No. 21-5179

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Stanford R. Coleman — PETITIONER
(Your Name)

vs.

Roger W. West "et al." — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For The Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Stanford R. Coleman
(Your Name)

P.O. Box 5000, FCI -Hazelton
(Address)

Bruceton Mills, WV 2652
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Whether this Court is required to consider the doctrine of Constitutional Avoidance in any case involving either the continued validity or extension of Almendarez-Torres--Both of which are at issue in the present case.

2. Whether this Court should address the conflict between the State Courts and the Federal Courts.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

NONE

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TABLE OF AUTHORITIES

I. Cases

Statutes and Rules

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at Case No. 18-5323; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Nov 17, 2020.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Dec 17, 2020, and a copy of the order denying rehearing appears at Appendix B.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including July (date) on 11 (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Case Involves the Question Of Constitutional Avoidance And Difficult Constitutinal Questions That Is The Jury's Alone, Which Assures Due Process, and The Fifth and Sixth Amendment. It also Involves the Constitutionality of the Career Offender and § 851.

Lastly, It Involves the Conflict between State Courts and Federal Courts, that according to Rule 10 This Court is Authorized to Hear.

STATEMENT OF THE CASE

This case stems from a family drug organization out of a very small town, Mt.Sterling, Kentucky. The primary actor was Lisa Crowe- whom Coleman was one-time paramour of Crowe--He was only paid for those services, and nothing else--it was no further evidence of any conspiratorial agreement.

After, Kentucky Police identified Crowe's residence as a hotspot and made numerous controlled-buys, from Crowe, Cundiff-(the Son), Tina Powell-(the Sister), Joann Powell-(the Mother), and Holder-(the Live-in boy-friend/dealer), all who are convicted felons looking to avoid the consquences of their own guilty actions.

In their plan to escape their own guilty actions Coleman quickly became the escape-goat. Being that Coleman has had a history of drug dealing, it was easy for the police to buy the story-But the jury was not so convinced--It took a lot of prosecutorial misconduct in order to convince the jury. The jury had difficulty coming to a final decision over it's two days of deliberation. The deliberation lasted longer than the trial. The jury, "Haven't been able to reach a decision." See Attachment(Doc # 143 page 74 (lines 18-19), ID#1357). In fact, the jury second note to the court stated, "We are unable to reach a decision at this time. It doesn't appear that a decision will be made "again" at this time." (R 87 Jury note, page ID 287).

In true essence, we all know most jurors are there to do their patriotic duties,(who has families of their own, which they are trying to get back home to), and they really do not want to be there--And

when they were informed about they would be there through this week and even into next week--they were rushed to decision, in return Coleman was rushed to judgment. See Attachment(Doc # 143 page 75 lines 12-14, ID# 1358.

But it does not stop there; Clearly, the judge cannot give the jury trial transcripts never admitted into evidence, at least, without giving them instructions. (R 88, Jury note, page ID 289). It is clearly abuse of discretion. The jury must rely on their own individual and collective memory. The jury's recollection is what controls as to the testimony they heard. Over Coleman's objections the judge sent transcripts to the jury. Once the government has rest its case, the trial was by law officially over. The jury were in deliberation for two days when the judge gave them the transcripts--giving them the transcripts allowed the jury to have a second trial without Coleman being able to put forth a defense. Coleman's due process and Sixth Amendment were violated.

But it does not stop there-during the trial when the prosection realized the case was beginning to slip away from him--his course of action turned into prosecutorial misconduct--Coleman was granted his constitutional right to represent himself, but the government had agent Maynard to read a portion of Coleman's plea deal to the jury--Over Coleman's objections- It was very prejudicial and inadmissible-

But it does not stop there-the prosecutorial misconduct continued--A direct violation of 18 USC § 201(c)(2), In theory the leniency in § 201(c) is only in exchange for truthfu testimony.

"Common sense would suggest that (an accused accomplice)

often has a greater interest in lying in favor of the prosecution rather than against it; especially, if he is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large." The words of this Court in 1967, in Washington v Texas 388 U.S. 14.

Congress' intent in § 201(c) sought to eliminate, at the source, the most obvious incentive for false testimony-And § 201(c) does not admit any exception for the government or its prosecutors.

The prosecutorial misconduct continued-the prosecution vouching and bolstered for a witness. A prosector may not express a personal oponion concerning the guilt of the defendant, or the crediblity of a witness. See Attachment (Doc # 143 page 24 lines 21-23, ID#1307. Line 32 ..."But is what they said the truth? Yeah." Here, clearly the prosecutor improperly invited the jurors to convit Coleman on a basis other than a neutral independent assessment of the record of proof- which is a denial of due process.

It was too much for Coleman to overcome, he was convicted of the one count indictment. Final judgment was entered on March 26,2018 and he was sentenced to the term of imprisonment of 340 months.(Judgment, R. 123 page ID 459). Notice of Appeal was timely filed pro se on March 28, 2018 (Notice of Appeal, R. 124, Page ID 466). The case was affirm Nov 17, 2020.

REASONS FOR GRANTING THE PETITION

This Court would be addressing the need to avoid Difficult Constitutional questions, and ~~sa~~constitutional avoidance of the continued validity and extension of Almendarez-Torres and holding its decision to the "unique facts" the exception demands.

This Court would be addressing a Conflict between the State Courts and the Federal Courts. It will provide guidance to the lower courts, to avoid constitutional questions when possible.

ARGUMENT 1: WHETHER, THIS COURT IS REQUIRED TO CONSIDER THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE IN ANY CASE INVOLVING EITHER THE CONTINUED VALIDITY OR THE EXTENSION OF ALMENDAREZ-TORRES -- BOTH OF WHICH ARE AT ISSUE IN THE PRESENT CASE

This Court's decisions in Shepard and Dretke v Haley, 124 S.Ct 1847 (2004), require that § 851 and Career Offender be construed, consistently with the doctrine of constitutional avoidance, to include indictment by grand jury and proof to a jury beyond a reasonable doubt, or an admission of all the components for § 851 and career offender.

But this Court need not even reach this question in the face of the omission of the career offender document from the the indictment and its facial insufficiency.

The Career Offender statute is not mention in the indictment. There is no allegation in the indictment.

Lastly, the notice in the indictment on its face does not invoke the § 851 or career offender applications. The insufficiency is compounded by the failure to follow the elements required by § 851 and career offender. As noted by this Court in Haley the sequence and characteristics of prior convictions are elements beyond the mere existence of a prior conviction, 124 S.Ct at 1853-54. Both statutes have a clear element that the prior convictions must occur on different occasions to provide proper invocation of the statutes, whether by indictment, admission or otherwise, the statutory minimum must be states and proven.

The government neither charged nor proved the necessary elements here.

A. The Doctrine Of Constitutional Avoidance Requires that § 851 and The Career Offender Be Construed To Require Pleading In The Indictment and Proof Beyond A Reasonable Doubt at Trial Or Admission To Establish All The Components For Applications of The Act.

Under governing Supreme Court authority this Court must apply the doctrine of constitutional avoidance to the question of how the § 851 and career offender must be charged and by what manner it must be proved. Because the career offender implicates both the validity of Almendarez-Torres, 523 U.S. 224 (1998), and that decision extension, the Court must avoid the constitutional issue by statutory interpretation: The career offender and § 851 silence on procedure should be filled with construction of the statute to require such procedures. This construction is especially appropriate because this Court construed the "ACCA" statute the same, requiring pleading and proof beyond a reasonable doubt in Castillo v United States, 530 U.S. 120 (2000), holding that 18 U.S.C. § 924(c) required pleading and proof of all its component parts.

The only possible justification for not including the components of § 851 and the career offender in the indictment or plea colloquy is the 'narrow exception' for prior convictions set out in Almendarez-Torres. Justice Thomas has renounced his deciding vote in Almendarez-Torres, first in Apprendi, then in Shepard, and finally, in Alleyne. Given the shift of the deciding vote, as well as, the rationales of Blakely v Washington, 124 S.Ct 2531 (2004), Booker, this Court has twice required that the doctrine of constitutional avoidance be applied to the difficult constitutional questions raised by the continued

vitality of Almendarez-Torres, and once again, in Alleyne, 570 U.S. 99 (2013).

In the watershed ruling in Apprendi, this Court established the constitutional norm that Fifth and Sixth Amendments require factors that increase the statutory maximum to be proved to a jury beyond a reasonable doubt. The Apprendi and Alleyne Courts recognized a "narrow exception" to this rule for "undisputed" prior convictions under the "immigration statutes" in Almendarez-Torres---Almendarez-Torres only covered a "narrow exception" to the constitutional requirement that elements of a crime be pled and proved to the factfinder beyond a reasonable doubt. In that case, the majority found that the fact of a prior felony judgment, which increased the statutory maximum only for "illegal reentry", did not need to be alleged in the indictment. The Court found that Congress intended to create a sentencing factor only in 8 U.S.C. § 1326(b)(2), rather than an element, Almendarez-Torres, 523 U.S. at 235-39. The Court precedent on trial rights inapplicable to the fact of a prior conviction " where conduct, in the absence of the recidivism, is independently unlawful." Almendarez-Torres 523 U.S. at 230, 241.

One year later, This Court applied the doctrine of constitutional doubt to construe the federal carjacking statute as describing the elements of different offenses rather than setting forth ' mere sentencing factors.' Jones v United States, 526 U.S. 227, 251-52 (1999). In dicta, the Jones' Court declared:

Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Jones, 526 U.S. at 243 n.6. To avoid possibly finding the statute unconstitutional, the Court interpreted the fact of intent to cause substantial bodily harm as an element of the carjacking crime.

On June 5, 2000, a unanimous Court in Castillo v United States, 530 U.S. 120 (2000), held that 18 U.S.C. § 924(c) described a separate offense. By rigorously construing the same section of the federal firearms statute that contains the ACCA, the Court found it unnecessary to rely on the doctrine of constitutional doubt. The Court held that section 924(c) made a weapon status as a machinegun an element, not a mere sentencing factor. Castillo, 530 U.S. at 124, 131. The Court also recognized that any doubt regarding Congress' intent would be resolved in favor of a jury determination. Castillo, 530 U.S. at 130.

Three weeks later, in Apprendi, this Court reached the constitutional issue and drew a bright line, which no legislature may cross.

In Apprendi, This Court addressed a New Jersey statute that increased the statutory maximum for assault when the crime was motivated by a discriminatory purpose. The state legislature left no room for doubt--- the additional factor was intended as a sentencing factor, not an element. This Court held the statute was unconstitutional.

Castillo, independently established that Almendarez-Torres should not apply to § 851, or the career offender because of the drastic effect on the maximum sentence, the distinct definitions of convictions under both statutes, and the inapplicability of protecting the defendants from the prior conviction, which the Almendarez-Torres, Court noted did not apply under 1326(b)(2), at 523 U.S. 230.

Castillo, 530 U.S. at 131, indictment submitted to a jury and proven beyond a reasonable doubt. Apprendi, 530 U.S. at 476 (quoting Jones, 526 U.S. at 243 n.6); In particular, Apprendi looked to its holding in Jones that:

> (I)t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Apprendi, 530 U.S. at 490 (quoting Jones, 526 U.S. at 252-53). This Court expressly noted that the factor's effect, not the legislature's labeling, determined whether the factor constituted an element of the crime. Apprendi, 530 at 494. The Apprendi, majority included Justice Thomas, who specifically renounced his former position as the swing vote in Almendarez-Torres, 530 at 520 (Thomas,J., concurring).

The constitutional protections announced in Apprendi to § 851 and career offender. The extremely 'narrow exception' recognized in Almendarez-Torres---the fact of a prior conviction---does not apply because that exception was described by this Court in Apprendi, as "at best an exceptional departure" based on "unique facts." Apprendi,

530 U.S. at 489, 490. This Court even suggested that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi, does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as "narrow exception" to the general rule we recalled at the outset." (emphasis added; footnote omitted). Thus, Apprendi limited the reach of Almendarez-Torres to the "unique" situation where the prior conviction was not otherwise before the jury and did not implicate other factual questions related to the prior conviction.

On May 3, 2004, this Court fundamentally changed the approach to Almendarez-Torres by holding that both its validity and expansion raised "difficult constitutional questions... to be avoided if possible." Haley, 124 S.Ct at 1853-54.

Then, on March 7, 2005, this Court expressly applied the doctrine of constitutional avoidance to the ACCA in Shepard.

The doctrine of constitutional avoidance requires that, prior to addressing difficult constitutional questions, the Court should attempt to construe the relevant statute to avoid the constitutional problem. Clark v Martinez, 125 S. Ct 716, 722-24 (2005). Because the career offender and § 851 are susceptible to construction to avoid constitutional problems, It should be treated without reaching any constitutional question.

In Haley, a Texas prisoner filed a petition for habeas

corpus relief under 28 U.S.C. § 2254. The prisoner had received a 16-year recidivist sentence for stealing...124 S.Ct at 1849-50. The Texas recidivist statute depended on temporally separate prior convictions. Although Haley did not raise the issue at his state penalty phase or on direct appeal, he was not really eligible for the recidivist sentence under Texas law because one of the offenses had occurred three days before the first conviction became final. 124 S.Ct at 1850. However, throughout state post-conviction proceedings, Texas insisted that the procedural default required that the unlawful sentence stand.

The Fifth Circuit granted habeas corpus relief, finding that the "actual innocence" gateway to federal heabeas corpus applies to non-capital sentencing. Haley 124 S. Ct at 1851, See also Schlup v Delo, 513 U.S. 298 (1995).

In this Court reasoning in Haley, it specifically addressed and applied the doctrine of constitutional avoidance to Almendarez-Torres Haley , 124 S. Ct at 1853. The Court noted that a claim of actual-innocence often implicates the constitutional sufficiency decision of Jackson v Virginia, 443 U.S. 307 (1979). This Court noted that the "constitutional hook in Jackson" was In re Winship, 397 U.S. 358 (1979) in which this Court held that "due process requires proof of each element of a criminal offense beyond a reasonable doubt." Haley 124 S. Ct at 1853. This Court then explicitly applied the doctrine of constitutional doubt to both the validity and possible extension of Almendarez-Torres:

> We have not extended Winship's protection to prior of prior convictions used to support recidivist enhancements. Almendarez-Torres... See also Apprendi v New Jersey, 503 U.S. 466, 488-90, (2000) (reserving judgment as to the validity of Almendarez-Torres; Monge v California, 524 U.S. 721, 734 ...(1998) (Double Jeopardy Clause does not preclude retrial on a prior conviction used to support recidivist enhancement). Respondent contends that Almendarez-Torres should be overruled or, in the alternative, that it does not apply because the recidivist statute at issue required the jury to find not only the existence of his prior convictions but also the additional fact that they were sequential... These difficult constitutional questions...are to be avoided if possible.

Haley, 124 S.Ct at 1853-54 (emphasis added)(citations omitted). Thus, the Court is required to consider the doctrine of constitutional avoidance in any case involving either the continued validity or the extension of Almendarez-Torres-both of which are at issue in present cases.

This Court followed Haley approach in construing the ACCA in Shepard. This Court applying the rule of constitutional avoidance, construed the ACCA to limit inquiry regarding the facts of the prior conviction. Shepard, 125 S.Ct at 1262-63.

This Court reasoned that judicial resolution of the disputed facts would require the Court to decide whether Almendarez-Torres authorizes a judge to make the finding regarding the disputed fact or whether, under Jones and Apprendi, the increase in statutory maximum can only be decided by a jury under the Sixth Amendment. Shepard, 125 S.Ct at 1262 ("While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like findings subject to Jones and Apprendi, to say that Almendarez-Torres clearly

authorizes a judge to resolve the dispute."). This Court should to avoid the serious risk of constitutionality; Especially, since this Court has twice held that both the validity and extension of Almendarez-Torres requires application of the doctrine of constitutional avoidance.

The application of Haley and Shepard in the career offender and to § 851 context is a question of first impression upon which there is no binding precedent. But under Miller v Gammie, 335 F.3d 889, 900 (9th cir. 2003)(En banc), intervening Supreme Court authority has undercut the theory and reasoning underlying prior circuit precedent. Therefore, this Court is free to rule in first instance.

B. The Doctrine Of Constitutional Avoidance Should Be Applied To require Due Process The Fifth and Sixth Amendment Compliance as a Matter Of Statutory Interpretation

In applying the doctrine of constitutional avoidance, "(E)very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." United States v Buckland, 289 F.3d 558, 564 (9th cir. 2002)(En banc) (quoting Hooper v California, 155 U.S. 648, 657 (1895)). In Buckland, the Court addressed the effect of Apprendi on the federal narcotics trafficking statute---21 U.S.C. § 841. Previously, courts had unformly interpreted this statute to allow drug quantity to be determined by a judge using a 'preponderance of the evidence standard'

In the wake of Apprendi, the court reexamined the statute seeking to avoid a finding that it was unconstitutional. Buckland, 289 F.3d at 564 ("(I)f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative

interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.") (quoting INS v ST. Cyr 533 U.S. 289, 299-300 (2001)).

Despite the existence of a clearly labeled "penalty" provision, the Court "eschews the distinction between sentencing factors and elements of a crime:

> '(T)he relevant inquiry is not one of form, but of effect-And does the required finding 'expose' the defendant to a 'greater punishment' than that authorized by the jury's guilty verdict?' "

Buckland, 289 F.3d at 566 (quoting Apprendi, 530 U.S. at 494). The Buckland court 'overruled' prior authority treating sentencing factors as immune from Fifth and Sixth Amendment protections based on construction of the statute:

> " We honor the intent of Congress and the requirements of due process by treating drug quantity and type, which fix the maximum sentence for a conviction, as we would any other material fact in a criminal prosecution: It must be charged in the indictment, submitted to the jury, subject to the rule of evidence, and proved beyond a reasonable doubt." Buckland, 289 F.3d at 568.

As in Buckland, the § 851 and the career offender statutes must be revisited in light of this Court's decisions in Blakely, Apprendi, Castillo, and Alleyne. To avoid the constitutional questions of the application and expansion of Almendarez-Torres and both, statutes must be construed to require charge by grand jury indictment and proof as required by the Fifth and Sixth Amendment.

The increase of the statutory minimum or maximum, where the indictment does not charge career offender, and nor admitted to application violates Due Process and the Fifth and Sixth Amendments

under Apprendi, Ring, Blakely and Alleyne.

Even without resort to statutory construction, the enhancement of the sentence would violate binding authority by this Court regarding reasonable doubt and jury trial rights.

C. Factual And Legal Distinctions From Almendarez-Torres Leave This Court To Be Controlled By Apprendi, Ring, Blakely And Alleyne.

The statutes involved in this case career offender and § 851 involve more than the 'mere existence' of a fact of conviction, and the label attached to the factual predicates for increase sentence is 'irrelevant' to 'Due Process,' and the 'Fifth and Sixth' Amendment rights.

The Career Offender and 21 U.S.C. § 851 require a number of 'factors' to be proven to increase the statutory minimum or maximum sentence. Clearly, the required factors are more than the mere existence of prior judgment of conviction, e.g., the language of the text.

> 21 U.S.C § 851 reads:
> (b) Affirmation or denial of previous conviction. If the United States attorney files information under this section the court 'shall' ... inquire of the person with respect to whom the information was filed whether he affirms or denies... and 'shall' inform him that any challenge to a prior conviction... may not thereafter be raised...
>
> (c)...(2) of this subsection, the United States attorney 'shall' have the burden of "proof beyond a reasonable doubt" on any issue of fact... the court 'shall' enter finding of fact and conclusions of law.
>
> 4B1.1 Career Offender reads:
> (a) A defendant is a career offender if (1)... (2) the "instant offense" of conviction is a felony that is either a crime of violence or a "controlled substance offense"

Clearly, in order for the punishment to increase under § 851 and the

career offender, additional facts surrounding the previous convictions, under the section 4B1.2(b) defintions, as well as the convictions were "committed on occasions different from one another," must be proved. Each prior, as well as the 'instant offense' must also meet the defintions for an offense to be considered a "controlled substance offense" and the definition of a "controlled substance offense" is :

1. The exhaustive definition of "controlled substance offense" in the text of § 4B1.2(b) includes only completed offenses.

The text of § 4B1.2(b) states that "[t]he term 'controlled substance offense' *means* an offense" that is one of an exhaustive list of six enumerated drug offenses: (1) manufacture, (2) import, (3) export, (4) distribution, or (5) dispensing of a controlled substance (or a counterfeit controlled substance), or the (6) possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b).

In Dillard v Roe, 244 F.3d 758, 772 (9th Cir. 2001), the Court applied the principles underlying Apprendi to the California three-strikes statute and the federal firearms statute to hold that factors beyond the mere existence of a prior judgment are elements of the offense. The Court considered a state statute that, like the career offender and § 851, that increase the statutory maximum based on prior conviction of a certain type of offenses---here a "controlled substance offense" But in Dillard, a "serious felony" where the defendant

"personally uses a firearm." The Court found that the decision was controlled by the Sixth Amendment guarantee of a jury determination of facts resulting in an increase statutory maximum. Dillard, 244 F.3d at 772-73. The Court's analysis of the statute required review of facts beyond the mere fact of conviction:

> Our determination concerning whether the fact that Dillard "personally use(d) a firearm" is an "element" or a "sentencing factor" requires that we look beyond the enumerated elements of the crime for which Dillard was convicted. We must analyze "the operation and effect of the law" mandating the two five-year sentence... We must then determine whether, in this instance, "Winship's reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged."

Dillard, 244 F.3d at 772 (citation omitted). The Court then viewed the additional facts that needed to be determined beyond the mere existence of a judgment and held that these factors must be submitted to a jury and determined beyond a reasonable doubt: "We conclude, therefore, that the additional fact found by the trial judge in this case is an 'element' that transforms the offense for which Dillard was charged and convicted into a different, more serious offense that exposes him to greater and additional punishment." Id. at 773. On that basis, the court found that federal relief was required in the absence of proof to a jury beyond a reasonable doubt that the prior offense involved personal use of a firearm against the victim. Id.

Under the career offender and § 851 the government must charge and prove the 'instant offense' and two other convictions were "controlled substance offense" or "crime of violence" (4B1.1), including facts necessary for a categorical analysis of the prior convictions..

Which 21 U.S.C. § 846, is not. Nor is the other prior conviction in this case; Therefore, the defendant is 'actual innocent' The conviction the government relied on-the indictment for the conviction do not contains the defendant's name(Stanford R. Coleman); See Attached Exhibit Clearly, the defendant is not the 'indicted person'...The defendant's name was penciled in, Nor is it the same Birthday or Social Security Number.[1]

The government must also prove the facts that effectively fix the mandatory/minimum sentence for a career offender-those facts are "elements" to which constitutional protections apply. See Alleyne 133 S.Ct at 2158. Those empirical issues, which rise or fall based on events occurring only after the conviction, by definition are beyond the 'fact' of conviction, and beyond the narrow Almendarez-Torres harbor.

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[1] Identity is mandated by DOJ policy through the First Step Act-("FSA") which clearly, is a **clarification** of what the law was always meant to be. The FSA did not announce a rule of constitutional law-but The FSA did announced a new, retroactive rule of statutory interpretation. A rule is new if it "was not dictated by precedent existing at the time the defendant's conviction became final." Teague v Lane, 489 U.S. 288, 301, 109 S.Ct 1060, 1070, (1989). A rule is not dictated by existing precedent unless the rule would have been "apparent to all reasonable jurists." Lambrix v Singletary, 520 U.S. 518 (1997). As for retroactivity, a rule applies retroactively on collateral review if it is a "new substantive rule()" or if it is one of "a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Schriro v Summerlin, 542 U.S. 348 (2004).

In order, to be a career offender the government must prove the defendant's 'instant offense' was an violation of a "controlled substance offense" and the government must prove he had two other convictions of a "controlled substance offense" or two convictions of a "crime of violence" or otherwise the defendant cannot be sentenced as a career offender--which raise the sentencing floor and/ or ceiling. On the other hand, for the reasons as to whether the defendant has been convicted of a "controlled substance offense" can have no effect.

The government must also prove the instant offense, and prior convictions for the purpose of a 'categorical approach' which looks only to the statutory definitions-i.e., the elements-of a defendant's prior convictions, if not the categorical approach, can have no effect; Otherwise, the sentence cannot be enhanced. As for the reasons discussed, Alleyne, requires these facts to beyond the limited Almendarez-Torres recidivism exception because they are 'not merely 'fact(s) of a prior conviction; They instead, are 'related to the manner and duration of the sentence and date of release. See Apprendi, 120 S.Ct at 2363. Those factual criteria are for the jury alone to evaluate. Clearly, these difficult constitutional questions...are to be avoided if possible. Apprendi, Blakely, Ring, and Alleyne establish that due process, and the Fifth and Sixth Amendment trial rights require that factors that increase statutory minimum/maximum must be either proved to a jury beyond a reasonable doubt or admitted during the guilty plea colloquy, and charged in an indictment(.)

At the outset, the Apprendi court established that the label given to the increase in punishment was not relevant: "Merely using the label 'sentence enhancement' to describe the (enhancing factor) surely, does not provide a principled basis for treating them differently" Apprendi 530 at 476. The Court noted that any distinction between an "element" and a "sentencing factor" was unknown at common law and did not emerge until McMillan v Pennsylvania, 477 U.S. 79 (1986). Which leave the question, for this Court, whether the term "sentencing factor" is **devoid** of meaning. And whether Judges are using the term "sentence enhancement" to describe 'facts' that increase a sentence beyond what due process, and the Fifth and Sixth Amendment allow?

That may be a question for another day-But McMillan has been overruled. This Court ultimately held that the precedent of Winship and Mullaney v Wilbur, 421 U.S. 684 (1975), required that factors increasing the statutory maximum must be proved to a jury beyond a reasonable doubt. Apprendi, 530 U.S. at 490.

As set out earlier, the Apprendi Court specifically addressed Almendarez-Torres and tightly limited it to its facts.

"Since Winship, this Court made clear beyond peradventure that Winship's due process and associated jury protections extend, to some degree, to 'determination that (go) not to a defendant's guilt or innocence, but simply to the length of his sentence.' " Apprendi 530 U.S. at 484 (quoting Almendarez-Torres, 523 U.S. at 255 (Scalia, J., dissenting)).

This Court noted that Almendarez-Torres "represents at best an exceptional departure from the historic practice (of requiring pleading

and proof of factors increasing statutory maximum)." Apprendi, 530 U.S. at 487. This Court then explicityly noted that Almendarez-Torres decision may have been incorrectly decided and should be narrowly applied: Even though it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurispridence. Apprendi, 530 U.S. at 489 (footnote omitted). In questioning the validity of Almendarez-Torres, the Court noted not only Justice Scalia's dissent in Almendarez-Torres, but added that Almendarez-Torres ignored previous Supreme Court authority that "the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." Apprendi, 530 U.S. at 490 n15 (quoting United States v Reese, 92 U.S. 214, 232-33 (1875)).

Under the reasoning of Apprendi, the reasonable doubt component of Fifth Amendment due process and the Sixth Amendment right to jury trial fully apply to any fact that increases the statutory maximum. Almendarez-Torres did not address other factual distinctions, which relate to factors beyond the pure fact of conviction. Almendarez-Torres should not, and cannot under Supreme Court precedent, be extended to these additional facts required under the career offender text. Justice Thomas' conurring opinion in Apprendi is worth mentioning:

"(I)f the legislature defines some core crime and then provided for increasing the punishment of that crime upon a finding of some aggravating fact (,)... the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime."

Justice Scalia " I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment that the defendant receives-whether the statute calls them elements of the offense, sentencing factors, or Mary Jane-- must be found by the jury beyond a reasonable doubt." Ring, 536 U.S. at 610.

In Blakely, the Court applied Apprendi's holding regarding reasonable doubt and jury trial rights to increases in available punishment in a state guidelines system. At the outset of the analysis, Justice Scalia, writing for the majority, noted the common law rule that "every fact which is **legally** essential to the punishment "must be charged in the indictment and proved to a jury. Blakely, involved the increase in Washington guidelines. From the outset, the Court noted that the aggravating factor was "neither admitted by Petitioner nor found by a jury." Blakely, 124 S.Ct at 2537. This Court held that increases in guidelines punishment implicated the constitutional trial rights:

> "(T)he relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When the judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishement" ...and the

judge exceeds his proper authority."

This Court should find the defendant is entitled to the protection of due process, the Fifth and Sixth Amendment- that Apprendi, and Alleyne afford him.

Alternatively, even if statutory construction under the doctrine of constitutional avoidance and the alternative of limiting Almendarez-Torres to its "unique facts" did not resolve this case, the defendant should prevail because, even on its facts, Almendarez-Torres is no longer good law. This Court stated long ago the "one rule of universal application,--- that every ingredient of the offence must be accurately and clearly expresses; or, in other words, that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." United States v Reese, 92 U.S. 214, 232 (1875) (Clifford, J., concurring). In the context of this precedent before and after--reasoning of the Sixth Amendment--reasonable doubt cases, Almendarez-Torres is an invalid deviation from the common law and constitutional requirement that all the ingredients necessary for punishment be alleged in the indictment. Especially given Alleyne, Apprendi and Justice Thomas' Shepard concurrence (125 S.Ct at 1263-64) pointing out that a majority of Justice believe Almendarez-Torres was "wrongly decided" the decision should not be applied to this case.

The defendant's 'actual innocence', his objections to the career offender and § 851, and his prior convictions clearly should place him under the protection of due process principles-The Sixth Amendment jury protection should be rewarded to the contested 'elements' of the offense-which is within a jury's sole purview. Alleyne.

ARGUMENT 2: ALTERNATIVE, WHETHER THIS COURT SHOULD ADDRESS THE CONFLICT BETWEEN THE STATE COURTS AND THE FEDERAL COURTS

The common-law approach to determining elements was the well-established rule that, if a statute increased the punishment of a common law crime, whether felony or misdemeanor, based on some fact, then that fact must be charged in the indictment in order for the court to impose the increased punishment. Archbold * 106; See id., at *50; ante, at _ - _, 147 L Ed 2d, at 449. There was no question of the State Courts as treating statutory aggravating fact as merely a sentencing enhancement-as 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 the punishment of the common-law crime. And the common-law crime was, in relation to the statutory one, essentially just like any other lesser included offense. See Archbold * 106.

Further evidence of the rule that a crime includes every fact that is by law a basis for imposing or increasing punishment comes from early cases addressing recidivism statutes. As Justice Scalia explained there was a tradition of treating recidivism as an element. See Almendarez-Torres, 523 US, at 256-257, 261, 140 L Ed 2d 350, 118 S Ct 1219 (dissenting opinion) That tradition stretches back to the earliest years of the Republic. See, e.g., Commonwealth v Welsh, 4 Va 57 (1817); Smith v Commonwealth, 14 Serg & Rawle 69 (Pa 1826); See also Archbold *695-*696.

The State Courts treated the fact of prior conviction just as any other fact that increased the punishment by law. By the same reasoning that the Courts employed in Hope and Lacy, the fact of a prior conviction was an element, together with the facts constituting the core crime of which the defendant was charged, of a new, aggravated crime.

The State two leading cases on whether recidivism is an element are/were Plumbly v Commonwealth, 43 Mass 413 (1841), and Tuttle v Commonwealth, 68 Mass 505 (1854). In the latter, the State Court explained the reason for treating as an element the fact of the prior conviction:

> "When the statute imposes a higher penalty upon a second and third conviction, respectively, it makes the prior conviction of a similar offence a part of the description and character of the offence intended to be punished; and therefore the fact of such prior conviction must be charged, as well as proved. It is essential to an indictment, that the facts constituting the offence intended to be punished should be averred." Id at 506.

The State Courts rested this rule on the common law the Massachusetts equivalent of the Sixth Amendment's Notice Clause. Ibid. See also Commonwealth v Haynes, 107 Mass 194, 198 (1871) (reversing sentence, upon confession of error by attorney general, in case similar to Tuttle).

Almost, the entire State system treated the fact of prior convictions as elements of the crime. The State Courts made it clear, by both their holdings and their language, that when a statute increases punishment for some core crime based on the fact of a prior conviction, the core crime and the fact of the prior crime together create a new, aggravated crime. Kilbourn v State, 9 Conn 560, 563 (1833) ("No person

ought to be, or can be subjected to a cumulative penalty, without being charged with a cumulative offence"); Plumbly supra, at (conviction under recidivism statute is "one conviction, upon one aggregate offence"); Hines v State, 26 Ga 614, 616 (1859) (reversing enhanced sentence imposed by trial judge and explaining, "(T)he question, whether the offence was a second one, or not, was a question for the'jury'... The allegation (of a prior offence) is certainly one of the first importance to the accused, for if it is true, he becomes subject to a greatly increased punishment"). See also Common v Phillips, 28 Mass 28, 33 (1831) ("(U)pon a third conviction, the court may sentence the convict to hard labor for life. The punishment is to be awarded upon that conviction, and for the offence of he is then and there convicted").

Here, in another State case, the exception to the practice of including the fact of a prior conviction in the indictment-to help prove the rule that the fact is an element because it increases the punishment by law. See State v Freeman, 27 Vt 523 (1855), the Vermont Supreme Court upheld a statute providing that, in an indictment or complaint for violation of a liquor law, it was not necessary to allege a prior conviction of that law in order to secure an increased sentence.- 'But the court did not hold that the prior was not an element-instead, it held that the liquor law created only minor offenses that did not qualify as crimes. Thus, the State Constitutional protections that would attach were a "crime" at issue did not apply. Id., at 527; See Goeller v State, 119 Md 61, 66-67, 85 A 954, 956 (1912) (discussing Freeman).

The State Courts clearly conflicts with the Federal Courts- Even to the points of treatises-which was one of the leading authorities of the era in criminal law. 1 J. Bishop, Law of Criminal Procedure 50 (2d ed. 1872), See id., § 81, at 51-53, the provision of State and Federal Constitutions guaranteeing notice of an accusation in all criminal cases, indictment by a grand jury for serious crimes, and trial by jury.

With regards to the common law, Bishop explained that this rule was "not made apparent to our understandings by a single case only, but by all the cases." It was followed "in all cases, without one exception." Bishop and the State higher Courts made no exception for the fact of prior conviction- "persons held for crimes ... shall be convicted, there shall be an allegation made against them of every element of crime which the law makes essential to the punishment to be inflicted."

Because neither the State or Federal constitution ratify the change the government relies on- And it is impossible to rule out that the the difficult constitutional questions in this case, is the jury's purpose alone.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Stanford R Coleman

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