No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

LAROME WAITERS,

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 the Fifth and Eighth Amendments prohibit courts, in imposing sentencing enhancements under the Armed Career Criminal Act or the Career Offender provisions of the United States Sentencing Guidelines, from relying on prior convictions for offenses committed when the defendant was less than 18 years-old?

LIST OF PARTIES

The parties to the judgment from which review is sought are the Petitioner and appellant in the lower court, Larome Waiters, 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The United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court in an unpublished opinion, *United States v. Waiters*, 2024 WL 2797919, 21-12492 (11th Cir. May 31, 2024), which is attached hereto as Appendix A.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 May 31, 2024. *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. 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.

U.S. CONST. amend. VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Petitioner Larome D. Waiters was charged in the Middle District of Florida, Tampa Division, with one count of possession with intent to distribute 40 grams of a mixture or substance containing fentanyl and heroin pursuant to 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B) and one count of illegal possession of firearms and ammunition pursuant to 18 U.S.C. §§ 922(g)(1) and 924(e). The first count stemmed from the recovery of two separate quantities of controlled substances – a) a fanny pack on Mr. Waiters' person that contained approximately 24.9 grams of fentanyl (including packaging), 8.1 grams of crack cocaine, and 1.7 grams of marijuana and b) a backpack located inside of a bedroom closet that contained approximately 301 grams of fentanyl (including packaging). (Doc. 1, 130 at 92-93.) The second count stemmed from two firearms and ammunition there was located in a dresser of the bedroom of the apartment where the backpack was located. (Doc. 130 at 66-68, 77.)

At sentencing, the Presentence Report proposed a Sentencing Guidelines range at adjusted offense level 34 and criminal history category VI. (Doc. 135 at 4.) At that range, the Guidelines provided for an advisory sentencing range of 262 to 327 months imprisonment. (Doc. 135 at 4.)

The PSR also alleged that Mr. Waiters was subject to the U.S.S.G. § 4B1.1 career offender enhancement, as well as to a 180-month mandatory minimum sentence on Count One under the Armed Career Criminal Act, 18 U.S.C. § 924(e). (Doc. 120 at 10-11.) The PSR proposed that Mr. Waiters was subject to those sentencing provisions based on a) a prior Florida robbery offense that was committed

when Mr. Waiters was 16 years-old and b) several prior Florida state convictions for controlled substances offenses under chapter 893 of the Florida Statutes. (Doc. 120 at 10-11.) Mr. Waiters objected to the reliance on the robbery conviction based on the fact that he was only 16 years-old at the time of the alleged offense. (Doc. 120 at 43.) In making that objection, he recognized precedent that held that juvenile offenses may be considered for sentencing enhancement purposes, but further argued that the consideration of juvenile conduct would violate due process and the Eighth Amendment. (Doc. 120 at 43.)

Mr. Waiters further objected to the reliance on the Florida drug convictions for the ACCA and career offender sentencing enhancements based on the fact that the Florida offenses did not provide for a *mens rea* element as to the illicit nature of the substances at issue so as to qualify as predicate offenses for either of the proposed enhancements. (Doc. 120 at 43-45.)

Finally, with respect to the Armed Career Criminal Act, Mr. Waiters objected to the proposed application of the ACCA because the Superseding Indictment did not allege all of the facts needed to support the enhancement and the jury, likewise, did not make the findings necessary to qualify the proposed prior convictions as ACCA predicate offenses. (Doc. 120 at 45.)

The district court overruled all of those objections. (Doc. 135 at 14-15, 19.)

The district court then varied downward and imposed concurrent sentences of 210 months imprisonment on each count. (Doc. 135 at 28.) The court further imposed

concurrent terms of supervised release of six years on count one and five years on count two. (Doc. 135 at 28.)

Mr. Waiters thereafter appealed the convictions and sentences to the United States Court of Appeals for the Eleventh Circuit. He raised five grounds, including the three issues addressed in this Petition. On May 31, 2024, the Eleventh Circuit issued a panel opinion affirming the convictions and sentences. App. A.

Concerning the the question of whether Mr. Waiters was subject to the ACCA sentencing enhancements based on the Florida controlled substances convictions, the Eleventh Circuit reasoned that its precedent, specifically *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014), holds that prior controlled substance convictions under section 893.13 of the Florida Statutes qualify as predicate offenses for the ACCA and the career offender guideline despite any lack of a *mens rea* element concerning the illicit nature of the controlled substance. App. A at 13.

The Eleventh Circuit similarly held that its precedent, to include *United States v. Spears*, 443 F.3d 1358 (11th Cir. 2006) and *United States v. Wilks*, 464 F.3d 1240, 1243 (11th Cir. 2006), did not preclude the sentencing court from imposing sentencing enhancements based on prior offenses that Mr. Waiters committed when he was a juvenile. App. A at 13-14.

Finally, with respect to the question of the predicate offenses not being charged in the indictment and found by the jury, the Court relied again on *United States v. Smith*, *supra*, 775 F.3d 1262, and held that "'[a]lthough it is ordinarily true that all elements of a crime must be alleged by indictment and either proved beyond a

reasonable doubt or admitted by a defendant, there is an exception for prior convictions' used for sentence enhancements." App. A at 16 *quoting Smith*, 775 F.3d at 1266.

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. Waiters' 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."

Similarly, the "Career Offender" provisions of the United States Sentencing Guidelines, while not setting a mandatory minimum, provide for a substantially enhanced advisory sentencing range for any defendant who qualifies as a "career offender." Section 4B1.1 of the Guidelines sets out the requirements for the application of the "career offender" enhancement. The Guidelines provide that "[a] defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1(a). The Guidelines then provide for enhanced offense levels and a mandatory criminal history category VI classification for any defendant who qualifies as a "career offender."

U.S.S.G. § 4B1.1(b).

Section 4B1.2 then defines the term "controlled substance offense" as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b). The Guidelines' corresponding definition of a "crime of violence" is essentially identical to the ACCA's definition for a "violent felony," as set forth in 18 U.S.C. § 924(e)(2)(B) and as discussed in greater detail below. *See* U.S.S.G. § 4B1.2(a); *see also United States v. Matchett*, 802 F.3d 1185, 1193-94 (11th Cir. 2015).

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 or Career Offender provisions. *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*, 589 U.S. 154, 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 157. 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 159-60. 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 165 (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 164-65 *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 165 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. Waiters 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*, 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*, 588 U.S. 225, 139 S. Ct. 2191, 2195, 204 L.Ed.2d 594 (2019) *citing Staples*, 511 U.S. at 606. Mr. Waiters 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, Mr. Waiters 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 103. 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. *Wooden v. United States*, 595 U.S. 360, 142 S.Ct. 1063, 212 L.Ed.2d 187 (2022).

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. Waiters' Fifth and Sixth Amendment rights.

Mr. Waiters 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. Waiters 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. Waiters 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*.

Given the reasoning of *Alleyne*, coupled with the erosion of the *Almendarez-Torres* reasoning in light of the *Apprendi* line of cases, Mr. Waiters 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 the Fifth and Eighth Amendments Prohibit Sentencing Courts from Enhancing Defendants' Sentences Under the Armed Career Criminal Act and the Career Offender Provisions of the Sentencing Guidelines Based on Prior Offenses Committed When a Defendant was Younger Than 18 Years-Old?

In the instant case, the district court relied on a predicate offense that was committed when Mr. Waiters was only 16 years-old to trigger the sentencing provisions of the Armed Career Criminal Act and the Career Offender Sentencing Guidelines. Lower courts, indeed, regularly rely on juvenile conduct in imposing such sentencing enhancements. As occurred in the instant case, the application of those enhancements often has a tremendous effect on the sentencing. Given the differences in relative culpability of a juvenile offender and an adult offender, the ACCA and the Guidelines' failure to distinguish between prior offenses that a defendant committed as a child, versus prior offenses that a defendant committed as an adult, results in irrational sentencing schemes that violate the Fifth and Eighth Amendments.

A. This Court's Holdings Regarding the Relative Culpability of Juvenile Versus Adult Offenders Illustrate the Constitutional Shortcomings of Relying on Juvenile Conduct to Trigger Sentencing Enhancements in Subsequent Adult Cases

This Court has found "children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform…' they are less deserving of the most severe punishments.'"

Miller v. Alabama, 567 U.S. 460, 471, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) *quoting Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 2026, 176 L.Ed.2d 825 (2010). In the first of the recent cases that reached that conclusion, *Graham*, *supra*, 560 U.S. 48, the Court held that the Eighth Amendment precludes the imposition of life sentences for non-homicide offenses committed by individuals under the age of 18 years-old. In *Miller*, the Court extended the *Graham* reasoning further and held that the imposition of mandatory life sentences without the possibility for parole on individuals under the age of 18 constitutes cruel and unusual punishment in any case, including murder cases. *Miller*, *supra*, 567 U.S. 460

The Court recognized in *Graham* that, "a 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Graham*, 560 U.S. at 70. "This reality, [the Court found], cannot be ignored." *Id.* at 71. As the Eleventh Circuit noted below, *Graham* and *Miller* addressed the constitutionality of sentences imposed on juveniles, rather than sentences imposed on adults that are enhanced for juvenile convictions. Nonetheless, one of the Court's primary focuses in *Graham* and *Miller* was the culpability of a juvenile offender in comparison to an adult offender. The Court held in *Graham* that "[t]he judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Graham*, 560 U.S. at 67. The Court then found that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control

continue to mature through late adolescence. *Graham*, 560 U.S. at 68. Given that inequity in the level of culpability, the Court found that a juvenile offense cannot be measured equally to an adult offense.

B. The Lower Courts' Frequent Imposition of Guidelines and Statutory Sentencing Enhancements Based on Prior Offenses Committed when a Defendant was a Minor Violates the Fifth and Eighth Amendments

The circuit courts of appeal have generally employed the same reasoning as the Eleventh Circuit employed in the cases it relied on in rejecting Mr. Waiters' arguments with respect to this question. *United States v. Spears*, 443 F.3d 1358 (11th Cir. 2006); *United States v. Wilks*, 464 F.3d 1240, 1243 (11th Cir. 2006); *Marshall v. United States*, 18 Fed.Appx. 15 (1st Cir. 2001); *United States v. Harrington*, 370 Fed.Appx. 216 (2d Cir. 2010); *United States v. Wilson*, 543 Fed.Appx. 213 (3d Cir. 2013); *United States v. Hunter*, 735 F.3d 172 (4th Cir. 2013); *United States v. Banks*, 679 F.3d 505 (6th Cir. 2012); *United States v. Salahuddin*, 509 F.3d 858, 864 (7th Cir. 2007); *United States v. Winfrey*, 23 F.4th 1085 (8th Cir. 2022); *United States v. Orona*, 724 F.3d 1297 (10th Cir. 2013). this Court then considered whether the use of juvenile convictions to trigger the ACCA violated the Eighth Amendment in light of *Graham* and *Miller*. The underlying reasoning has been that the application of the respective sentencing enhancements punishes adult conduct rather than the defendant's earlier juvenile conduct. *See generally id.* In the wake of *Graham* and *Miller*, for instance, the Eleventh Circuit reasoned that "*Graham* and *Miller* do not apply to this case because, in both of those cases, the Court focused on why it would be cruel and unusual for a *juvenile* to face a mandatory *life* sentence." *United States*

v. Coleman, 563 Fed.Appx. 740, 741 (11th Cir. 2014) *citing Graham*, 560 U.S. 48, 130 S.Ct. 2011; *Miller*, 132 S.Ct. 2455. The court thereby held that "[n]othing in either case suggested that an adult offender who committed prior crimes as a juvenile should not receive a mandatory 15–year sentence as an adult." *Id.*; *see also United States v. Hoffman*, 710 F.3d 1228 (11th Cir. 2013) (rejecting the appellant's plain error argument that the reliance on juvenile convictions to enhance his sentence under 21 U.S.C. § 841 violated due process; reasoning that *Miller* was inapplicable because it pertained to a juvenile who was facing sentencing, not an adult whose sentence was being enhanced for a juvenile offense). While it is certainly correct that ACCA and the Career Offender Guidelines punish adult conduct, the lower courts have failed to recognize and address the fact that even prior juvenile convictions cannot be given the same weight as a prior adult conviction at a later sentencing because the juvenile offender simply is not on a level playing field, mentally and emotionally, as an adult offender. As *Graham* and *Miller* aptly recognize, the culpability of a juvenile offender and an adult offender simply cannot be weighed on the same scale.

"Due process requires that a sentencing scheme be rational and not based on an arbitrary distinction." *Webster*, 159 Fed.Appx. at 136 *citing Chapman v. United States*, 500 U.S. 453, 465, 111 S.Ct. 1919, 1927, 114 L.Ed.2d 524 (1991). In a similar, but significantly different vein, Eighth Amendment claims in non-capital cases require a determination of "whether the sentence imposed is grossly disproportionate to the offense committed." *Coleman*, 563 Fed.Appx. at 741 *citing United States v.*

Johnson, 451 F.3d 1239, 1242–43 (11th Cir. 2006). "If a sentence is within the limits imposed by statute, it is generally not cruel and unusual under the Eighth Amendment." *Id. citing id* at 1243.

On the other hand, this Court has long held that "[t]o determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham*, 560 U.S. at 58 *quoting Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (*quoting Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion)). The Court similarly held in *Graham* that the "concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Id.* at 59 *quoting Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910).

In light of *Graham* and *Miller*'s recognition that a juvenile offender does not act with the same level of culpability as an adult offender, Mr. Waiters respectfully submits that the consideration of juvenile conduct in applying the ACCA and career offender sentencing enhancements violates the Fifth and Eighth Amendments. Given the relatively recent, but generally accepted, principle that a juvenile brain is not developed consistent with an adult brain, particularly with respect to impulse control, prior offenses that were committed when a defendant was a juvenile cannot be used in the same way as a prior adult offense to trigger Guidelines or statutory

sentencing enhancements. To be sure, *Graham* and *Miller* concerned sentences imposed on juvenile offenders, not sentences imposed on adults. The crux of those opinions, however, was the lesser degree of culpability of a juvenile offender in comparison to an adult offender. That same measure of culpability carries over when a court is comparing prior offenses committed when a defendant was a juvenile versus prior offenses committed when the defendant was an adult. An act committed by a child simply cannot be viewed on the same level playing field as an act committed by an adult. Nonetheless, the Sentencing Guidelines and the ACCA hold a defendant accountable for a prior offense committed at age 15 just the same as it would a prior offense committed at age 50. The continued failure to distinguish between prior juvenile and prior adult offenses has not kept pace with the evolving standards of our maturing society. While the consideration of recidivism undoubtedly has a place in sentencing, the Fifth and Eighth Amendment protections must compel sentencing courts to distinguish between prior acts that were committed when a defendant was an adult and prior acts that were committed when a defendant was a child. To apply a crushing sentencing enhancement to an adult defendant based on a prior act he committed as a child, at a time when his brain was not fully developed, results in a sentence that is not graduated and proportioned to the crime, particularly when a defendant who committed the same predicate offense as an adult would face the very same sentence. Similarly, by failing to distinguish between prior offenses committed as a child and prior offenses committed as an adult, the ACCA and career offender

guidelines provisions create irrational sentencing schemes that result in arbitrary sentences that fail to account for the relative culpability of offenders.

As the line of lower court cases cited above demonstrates, the instant issue is one that is likely, and in fact surely, to frequently arise in the lower courts. Because the plain text of the Armed Career Criminal Act and Sections 4A1.2 and 4B1.1 of the Sentencing Guidelines provide for sentencing courts to rely on juvenile conduct, lower courts following those provisions will be required to continue to apply the respective sentencing enhancements based on juvenile conduct. Consequently, the instant question is a question of great importance that has not yet been decided by this Court and one which will arise frequently in the lower courts in the future. SUP. CT. R. 10(c).

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 29th day of August 2024,

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APPENDIX A

ELEVENTH CIRCUIT OPINION BELOW