No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ORTAVIOUS DEVON WILSON,
Petitioner,

v.

RICKY D. DIXON,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner's sentence violated his Sixth Amendment right to a jury trial when the trial court imposed a minimum mandatory sentence of life imprisonment based on *the trial court's* finding that the Petitioner is a prison releasee reoffender (i.e., the trial court made a factual finding that the Petitioner's offenses were committed within three years of the date that he was released from prison) – a conclusion that was not found beyond a reasonable doubt by *the jury*. Alternatively, whether *Almendarez-Torres v. United States*, 523 U.S. 224 (1997), is still good law in light of the Court's recent Sixth Amendment jurisprudence.

2. Whether the court of appeals in this case improperly applied the "reasonable jurists could debate" certificate of appealability standard articulated by the Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

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The Petitioner, ORTAVIOUS DEVON WILSON, requests the Court to issue a writ of certiorari to review the judgment/order of the Eleventh Circuit Court of Appeals entered in this case on March 3, 2022. (A-?).[1]

D. CITATION TO ORDER BELOW

The order below was not reported.

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the final judgment of the Eleventh Circuit Court of Appeals.

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

Section 775.082(9), Florida Statutes, states in relevant part:

> (a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
>
> . . . .
>
> b. Murder;
>
> . . . .
>
> g. Robbery;
>
> . . . .
>
> within 3 years after being released from a state correctional facility

[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

operated by the Department of Corrections or a private vendor or within 3 years after being released from a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.

. . . .

3. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:

a. For a felony punishable by life, by a term of imprisonment for life;

. . . .

(b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

In 2005, the Petitioner was convicted following a jury trial of second-degree felony murder and robbery. At the sentencing hearing, the trial court sentenced the Petitioner to life imprisonment on both counts (finding that the Petitioner is a prison releasee reoffender pursuant to section 775.082(9), Florida Statutes). (A-8). On direct appeal (and in a post-trial motion pursuant to Florida Rule of Criminal Procedure 3.800(b)), the Petitioner argued that his prison releasee reoffender sentence violated his Sixth Amendment right to a jury trial. The Florida First District Court of Appeal *per curiam* affirmed the Petitioner's convictions and sentence. *See Wilson v. State*, 130 So. 3d 232 (Fla. 1st DCA 2014).

Following the direct appeal – and after the Petitioner unsuccessfully sought postconviction relief in state court – the Petitioner timely filed a petition pursuant to 28 U.S.C. § 2254. In his § 2254 petition, the Petitioner again argued that his prison releasee reoffender sentence violated his Sixth Amendment right to a jury trial. Thereafter, the magistrate judge issued a report and recommendation recommending that the Petitioner's § 2254 petition be denied. (A-7). After the Petitioner filed objections, the district court denied the Petitioner's § 2254 petition. (A-5, A-6).

The Petitioner subsequently filed an application for a certificate of appealability in the Eleventh Circuit Court of Appeals. On March 3, 2022, a single circuit judge denied a certificate of appealability on the Petitioner's § 2254 claim. (A-3).

H. REASON FOR GRANTING THE WRIT

The questions presented are important.

The Petitioner contends that the Eleventh Circuit erred by denying him a certificate of appealability on his Sixth Amendment claim. As explained below, the Petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

This case provides the Court with an opportunity to decide whether the Sixth Amendment right to a jury trial is implicated when the *timing* of a defendant's previous conviction is a necessary element of a sentencing enhancement. The first questions presented in this case are as follows:

> Whether the Petitioner's sentence violated his Sixth Amendment right to a jury trial when the trial court imposed a minimum mandatory sentence of life imprisonment based on *the trial court's* finding that the Petitioner is a prison releasee reoffender (i.e., the trial court made a factual finding that the Petitioner's offenses were committed within three years of the date that he was released from prison) – a conclusion that was not found beyond a reasonable doubt by *the jury*. Alternatively, whether *Almendarez-Torres v. United States*, 523 U.S. 224 (1997), is still good law in light of the Court's recent Sixth Amendment jurisprudence.

In the instant case, the Petitioner's sentence was increased due to facts/elements not charged in the information nor proven beyond a reasonable doubt to the jury. The information is silent regarding any prior felonies for which the Petitioner was convicted. The jury was never asked to determine whether the Petitioner had previously been convicted of a felony (and specifically, whether the Petitioner committed the instant offenses within three years after being released from prison). The Petitioner's sentence was severely increased due to the *trial court's* finding that

he is a prison releasee reoffender (he was sentenced to a mandatory minimum sentence of life imprisonment with no possibility of gain time). *See* § 775.082(9)(b), Fla. Stat.[2] Accordingly, the Petitioner submits that his sentence violates his Sixth Amendment right to a jury trial.

In *Alleyne v. United States*, 570 U.S. 99, 116 (2013), the Court held that "facts that increase mandatory minimum sentences must be submitted to the jury" and established "beyond a reasonable doubt." In the instant case, the issue of whether the Petitioner is a prison releasee reoffender was not submitted to the jury and found by the jury beyond a reasonable doubt (i.e., the trial court – not the jury – made the factual finding that the Petitioner was a prison releasee reoffender).

The Petitioner is aware that under the current law, there is a "prior conviction exception" to the Sixth Amendment right to a jury trial (i.e., when a sentencing enhancement is based solely on the existence of a "prior conviction," the existence of the prior conviction need not be found beyond a reasonable doubt by the jury). *See Almendarez-Torres v. United States*, 523 U.S. 224 (1997). However, in order to find that a defendant is a prison releasee reoffender, more is required than just establishing the "prior conviction." In addition to establishing the "prior conviction," a factual determination must be made as to whether the sentencing offense was committed *within three years of the defendant's release from prison*. *See* § 775.082(9)(a), Fla. Stat.

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[2] But for the imposition of the minimum mandatory prison releasee reoffender sentences, the Petitioner would have been sentenced pursuant to the Florida Criminal Punishment Code (and the trial court would have been afforded discretion to impose sentences of less than life imprisonment).

Pursuant to *Alleyne*, this factual finding as to whether the sentencing offense was committed within three years of the defendant's release from prison must be submitted to the jury and found beyond a reasonable doubt before a court can impose the minimum mandatory prison releasee reoffender sentence. *See Alleyne*, 570 U.S. at 116 ("facts that increase mandatory minimum sentences must be submitted to the jury" and established "beyond a reasonable doubt").

The Petitioner notes that the Ninth Circuit Court of Appeals has held that the Sixth Amendment right to a jury trial is implicated when the *timing* of a defendant's previous conviction is a necessary element of a sentencing enhancement. In *United States v. Salazar-Lopez*, 506 F.3d 748 (9th Cir. 2007), the Ninth Circuit considered 8 U.S.C. § 1326(b)(1), which provides for a sentencing enhancement if a defendant is an alien who has been removed from the United States *following a felony conviction.* The Ninth Circuit held that the timing of the defendant's previous conviction was a "fact other than a prior conviction":

> [T]he temporal relationship between Salazar-Lopez's removal and his previous conviction was a fact that increased the maximum sentence that he faced. As such, the date of the removal, or at least the fact that Salazar-Lopez had been removed after his conviction, should have been alleged in the indictment and proved to the jury.

Salazar-Lopez, 506 F.3d at 752. Similarly, in light of the prison releasee reoffender enhancement in the instant case, the temporal relationship of the instant offenses and the Petitioner's previous release from prison was a "fact other than a prior conviction." In order to establish that the Petitioner qualified as a prison releasee reoffender, the State was required to establish that the Petitioner was released from prison within

three years from the date of the alleged offenses in the instant case. *See* § 775.082(9)(a)1., Fla. Stat. Pursuant to *Salazar-Lopez*, the State was required to prove the Petitioner's prison release date to the jury. Because this alleged "fact" was not found beyond a reasonable doubt by the jury, the imposition of the minimum mandatory prison releasee reoffender sentence in this case violated the Petitioner's Sixth Amendment rights.

Notably, last year – in *State v. Neal*, case number 1999-CF-10077 (Florida Ninth Circuit/Orange County) – a Florida judge considered this *exact* issue and found that Florida's prison releasee reoffender statute is unconstitutional pursuant to *Alleyne*. (A-86, A-88).

Based upon the foregoing, the Petitioner contends that his sentence violates the Sixth Amendment. The state courts' rulings on this matter are contrary to and an unreasonable application of the Sixth Amendment. Moreover, the state courts' rulings are based on an unreasonable determination of the facts in light of the evidence presented in the proceeding.

Alternatively, the Petitioner requests the Court to consider whether *Almendarez-Torres* is still good law in light of the Court's recent Sixth Amendment jurisprudence. In *Almendarez-Torres*, the Court held that the prior aggravated felony conviction enhancement prescribed in 8 U.S.C. § 1326(b) was not an element of the offense but rather a sentencing factor.[3] The Court discerned no constitutional problem

[3] At issue in *Almendarez-Torres* was a federal statute that provided a two-year prison term for a deported alien who illegally reentered the United States. *See* 8 U.S.C. § 1326(a). Another subdivision of that statute called for a twenty-year sentence

with allowing the defendant's sentence to be increased from a maximum of two years to a maximum of twenty years based on the defendant's prior aggravated felony conviction, despite the fact that the prior conviction had not been charged in the indictment. The Court held that the Constitution did not require the government to charge such prior convictions in the indictment. Accordingly, the holding in *Almendarez-Torres* is arguably limited to the issue of due process/notice and whether a prior conviction must be alleged in the charging document. The opinion did not address whether a sentence enhancement based on a prior conviction implicates the Sixth Amendment right to a trial by jury.

As Justice Scalia pointed out in his dissenting opinion in *Almendarez-Torres*, "there is no rational basis for making recidivism an exception" to the general rule that any fact altering the maximum penalty for a crime must be proved to a jury beyond a reasonable doubt. *Almendarez-Torres*, 523 U.S. at 258 (Scalia, J., dissenting). And, although the Court's subsequent decision in *Apprendi* casts significant doubt on both the reasoning and the result of *Almendarez-Torres*, *Apprendi* does purport to exempt

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if the defendant had been deported after being convicted of an aggravated felony. *See* 8 U.S.C. § 1326(b). The defendant in *Almendarez-Torres* was convicted under the latter provision and contended on appeal that the truth of the prior aggravated felony conviction was an element of the offense that had to be charged in the indictment.

Several of the basic premises of *Almendarez-Torres* were repudiated by the Court in *Blakely v. Washington*, 542 U.S. 296 (2004). For example, in *Almendarez-Torres*, the component of whether a particular fact increases the maximum penalty was only *one of several* components that the Court focused on to determine whether the fact of a prior aggravated felony was an element or a sentencing factor. *See Almendarez-Torres*, 523 U.S. at 242-43. In contrast, *Blakely* set forth a bright-line rule establishing that whether a particular fact increases the maximum penalty was *the determinative component*.

"the fact of a prior conviction" from its otherwise universal rule that 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." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

But for *Almendarez-Torres* and the corresponding exception to the *Apprendi* rule, the Petitioner's sentence would be unconstitutional. The Petitioner submits that the fundamental logic of the Court's subsequent decisions in *Apprendi* and *Blakely v. Washington*, 542 U.S. 296 (2004), suggest no basis for a recidivism exception. The validity of the holding in *Almendarez-Torres* has already been called into question by the Court's opinion in *Apprendi*. *Apprendi* confirmed the general Sixth Amendment rule that facts increasing the quantum of punishment that a defendant faces must be found by a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490. Although *Apprendi* did not overrule *Almendarez-Torres*, the Court made no secret that it was retreating from the broader constitutional foundations of *Almendarez-Torres*:

> 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 contest the decision's validity and we need 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 jurisprudence.

Apprendi, 530 U.S. at 489-90; *see also id.* at 487 ("*Almendarez-Torres* represents at best an exceptional departure from the historic practice that we have described."). Nevertheless, it was not necessary in *Apprendi* for the Court to actually overrule

Almendarez-Torres to find the New Jersey hate crime statute unconstitutional, as that statute raised the maximum penalty based on a judicial finding that the defendant had committed a crime for a particular purpose, not on a recidivism finding. *See Apprendi*, 530 U.S. at 491-92. Because the Court had no need to revisit the narrow holding of *Almendarez-Torres*, the exception that *Apprendi* makes for recidivism findings is perhaps best understood as an interim prudential measure.

The *Almendarez-Torres* holding has never been tested in a case (like this one) in which the lawfulness of the defendant's sentence actually depends on the validity of the exception. Thus, even if preserving *Almendarez-Torres* was prudent in the context of *Apprendi*, the former's mistakes should not be perpetuated when they would actually make a difference to the outcome.

Notably, the vote in *Almendarez-Torres* was five-four, with Justice Thomas voting with the majority. In his concurring opinion in *Apprendi*, Justice Thomas acknowledged the fallacy of the holding in *Almendarez-Torres*, stating that "one of the chief errors of *Almendarez-Torres* – an error to which I succumbed – was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence." *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring). The proper analysis, Justice Thomas continued, was instead "the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment . . . it is an element." *Id.* at 521. Thus, explained Justice Thomas, "it is evident why the fact of a prior conviction is an element under a recidivism statute." *Id.*

Eliminating the recidivism exception to *Apprendi* would keep faith with the animating principle of the Court's more recent decisions: that every fact authorizing additional punishment against a criminal defendant must have been either found by a jury or admitted by the defendant. *See Apprendi*, 530 U.S. at 490; *Blakely*, 542 U.S. at 303-04. Exempting recidivism findings from that bedrock rule is supported neither by logic nor by experience. Indeed, it is supported only by *Almendarez-Torres* itself, a decision whose assumptions and reasoning were problematic from the start and have been fatally undermined by subsequent cases.

In *Shepard v. United States*, 544 U.S. 13, 16 (2005), the Court further called into question the holding of *Almendarez-Torres*. In *Shepard*, the Court ruled that in determining whether a prior conviction qualified as a predicate felony for the Armed Career Criminal Act (ACCA),[4] when the statute of conviction is sufficiently broad to include both qualifying and non-qualifying offenses, a sentencing court "is generally limited to examining the statutory definition [of the prior offense of conviction], charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." The *Shepard* opinion comes very close to overruling *Almendarez-Torres*, but stops just short. Justice Souter wrote for a plurality of four, and Justice Thomas concurred in the result. Justice Souter reasoned that recent "[d]evelopments in the law . . . provide a further reason to adhere to the demanding requirement that any sentence under the

[4] 18 U.S.C. § 924(e).

ACCA rest on a showing that a prior conviction 'necessarily' involved . . . facts equating to generic burglary." *Shepard*, 544 U.S. at 24. Therefore, Justice Souter reasoned that *Almendarez-Torres* does not help the government: "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 the findings subject to . . . *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." *Id.* Justice Souter acknowledged that the Court was heading down the path of receding from *Almendarez-Torres*:

> The dissent charges that our decision may portend the extension of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to proof of prior convictions, a move which (if it should occur) "surely will do no favors for future defendants in Shepard's shoes." According to the dissent, the Government, bearing the burden of proving the defendant's prior burglaries to the jury, would then have the right to introduce evidence of those burglaries at trial, and so threaten severe prejudice to the defendant. It is up to the future to show whether the dissent is good prophesy, but the dissent's apprehensiveness can be resolved right now, for if the dissent turns out to be right that *Apprendi* will reach further, any defendant who feels that the risk of prejudice is too high can waive the right to have a jury decide questions about his prior convictions.

Shepard, 544 U.S. at 26 n.5.

After *Shepard*, it is clear that several members of the Court have had "serious constitutional doubt[s]" about the continuing viability of *Almendarez-Torres*. Justice Thomas goes further in his *Shepard* concurrence, writing that "a majority of the Supreme Court now recognizes that *Almendarez-Torres* was wrongly decided":

> *Almendarez-Torres* . . . 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 248-49 (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting);

> *Apprendi*, *supra*, at 520-21 (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, 581-82 (2002) (Thomas, J., dissenting).

Shepard, 544 U.S. at 27-28 (Thomas, J., concurring).

Accordingly, after *Apprendi*, *Blakely*, *Shepard*, and *Alleyne*, there exists no justification to exempt prior convictions from the Sixth Amendment. As the Court stated in *Blakely*, "The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the unanimous suffrage of twelve of his equals and neighbors rather than a lone employee of the State." *Blakely*, 542 U.S. at 313-14 (citation omitted). The Sixth Amendment's bedrock principle applies equally to the accusation that a defendant has been convicted of previous crimes.

In light of the foregoing, the Court should grant this petition to address the first questions presented in this case. The resolution of these questions has the potential to impact numerous criminal cases nationwide.

The second question presented in this case is as follows:

> Whether the court of appeals improperly applied the "reasonable jurists could debate" certificate of appealability standard articulated by the Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

28 U.S.C. § 2253(c)(1) provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . ." 28 U.S.C. § 2253(c)(2) further provides that "[a] certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right." Finally, 28 U.S.C. § 2253(c)(3) provides that "[t]he certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

The provisions of 28 U.S.C. § 2253(c)(1) were included in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which amended the statute governing appeals in habeas corpus and postconviction relief proceedings. In *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), the Court observed that a certificate of appealability ("COA") will issue only if the requirements of § 2253 have been satisfied. "§ 2253(c) permits the issuance of a COA only where a petitioner has made a substantial showing of the denial of a constitutional right." *Id.* "Under the controlling standard, a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.*

The Court in *Miller-El* recognized that a determination as to whether a certificate of appealability should be issued "requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* The Court looked to the district court's application of AEDPA to Mr. Miller-El's constitutional claims and asked

whether that resolution was debatable amongst jurists of reason. The Court explained:

> This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* [*v. McDaniel*, 529 U.S. 473 (2000),] held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "has already failed in that endeavor." *Barefoot* [*v. Estelle*, 463 U.S. 880,] 893 n.4. [(1983)].

Id. at 336-337. The Court proceeded to stress that the issuance of a certificate of appealability must not be a matter of course. The Court clearly defined the test for issuing a certificate of appealability as follows:

> A prisoner seeking a COA must prove "something more than the absence of frivolity" or the existence of mere "good faith" on his or her part. *Barefoot*, at 893. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S. at 484.

Id. at 338.

Thus, to be entitled to a certificate of appealability, the Petitioner needed to

show only "that jurists of reason could disagree with the district court's resolution of his constitutional claim[] or that jurists could conclude the issue[] presented [is] adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. The Petitioner has satisfied this requirement because he has (1) made "a substantial showing of the denial of a constitutional right" (i.e., his Sixth Amendment right to a jury trial) and (2) the district court's resolution of this claim is "debatable amongst jurists of reason." This is especially true given (1) the Ninth Circuit's decision in *Salazar-Lopez* and (2) that the enhancement element at issue in this case concerns the *timing* of the Petitioner's previous conviction. Hence, the issue in this case is "adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336.

By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to further clarify the certificate of appealability standard. The issue in this case is important and has the potential to affect all federal habeas cases nationwide. Accordingly, for the reasons set forth above, the Petitioner asks the Court to address this important issue by either accepting this case for plenary review or remanding it to the Eleventh Circuit for the consideration it deserves.

I. CONCLUSION

The Petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully Submitted,

/s/ Michael Ufferman

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