No.

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH PATRICK KEEL, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIROARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether courts, including those in Florida, have been incorrectly applying a "prior record" exception to the rule from *Apprendi v. New Jersey* 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), when in fact no such exception to the Sixth Amendment exists?

2. Assuming the answer to the first question presented is "no" and there is some form of a "prior record" exception to the Sixth Amendment, whether courts have been improperly applying that exception to the issues of identity (whether the prior records are those of the defendant currently before the court)?

RELATED PROCEEDINGS

The proceedings listed below are directly related to the above-captioned case in this Court:

State of Florida v. Joseph Patrick Keel, No. 14-01926CF10A
(Fla. 17th Jud. Cir.).
Judgment entered May 7, 2018.

Keel v. State, 2021 WL 5830224, No. 4D18-1415
(Fla. 4th DCA Dec. 9, 2021) (unpublished).
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PETITION FOR A WRIT OF CERTIORARI

Joseph Keel respectfully petitions for a writ of certiorari to review the judgment of the Fourth District Court of Appeal of Florida.

OPINION BELOW

The opinion of the Fourth District Court of Appeal is an unpublished decision locatable at *Keel v. State*, 2021 WL 5830224, No. 4D18-1415 (Fla. 4th DCA Dec. 9, 2021). It is also reprinted in the appendix. A1.

JURISDICTION

The Fourth District Court of Appeal affirmed the trial court judgment, including its order denying Keel relief on the questions presented in this petition, on December 9, 2021. A1. The decision was "Per Curiam. Affirmed." A1. This decision was final, as the Florida Supreme Court has no jurisdiction to review "per curiam affirmed" decisions. *See Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 139 n.4 (1987) (acknowledging that "[u]nder Florida law, a per curiam affirmance issued without opinion cannot be appealed to the State Supreme Court" and therefore petitioner "sought review directly in this Court."). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

II. Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> 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 any 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.

III. Section 775.084, Florida Statutes, is reproduced in the appendix. A6-A8.

STATEMENT OF THE CASE AND FACTS

Petitioner Joseph Keel was found guilty of attempted first-degree murder with a firearm, attempted robbery with a firearm, and possession of a firearm by a convicted felon. A9-A11, A13-A16.

At sentencing, the State sought to have Keel sentenced as a habitual felony offender under section 775.084, Florida Statutes. A12. This statute requires that "[t]he defendant has previously been convicted of any combination of two or more felonies . . . ."[1] § 775.084(1)(a), Fla. Stat. This determination is made "by the court" "in a separate proceeding" and the standard is "by a preponderance of the evidence." § 775.084(3)(a), Fla. Stat. The effect of a habitual felony offender finding is to increase the maximum sentence for the crimes. § 775.084(4)(a), Fla. Stat.

The trial court found that habitual felony offender statute applied and used it to sentence Keel to life in prison on the attempted murder and attempted robbery charges, and to 30 years in prison on the possession of a firearm charge. A53-A54.

Keel appealed to Florida's Fourth District Court of Appeal. During the pendency of his appeal, Keel filed three motions to correct sentencing errors under Florida Rule of Criminal Procedure 3.800(b)(2).[2] A58-A91, A136-A145. His overall argument relevant to this petition was that his habitual felony offender sentences violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because his maximum sentence had been increased based on findings made by a judge (rather than a jury)

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[1] The other requirements of the statute are not relevant to this petition.

[2] The first of these is not relevant to the issues in this petition; it is not included in the appendix. The second and third contain the arguments discussed.

under a preponderance of the evidence standard (rather than beyond a reasonable doubt). A63-A89.

Florida Rule of Criminal Procedure 3.800(b)(2) allows a defendant to move to correct "any sentencing error, including an illegal sentence" while an appeal is pending, so long as it is filed "before the party's first brief is served." Filing a motion under this rule is "the proper method to raise the issue of an *Apprendi* violation." *Hollingsworth v. State*, 293 So. 3d 1049, 1051 (Fla. 4th DCA 2020). The same is true when the claim is made under *Alleyne*. *Id.* (citing with approval *Bean v. State*, 264 So. 3d 947 (Fla. 4th DCA 2019), which considered both *Apprendi* and *Alleyne* arguments made in a 3.800(b)(2) motion).

Keel made two related arguments in his 3.800(b)(2) motions. First, he argued that Florida should overturn its "prior record exception" to *Apprendi* and *Alleyne* because it was not required by this Court's precedents, because it is contrary to the Sixth Amendment and historical practices, and because the distinction between sentencing factors and elements of a crime that once supported the exception is no longer good law and would permit legislatures to avoid the Sixth Amendment through technical focuses on labels. A67-A81. Second, Keel argued that even if the prior record exception were maintained, it should not apply to the question of identity. A82-A88. In other words, the exception (if it exists) should apply only to the fact that *someone* was convicted in a prior case, not the separate question of whether the current defendant was in fact that previous someone.

The trial court conducted a resentencing hearing to correct an illegal

sentence unrelated to the questions presented in this petition. At that sentencing hearing, the State again sought a habitual felony offender sentence and introduced evidence in support of that statute's application. A105-A107. Keel continued to argue, as he did in his 3.800(b)(2) motion, that the habitual felony offender statute is unconstitutional. A119. The trial court disagreed, and applied the habitual felony offender statute when it sentenced Keel to life in prison for the attempted murder count and to 30 years in prison on the attempted robbery and possession of a firearm counts. A3, A119, A122-A123, A146-A154.

Following his resentencing, Keel continued on his direct appeal in the Fourth District Court of Appeal. In that court, he made the same argument he had made to the trial court regarding the habitual felony offender statute—that it violated the Sixth Amendment (incorporated by the Fourteenth) by permitting a judge to make findings that increased his maximum sentences.[3] A155-A205.

The Fourth District Court of Appeal affirmed without explanation in a one-word per curiam opinion: "Affirmed." A1. This petition for a writ of certiorari follows.

[3] Keel also raised a state-law issue regarding hearsay. That claim is not raised as part of this petition.

REASONS FOR GRANTING THE PETITION

In the twenty years since this Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court has never explicitly answered the questions that opinion left open: whether "the fact of a prior conviction" must be found by a jury before that fact can increase a person's minimum or maximum sentence, and if so, what exactly constitutes such a fact? This Court has repeatedly noted this omission, and individual Justices (both past and present) have called for a case that can present these issues so they might be resolved. This case provides this Court with the opportunity to resolve the final outstanding questions from *Apprendi* and its progeny, and to recognize that the protections of the Sixth Amendment are as strong today as they were at the founding of our nation.

I. This case presents this Court with the opportunity to speak on an issue of great importance.

The issue of whether a criminal defendant's prior record may be used to raise the minimum or maximum end of their sentencing range is critically important and affects a near-unknowably large number of people. "Every state currently authorizes increased punishment for repeat offenders . . . ." Alex Glashausser, Note, *The Treatment of Foreign Country Convictions as Predicates for Sentence Enhancement Under Recidivist Statutes*, 44 DUKE L.J. 134, 135 (1994). Florida alone has at least five different recidivist statutes, all of which involve judicial fact-finding regarding the prior offenses. § 775.082(9), Fla. Stat.; § 775.084, Fla. Stat. (four categories). Suffice it to say that the issue of whether a jury is required before a sentencing range can be raised based on a prior record is an issue that is not

particular to Petitioner; its importance and reach go far beyond the specific facts of this case.

But despite being an issue of such importance, this Court has never clearly and explicitly decided whether the fact of a prior conviction is an exception to the general rule from the Sixth Amendment that elements of a crime increasing the minimum or maximum sentence must be submitted to a jury and proved beyond a reasonable doubt. This Court's closest holding on the issue was in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which stated "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." *Id.* at 490. However, reading the opinion as a whole, as well as in context with those cases both preceding and following it, reveals the "Other than the fact of a prior conviction" statement is not a holding but rather a recognition of the limits of the holding actually reached. *See* Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to Apprendi*, 97 MARQ. L. REV. 523, 551 (2014) ("[N]one of the many cases stating the Apprendi rule have actually involved a recidivist penalty, so the exception remains dicta.").

This Court coined the term "sentencing factor" in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), "to refer to a fact that was not found by a jury but that could affect the sentence imposed by a judge." *Apprendi*, 530 U.S. at 485. Although this Court approved a mandatory minimum in that case, it did so while recognizing that a potential increase in the maximum punishment based on a fact not found by a

jury "may raise serious constitutional concern[s]." *Id.* at 486.

Later, in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), this Court held that a prior record was a "sentencing factor" rather than an "element," but did so in the context of determining whether the record needed to be included as part of an indictment. *Id.* at 228, 230, 243, 247. Like in *McMillan*, however, this Court explicitly left open the question about what standard of proof might be required for a sentencing factor that raised the maximum possible sentence. *Id.* at 247-48. Also notable is the fact that Almendarez-Torres admitted his prior convictions, making any issue over their existence a moot point. *See Apprendi*, 530 U.S. at 488.

In *Jones v. United States*, 526 U.S. 227 (1999), this Court discussed *Almendarez-Torres* and recognized that a prior record was "potentially distinguishable" from other sentencing factors because "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.* at 249.

When this Court decided *Apprendi* in 2000, it had to contend with these prior decisions. *Apprendi* recognized that *Almendarez-Torres* "represents at best an exceptional departure from the historic practice" of connecting a sentencing range to the elements of a crime, and also recognized the "serious constitutional concern[s]" implicated by an extension of *McMillan* described above. *Apprendi*, 530 U.S. at 486-87. Based on this recognition, this Court noted that "it is arguable that *Almendarez-Torres* was incorrectly decided" and that the rule the Court was setting forth in *Apprendi* (that a fact increasing the maximum penalty must be found by a jury)

might logically apply even to a defendant's prior record. *Id.* at 489. However, because Apprendi had not argued against *Almendarez-Torres*, this Court avoided the question about whether that previous case needed to be revisited. *Id.* Instead, this Court treated *Almendarez-Torres* as "a narrow exception" based on the lack of briefing and the lack of a need to decide that issue. *Id.*

Reading *Apprendi* as a whole and in context with the cases that came before it, it becomes clear that this Court's exception was not an intentional and carefully-carved-out affirmative exception to the rule. Instead, this Court properly recognized that there was precedent that could be called into question by its general holding, and put discussion of whether that precedent needed to be revisited into a narrow box set aside for another day. *Apprendi*'s "narrow exception" was created to *avoid* creating a rule, not to create one that was unbriefed and irrelevant to the disposition of the specific case being decided.

The cases that follow *Apprendi* also show that this Court has so-far avoided answering the questions presented in this petition. In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court made specific note that Ring (and therefore its decision) did not challenge the validity of *Almendarez-Torres* because the factors at issue in his case did not involve past convictions. *Id.* at 597 n.4.

The case of *Shepard v. United States*, 544 U.S. 13 (2005), came perhaps the closest to converting the prior record exception into a holding, but this Court refrained from going that far. Instead, based on the questions presented,[4] this Court

[4] *Available at* https://www.supremecourt.gov/qp/03-09168qp.pdf.

simply held that the particular facts at issue were "too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres*" authorized judicial fact-finding. *Id.* at 25. This interpretation allowed this Court to avoid the risk of holding the statute at issue unconstitutional, which the alternative holding implicating *Almendarez-Torres* might have done. *Id.* at 25-26. Notably, both Justice Thomas in concurrence, as well as the dissent, recognized this Court's avoidance of the prior record exception issue. Justice Thomas noted that "[t]he parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres'* continuing viability." *Id.* at 28 (Thomas, J., concurring). And although the dissent worried about "extending the *Apprendi* rule" to prior convictions, it nevertheless recognized that "*Apprendi* and succeeding cases had expressly and consistently disclaimed" such application. *Id.* at 37-38 (O'Connor, J., dissenting). *Shepard* is therefore best viewed as a case interpreting what would be required *if* there was a prior record exception, because the parties did not challenge that underlying assumption.

The final case of note from this Court on this issue is *Alleyne v. United States*, 570 U.S. 99 (2013). There, this Court overruled *McMillan*'s rule that had allowed the bottom of a sentencing range to be modified by judicially-found facts. *Id.* at 119 (Sotomayor, J., concurring) (making clear that the majority's overruling of *Harris v. United States*, 536 U.S. 545 (2002), also overruled *McMillan*). Importantly, however, like Apprendi, Ring, and Shepard, Alleyne chose not to challenge *Almendarez-Torres*'s prior record exception. *Id.* at 111 n.1. This Court therefore did not revisit

that rule or attempt to apply it to the *Apprendi* (now *Apprendi/Alleyne*) holding. *Id.*

Overall, the best way to view this Court's approach to the prior record exception to *Apprendi* and *Alleyne* is that this Court has been hesitant. It hesitantly accepted that prior records might possibly be an exception in *Apprendi* itself, and it has tailored that exception as necessary so long as no one challenged its applicability. But this Court has never wholeheartedly embraced the exception or decided a case on the ground that the exception existed and applied. Instead, it has echoed a constant refrain in both majority and other opinions that the day might come when the exception, and the continued viability of *Almendarez-Torres*, would need to be revisited. Today is that day; this case provides this Court with the opportunity to clearly speak on this highly important issue.

II. This case provides an ideal vehicle for this Court to consider the important questions raised.

Unlike *Apprendi*, *Alleyne*, and other cases where petitioners in this Court have avoided the question of whether "the fact of a prior conviction" is subject to the Sixth Amendment, this case presents that issue squarely and head-on for this Court's review.

In Keel's original sentencing hearing, he disputed the accuracy of the prior convictions being used to apply the habitual felony offender statute. A41. In the late stages of the trial court proceedings and early stages of the appeal,[5] Keel made his

[5] 3.800(b)(2) motions like that described here happen during the pendency of an appeal but are considered by the trial court and may be used to preserve issues so that they may be argued on appeal. *See Arrowood v. State*, 843 So. 2d 940, 941 (Fla. 1st DCA 2003) ("[D]uring the pendency of this appeal, [Arrowood] properly

specific and federalized arguments on the two questions presented in this petition. A58-91, A119, A136-A145, A155-A205. Those arguments were considered and rejected by both the trial court and appellate court in Florida. A1, A3, A119, A122-A123.

The issues raised by this case are clear and the case has been trimmed of all extraneous legal and factual stumbling blocks. This case is the ideal vehicle for this Court to consider the questions presented.

III. The Florida courts have reached the wrong result.

Keel was sentenced under Florida's habitual felony offender statute, which raised the maximum potential sentence for his crimes. § 775.084(4)(a), Fla. Stat. The method by which these maximums were increased was through a determination by the judge, under a preponderance of the evidence standard that, Keel "has previously been convicted of any combination of two or more felonies . . . ." § 775.084(1)(a), (3)(a), Fla. Stat.

Here, the State introduced evidence Keel met the requirements. A105-A107. However, it was the judge, rather than a jury, that weighed this evidence and made the finding. A119, A122-123. The trial court and appellate court's decisions, in accordance with Florida precedent on this issue, applied a "prior conviction" exception to the Sixth Amendment's jury requirement. A1, A3, A119, A122-A123. These courts, and Florida precedent on this point, are wrong. The Sixth Amendment does not have an exception for this specific category of elements, and even if it did,

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filed a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) to raise his *Apprendi* claim.").

the challenge raised by Keel went beyond the mere "fact of a prior conviction."

The distinction between a "sentencing consideration" and an "element" was created in 1986 in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *see Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (calling this distinction "constitutionally novel and elusive"). The distinction was refined in the context of an indictment in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). But since *McMillan* and *Almendarez-Torres*, this distinction has "been eroded by this Court's subsequent Sixth Amendment jurisprudence." *Shepard v. United States*, 544 U.S. 13, 27 (2005) (Thomas, J., concurring). In fact, this erosion is actually a return to the long historical tradition of treating as an element "every fact that is by law a basis for imposing or increasing punishment." *Apprendi*, 530 U.S. at 501, 506, 518 (Thomas, J., concurring); *see also id.* at 477-85 (majority opinion).

The fact the *McMillan* distinction was a brief diversion from the historical tradition this Court has now reaffirmed is made evident by the fact that *McMillan* was overruled in *Alleyne v. United States*, 570 U.S. 99 (2013). *See id.* at 119 (Sotomayor, J., concurring). But although *McMillan* has been overruled, its legacy persists through *Almendarez-Torres* and other decisions that repeat the now-defunct distinction *McMillan* created. The bottom line, as can be seen in the historical tradition and in cases decided after *Almendarez-Torres*, is that the relevant Sixth Amendment question is "the way by which a fact enters the sentence," not a "doubtful" treatment of recidivism as a special exception to the rule. *Apprendi*, 540 U.S. at 520-21 (Thomas, J., concurring) (first quote); *Almendarez-*

Torres, 523 U.S. at 258 (Scalia, J., dissenting) (second quote).

Even if there was a historical basis, rather than a historical blip, to ground a prior record exception to the Sixth Amendment, creating such an exception would allow the exception to swallow the rule. For example, Florida generally treats first and second DUIs as misdemeanors, but subsequent DUIs as felonies. § 316.193(2), Fla. Stat.; *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000). Clearly the status of having prior convictions is an element of the felony offense. But with the prior record exception, a defendant who conceded he drove drunk on this occasion but denied that he had been found guilty of doing so in the past would find himself facing imprisonment without the protection of a jury to determine the actual issue in dispute. Under the Sixth Amendment, a jury would be required to find that he drove drunk this time, and then by applying the prior record exception a judge could make the finding that the defendant had the requisite prior convictions without any jury being involved.[6]

This sort of end-run around jury protections is exactly what *Apprendi* and its progeny have sought to avoid. *See Apprendi*, 530 U.S. at 494 ("[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than authorized by the jury's guilty verdict."). A

[6] Thankfully, this is not the standard practice for how Florida courts deal with felony DUIs. But there is no logical or legal reason why the prior record element for that crime should be viewed as having different Sixth Amendment protections than the prior record sentencing factors at issue in this case. Florida has recognized through its practice that the Sixth Amendment applies to prior records for felony DUIs; it is wrong to have concluded that there is an exception for prior records when it comes to recidivist enhancement statutes. That distinction relies on form rather than effect, which *Apprendi* forbids. *Apprendi*, 530 U.S. at 494.

prior record exception to the Sixth Amendment, which the Florida courts applied in this case, would permit just that sort of jury-evading technical chicanery, resulting in a massive blow to the protections offered by the Constitution.

Finally, even if the Florida courts were correct to find there is a narrow exception to the Sixth Amendment for "the fact of a prior conviction," they were wrong to apply that exception to the issue of identity in this case. *Apprendi*, 530 U.S. at 490. The fact that at some previous date a trial court entered a judgment for a particular crime against some named defendant is readily verifiable from the court's own records, and the fact that the defendant named on that previous judgment committed the crime has been "established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones v. United States*, 526 U.S. 227, 249 (1999). But the same cannot be said for the question of whether the defendant in court on a later date is in fact the same defendant who was listed on the previous judgment. The prior record exception, as justified in *Jones*, only makes sense when the question is "was a previous judgment entered? And if so, against whom and for what?" When the question becomes "is this person in court today the same person the previous judgment was entered against?," it is far closer to the basic question of identity present in nearly every criminal case. The Constitution does not permit a judge to decide that the defendant was the one who committed the crime in the first instance, and similarly it does not permit a judge to decide that the person sitting in the courtroom for sentencing is in fact the same person who was found to have committed a crime at some arbitrary point in the

past.

In addition to the questions presented being of great importance and this case being an ideal vehicle for this Court to consider them, this Court should also grant this petition for a writ of certiorari because the Florida courts reached the wrong conclusions in their interpretation of the Sixth Amendment.

IV. Deciding this case will resolve, or at least advance resolution of, a variety of legal splits around the country.

As discussed above in Section I, this Court has not required the creation and application of a prior record exception to the Sixth Amendment. However, courts around the country have collectively seized on (or misunderstood) this Court's dicta in *Apprendi* (and uprooted *Almendarez-Torres* from its charging-document foundation) by applying such an exception. Therefore, there does not appear to be a split of authority on the issue of whether there is a prior record exception at all; the courts are all equally wrong in this regard.

But there are myriad smaller splits that this case implicates and that resolution by this Court would resolve, or at least move closer to resolution. As detailed in the Brooklyn Law Review, courts around the country can generally be described as taking either a "broad" or "narrow" view of the prior record exception. Daniel Doeschner, Note, *A Narrowing of the Prior Record Exception*, 71 BROOK. L. REV. 1333, 1359-72 (2006).

An example of the "broad" view can be found in Florida, where courts have recognized the distinction between the fact of a prior conviction and a person's release date from prison following that conviction, but nevertheless find the latter

to fall under the exception because "it is directly derivative of a prior conviction." *Lopez v. State*, 135 So. 3d 539, 540 (Fla. 2d DCA 2014) (quoting *Calloway v. State*, 914 So. 2d 12, 14 (Fla. 2d DCA 2005)). In this context, the prior record exception goes beyond the mere fact of a prior conviction and instead encompasses everything that is "directly derivative" of that conviction, including (at least to the Second District Court of Appeal) the date of release from prison.

An example of the "narrow" view can be found in Ohio, where the state supreme court identified this Court's "unwavering commitment to a narrow definition of a prior conviction" when it held that a juvenile non-jury adjudication was not the sort of prior conviction the exception would permit a judge to find as part of a later enhancement. *State v. Hand*, 73 N.E.3d 448, 458-59 (Ohio 2016). This view was in contrast to a "broad" view, however, as advocated in cases such as *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002). There, the Eighth Circuit held that juvenile adjudications "can rightly be characterized as 'prior convictions' for *Apprendi* purposes." *Id.* at 1033.

The *Hand/Smalley* split with regard to juvenile adjudications is not directly at issue in this case. But an ultimate decision by this Court reversing the judgment below could work to resolve this and other splits by simply making clear there is no prior record exception to the Sixth Amendment. Even if this Court were to decide this case on the second question presented, rather than abandoning the prior record exception altogether, that decision would help resolve the split between the "narrow" and "broad" interpretations of the exception by providing more analysis, as

well as another data point, for courts to draw upon.

The issues raised in the questions presented are of great importance, the state courts in Florida have reached the wrong result, and this case is an ideal vehicle for this Court to address the prior-record elephant in the room head on. But more than that, this case would allow this Court to resolve unknown numbers of splits on issues both major and minor by simply doing away with the subject of the disagreement. The belief that there is a prior record exception has caused rifts in analysis, theory, and application. Clarifying and correcting that belief, by granting this petition for a writ of certiorari, would resolve those conflicts in one fell swoop.

CONCLUSION

For these reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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