almendarez-Torres* does not provide the legal foundation necessary to permit judicial fact-finding of recidivism-related facts.

The defendant in *Almendarez-Torres* admitted that he had prior convictions for aggravated felonies, did not contest the validity of those convictions, and contended only that they should have been set forth in his indictment under the Fifth Amendment. 523 U.S. at 227-28, 248. He did not claim that a jury had to find beyond a reasonable doubt that the convictions existed pursuant to the Sixth Amendment.

This Court should grant certiorari and either clarify that *Almendarez-Torres* does not permit judicial fact-finding of any recidivism-related fact or explicitly overrule *Almendarez-Torres*, so that the circuit courts will have a common understanding of how to make the different-occasions determination called for by the ACCA. Many courts, reluctant to abandon *Almendarez-Torres*, are upholding potentially unlawful ACCA sentences.[6]

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[6] *See, e.g., United States v. Farrad*, 895 F.3d 859, 888 (6th Cir. 2018) (citing circuit's "binding precedent" as basis to reject constitutional argument "until the Supreme Court explicitly overrules it"); *United States v. Weeks*, 711 F.3d 1255, 1259 (11th Cir. 2013) ("*Almendarez-Torres* remains binding until it is overruled by the Supreme Court"); *United States v. Browning*, 436 F.3d 780, 782 (7th Cir. 2006) ("We are not authorized to disregard the Court's decisions even when it is apparent that they are doomed,"); *United States v. Santiago*, 268 F.3d 151, 156 (2d Cir.

As the Honorable David R. Stras, Circuit Judge said in his concurring opinion in *United States v. Perry*, this Court "has all but announced that an expansive view of the prior-conviction exception is inconsistent with the Sixth Amendment." 908 F.3d at 1135. "[T]here is simply no way to square an expansive view of the prior-conviction exception with *Mathis*, which left little doubt that a finding of whether a burglary involved a building or a vehicle—in other words, the location of a crime—cannot be treated the same as the fact of a prior conviction." *Id*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition.

2001) ("*Almendarez-Torres* explains why recidivism requires special treatment, and absent an explicit Supreme Court ruling to the contrary, we decline to institute a policy that runs counter to the principles set forth in that opinion").

Respectfully submitted,

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APPENDIX

Appendix A – Opinion of the Eighth Circuit Court of Appeals

Appendix B – Order Denying Petition for Rehearing