No. ____________

IN THE SUPREME COURT OF THE UNITED STATES

DANYEL BLACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether a Florida controlled substances offense, which does not require proof that the defendant knew of the illicit nature of the controlled substance, can qualify as a predicate "serious drug offense" under the Armed Career Criminal Act?

II.

Whether the Sixth Amendment requires that the fact of a defendant's prior conviction be alleged in the indictment and submitted to a jury if the Government intends to use that prior conviction to trigger a sentencing enhancement that would increase the mandatory minimum penalties that the defendant is facing?

III.

Whether law enforcement violated the Petitioner's Fourth Amendment rights when it searched the Petitioner residence during a warrantless probation "compliance search"?

LIST OF PARTIES

The parties to the judgment from which review is sought are the Petitioner and appellant in the lower court, Danyel Black, and the Respondent and appellee in the lower court, the United States of America.

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OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court in an unpublished opinion, *United States v. Danyel Black*, --- Fed.Appx. ----, No. 20-14280 (11th Cir. Jan. 5, 2022), which is attached hereto as Appendix A.

GROUNDS FOR JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its panel opinion on January 5, 2022. *See* Appendix A. Petitioner thereby seeks the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) through the filing of the instant petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend. VI

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

STATEMENT OF THE CASE

The events at issue in this case arose from a warrantless search and a subsequent search pursuant to a warrant of an apartment where Petitioner Danyel Black was residing. (Doc. 32 at 1-3.) At the time of the searches, Mr. Black was serving a term of probation imposed by a Florida state court on convictions for possession of controlled substances and driving under the influence. (Doc. 38 at 1; 99 at 82-84.)

The initial search occurred as a probation "compliance search" based on a tip the Bureau of Alcohol, Tobacco, and Firearms ("ATF") received from an undisclosed inmate. The inmate alleged Mr. Black was in possession of a firearm and involved with the distribution of narcotics. (Doc. 32 at 2; 38 at 2; 98 at 16-17.) On the evening of February 19, 2019, the state probation office, with the assistance of law enforcement, conducted the warrantless search of the apartment Mr. Black was residing in. (Doc. 99 at 90-93, 96.) The Government would allege in a later motion hearing that Mr. Black smelled of marijuana and had a marijuana cigarette in his vehicle when he met with probation officers at the residence for the home visit. (Doc. 98 at 16.) Mr. Black, however, had a medical marijuana license from the State of Florida. (Doc. 98 at 18; 99 at 84-85.)

During the warrantless search, a baggie containing white powder was allegedly found in a nightstand on the left side of the bed in the master bedroom along

with razor blades and a Crown Royal baggie with some white substance on it.[1] (Doc. 99 at 120, 123.) In a linen closet in an area that led to the master bedroom door, a probation officer found a black case that contained a firearm magazine with ammunition. (Doc. 99 at 144-45.) A third probation officer found a Pyrex dish with white residue in it and a scale under the kitchen sink. (Doc. 99 at 159.) A pink purse was located next to the items found under the sink. (Doc. 99 at 161.)

After being advised of the probation officers' observations, law enforcement secured the residence and sought and obtained a search warrant. (Doc. 99 at 170.) They executed the search warrant later that night. (Doc. 100 at 65, 124.) During that search, a .380 firearm was found in a dresser drawer. (Doc. 100 at 42-43.) The dresser that contained the firearm was located in what appeared to be a child's room and was alongside women's clothing and a woman's personal item. (Doc. 100 at 44-45.)

Law enforcement also conducted a search of Mr. Black's vehicle. (Doc. 100 at 19-20.) Inside the vehicle, they found $1,865.00. (Doc. 100 at 38.) Law enforcement did not, however, find any cocaine or firearms in the vehicle. (Doc. 100 at 19-20.)

Appellant Danyel Black was thereafter charged by indictment in the United States District Court for the Middle District of Florida, Tampa Division, with one count of possession of a firearm by a convicted felon pursuant to 18 U.S.C. §§ 922(g)(1), 924(e) [Count One] and one count of possession of a mixture or substance

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[1] Probation had purportedly identified that bed as a bed where Mr. Black had slept. (Doc. 99 at 121.) A probation officer testified at trial that the quantity of powder found was indicative of personal use. (Doc. 99 at 131.)

containing cocaine pursuant to 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) [Count Two]. (Doc. 1.)

Prior to trial, Mr. Black moved to suppress the fruits of the warrantless search of the apartment, asserting that law enforcement lacked reasonable suspicion of criminal activity to justify the search. (Doc. 32.) The Government first argued in response that, pursuant to *Samson v. California*, 547 U.S. 843, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006), reasonable suspicion was not needed to support a search of a probationer's residence. (Doc. 98 at 9.) It additionally argued that Mr. Black had consented to searches of his residence when he signed a probation order that was accompanied with instructions that included, in a section titled "home verifications," the language "Probation officers will conduct home verifications routinely and need to have access to your residence. Probation officers have the right to search your residence." (Doc. 98 at 10-12; Gov. Ex. 1.) Finally, the Government argued that Mr. Black had a history of offenses involving controlled substances. (Doc. 98 at 15-17.) It specifically referenced an incident that occurred on November 2, 2018, while Mr. Black was on probation, in which a traffic stop was conducted of a vehicle being driven by Mr. Black and a baggie containing cocaine that was found therein. (Doc. 98 at 15.) The Government acknowledged that a state prosecutor dismissed criminal charges in a case stemming from that traffic stop. (Doc. 98 at 15.) It would further allege Mr. Black's history, coupled with the tip ATF received and other factors that the District Court did not seemingly rely on, supported the warrantless search. (Doc. 98 at 15-17.)

Mr. Black replied that reasonable suspicion of criminal activity was still required to support a search of his residence despite the form language of the probation instructions, particularly given that Mr. Black did not have the ability to negotiate the terms of the probation. (Doc. 98 at 12-13.) He further argued that no such reasonable suspicion supported the warrantless search. (Doc. 98 at 17.)

The District Court went on to deny the motion to suppress, holding:

> THE COURT: Okay. Well, I'm going to start with the Order of Probation, and my ruling is that that Order itself gave permission for the probation officer to search the home, and that Mr. Black signed the document that had the consent provision on it. So that's like him giving consent for the search of his home.
>
> Going to the next step, even beyond that, the Government has argued that the *US vs. Walker*[2] case says that no reasonable suspicion is required. I'm not aware of that because I will acknowledge on the record I have not read *US vs. Walker*. So I'm going to proceed on the more conservative route that reasonable suspicion is required, as explained in the *Yuknavich* case, *US vs. Y-U-K-N-A-V-I-C-H*, 419 F.3d 1302, 11th Circuit, 2005, and I find that the probation officers did have reasonable suspicion to conduct the search.
>
> First, the probation officer received a tip that was passed along by ATF that Mr. Black has violated probation by selling drugs and possessing firearms. The probation officer reviewed Mr. Black's file, which would tell the probation officer the long history of drug offenses, and there was a recent finding by a Court that Mr. Black had violated his probation. So that would tell the probation officer that he was violating his probation recently. Therefore, I find that the probation officer had a reasonable suspicion to conduct a compliance search. That compliance search was apparently not overly thorough because it did not find the gun, and the law enforcement officer got a search warrant based on what the probation officer did find, and it was the more thorough search under the search warrant that discovered the evidence that I think the Defense is trying to suppress, is that correct?

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[2] It appears, based on a review of the transcript of the motion hearing, that the District Court may have been intending to refer to the Government's discussion of *Samson v. California*, 547 U.S. 843, when it discussed *United States v. Walker*.

. . .

> THE COURT: All right. So, I deny the Motion to Suppress both as to the evidence found in the compliance search and as to the evidence found pursuant to the search warrant.

(Doc. 98 at 18-20.)

The case then proceeded to a jury trial beginning on November 14, 2019. (Doc. 99.) The jury went on to find Mr. Black guilty as charged as to count one. (Doc. 70.) On count two, the jury found Mr. Black guilty of the lesser-included charge of unlawful possession of cocaine. (Doc. 70.)

On November 4, 2020, the case proceeded to sentencing. (Doc. 105.) The Presentence Report alleged that Mr. Blank was subject to a 180-month mandatory minimum sentence on count one under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA") based on prior Florida state convictions for a) Resisting an Officer with Violence, from May 21, 2013, b) Resisting Arrest with Violence from September 1, 2011, and c) Possession of Cocaine with Intent to Sell and/or Deliver from February 22, 2001. (PSR ¶ 38.) Mr. Black initially objected to the application of the ACCA based on the fact that the Florida drug offense that made up one of the requisite predicate convictions lacked a *mens rea* element so as to qualify it as a "serious drug offense." (PSR at 50-51.) At sentencing, Mr. Black withdrew that objection based on this Court's then-recently decided opinion *Shular v. United States*, --- U.S. ---, 140 S.Ct. 779, 206 L.Ed.2d 81 (2020). (Doc. 114 at 5.)

The District Court sentenced Mr. Black to concurrent sentences of 180 months imprisonment on count one and 24 months imprisonment on count two. (Doc. 105.)

The court further imposed concurrent terms of supervised release of 60 months on count one and 12 months on count two. (Doc. 105.)

The Direct Appeal to the Eleventh Circuit

Mr. Black then appealed the convictions and sentences to the United States Court of Appeals for the Eleventh Circuit. He raised three grounds, including the question of whether the District Court erred in denying his motion to suppress and whether the District Court committed plain error in sentencing him pursuant to the Armed Career Criminal Act ("ACCA"). On January 5, 2022, the Eleventh Circuit issued a panel opinion affirming the convictions and sentences.

Concerning the motion to suppress issue, the Eleventh Circuit provided that "[p]robationers are not subject to reasonable suspicion searches solely because they are on probation. *United States v. Carter*, 566 F.3d 970, 973 (11th Cir. 2009). However, reasonable suspicion may be enough to support a warrantless search of a probationer's house when the *Knights* balancing test is applied." App. A at 3. The court went on to hold:

> The district court did not err when it denied Black's motion to suppress because his expectation of privacy in his home was diminished when he received probation instructions that granted his probation officer the right to search his home, and, when balanced against the Government's interest in preventing drug and violence related crimes, the warrantless search of his apartment by his probation officer did not violate the Fourth Amendment. Black received probation instructions with his probation order that gave him notice probation officers would conduct routine home verifications and had the right to search his residence. Black signed these probation instructions and certified he understood them. Therefore, his expectation of privacy in his home was diminished. See *Knights*, 534 U.S. at 119. Moreover, days before the probation officer searched Black's home, Black conceded the ATF received a tip that he possessed a firearm and was distributing illegal narcotics. See *Griffin*,

> 483 U.S. at 871-72. Since the Government has a high interest in preventing drug and violence-related crimes, under the *Knights* balancing test, the Government had a legitimate interest in preventing those crimes. *See Griffin*, 483 U.S. at 871; *Carter*, 566 F.3d at 974-75. Therefore, the Government's interest in preventing drug and violence related crimes coupled with Black's already-diminished expectation of privacy while he was on probation, supports that the probation officer's initial warrantless search of Black's home did not violate the Fourth Amendment. *See Knights*, 534 U.S. at 119.
>
> In turn, the subsequent basis for a search warrant was not violative of the Fourth Amendment because there was probable cause to issue a search warrant based upon the probation officer's discovery of illegal narcotics and ammunition in Black's apartment, so the evidence collected by law enforcement was not "fruit of the poisonous tree." *See Segura v. United States*, 468 U.S. 796, 804 (1984) (explaining an unconstitutional search or seizure extends from primary evidence obtained illegally to any other evidence obtained as a direct result of the illegal search with the latter evidence termed, "fruit of the poisonous tree"). Accordingly, the district court did not err when it determined Black's Fourth Amendment rights were not violated and it denied the motion to suppress the evidence.

App. at 4-5.

Turning to the question of whether Mr. Black was subject to the ACCA provisions, the Eleventh Circuit reasoned that Mr. Black acquiesced to the District Court's classification of his Florida controlled substances conviction as an ACCA predicate "serious drug offense" and that he could not argue otherwise in his direct appeal. App. A at 7.

This petition follows.

REASONS FOR GRANTING THE PETITION

I.

THE QUESTION OF WHETHER A FLORIDA CONTROLLED SUBSTANCES OFFENSE, WHICH DOES NOT REQUIRE PROOF THAT THE DEFENDANT KNEW OF THE ILLICIT NATURE OF THE CONTROLLED SUBSTANCE, CAN QUALIFY AS A PREDICATE "SERIOUS DRUG OFFENSE" UNDER THE ARMED CAREER CRIMINAL ACT.

Mr. Black's prior conviction for a Florida controlled substances offense should not have qualified as a "serious drug offense" because the Florida offense lacked a *mens rea* element of the illicit nature of the controlled substance. Section 924(e), the Armed Career Criminal Act ("ACCA") calls for the imposition of a mandatory sentence of 15 years imprisonment on a conviction under 18 U.S.C. §922(g) if the defendant has "three previous convictions...for a violent felony or a serious drug offense, or both, committed on occasions different from one another..." *United States v. Sneed*, 600 F.3d 1326, 1329 (11th Cir. 2010) *quoting* 18 U.S.C. § 924(e)(1). The statute goes on to define the term "serious drug offense" as:

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act

> (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law...

18 U.S.C. § 924(e)(2)(A)(i)-(ii). The statute then defines the term "violent felony" as:

> ...any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another...

18 U.S.C. § 924(e)(2)(B)(i)-(ii). 18 U.S.C. § 924(c)(3). The first clause in the violent felony definition is typically referred to as the "elements" or "force" clause. The second clause is referred to as the "residual clause."

This Court has held that the label a state attaches to an offense is not indicative of whether the offense qualifies as a predicate offense under the ACCA. *United States v. Palomino-Garcia*, 606 F.3d 1317, 1326 (11th Cir. 2010) *citing Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) and *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). In *Taylor*, *Shepard*, and the cases that have followed them, courts have addressed the use of "categorical approach" and "modified categorical approach" in making the determination as to whether a defendant's sentence and/or Guidelines range should be enhanced based on a prior conviction. Under the categorical approach, a court looks to the law underlying the prior conviction to determine if the offense at issue is the equivalent of one of the generic enumerated offenses. *Palomino-Garcia*, 606 F.3d

at 1331-34, 1336. If the law underlying the prior conviction does not fall into the generic class of enumerated offenses, but rather, "contains different statutory phrases -- some of which require the use of force and some of which do not -- the judgment is ambiguous and [courts should therefore] apply a 'modified categorical approach.'" *Id. citing Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265, 1273, 176 L.Ed.2d 1 (2010).

The modified categorical approach is to be employed in cases involving such divisible statutes, *i.e.* a statute that proscribes alternative means of committing an offense, with one or more alternatives being potential crimes of violence and one or more other alternatives that would not be crimes of violence. *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). Under the modified categorical approach, a court may look to the actual offense of conviction, and the alternative means of prosecution it fell under within the statute of conviction, to determine if the elements of the crime of conviction are consistent with the elements of the generic offense. *Id.* at 257. In making that determination, the Court may consult the "narrow universe of *Shepard* documents", including the transcript of the defendant's plea colloquy, the charging documents, and any factual findings of the trial court, to determine if the offense would otherwise qualify as a crime of violence. *Palomino-Garcia*, 606 F.3d at 1337 (citations omitted).

In 2002, the Florida legislature created a statute that specifically held that knowledge of the illicit nature of a controlled substance is not an element in any offense set forth in the controlled substances statutes listed in chapter 893 of the

Florida Statutes. *See* FLA. STAT. § 893.101(2). The statute specifically states that prior Florida Supreme Court opinions that held that the state must prove a defendant's knowledge of the illicit nature of the substance were contrary to legislative intent. *Id.* at 893.101(1). Consequently, the Florida drug offense that was used as a predicate "serious drug offense" in this case lacked a *mens rea* element of knowledge of the illicit nature of the controlled substance.

This Court recently held in *Shular v. United States*, --- U.S. ---, 140 S.Ct. 779, 206 L.Ed.2d 81 (2020), that the determination as to whether a prior conviction qualifies as a "serious drug offense" under the ACCA does not require a comparison to a generic offense. *Id.* at 782. The Court found that the "'serious drug offense' definition requires only that the state offense involve the conduct specified in the federal statute; it does not require that the state offense match certain generic offenses." *Id.* The *Shular* defendant had challenged the qualifications of his Florida convictions for sale of cocaine and possession of cocaine with intent to sell. *Id.* at 784. He argued that the elements of the state offenses did not match the elements of the generic offense because the Florida offenses did not require a *mens rea* element that the defendant had knowledge of the illicit nature of the drugs. *Id.* The Court reasoned that the proper inquiry for the ACCA predicate determination is whether the elements of the state offense involve "the *conduct* of 'manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance.'" *Id.* at 787 (emphasis in original). It also noted that the lack of *mens rea* was overstated by the *Shular* defendant because the Florida statues provide for an affirmative defense

of lack of knowledge of the illicit nature of the substance despite not requiring that the State prove such an element. *Id.* at 787 *citing* FLA. STAT. § 893.101(2); Fla. Crim. Jury Instr. § 25.2 (2020). Nonetheless, the Court also noted that the *Shular* defendant had initially argued in the alternative that "even if § 924(e)(2)(A)(ii) does not call for a generic-offense-matching analysis, it requires knowledge of the substance's illicit nature." *Id.* at 787 n.3. The Court specially declined to address that question, however, because the *Shular* defendant had disclaimed that argument at the certiorari stage. *Id.*

Mr. Black submits that, given the severe nature of the mandatory penalty required under the ACCA, Congress did not likely intend for a strict liability offense, such as a Florida controlled substances offense, to qualify as a "serious drug offense." *See Staples v. United States*, 511 U.S. 600, 616-17, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994) (reading the statute at issue to require *mens rea*, which was supported by the "potentially harsh penalty" of up to 10 years in prison); *Begay v. United States*, 553 U.S. 137, 144-47, 128 S.Ct. 1581170 L.Ed.2d 490 (2008) *abrogated by Johnson, supra*, 576 U.S. 591 (interpreting the ACCA's residual clause, prior to *Samuel Johnson*, to be limited to purposeful offenses and considering the ACCA's 15-year mandatory-minimum sentence in reaching this conclusion); *McFadden v. United States*, 576 U.S. 186, 135 S. Ct. 2298, 2302, 2305, 192 L.Ed.2d 260 (2015) (interpreting 21 U.S.C. § 813 to require that the defendant know that the substance is a controlled substance, or know the specific substance involved). This Court, furthermore, applies "the presumption in favor of scienter even when Congress does not specify any scienter in

the statutory text." *Rehaif v. United States*, --- U.S. ---, 139 S. Ct. 2191, 2195, 204 L.Ed.2d 594 (2019) *citing Staples*, 511 U.S. at 606. For these reasons, Mr. Black respectfully submits that his prior Florida drug conviction did not qualify as a serious drug offense under the ACCA.

Mr. Black now, thereby, requests this Honorable Court to grant certiorari to determine the question of whether a Florida controlled substances conviction can qualify as a "serious drug offense" when it lacks a *mens rea* element requiring knowledge of the illicit nature of the controlled substance. As this Court observed in *Shular*, Florida dispensed with the *mens rea* element 20 years ago. As a result, an increasing number of defendants charged with federal firearms offenses will potentially face enhanced sentencing sanctions under the Armed Career Criminal Act based on prior Florida controlled substances convictions. Given the extremely detrimental effect the ACCA can have on a defendant's sentence, district courts are in need of greater direction in making the determination as to whether proposed predicate ACCA offenses are separate and successive offenses or are a single criminal episode for purposes of the ACCA. For the reasons set forth above, Petitioner Black respectfully submits that the question presented herein is one of great importance that has not yet been directly decided by this Court and one which will arise frequently in the lower courts in the future. SUP. CT. R. 10(c).

II.

THE QUESTION OF WHETHER A PRIOR CONVICTION THAT CAN BE USED TO ENHANCE A MANDATORY MINIMUM SENTENCE IS AN ELEMENT OF THE OFFENSE THAT MUST BE ALLEGED IN THE INDICTMENT.

This Court held in *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct 2151, 186 L.Ed.2d 314 (2013), that "any fact that increases the mandatory minimum [sentence for a criminal offense] is an element that must be submitted to the jury." *Id* at 2155. In so holding, the Court essentially extended the requirements of the landmark decision *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct 2348, 147 L.Ed.2d 435 (2000), to apply to facts underlying mandatory minimum sentencing enhancements. *Id.* Likewise, in holding that any fact that increases a mandatory minimum sentence is an element of the offense, the Court also essentially required that any such fact must also be set forth in the indictment. *See id* at 108-17 (tracing and discussing the legal history leading to the Court's conclusion and finding "[f]rom these widely recognized principles followed a well-established practice of including in the indictment, and submitting to the jury, every fact that was a basis for imposing or increasing punishment." *Id.* at 109-10).

When it decided *Alleyne*, this Court stopped short of addressing whether its holding in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), would be affected by its holding in *Alleyne*. *Id.* at 111 n.1. In *Almendarez-Torres*, which was decided prior to *Apprendi*, the Court held that a prior

conviction that triggers a sentencing enhancement need not be alleged in the indictment or proven beyond a reasonable doubt. *Almendarez-Torres*, *supra*, 523 U.S. 224. In the *Alleyne* opinion, the Court reasoned that, because *Alleyne* did not involve a sentencing enhancement brought on by a prior conviction, it did not have reason to readdress the *Almendarez-Torres* holding. *Id.*

This Court decided *Almendarez-Torres* in 1998, two years before it would go on to decide *Apprendi*. When the Court decided *Almendarez-Torres*, it found that no constitutional violations occurred as a result of the enhancement of a defendant's potential maximum sentence from two years to twenty years based on a prior conviction that was not alleged in the indictment. Because, however, *Apprendi* and its progeny had not been decided at that point, the Court had not yet extended the Sixth Amendment protections to sentencing enhancements. As this Court is well aware, the reach of *Apprendi* has continually expanded in cases such as *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); and *Alleyne*.

Since the very beginning of the *Apprendi* chain, this Court has questioned the continued validity of *Almendarez-Torres* in light of *Alleyne*. To begin with, the *Apprendi* majority reasoned "... 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*, 530 U.S. at 489-90. A few years

later in *Shepard v. United States*, Justice Thomas wrote in a decision concurring in part with the *Shepard* majority:

> *Almendarez-Torres* like *Taylor* [*v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607] 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, 27-28 125 S.Ct. 1254, 1264 161 L.Ed.2d 205 (2005) (THOMAS, J., concurring in part). Shortly thereafter, Justice Stevens, while agreeing in a decision not to grant certiorari to readdress *Almendarez-Torres*, nonetheless, wrote "[w]hile I continue to believe that *Almendarez-Torres* was wrongly decided, that is not a sufficient reason for revisiting the issue." *Rangel-Reyes v. United States,* 547 U.S. 1200, 1201, 126 S.Ct. 2873, 165 L.Ed.2d 910 (2006) (STEVENS, J concurring in denial of certiorari). More recently, in a concurring opinion in *Descamps*, Justice Thomas noted, "[t]he only reason Descamps' ACCA enhancement is before us is because this Court has not yet reconsidered Almendarez-Torres..." *Descamps v. United States*, 570 U.S. 254, 281, 133 S.Ct. 2276, 2295 186 L.Ed.2d 438 (2013) (THOMAS, J., concurring).

In cases involving the section 922(g) charge of being a felon in possession of a firearm, section 924(a) provides for a ten-year statutory maximum sentence. 18 U.S.C. § 924(a)(2). The 15-year mandatory minimum required under section 924(e) thereby increases the sentence above the otherwise applicable statutory maximum sentence. Consequently, the *Alleyne* reasoning requires that the specific facts needed to support an ACCA sentence be charged in the indictment and admitted at the time of the plea or proven to a jury beyond a reasonable doubt. *See Shepard*, 544 U.S. at 27-28 (Thomas, J., concurring in part and concurring in the judgment). Moreover, the ACCA depends on findings of fact that go beyond the elements of the prior offenses, including findings such as whether the offenses were committed on different occasions.

In the instant case, while the indictment listed the alleged predicate offenses that would be used for the ACCA enhancement, it did not list all of the requirements needed to qualify those prior convictions as "serious drug offenses" or "violent felonies." More critically, the jury did not make the requisite findings that would be needed to qualify any of those prior convictions as ACCA qualifying predicate convictions. Consequently, the imposition of the ACCA sentence violated Mr. Black's Fifth and Sixth Amendment rights.

Mr. Black respectfully submits that the *Alleyne* holding should extend to *any* fact that triggers a sentencing enhancement, including the fact of a prior conviction. While the Court did not readdress *Almendarez–Torres* under the circumstances at issue in *Alleyne*, it explicitly stated that "*Any* fact that, by law, increases the penalty

for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 570 U.S. at 102 (emphasis added). Moreover, when this Court decided *Apprendi*, it specifically made an exception for prior conviction sentencing enhancements. *Apprendi*, 530 U.S. at 490. In *Alleyne*, on the other hand, the Court provided for no such exceptions. In contrast, the Court repeatedly stated that *any* fact that increases a mandatory minimum sentence must be an element of the offense.

Because the instant case does in fact involve a sentencing enhancement that was brought on by a prior conviction, the instant case presents an ideal scenario in which to decide if the *Alleyne* holding should extend to *any* fact that triggers a sentencing enhancement, including the fact of a prior conviction. As such, Mr. Black respectfully requests this Court to grant certiorari to decide whether the fact of prior conviction that is to be used to enhance a mandatory minimum sentence is an element of the offense that must be set forth in the indictment. In deciding that question, Mr. Black suggests that the Court would also be deciding if the reasoning of *Apprendi*, *Alleyne*, and the related Sixth Amendment cases serve to abrogate this Court's earlier holding in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

Given the reasoning of *Alleyne*, coupled with the erosion of the *Almendarez-Torres* reasoning in light of the *Apprendi* line of cases, Mr. Black respectfully requests this Court to grant certiorari in this case to readdress the holding of *Almendarez-Torres*. Based on the authorities briefly discussed above, the several post-*Apprendi*

opinions of this Court suggest that the instant question is ripe for Supreme Court review. Moreover, *stare decisis* should not be a barrier to this Court's reassessment of *Almendarez-Torres* because the question of the decision's continued validity "rests upon an interpretation of the Constitution" and "the decision has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." *United States v. Gaudin*, 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

As this Court is aware, sentencing enhancements brought on by prior convictions occur with great frequency in the federal district courts – most notably in cases involving the ACCA and in cases of enhanced penalties pursuant to 21 U.S.C. § 851. Indeed, prior convictions are perhaps the most common catalyst triggering sentencing enhancements in federal district courts. The question of whether the *Alleyne*, *Apprendi*, and related holdings apply to sentencing enhancements brought on by prior convictions or whether, in the alternative, *Almendarez-Torres* remains in full effect, is a question that would have far reaching effects in the federal district courts.

III.

THE QUESTION OF WHETHER LAW ENFORCEMENT VIOLATED THE FOURTH AMENDMENT IN SEARCHING MR. BLACK'S RESIDENCE BASED ON AN UNVERIFIED TIP AND PURSUANT TO A BLANKET SEARCH CONDITION OF MR. BLACK'S STATE PROBATION

Under the facts and circumstances of the instant case, law enforcement lacked even reasonable suspicion conduct the warrantless search of Mr. Black's residence. Because law enforcement never amassed reasonable suspicion to believe that Mr. Black was involved in criminal activity so as to justify a warrantless search, the search violated the Fourth Amendment. But for the warrantless search, law enforcement would not have a legal basis for subsequently obtaining the search warrant. Consequently, Mr. Black respectfully requests this Court to grant certiorari to decide the question of whether law enforcement's searches of Mr. Black's residence violated the Fourth Amendment. The instant question bears on the issue of law enforcement's authority to conduct searches of individuals serving terms of probation, specifically those who have signed or acquiesced to conditions of probation that would provide for searches of their residences. That issue is likely to arise in a large number of cases in the future and will likely be of concern in any scenario in which an individual is serving a term of probation.

In *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001), this Court considered the reasonableness of a search that was conducted of a probationer's residence based on reasonable suspicion of criminal activity. The *Knights* defendant was serving probation imposed by a state court under a probation

order that included a term that the defendant would submit to a search of his "person, property, place of residence, vehicle, personal effects... at any time, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." *Id.* at 114. While serving the probation term, the defendant was being investigated as a suspect in acts of arson and vandalism that occurred to the property of a utility provider. *Id.* Prior to the acts of vandalism and arson, the utility provider had filed a theft-of-services complaint against the defendant. *Id.* at 114-15. In addition, law enforcement had stopped the defendant in an area near where the arson occurred and observed pipes and gasoline in his truck prior to the arson. *Id.* at 115. After the arson, law enforcement began surveilling the defendant and observed him dispose of items believed to have been pipe bombs. *Id.* Officers later observed in the defendant's truck, "a Molotov cocktail and explosive materials, a gasoline can, and two brass padlocks that fit the description of those removed from the [vandalized property]." *Id.* Based on those observations, law enforcement decided to conduct a search of the defendant's residence. *Id.* During that search, officers found evidence linking him to the arson and vandalism. *Id.*

After he was later charged with federal offenses stemming from the acts in question, the defendant moved to suppress the evidence recovered from the search of his residence. *Id.* at 116. The district court found that the search was supported by reasonable suspicion of criminal activity but granted the motion to suppress because it reasoned that the search was conducted for "investigatory" rather than for "probationary" purposes. *Id.* When the case reached this Court, the Court held that

"the warrantless search of Knights, supported by reasonable suspicion and authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment." *Id.* at 122. In reaching that holding, the Court noted that "[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* at 118-119 *quoting Wyoming v. Houghton,* 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999). It went on to reason that when a court places a defendant on probation, the court "may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Id.* at 119. In balancing the degree of intrusion on the probationer's privacy against the degree of instruction necessary to promote a legitimate government interest, the court concluded that "no more than reasonable suspicion" was needed a search a probationer's residence. *Id.* at 121. In conducting its analysis, the Court specifically declined to rule on an argument from the Government that the defendant's acquiescence to the probation terms rendered any subsequent searches to be lawful consent searches. *Id.* at 118.

Shortly after deciding *Knights*, the Court decided *Samson v. California*, 547 U.S. 843, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006), and held that the Fourth Amendment did not preclude law enforcement from conducting a suspicionless search of a *parolee*. *Id.* at 857. In that case, the defendant had chosen to finish a California prison sentence on parole. California law permitted a prisoner to "serve his parole

period either in physical custody or elect to complete his sentence out of physical custody and subject to certain conditions." *Id.* at 851 *citing* Cal. Penal Code Ann. § 3060.5 (West 2000). If a prisoner chose to serve the parole portion out of physical custody, the individual remained "in the legal custody of the California Department of Corrections through the remainder of his term." *Id.* California law, moreover, expressly provided that any such parolee "shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." *Id.* at 846 *quoting* Cal. Penal Code Ann. § 3067(a) (West 2000). In determining whether law enforcement could conduct a suspicionless search of a California parolee subject to those conditions, the Court employed the same balancing analysis it had employed in *Knights*. *Id.* at 850-56. The Court went on to reason that "[t]he extent and reach of these conditions clearly demonstrate that parolees like petitioner have severely diminished expectations of privacy by virtue of their status alone." *Id.* at 852. On the other side of analysis, the Court found that "[t]he State's interests, by contrast, are substantial. This Court has repeatedly acknowledged that a State has an 'overwhelming interest' in supervising parolees because 'parolees ... are more likely to commit future criminal offenses.'" *Id.* at 853 *quoting Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 365, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998). It thereby concluded that a search of a parolee could occur even without reasonable suspicion. When it decided *Sampson*, the Court again declined to address whether acquiescence to search conditions would render any such search a lawful consent

search: "Because we find that the search at issue here is reasonable under our general Fourth Amendment approach, we need not reach the issue whether 'acceptance of the search condition constituted consent in the *Schneckloth [v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973),] sense of a complete waiver of his Fourth Amendment rights.'" *Id.* at 852 n.3 *quoting Knights*, 534 U.S. at 118.

In comparison to the scenario at issue in *Sampson*, in *Knights*, the defendant's probation order specifically held that the defendant would submit to searches of his person and property at any time. *Knights*, 534 U.S. at 114. The Court still, nonetheless, analyzed the Fourth Amendment reasonableness of the search under the balancing test. The Court's analysis thereby indicates that a probationer's agreement to a search condition should not be the sole legal justification for a search of the defendant's property. The Eleventh Circuit stopped short of addressing the District Court's conclusion that the search condition rendered the search of Mr. Black's residence a valid consent search. The fact that the Eleventh Circuit found the search to have been reasonable under the circumstances of the instant case indicates, however, that the search condition of probation would have essentially justified a search of Mr. Black's residence for any pretextual reason.

The totality of the circumstances in the instant case did not provide probation or law enforcement officers with "a sufficiently high probability that criminal conduct is occurring" so as to provide reasonable suspicion for the search of the apartment. *Knights*, 534 U.S. at 121. The District Court and the Eleventh Circuit erroneously found the existence of reasonable suspicion based on the ATF tip, coupled with Mr.

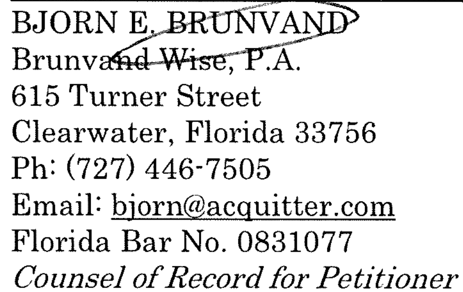
Black's history. Those factors, however, rendered law enforcement's basis for the search nothing more than a hunch that criminal activity was occurring or had already occurred. A hunch is not sufficient to support a reasonable suspicion search. *Id.*

In this case, neither probation nor law enforcement made any meaningful attempts to corroborate the tip that ATF received. They, likewise, made no observations to support the reliability of the tip or to otherwise suggest that Mr. Black was involved in any criminal activity. Instead, they conducted the initial warrantless search based only on the tip and the consideration of Mr. Black's history. Those factors did not amount to reasonable suspicion. Under the circumstances, probation and, in turn, law enforcement used the probation search condition as a pretextual basis for searching Mr. Black's apartment. For those reasons, Mr. Black respectfully requests this Honorable Court to exercise its supervisory powers to consider whether the Eleventh Circuit "departed from the accepted and usual course of judicial proceedings" in holding the searches of Mr. Black's residence did not violate the Fourth Amendment. SUP. CT. R. 10(a).

CONCLUSION

Based on the foregoing, the Petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari.

Respectfully Submitted on this 5th day of April 2022,



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APPENDIX A

ELEVENTH CIRCUIT OPINION BELOW