No. _____

In The
Supreme Court of the United States

CHRISTOPHER RYAN MARTIN,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

On Petition For Writ Of Certiorari To The Nevada Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should overrule *Almendarez-Torres* in light of *Apprendi* and its progeny.

II. Whether Nevada's use of prior convictions for enhancement of penalties which did not have the safeguard of a jury trial violates *Apprendi* and runs afoul of the Sixth Amendment jury trial guarantee.

STATEMENT OF RELATED CASES

1. *State v. Martin*, No. C-18-336705-1, District Court, Clark County, Nevada. Judgment (judgment of conviction) entered January 29, 2021.

2. *Martin v. State*, No. 82498-COA, Court of Appeals of the State of Nevada. Judgment (order of affirmance) entered September 13, 2021.

3. *Martin v. State*, No. 82498-COA, Court of Appeals of the State of Nevada. Judgment (order denying rehearing) entered October 20, 2021.

4. *Martin v. State*, No. 82498, Supreme Court of the State of Nevada. Judgment (order denying petition for review) *en banc* entered January 27, 2022.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher Martin ("Martin") respectfully prays that a writ of certiorari issue to: (1) reconsider the continued vitality of *Almendarez-Torres*, 523 U.S. 224, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998) in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000) and its progeny and (2) review the Nevada Court of Appeals' decision that all prior convictions, contrary to *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999) and *Apprendi, supra*, whether subject to the procedural safeguards of a jury or not, can be used to increase Martin's and any other defendant's from a misdemeanor sentence of a maximum six (6) months incarceration (the maximum allowable penalty by a jury verdict) to a non-probationable felony of a minimum mandatory of one (1) year to a maximum of six (6) years in prison under NRS 484C.400(1)(c) & (2)(b).

Review should be granted under Supreme Court Rule 10(c) because the Nevada Court of Appeals per NRAP 40(a)(3) is the court of last resort here and has decided an important federal question in a way that conflicts with *Jones, supra* and *Apprendi, supra*.

OPINIONS BELOW

The Nevada Court of Appeals' ORDER OF AFFIRMANCE in *Martin* gives rise to this Petition and is

reprinted in Appendix 1. *See also* Appendix 5 and Appendix 6.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Sec. 1257(a). Certiorari is available for " . . . any right . . . claimed under the Constitution. . . ."

The date of the Nevada Court of Appeals' decision to be reviewed was entered September 13, 2021. *See* Appendix 1. Martin's request for rehearing before the Court of Appeals and the Nevada Supreme Court were denied on October 20, 2021 and January 27, 2022 respectively. Appendix 5; Appendix 6.

CONSTITUTIONAL AND STATUTORY PROVISIONS

SIXTH AMENDMENT:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

FOURTEENTH AMENDMENT:

> "Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive and person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEVADA STATUTES:

NRS 484C.400(1)(c) & (2)(b);

(c) Except as otherwise provided in NRS 484C.340, for a third offense within 7 years, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and shall be further punished by a fine of not less than $2,000 nor more than $5,000. An offender who is imprisoned pursuant to the provisions of this paragraph must, insofar as practicable, be segregated from offenders whose crimes were violent and, insofar as practicable, be assigned to an institution or facility of minimum security.

2. An offense that occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section; * * * (b) when evidenced by a conviction, without regard to the sequence of the offenses and convictions. The facts concerning a prior offense must be alleged in the complaint, indictment or information, must not be read to the jury or proved at trial but must be

> proved at the time of sentencing and, if the principal offense is alleged to be a felony, must also be shown at the preliminary examination or presented to the grand jury.

STATEMENT OF THE CASE

Petitioner Martin (Martin) was charged with driving under the influence, having two (2) prior Nevada misdemeanor DUI convictions. State Appeal Appendix (SAA) 3-4; 15-16. Martin's two (2) prior convictions were no-jury judgments because Nevada misdemeanor DUI's do not trigger the constitutional right of trial by jury. *Blanton, infra*. Martin pled guilty, a necessary requirement to apply for alcohol treatment, to the DUI charge and was allowed to enter the treatment program in lieu of prison. SAA 5-23. After a misunderstanding regarding his obligation to install a breath interlock device on his wife's vehicle which he never drove, Martin was terminated from the treatment program and adjudicated guilty of the DUI. Martin's sentence was enhanced by the judge to a mandatory prison term as a result of the two prior Nevada misdemeanor non-jury convictions. SAA 24-26. Martin was sent to prison.

Martin appealed his conviction to the Nevada Supreme Court on several issues, including the issues raised by Martin in this Court. Martin argued that precedence from this Court precluded enhancement of non-jury prior convictions. Appellant's Opening Brief

(AOB) ps. 17-24. Martin also informed the court that allowing the judge as opposed to a jury to enhance punishment was seriously questioned by this Court. AOB n.34. After completion of the briefings by the parties, the appeal was transferred to the Nevada Court of Appeals.

The Court of Appeals denied Martin's enhancement issue stating,

> Martin contends that only prior convictions obtained through a jury trial can be used to enhance a sentence. In support, Martin relies on *Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000), and *Jones v. United States*, 526 U.S. 227, 249 (1999). These cases are unequivocal: "*Other 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."
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> ***
>
> Martin thus has not demonstrated that only prior convictions that were subject to a jury trial may be considered when enhancing a sentence due to recidivism. . . .

ORDER OF AFFIRMANCE (OOA) ps. 2-3 (italics original).

The Court of Appeals never mentioned the likelihood that *Almendarez-Torres, infra* was in danger of being overruled by this Court based on *Apprendi* and its progeny.

Martin's request for rehearing by the Court of Appeals and review by the Nevada Supreme Court were denied. Appendix 5 and 6. Martin now seeks relief in this Court.

REASONS FOR GRANTING THE WRIT

I

LIKE *MCMILLAN* AND *HARRIS*, *ALMENDAREZ-TORRES*' REASONING HAS BEEN ERODED BY *APPRENDI* AND ITS PROGENY AND SHOULD BE OVERRULED.[1]

a. Martin's case is well suited for this Court to reconsider *Almendarez-Torres*.

Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998) finding that prior convictions are sentencing factors, thus allowing judicial factfinding, has been eroded by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000) and its progeny and, as suggested by some

[1] Before *Apprendi*, the Supreme Court had held that facts elevating the minimum punishment need not be proven by the jury. *McMillan v. Pennsylvania*, 477 U.S. at 79, 106 S. Ct. 2411, 91 L.Ed.2d 67 (1986); *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L.Ed.2d 524 (2002) (adhering to *McMillan*). Both decisions were subsequently overruled as being in conflict with *Apprendi*. *Alleyne*, 570 U.S. at 116, 133 S. Ct. 2163. *See Haymond*, 139 S. Ct. at 2378 discussing the overruling of *McMillan* and *Harris* by *Alleyne*.

members of this Court, should be overruled.[2] The irreconcilable antagonism between "facts" and "sentencing factors" centers around the Sixth and Fourteenth Amendments guarantee of trial by jury. *Apprendi* invokes the jury trial right and *Almendarez-Torres* dispenses it.

The keystone of *Apprendi* is its preservation of the constitutional right to be tried by a jury of peers – not a judge. U.S. Const., Amend. VI; U.S. Const., Amend. XIV. All elements constituting the offense must be submitted to the jury and proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 368, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). The right to trial by jury extends as far back as the Magna Carta in 1215 A.D.[3] The Court in *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L.Ed.2d 491 (1968) stated, "[p]roviding an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge." *Id*. 391 U.S. at 156, 88 S. Ct. 1451. *Duncan* further stated, "[b]ecause we believe that **trial by jury in criminal cases is fundamental to the American scheme of justice**, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases – were they to be tried in a

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[2] The makeup of the United States Supreme Court has changed since *Apprendi* but the reasoning of *Apprendi* has remained intact.

[3] *Duncan, infra* provides an excellent account of trial by jury from the Magna Carta to our Declaration of Independence. *Id*. 391 U.S. at 151-152, 88 S. Ct. 1448-1449.

federal court would come within the Sixth Amendment guarantee," 391 U.S. at 149, 88 S. Ct. 1447, and " . . . must be respected by the States." 391 U.S. at 156, 88 S. Ct. 1451 (emphasis added) (footnote omitted). Again, *Apprendi* protects the jury trial right and *Almendarez-Torres* does not.

The erosion of *Almendarez-Torres* by *Apprendi* and its progeny is directly related to *Almendarez-Torres'* avoidance of the Sixth and Fourteenth Amendments jury trial guarantee by labeling prior convictions as "sentencing factors," a term created in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L.Ed.2d 67 (1986). *Apprendi* stated that in *McMillan* " . . . this Court, for the first time, coined the term 'sentencing factor' to refer to a fact that was not found by a jury but could affect the sentence imposed by the judge." *Id*. 530 U.S. 485, 120 S. Ct. 2360. *Apprendi* characterized *Almendarez-Torres*' use of prior convictions for enhancement as at best "an exceptional departure from" historic sentencing practices, 530 U.S. at 487, 120 S. Ct. 2348, and observed that it is "arguable that *Almendarez-Torres* was wrongly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested. . . ." *Id*. 530 U.S. at 489-490, 120 S. Ct. 2348. *Apprendi* pointed out that merely labeling facts as sentencing factors does not necessarily make it so.

> [T]he relevant inquiry is not one of form, but of effect – does the required [judicial] finding expose the defendant to a greater punishment

> than that authorized by the jury's guilty verdict?

Apprendi, 530 U.S. at 494, 120 S. Ct. 2348.

Apprendi recognized that lawmakers may very well try to avoid the jury trial guarantee by merely labeling what really is an element of the offense as a sentencing factor. But the Court noted that it would not budge from protecting defendants from a State "defin[ing] away facts necessary to constitute a criminal offense." *Id*. 530 U.S. at 486, 120 S. Ct. 2360 (cites omitted). *Apprendi* sees *Almendarez-Torres* as wrongly decided because prior conviction enhancements are elements not sentencing factors. "When one considers the question from this perspective [the effect of judicial factfinding] it is evident why the fact of a prior conviction is an element under a recidivism statute." THOMAS, J., concurring, 530 U.S. at 521, 120 S. Ct. 2379.

Apprendi, unlike *Almendarez-Torres*, other than its reluctant adoption of *Almendarez-Torres'* holding, is grounded in the long tradition of the English common-law and early American jurisprudence. The Court in *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L.Ed.2d 314 (2013) noted, "[c]onsistent with the common-law and early American practice, *Apprendi* concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Id*. 570 U.S. at 111, 133 S. Ct. 2160. *Almendarez-Torres* considered whether 8 U.S.C. § 1326(b)(2) " . . . defines a separate crime or

simply authorizes an enhanced penalty," *id*. 523 U.S. at 226, 118 S. Ct. 1222, and held that the statute "simply authorizes a court to increase the sentence for a recidivist . . . [and] does not define a crime." *Id*. 523 U.S. at 226, 118 S. Ct. 1222. At common-law, recidivism was included as an ingredient of the crime itself. The Court in *United States v. Haymond*, ___ U.S. ___, 139 S. Ct. 2369, 204 L.Ed.2d 897 (2019) stated,

> At common-law, crimes tended to carry with them specific sanctions, and "once the facts of the offense were determined by the jury, the judge was meant simply to impose the prescribed sentence. *Alleyne v. United States*, 570 U.S. 99, 108, 133 S. Ct. 2151, 186 L.Ed.2d 314 (2013)"

Id. 139 S. Ct. at 2376.

Apprendi noted,

> [t]here was no question of treating the statutory aggravating fact as merely a sentencing enhancement – as a nonelement enhancing the sentence of the common-law crime. The aggravating fact was an element of a new, aggravated grade of the common-law crime simply because it increased punishment of the common-law crime.

Id. 530 U.S. at 506, 120 S. Ct. 2371.

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> As Justice SCALIA has explained, there was a tradition of treating recidivism as an element. *See Almendarez-Torres*, 523 U.S. at

> 256-257, 261, 118 S. Ct. 1219 (dissenting opinion). That tradition stretches back to the earliest years of our Republic. . . .

Id. 530 U.S. at 506-507, 120 S. Ct. 2371 (cites omitted) (THOMAS and SCALIA, JJ., concurring).

At common-law, all facts constituting the crime including sanctions such as recidivism were considered elements to be proven by the jury. *Almendarez-Torres* parts from the common-law and early American practices, unlike *Apprendi* which follows them.

Apprendi's progeny undermines *Almendarez-Torres*. *Apprendi* has been applied to strike down mandatory sentencing systems at the state and federal level. *See Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856, 166 L.Ed.2d 856 (2007); *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 253, 159 L.Ed.2d 403 (2004); *United States v. Haymond*, ___ U.S. ___, 139 S. Ct. 2369, 204 L.Ed.2d 897 (2019). *See also Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 248, 153 L.Ed.2d 556 (2002) (imposition of death penalty based on judicial factfinding); *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L.Ed.2d 205 (2005) (sentencing court cannot examine police reports to find generic burglary from guilty pleas). *Apprendi*'s reasoning was extended to criminal fines in *Southern Union Co. v. United States*, 567 U.S. 343, 132 S. Ct. 2344, 183 L.Ed.2d 318 (2012).

The Court in *Alleyne v. United States*, 570 U.S. 99, 116, 133, S. Ct. 2151, 2163, 186 L.Ed.2d 314 (2013)

overruled *McMillan v. Pennsylvania*, *supra*, and *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L.Ed.2d 524 (2002) as conflicting with *Apprendi*.

Almendarez-Torres' finding that prior convictions are sentencing factors, thus allowing judicial fact finding to increase punishment, has been irreconcilably eroded by *Apprendi* and its progeny and, as suggested by some members of this Court, should be overruled.

> Almendarez-Torres, like Taylor, has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a **majority of the Court now recognizes that Almendarez-Torres was wrongly decided**. See 523 U.S., at 248-249, 118 S. Ct. 1219 (SCALIA, J., joined by STEVENS, SOUTER, and GINSBURG, JJ., dissenting); Apprendi, supra, at 520-521, 120 S. Ct. 2348 (THOMAS, J., concurring). **The parties do not request it here, but in an appropriate case, this Court should consider Almendarez-Torres' continuing viability**. Innumerable criminal defendants have been 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." Harris v. United States, 536 U.S. 545, 581-582, 122 S. Ct. 2406, 153 L.Ed.2d 524 (2002) (THOMAS, J., dissenting).

Shepard v. United States, 544 U.S. 13, 28, 125 S. Ct. 1254, 1264, 161 L.Ed.2d 205 (2005) (emphasis added).

Martin's case is appropriate for this Court to reconsider *Almendarez-Torres*.

Nevada's DUI prior conviction enhancement law [NRS 484C.400(1)(c) & (2)(b)], substantially following *Almendarez-Torres*,[4] allows judicial factfinding to increase a misdemeanor penalty from a maximum six (6) months incarceration to felony penalties of a minimum mandatory one-year to a maximum non-probationable six (6) years in prison based on the judge's finding of two or more prior convictions. Martin's sentence was enhanced from a misdemeanor penalty to felony penalties by judicial factfinding of two Nevada misdemeanor convictions, offenses of which Martin did not have jury trial protections.[5] Nevada's prior conviction enhancement law is unsupportable under *Apprendi* and its progeny. Therefore, as this Court did with *McMillan* and *Harris*, and desired to do in *Apprendi*,

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[4] Nevada requires that prior convictions be set forth in the formal accusation and proven beyond a reasonable doubt by the judge. *See* NRS 484C.400(2)(b); *Phipps v. State*, 111 Nev. 1276, 1281, 903 P.2d 820, 823 (1995) ("Due process requires the prosecution to shoulder the burden of proving each element of a sentence enhancement beyond a reasonable doubt.") However, Nevada adopts *Almendarez-Torres*' judicial factfinding of the prior convictions.

[5] The Court in *Blanton v. N. Las Vegas*, 489 U.S. 538, 109 S. Ct. 1289, 103 L.Ed.2d 550 (1989) held that Nevada defendants charged with first or second misdemeanor DUI's are not constitutionally entitled to trial by jury. However, *Blanton* explicitly reserved "whether a repeat offender facing enhanced penalties may state a constitutional claim because of the absence of a jury trial in a prior DUI prosecution." *Id*. 489 U.S. at 545, n.12, 109 S. Ct. 1294, n.12. This issue is raised in Martin's Paragraph II, *infra*.

Certiorari should be granted and *Almendarez-Torres* overruled.

II

UNDER *APPRENDI*, NRS 484C.400(1)(c) & (2)(b) IS UNCONSTITUTIONAL, "FACIALLY" OR "AS APPLIED," BECAUSE THE STATUTE ALLOWS THE JUDGE TO ENHANCE MISDEMEANOR PENALTIES TO NON-PROBATIONABLE FELONY PUNISHMENT USING PRIOR CONVICTIONS OBTAINED WITHOUT THE BENEFIT OF A JURY.

a. Nevada does not allow jury trials for misdemeanor DUI's (*Blanton, infra*), thus Martin's two prior Nevada misdemeanor convictions cannot lawfully be used as sentencing factors by the Judge.

NRS 484C.400 sets forth penalties for a core misdemeanor offense of NRS 484C.110 with enhanced penalties of the core offense for prior convictions. The statute treats prior offenses as sentencing factors as opposed to elements of the offense. Section 2(b) of NRS 484C.400 states in pertinent part, " . . . a prior offense . . . must not be proved at trial **but must be proved at the time of sentencing**. . . ." (emphasis added). It is the judge, not the jury, who enhances punishment for prior convictions.

NRS 484C.400(1)(c) enhances the penalties of the core offense based on prior convictions. The core offense, a misdemeanor with a maximum period of six

(6) months incarceration, is enhanced to a felony " . . . punished by imprisonment in the state prison for a minimum term of not less than 1 year and maximum term of not more than 6 years . . . " if the defendant has two or more prior convictions. The enhanced penalty is a serious restraint on a defendant's liberty and subject to the guarantees under the Fourteenth Amendment Due Process Clause. At issue here is NRS 484C.400(1)(c)'s failure to limit the use of prior convictions to those that were obtained through proceedings that included the right to a jury trial. The statute's failure to limit prior convictions to those obtained where the defendant had a right to trial by jury runs afoul of controlling United States Supreme Court case law and the Sixth Amendment jury trial guarantee.

Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998), *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999) and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), requires that the use of prior convictions for enhancement must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial.

A law repugnant to the United States Constitution is null and void. *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803). *See also* U.S. Const., Art. VI ("This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ." *Marbury*'s often quoted holding states, " . . . that a law repugnant

to the constitution is void, and that courts, as well as other departments, are bound by that instrument." *Id.* 5 U.S. at 180. Under *Apprendi* and its progeny, not all prior convictions can be used to enhance penalties – only those priors that have been obtained with the procedural safeguards of a jury.

The Sixth Amendment right to a jury trial applies to state prosecutions under the Fourteenth Amendment Due Process Clause. *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L.Ed.2d 491 (1968), stated,

> [t]hose who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. **Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.** If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear

> of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

Id. 391 U.S. at 156, 88 S. Ct. 145 (emphasis added).

However, the Sixth Amendment right to a jury trial has been limited to "serious" criminal prosecutions, such as the DUI offense in Martin's case. *See Duncan*, 391 U.S. 145, 160, 88 S. Ct. 1444, 1453 (1968); *Baldwin v. New York*, 399 U.S. 66, 73, 90 S. Ct. 1886, 1890, 26 L.Ed.2d 437 (1970) and *Blanton v. N. Las Vegas*, 489 U.S. 538, 109 S. Ct. 1289 103 L.Ed.2d 550 (1989). It cannot be disputed that the absence of trial by jury more often favors the prosecution and provides less protection for defendants.[6]

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[6] "Where the accused cannot possibly face more than six months imprisonment, we have held that these disadvantages, onerous though they may be, **may be outweighed by the benefits that result from speedy and inexpensive non-jury adjudications**." *Baldwin*, 399 U.S. at 73, 90 S. Ct. 1890 (emphasis added). The Court in *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L.Ed.2d 530 (1972) noted that summary adjudications of misdemeanors are "assembly-line" justice which are most often unfair to those defendants. "The misdemeanor trial is characterized by insufficient and frequently irresponsible preparation" where defendants are "numbers on dockets, faceless ones to be

Martin's Petition for a Writ of Certiorari is a challenge to the constitutionality of NRS 484C.400(1)(c) & (2)(b) enhancing a subsequent misdemeanor to a non-probationable felony based on prior misdemeanor convictions obtained without a jury. The Court in *Blanton v. N. Las Vegas*, *supra*, held that Nevada defendants who are charged with misdemeanor DUIs, first or second offense, are not constitutionally entitled to trial by jury. However, *Blanton*, explicitly reserved "**whether a repeat offender facing enhancement penalties may state a constitutional claim because of the absence of a jury trial in a prior DUI prosecution**." *Id.* 489 U.S. at 545, n.12, 109 S. Ct. 1294, n.12 (emphasis added). The United States Supreme Court now supports defendants on this issue. *Almendarez-Torres v. United States, supra*, *Jones v. United States*, *supra* and *Apprendi v. New Jersey, supra*, requires that the use of prior convictions for enhancement must be limited to "prior convictions" that were themselves obtained through proceedings that included the right to a jury trial. *Cf. United States v. Tighe*, 266 F.3d 1187, 1193 (9th Cir. 2001) (*Tighe* noted the constitutional safeguards necessary for the use of prior convictions as enhancements, one being the right to a jury trial.).[7]

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processed and sent on their way. . . . Everything is rush, rush." *Id.* 407 U.S. at 34, 92 S. Ct. 2012. Summary adjudications are widespread " . . . regardless of the fairness of the result." *Argersinger*, 407 U.S. at 34, 92 S. Ct. 2012. No doubt these are reasons for *Blanton's, infra*, reservation. *Blanton*, 489 U.S. at 545, n.12, 109 S. Ct. 1294, n.12.

[7] *Tighe* is a juvenile case which is traditionally not characterized as a criminal prosecution, thus the Sixth Amendment

Almendarez-Torres held that prior convictions are sentencing factors (as opposed to elements of the offense) to raise the maximum penalty of an offense.[8] However, *Almendarez-Torres* does not support the position that all prior convictions can be used to enhance punishment. *Almendarez-Torres* had the right to a trial by jury on the prior convictions for aggravated felonies used by the Government for enhancement of penalties unlike Martin.

In *Jones v. United States, supra*, the Supreme Court noted that, for constitutional purposes, recidivism was distinguishable from other facts that expand the penalty range, and stated that the basis for this distinction was because "unlike virtually any other consideration used to enlarge the possible penalty for an offense. . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, **and jury trial guarantees**."

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guarantee of a jury trial is inapposite. However here, *Tighe* is instructive as to what prior convictions can be used to enhance punishment according to *Almendarez-Torres, Jones* and *Apprendi.*

[8] *Apprendi* recognized that the prior conviction exception first adopted in *Almendarez-Torres* was wrongly decided. Justice Thomas who made the crucial fifth vote in the five (5) to four (4) *Almendarez-Torres* majority, later recognized that his vote was wrong. *Apprendi* telegraphed its disapproval of *Almendarez-Torres*' "prior conviction exception" for enhancement and recognized the issue was decided in error. *Apprendi*, 530 U.S. at 520-521, 120 S. Ct. 2378-2379. *Apprendi*, while criticizing *Almendarez-Torres*, did not overrule the prior conviction exception because the defendant in *Apprendi* did not challenge it. *Apprendi*, 530 U.S. at 489, 120 S. Ct. 2362. **Thus, *Almendarez-Torres* is now extremely questionable at best and reversal appears inevitable.** Martin has fully addressed this issue in Paragraph 1, *supra*.

Id., 526 U.S. at 249, 119 S. Ct. 1228 (emphasis added). The *Tighe* Court stated,

> Thus, *Jones*' recognition of prior convictions as a constitutionally permissible sentencing factor was rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions: fair notice, reasonable doubt **and the right to a jury trial**.

Id. 266 F.3d at 1193. (emphasis added)

See also Justice O'Connor, with whom Justice Kennedy and Justice Breyer dissented in *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L.Ed.2d 205 (2005) (" . . . Shepard's prior convictions were themselves 'established through procedures satisfying the fair notice, reasonable doubt, **and jury trial guarantees**. *Jones, supra*, at 249, 119 S. Ct. 1227.'") (emphasis added). *Shepard*, 544 U.S. at 38, 125 S. Ct. 1270. These three dissenting Justices recognized that the prior convictions to be used for enhancement must themselves have been obtained by a jury.

The *Apprendi* Court's continued acceptance of the *Almendarez-Torres* holding, however reluctantly so, regarding prior convictions was premised on sentence-enhancing prior convictions which were the product of proceedings that afford crucial procedural protections, particularly the right to a jury trial. *Apprendi* said, " . . . there is a vast difference between accepting the

validity of a prior judgment of conviction entered in a proceeding in **which the defendant had the right to a jury trial** and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Apprendi*, 530 U.S. at 496, 120 S. Ct. 2366 (emphasis added).

Based on *Jones* and *Apprendi*, the "prior exception" to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial. *See again, Tighe*, 266 F.3d at 1194. When convictions are obtained without the Sixth Amendment protection of a trial by jury, the Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits use of those prior convictions to enhance a subsequent misdemeanor into a felony with a prison term. NRS 484C.400(1)(c) & (2)(b) violates *Almendarez-Torres, Jones* and *Apprendi*.

NRS 484C.400(1)(c) & (2)(b) reads,

> (c) Except as otherwise provided in NRS 484C.340, for a third offense within 7 years, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and shall be further punished by a fine of not less than $2,000 nor more than $5,000. An offender who is imprisoned pursuant to the provisions of this paragraph must, insofar as practicable, be segregated from offenders

> whose crimes were violent and, insofar as practicable, be assigned to an institution or facility of minimum security.
>
> 2. An offense that occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section; * * * (b) when evidenced by a conviction, without regard to the sequence of the offenses and convictions. The facts concerning a prior offense must be alleged in the complaint, indictment or information, must not be read to the jury or proved at trial but must be proved at the time of sentencing and, if the principal offense is alleged to be a felony, must also be shown at the preliminary examination or presented to the grand jury.

Section 2 of NRS 484C.400 can be read in two ways: (1) all prior convictions can be used for enhancement or (2) only those "prior convictions" which were obtained by a jury. If the former, NRS 484C.400(1)(c) is facially unconstitutional. If the latter, the statute is unconstitutional "as applied" to Petitioner Martin. The Nevada Court of Appeals' holding that all prior convictions, jury determined or not, can be used for enhancement of punishment under NRS 484C.400(1)(c) & (2)(b) is contrary to *Almendarez-Torres, supra*, *Jones, supra*, and *Apprendi, supra*.

III

THE NEVADA COURT OF APPEALS OVERLOOKED A NUMBER OF SALIENT FACTS IN DENYING MARTIN RELIEF

The Nevada Court of Appeals' assertion that *Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000) and *Jones v. United States*, 526 U.S. 227, 249 (1999) are "unequivocal" allowing all prior convictions to be used as penalty enhancements is a misreading of *Apprendi* and *Jones* as well as overlooking *State v. Tighe*, *supra* understanding of *Jones, supra*.

Apprendi and *Jones*, recognized by *Tighe*, limit the use of prior convictions for penalty enhancement to those prior convictions which were determined by a jury. Jones stated, "unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . **a prior conviction must itself have been established through the procedures satisfying** the fair notice, reasonable doubt, **and jury trial guarantees**." *Id*., 526 U.S. at 249 (emphasis added). *Apprendi* is in *accord*. ("There is a vast difference between accepting validity of a prior judgment of conviction entered in a proceeding **in which the defendant had the right to a jury trial**. . . .") *Id*. 530 U.S. at 496 (emphasis added). The Nevada Court of Appeals' acknowledgement that the reference to jury trial guarantees for prior convictions in *Apprendi* and *Jones* was " . . . one reason why recidivism is treated differently from other considerations that could enlarge a sentence" is an admission that the prior convictions must have been determined by a jury before they can be used

to enhance a sentence. Appendix 3. Equally true, the Nevada Court of Appeals' recognition of the jury trial requirement contradicts its reliance on the "unequivocal" language as meaning all prior convictions. The jury trial "reason" also applies to Appellant Martin, not just *Almendarez-Torres*.

This Court overlooked *United States v. Tighe*, *supra*. *Tighe* stated,

> Thus, *Jones*' recognition of prior convictions as a constitutionally permissible sentencing factor was rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions: fair notice, reasonable doubt **and the right to a jury trial**.

Id. 266 F.3d at 1193 (emphasis added).

Equally true, the Nevada Court of Appeals overlooked Justice O'Connor, with whom Justice Kennedy and Justice Breyer dissented in *Shepard v. United States*, 544 U.S. 13 (2005) recognizing that the *Jones* prior convictions were themselves "established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Jones, supra* at 249." *Shepard*, 455 U.S. at 38.

The Nevada Court of Appeals overlooked the reservation made in *Blanton v. N. Las Vegas*, 489 U.S. 538 (1989) "whether a repeat offender facing enhancement penalties may state a constitutional claim because of

the absence of a jury trial in a prior DUI prosecution." *Id*., 489 U.S. at 545, n.12. The United States Supreme Court in *Almendarez-Torres*, *supra, Jones, supra* and *Apprendi, supra*, as well as *Tighe*, *supra* supports Martin. The use of prior convictions for enhancement of penalties must be limited to "prior convictions" that were themselves obtained through proceedings that included the right to a jury trial. This Court's "unequivocal" assertion ignores the controlling constitutional law.

Martin cited to *Almendarez-Torres* to show that the prior convictions used to enhance Almendarez-Torres' sentence qualified as a prior convictions under *Apprendi* and *Jones*. Martin pointed out that the prior convictions used in *Almendarez-Torres* had been determined by a jury. Martin's Opening Brief, p. 22, n.34.

The Nevada Court of Appeals' reliance on Martin's "admitt[ing] his recidivism at the time he pleaded guilty" is not dispositive. An admission of guilty does not change the law as to what prior convictions can be used for sentence enhancements. Additionally, the state appellate court ignored that the law required Martin to plead guilty (and not challenge the validity of his prior convictions) to be eligible for treatment of alcoholism in lieu of prison. *See* NRS 484C.430. *Also see Aguilar-Raygoza v. State*, 127 Nev. 349, 255 P.3d 262 (2011) (requiring a defendant to plead guilty to apply for treatment of alcoholism does not violate defendant's due process rights).

CONCLUSION

Almendarez-Torres' labeling of prior conviction enhancements as sentencing factors has been irreconcilably eroded by *Apprendi* and its progeny and, as suggested by some members of the Court, should be overruled. The effect of prior convictions, which is the controlling factor, renders prior convictions as elements, not sentencing factors.

Martin's case is prime for reconsideration of *Almendarez-Torres* as Nevada allows prior conviction enhancements to be based on judicial factfinding in light of *Almendarez-Torres*.

The keystone of *Apprendi* and its progeny is the preservation and enforcement of the Sixth and Fourteenth right to be tried by a jury. This is why *Jones* and *Apprendi* made clear that *Almendarez-Torres*, prior conviction enhancement by the Judge must have been the result of the procedural safeguards of a jury. The Nevada Court of Appeals' finding that under NRS 484C.400(1)(c) prior convictions in which the defendant did not have the right to a jury trial can be used as enhancement to send a person to prison is incongruent with *Jones, supra*, *Apprendi*, *supra* and its progeny.

Under *Almendarez-Torres*, *Jones* and *Apprendi*, NRS 484C.400(1)(c), as interpreted by Nevada's Court of Appeals, is facially unconstitutional because the statute allows the enhancement of penalties based on prior convictions which were not found by a jury.

Alternatively, the statute is unconstitutional "as applied" to Petitioner Martin.

Respectfully submitted,

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