No. 20-7121

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGES MICHEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

GEORGES MICHEL
7900 Harbor Island Drive, Apt. 906A
North Bay Village, Florida, 33141
Pro se Counsel

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QUESTIONS FOR REVIEW

I. In *Apprendi v. New Jersey*, 120 S.CT. 2348 (2000)], the Supreme Court held that "any fact, other than a prior conviction, that increases the penalty beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." (Id. at 2362-63). The statute under which petitioner, Mr. Michel, was convicted, 21 U.S.C. § 841, provides a range of statutory penalties that depends, in part, upon the quantity of drugs attributed to the defendant. For a defendant, such as appellant Michel, with no prior felony drug convictions, the minimum penalty range under § 841 is zero to twenty years. 21 U.S.C. § 841 (b)(1)(C) (2000). For possession of at least five kilograms of cocaine, the maximum available sentence under § 841 rises to life imprisonment. 21 U.SC. § 841 (b)(1)(B). Accordingly, if the drug quantity attributed to a defendant is not submitted to a jury, the statutory maximum under § 841 is twenty years pursuant to § 841 (b)(1)(C), which requires no finding of drug amount. And, under Eleventh Circuit law, a defendant sentenced under the, then, mandatory Sentencing Guidelines must be sentenced under a "specific" base offense level and guidelines range, as shown below. In this case, after the Court of Appeals *reversed* Mr. Michel's sentence based on the *Apprendi Rule*, the lower court, again, and in violation of *Apprendi*, made yet another drug quantity determination

and reimposed another illegal sentence contrary to this Court's decision in *Apprendi*, which was subsequently affirmed by the Eleventh Circuit Court of Appeals, and is the basis for this appeal and petition.

The question for this Court to decide is "whether the Court of Appeals erred, reversibly, in affirming the district court's decision—making a drug quantity determination, after the Remand—where the sentence, again, *exceeded* the authorized statutory maximum [for *Apprendi* purposes] which is the maximum authorized based solely on the jury's verdict alone?"

II. In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court, with respect to the *Organizer* and/or *Leadership* Role enhancements, stated that this factor, like the drug quantity determination, "violated *Apprendi* because neither were found by a jury beyond a reasonable doubt." In *Booker*, the Justices made observations as it relates to Prosecutors seeking to *enhance* a defendant's sentence, and what it would require in order to conform with the dictates of the, then, new *Apprendi* Rule. There, JUSTICE STEVENS observed, and pointed to two analysis of, what was required for prosecutors to *lawfully seek enhancements* of the particular defendant's sentence. Specifically, Justice Stevens, in the second analysis, stated, in relevant part, that:

> "Enhancing the specificity of indictments would be a simple matter... The Government has already *directed its prosecutors to allege facts* such as ... *the defendant was an organizer or leader* ... in the indictment and prove them to the jury *beyond a reasonable doubt*."

Booker, 543 U.S. at 277-78. (emphasis added) In appellant's case, the Government failed, completely, to comply with the Justices' "observances" so as to comply with *Apprendi* and the Sixth Amendment guarantee when appellant's sentence was "*enhanced*" by three-levels based solely on the government's request and the lower court's finding that Mr. Michel was in a leadership role. Therefore, this error is not harmless as it is a constitutional violation of the Sixth Amendment and Fifth Amendment's Due Process of Law doctrines.

The question for this Court to decide is "whether the Court of Appeals erred, reversibly, by affirming the lower court's factual finding, without a jury finding, regarding leadership or organizer role and imposing a sentence that exceeded the authorized statutory maximum for *Apprendi* purposes?"

CERTIFICATE OF INTERESTED PERSONS

Petitioner, Georges Michel, certifies that the following list of persons have an interest in the outcome of this appeal, and that all, save for the Petitioner/Co-Defendant, are from the Southern District of Alabama.

1. The United States Court of Appeals for Eleventh Circuit
2. The Honorable Jeffery U. Beaverstock (United States District Judge).
3. The Honorable Charles R. Butler, Jr. (U.S. Dist. Court Trial Judge).
4. United States Attorney (Mobile, Alabama)
5. Mr. Paul Brown (Trial Attorney) (Mobil Ala.).
6. Mr. Arthur Madden (Sentencing Atty.) (Mobil Ala.).
7. Mr. James Armstrong (Co-Defendant).
8. Mr. George Michel (Petitioner) *Pro se.*

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III. This Court should determine, or clarify, whether the Eleventh Circuit Court of Appeal's affirmance of the lower court's decision violated its own, as well as this Court's, decision(s)— *United States v. Jordan*, 915 F.2d 622, 624-25 (11th Cir. 1990) and *Andrews v. United States*, 373 US 334, 83 S. Ct. 1236, 10 L. Ed. 2d 383 (1963)—when the Court of Appeals failed to address the merits of, or alternatively assuming it did address the merits, erred in failing to grant relief on the *Apprendi* claim. In *Jordan*, supra, citing *Andrews*, supra, the Court held that "Federal courts have long recognized that they have an *obligation* to look behind the label of a motion filed by a *pro se* inmate and determine whether the motion is, in effect, *cognizable under a different remedial statutory framework.*" (all emphasis added).

TABLE OF AUTHORITIES

CASES:

OTHER STATUTES AND AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

Georges Michel respectfully petitions the Supreme Court of the United States for Writ of Certiorari to review the judgment of the United States Court of Appeals

for the Eleventh Circuit, rendered and entered in Case No. 19-15037 on June 22, 2020, in *United States v. Michel,* (**App. [Exh] G**) which affirmed the judgment of the United States District Court for the Southern District of Alabama. (**App. [Exh.] F**)

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit's Order denying the petition for Rehearing and Rehearing En Banc is attached as well as a summary of Mandate. (**App. [Exh.] H 1-2**)

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the Rule of the Supreme Court of the United States. This petition is timely filed pursuant to SUP. CT. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in

jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without the due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. VI:

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 witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Procedural History

1. Petitioner was convicted on March 20, 1998 (Doc. 320) after a Federal Grand Jury returned a ten-count indictment charging appellant with various drug conspiracies—the jury convicted appellant of Counts 1, 2, 4, 5, 6, and 10, but Count 3 was dismissed by motion of the Government). (App. A-1)

2. At the *initial* Sentencing Hearing, the district court made a drug finding only *as to Count Ten* of the Indictment, stating that it did "not need to get into the rest of the counts," and having made *no further determination of drug quantities,* the Government did *not object nor appeal* the judge's decision not to make a drug quantity determination. The district court then imposed a prison sentence of 400 months of imprisonment plus 5 years of Supervised Release. (Id.)

3. Petitioner filed a timely Notice of Appeal (NOA) to the Eleventh Circuit challenging his convictions and sentences alleging various errors, and on February 15, 2001 the Court *reversed* petitioner's conviction, on Count Ten (Theory of Defense and/or Jury Instruction violations); and the Court also *reversed* each of his sentences (Counts 1,2,4,5, and 6) on an *Apprendi* error (fail to submit drug quantity to jury) (See *U.S. v. Armstrong & Michel*, No. 98-6933 (11th Cir. 2001) in an unpublished opinion). (App. A-2)

4. On August 13, 2001 at the Resentencing Hearing, the district court rescheduled the Hearing after counsel for petitioner pointed out the law of the Eleventh Circuit and argued that "level twelve was the highest level applicable under *U.S. v. Marshall White*, No. 00-11447 (11th Cir. 2001) (Unpublished) (App. A-9);" and (Resentencing of 8/13/2001, Vol. 1 at pages 2-9) (App. A-3)

5. Various Resentencing Hearings were called to order in this, and the co-defendant's, case before the district court finally made a sentencing determination in this case after the Remand from the Court of Appeals. In that final Sentencing Hearing in which—representing himself *pro se* after his attorney Mr. Arthur Madden was allowed to withdraw as counsel of record—over petitioner's objections, the district court imposed an *aggregate* sentence of 360 months imprisonment. (Sent. Hearing 12/ 3/ 2001—Vol. One at pg. 20) (App. A-4)

6. On 12/18/2001 the lower court entered the Amended Judgment (dismissing Counts 3 and 10 on motion of government) (App. A-5) and on June 7, 2019, petitioner sought to correct his sentence by filing a "Motion to Correct Clerical Error Pursuant to Federal Rule Criminal Procedure 36 and/or Alternatively as a 2241 Habeas Petition." (Doc. 820 U.S.D.C., S.D. Ala.)

7. On November 21, 2019, the district court determined that the Motion to

Correct Clerical Errors was not the appropriate forum to challenge petitioner's claim(s) even under Section 2241 Habeas Corpus provision, and DENIED the Motion stating it would have denied it otherwise under § 2241. (App. A-6)

8. Petitioner timely filed a Notice of Appeal and, on June 22, 2020, the Court of Appeals affirmed the lower court's decision; and on October 8, 2020, the Mandate issued. (App. A-7) This timely petition follows.

Facts.

DRUG QUANTITY *POST-APPRENDI*:

Petitioner was convicted on six (6) counts of the indictment which included: **(a)** Count One **(b)** Count Two **(c)** Count Four **(d)** Count Five, **(e)** Count Six, and **(f)** Count Ten [Count Three of the second superseding indictment was dismissed 0n motion of the United States] (App. A-1). Petitioner was sentenced under the, then, *Mandatory Sentencing Guidelines* which are not questionable in this appeal. There, the jury was not asked to make drug quantity determinations because the laws, at that time, under *Apprendi v. New Jersey*, were not yet established or made applicable. Therefore, when applied to petitioner's direct review, based on *Apprendi*, the Court of Appeals reversed all of petitioner's sentences, including his *conviction* under Count Ten of the Indictment. At the resentencing hearing, the judge made drug calculations over petitioner's objections

, who represented himself, and reimposed a sentence beyond the *Apprendi* requirements. The Court of Appeals affirmed, under what appears to be the lower court's reasoning that "it could make a drug quantity determination [without violating *Apprendi]*."

ORGANIZEER/LEADERSHIP ROLE/ *U.S. v. BOOKER*, 543 U.S. 220:

With respect to the "Organizer" and/or "*Leadership*" role enhancements, as the latter was applied to petitioner, the district court, at *Resentencing*, applied a three-level enhancement upon appellant after rejecting the Government's request for a four-level Leadership enhancement. (Govt's Br. at 6, ¶ 4; at 7, ¶ 1) This factor, like the drug quantity determination, violated *Apprendi* because it was not *found by a jury* beyond a reasonable doubt; and, the fact that the enhancement caused the sentence to *exceed* the *Apprendi* statutory maximum based on the jury's verdict alone, as announced, also, in *Booker*, 543 U.S. at 278.

REASONS FOR GRANTING THE WRIT

This case presents questions of exceptional and potentially recurring national importance. First, is the question whether a district court may, contrary to a Supreme Court decision, make a *post-Apprendi* drug quantity determination, ignore the mandatory provisions of the Federal Sentencing Guidelines which establishes the *Apprendi* rule for statutory maximums of particular defendant, and

apply the ***pre-Apprendi*** statutory maximum—under the statute *per se* rather than the maximum for *Apprendi* purposes—in order to reimpose the initial illegal sentence that was reversed on *Apprendi* grounds?

Secondly, this case also present questions of exceptional and potentially recurring national importance as to whether the Court of Appeals' decision affirming the lower court's decision regarding Organizer and Leadership roles would continue to subject persons, in one part of the country, to enhanced sentences without the jury making the factual finding while defendants in separate areas are not?

Thirdly, is the question whether, and to what extent, a district court, and/or a Court of Appeals, may decline/refuse to address the merits of a claim, in its discretion, where this Court's decision *mandates* lower courts, without discretion, to apply *any available remedy at law* that provides relief regardless of the title attached to the [*pro se*] motion or petition [in order to conform with the Due Process Clause, the Sixth Amendment, and *In re Winship*, 397 U.S. 358 (1970)]."

ARGUMENT ONE

THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DECISION OF MAKING A *POST-APPRENDI* DRUG QUANTITY DETERMINATION THAT IMPOSED A PENALTY BEYOND THE *APPRENDI* STATUTORY MAXIMUM AS REACHED BY THIS COURT USING THE FEDERAL SENTENCING GUIDELINES MAXIMUM AND NOT THE MAXIMUM REFLECTED BY THE STATUTE OF THE OFFENSE

In this case, the Court of Appeals reversed petitioner's sentences under the *Apprendi* rule, which required the jury, rather than a judge, to make factual findings, including drug quantity and leadership roles, that increased a defendant's sentence beyond the "*Apprendi* statutory maximum" rather than the maximum for the *offense under the statute*," as defined under the statute itself. That is, the *Apprendi* statutory maximum, here, refers to the maximum penalty authorized by the Federal Sentencing Guidelines and not the statute of conviction (§ 841(b)(1)(B) or (C)).

This was demonstrated in *United States v. RLC*, 503 U.S. 291 (1992) where this Court *clarified* the meaning of "authorized statutory maximum" for purposes of the Federal Sentencing Guidelines. There, this Court held, in relevant part, that:

> "We hold that this limitation refers to the maximum sentence that could be imposed if the juvenile was being

> sentenced after application of the United States Sentencing Guidelines."

There, this Court, in defining the meaning of "authorized maximum sentence," rejected the Government's argument that "authorized" must refer to the "maximum term of imprisonment *provided by the statute defining the offense*." This Court explained that:

> "At least equally consistent, and arguably more natural, is the construction that "*authorized*" refers to the result of applying all statutes with a required bearing on the sentencing decision, including not only those that empower the court to sentence but those that limit the legitimacy of its exercise of that power, including § 3553(b), which requires application of the Guidelines and caps [a] ...sentence *at the top of the relevant Guidelines range*, absent circumstances warranting departure."

U.S. v. RLC, 503 U.S. at 297-298. Clearly this Court demonstrated that the Federal Sentencing Guidelines "*range*" sets the "authorized" maximum, and not the statute defining the offense. Moreover, this Court went on to explain that:

> "Where the *statutory provision applies*, a sentencing court's concern with the Guidelines goes solely to the *upper limit of the proper Guidelines range as setting the maximum term for which a [defendant] may be committed to official detention*, absent circumstances that would warrant departure under § 3553(b)." (emphasis added)

(Id., at 306-307). This Court also explained, previously, that "Congress' purpose

today can be achieved only by reading "authorized" to refer to the maximum sentence that may be imposed consistently with § 3553(b)," which is, in fact, the Federal Sentencing Guidelines. (Id., at 298-305) Without questioning the authority of this Court's decision, in *RLC*, there can be no question as to what constitutes the *authorized statutory maximum* term of imprisonment, absent a jury verdict, under the, then, applicable mandatory Guidelines for which petitioner was sentenced under.

Additionally, in clarifying *Apprendi's* "statutory maximum," or what constitutes a defendant's "statutory maximum," this Supreme Court held that:

> "Statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the *facts reflected in the jury verdict* or admitted by the defendant." (all emphasis added)

See *Blakely v. Washington*, 542 U.S. 296, 303, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004). The *Blakely* court went on to say that, "while judges may exercise discretion, they may not "inflict punishment that the jury's verdict *alone* does not allow."" (Id., at 304) (emphasis added). In the instant case, the judge, during Resentencing, stated:

> "I can still find by a preponderance [of the evidence the drug quantity] as long as I don't exceed the statutory cap."

(App. A-3 at 8, L. 6-9) (Resentencing Hearing). More troublesome, however, is

the fact that after petitioner, who was proceeding without counsel, argued that "[he had an] *Apprendi* error," (App. A-4 at 10, L.1-4) the district court somehow determined that the Court of Appeals' decision did not matter; and by its actions, went on to state that:

> "And the Court finds, *by a preponderance of the evidence*, that on each of the counts of conviction, other than Count 10, which is no longer before the Court, that there was a conspiracy in Count One, Four and Five to import *a hundred and fifty kilograms or more of cocaine*. And Count Two and Six a conspiracy to possess with intent to distribute cocaine. Which results in a sufficient basis for the findings in paragraph 24, [of] the original presentence report, that the offense level should which (sic) a [level] thirty-eight... That means, Mr. Michel, ...that your criminal history is a four, your offense level is a forty-one... that would result in a *guideline range of three hundred and sixty months to life*."

(See App. A-4 at 14, L.16-25; at 15, L. 1-6; at 16, L. 6-13). This determination, based on the judge's drug quantity findings, resulted into a range of penalties, *not found by the jury (360-Life)* as opposed to the 21-27-month range absent a jury finding, as determined by the Eleventh Circuit Court of Appeals in *U.S. v. Marshall White* (11th Cir. 2001) (Unpublished) (App. A-9); and (See Resentence Hearing of August 13, 2001, Vol. 1 at pages 2-9) (App. A-3).

In *White*, a post-*Apprendi* decision, the Eleventh Circuit Court of Appeals held, as counsel for petitioner argued before the district court (App. A-9 at 2) that:

> "Because there was no determination of drug quantity at trial or at the first sentencing hearing, the Government is not entitled to a quantity determination for purposes of sentencing that exceeds the lowest possible amount according to the Sentencing Guidelines. *Therefore, ... the district court shall sentence White in accordance with the lowest Guideline offense level of 12.* VACATED and REMANDED, with instructions." (all emphasis added)

White, supra. In petitioner's case, counsel argued that, "[a]t sentencing, the government had an opportunity to put on evidence and require the court to make a factual determination as to drug quantity [but did not], (Id., at 6) just as in *White*," *supra.* Therefore, like the Court held in *White*, "*base offense level 12 applies*" because the district court made "*no drug quantity determinations*" at "*trial or the first sentencing hearing*" on counts 1, 2, 4, 5, or 6, the counts of convictions involved in this, the current, appeal. (Govt's Br. at 2, ¶ 3); (Id., at 4, ¶ 3) (district court stating it only "*determined drug quantity on count ten,* not counts 1, 2, 4, 5, and 6" of the indictment; and Count Ten was *vacated* by the Court and later *dismissed* by the government [with prejudice]) (see also, Tr. R., Vol. I—Transcript of Resentencing of Aug. 13, 2001, at 2, L. 14-20—Or Exh. C at 2). Here, petitioner is in the *exact* situation as was *White*, supra, and the rulings should, likewise, correspond with each other to avoid conflicting opinions.

This, the above, holds true as a matter of law because the Supreme Court, applying *Apprendi* to *Blakely's* case on appeal, explicitly showed the prime example, using the facts of *Blakely's* case. There, based on the jury's verdict alone, *Blakely's* conduct called for 53 months imprisonment, but the State wanted to apply an enhancement, *not found by the jury's verdict*, and stated that the enhancement "was not problematic under *Apprendi* because the *statutory maximum was 10 years*, not 53 months." But, "[t]he Court read *Apprendi* as having held that the "statutory maximum" punishment was "*the maximum sentence [the judge] may impose without any additional findings*... Accordingly... the judge could not ...enhance *Blakely's* sentence ***above the 53-month*** statutory maximum [guidelines sentence]." This ruling is cemented in stone, as the Court has *repeatedly* reaffirmed its *Apprendi* ruling. This same rule of law applies equally to Mr. Michel's case, the petitioner. See, for many of the examples, *Blakely*, 542 U.S. at 303 (increased imprisonment above statutorily prescribed "standard range"); *United States v. Booker*, 543 U.S. 220 (2005) (increased imprisonment range under, then, mandatory Federal Sentencing Guidelines); *Cunningham v. California*, 549 U.S. 270 (2007) (elevated "upper term" of imprisonment); *Ring v. Arizona*, 536 U.S. 584 (2002) (death penalty authorized by finding of aggravating factors); and, *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012) (applying *Apprendi* to

Fines that require jury findings).

(a) CLARIFYING *APPRENDI* RULE VIA *BOOKER*

Explaining that *Blakely* did not establish that a judge could not make findings that the jury did not, but stressing when and how it operates, as it should have been and should be in petitioner's case, here, on appeal, this Court explained that:

> [O]ur holding in Parts I-III ... that Blakely applies to the Guidelines does not establish the impermissibility of judicial factfinding ... Instead, judicial fact finding to support an offense level determination or enhancement is only unconstitutional when that finding raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant." (italic emphasis added)

Booker, 543 U.S. at 278. That "crucial distinction" aforehand mentioned by this Court, above, is also important to Mr. Michel's case in that the district court, on Resentencing, violated the *Apprendi* Rule, as stated by the Government's brief showing that:

> "At resentencing for counts one, two, four, five, and six of the indictment, the district court made a finding of facts that [petitioner's] crimes involved more than 150 kilograms of powder [cocaine] and that [petitioner] played a leadership role in the conduct underlying count ten of the indictment." (emphasis added)

(Govt's Br. at 2, ¶ 3) As shown below, even the "*leadership role*" enhancement did

violate *Apprendi*. Concerning the "holding in Parts I-III," of the preceding page, the *Booker* Court went on to give an example which *unequivocally* demonstrates that Mr. Michel's, petitioner's, "statutory maximum" *was BOL 12 and category 4* equaling 21-27 months maximum imprisonment on each count of conviction. There, this Court stated:

> "Consider, for instance, a case in which the initial sentencing range under the Guidelines is 130-to-160 months, calculated by combing a base offense level of 28 and a criminal history category of V. See USSG ch. 5, pt. A (Table). Depending upon the particular offense, the sentencing judge may use her discretion to select any sentence within this range, even if her selection relies upon factual determinations beyond the facts found by the jury. If the defendant described above also possessed a firearm, the Guidelines would direct the judge to apply a two-level enhancement under § 2D1.1, which would raise the defendant's total offense level from 28 to 30. That, in turn, would raise the defendant's eligible sentencing range to 151-to-188 months. That act of judicial fact-finding would comply with the Guidelines and the Sixth Amendment so long as the sentencing judge then selected a sentence between 151-to-162 months—the lower number (151) being the bottom of offense level 30 and the higher number (162) being the maximum sentence under level 28, which is the upper limit of the range supported by the jury findings alone. This type of overlap between sentencing ranges *is the rule*, not the exception, in the Guidelines as currently constituted."

Booker, 543 U.S. at 279. Therefore, in the case of this petitioner, Mr. Michel, consider petitioner's initial sentencing range under the Guidelines is 21-27 months,

calculated by combining a base offense level of 12 and a criminal history category of 4 (compare *United States v. Marshall White*, No. 00-11447 (11th Cir. 2001)) (App. A-9), the sentencing judge, here, may use her discretion to select any sentence *within this range* (21-27 months), even if her selection relies upon factual determinations beyond the facts found by the jury. The three-level enhancement, for *leadership role*, does not apply in this case, as shown below, therefore, the "statutory maximum" for appellant is "*27 months*" on each crime of conviction.

Applying *Apprendi* to the Federal Sentencing Guidelines, under *United States v. Booker*, 543 U.S. 220 (2005), and applying the principles established in *Blakely v. Washington*, 542 U.S. 296 (2004), petitioner's guideline sentenced, on Remand, could not exceed the lowest possible base offense level, based on the fact that no jury made a drug quantity determination, as expressed by the Court in *United States v. Marshall White*, supra, i.e., a base offense level 12, and as applied here, with a category 4 yielding a range of 21-27 months imprisonment on each offense of conviction. And, because the offenses must be grouped, under the Guidelines, they cannot be imposed consecutively.

In this case, the Government argued that "th[e Eleventh Circuit] rejected Michel's *Apprendi* argument because *Apprendi* does not prohibit a sentencing court from imposing consecutive sentences on multiple counts of convictions as

long as they are within the applicable statutory maximums." (Govt's Br at 17, ¶ 1) While petitioner agrees that *Apprendi* contains no provisions to prohibit a court from imposing *consecutive* sentences on multiple counts of convictions as long as they do not exceed the *authorized statutory maximum* as defined by the law, the problem, there, as shown by *White* and *RLC*, supra, as defined by this Court, is that the sentences, *on each count of conviction*, does, in fact, exceed the *statutory maximum* (27-months imprisonment) "for *Apprendi* purposes." See *Blakely* (53-month maximum—Guidelines Range), *Booker* (Guidelines Maximum Range), RLC (Guidelines maximum Range), and *White* (Guideline Maximum Range), supra. Petitioner's Guidelines *range* also constitutes his *statutory maximum penalty*.

Even assuming, *for arguments sake,* that the sentences could run *consecutively*, the total term of imprisonment for counts 1, 2, 4, 5, and 6 *consecutively* could only result into five 27-month terms of imprisonment for a *total term of 135 months imprisonment* or *11 years and 3 months* under the rule as established in *Apprendi* and *RLC*, supra. Here, **petitioner has served more than *twenty-two and a half (22 years and ten months) consecutive years of imprisonment***, which "exceeds" the *Apprendi statutory maximum*, worst case scenario, *of 135-months imprisonment*. The district court erroneously believed that

because petitioner's sentence was to be imposed under 841(b)(1)(C), a twenty-year *offense* statutory maximum, that the court had the authority to somehow still make a drug quantity determination that would place petitioner in a "*higher* base offense level (*360-Life*, based on judicial finding of drug amount)" than what the jury verdict *alone* called for, which is a base offense level of 12 (the lowest level without a jury or judge's finding of drug quantity). See *United States v. Marshall White* and *RLC*, supra. The district court erred when it exceeded the scope of the Remand Mandate, which required only that the court apply the *Guidelines* for *no drug quantity*. Because the district court imposed a *30-year sentence*, nearly three times the *authorized statutory maximum* under *Apprendi* and *RLC*, petitioner is due immediate release.

The Court of Appeals' affirmance of the lower court's sentence, based on the "*statute of the offense*" rather than on the "*Apprendi statutory maximum*" constitutes reversible error. This Court, in the interest of justice should intervene, vacate, and remand this case with directions to vacate petitioner's sentences to reflect a sentence using the framework established by *Apprendi*.

ARGUMENT TWO

THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DECISION OF MAKING A *POST-APPRENDI* DETERMINATION FOR *LEADERSHIP ROLE* THAT WAS NOT MADE BY THE JURY WHICH INCREASED THE PETITIONER'S SENTENCE BEYOND THE STATUTORY MAXIMUM FOR PURPOSES OF *APPRENDI V. NEW JERSEY* RULE

LEADERSHIP ROLE ENHANCEMENT

With respect to the "Organizer" and/or "*Leadership*" role enhancements, as the latter was applied to petitioner, the district court, at *Resentencing*, applied a three-level enhancement after rejecting the Government's request for a four-level Leadership enhancement. (App. A-4 at 14-16) and (Govt's Br. at 6, ¶ 4; at 7, ¶ 1) This factor, like the drug quantity determination, violated *Apprendi* because neither were "found by a jury beyond a reasonable doubt." In *Booker*, the Justices made observations as it relates to Prosecutors seeking to "*enhance*" a defendant's sentence, and what it would require in order to conform with the dictates of the, then, new *Apprendi* Rule.

There, Justice Stevens observed what was required for prosecutors to *lawfully* seek enhancements of a defendant's sentence. Stating, in part, that:

> "Enhancing the specificity of indictments would be a simple matter... The Government has already *directed its prosecutors to allege facts* such as ... *the defendant was*

> *an organizer or leader* ... in the indictment and prove them to the jury *beyond a reasonable doubt*."

Booker, 543 U.S. at 277-78. (emphasis added) In petitioner's case, the Government failed to comply with *Apprendi* and the Sixth Amendment guarantee when petitioner's sentence was enhanced by three-levels based on the "leadership" role found by the lower court and affirmed by the Court of Appeals. (App. A-4 at 14-16) Therefore, this error is not harmless as it is a constitutional violation of the Sixth Amendment and Due Process of Law where, under any view, petitioner's sentence (360 months or 30 years) exceeds the Apprendi statutory maximum of either 27 months or the 135-month sentence assuming the court was authorized to impose the five 27-month prison terms consecutively. This Court has made clear that:

> "[A]ny amount of additional jail time has Sixth Amendment significance."

Glover v. United States, 531 U.S. 198 (2001) (where a *6-21-month additional term of imprisonment* was held "insignificant" for Sixth Amendment purposes, but *reversed* by this Supreme Court). Therefore, Mr. Michel's sentence must, as a matter of law, be reversed, remanded, and corrected under the framework of *Apprendi*, supra.

ARGUMENT THREE

THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DECISION FOR FAILING TO INTERPRET PETITIONER'S MOTION UNDER ANY AVAILABLE STATUTE THAT WOULD PROVIDE RELIEF AND WAS ERROR UNDER THIS COURT'S DECISION REQUIRING REVERSAL

The Government's argument—that the District Court Properly Denied Michel's Rule 36 Motion—and that the district court's order, *summarily*, denying appellant's Motion [*without addressing the merits*] as being "outside the scope of Rule 36," is clearly erroneous as a matter of law under this Court's precedent. While petitioner's motion *may have* exceeded the scope of Rule 36 *per se*, such does not end the district court's inquiry as to whether petitioner was entitled to relief; or, at the very least, whether appellant was entitled to have his claim addressed "*on the merits*" under some *other applicable provision* that would have provided the court authority to grant the relief sought.

Assuming, *for argument's sake*, that Rule 36 is not the proper vehicle for, *pro se*, petitioner to have invoked the court's authority and/or jurisdiction to entertain, on the merits, his claim for relief, this Court has held, in relevant part, that federal courts must look beyond the labels of motions filed by *pro se* inmates to interpret them under whatever statute that provides relief. *Andrews v. U.S.*, 373

U.S. 334, 83 S. Ct. 1236, 10 L. Ed. 2d 383 (1963) (cited in *United States v. Jordan*, 915 F.2d 622, 624-25 (11th Cir. 1990). There, the Eleventh Circuit Court of Appeals held:

> "That *Jordan* mislabeled his petition, however, *is not fatal to his claim*. Federal courts have long recognized that they have an *obligation* to look behind the label of a motion filed by a *pro se* inmate and determine whether the motion is, in effect, *cognizable under a different remedial statutory framework*." (Citing *Andrews v. United States*, 373 US 334, 83 S. Ct. 1236, 10 L. Ed. 2d 383 (1963)). (all italic emphasis added, except term "*pro se*" as in original)

In *Jordan*, the district court did, in fact, look behind the label of the motion and properly interpreted it under the correct label (§ 2255). There, the Eleventh Circuit stated that "*[t]hus, the proper inquiry in this case [wa]s whether the district court was correct in treating Jordan's claim as cognizable under § 2255*," of which th[e] Court agreed.

Conversely, however, in the instant case, the district court failed to determine whether petitioner's claim provided relief under any provision, other than § 2241 of which was an alternative provision asserted by petitioner, and, as such, the court *summarily* denied the Rule 36 Motion *without further inquiry*. For this reason, and based on the Eleventh Circuit Court's binding authorities, including *Means v. Alabama*, 209 F.3d 1241 (11th Cir. 2000), the Court should find

that the district court erred, *reversibly*, in its actions of *summarily* denying petitioner's Rule 36 motion without applying the protections afforded under the circumstances of the case. That is, petitioner's case is clearly, under the *Apprendi* line of cases, a *miscarriage of justice* wherein petitioner has been compelled to serve an additional prison term *exceeding a decade* (10 years), or possibly *more than twenty-years (20 years)*, longer in prison than required under *Apprendi*.

In order to preserve the integrity of this Court's line of *Apprendi* decisions, this Court should vacate the Court of Appeals' affirmance of the lower court's decision denying relief to the petitioner. Specifically, this Court held that:

> "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights [are] alleged... loss of liberty and sometimes loss of life... are far too great to permit the automatic application of an entire body of technical rules whose primary relevance lies in the area civil litigation."

Sanders v. United States, 373 U.S. 1, 24, 83 S. Ct. 1081 (1963); see also, *Wade v. Mayo*, 334 U.S. 672, 681, 68 S. Ct. 1270, 1275, 92 L. Ed. 1647 (1948). Therefore, petitioner urges this Court, having come to his final opportunity to obtain the relief for which the law guarantees unto him, to vacate the erroneous decision of the Eleventh Circuit and to direct that justice, already delayed, be served even at this late date and time. Better that justice be late or delayed, than not at all!

CONCLUSION

WHEREFORE, based on the foregoing petition, facts and authorities, the Court should GRANT the writ of certiorari to the Court of Appeals for the Eleventh Circuit, or, otherwise, GVR this case with instructions to grant the petition.

Respectfully submitted,

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