QUESTION PRESENTED

Whether Petitioner's Fifth Amendment right to be subject to a maximum punishment based solely on facts charged in an indictment and his Sixth Amendment right to jury trial were violated by virtue of the application at sentencing of the Armed Career Criminal Act, 18 U.S.C. § 924(e), which mandated a minimum sentence of 15 years' imprisonment—5 years more than the otherwise applicable statutory maximum punishment—based on judicial fact-finding regarding Petitioner's criminal history.

No._____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY VAZQUEZ,
a/k/a Eziequ Vasquez,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Anthony Vazquez respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit affirming Petitioner's sentence in this matter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit affirming the judgment of the district court, *United States v. Anthony Vazquez*, No. 08-4696 (3d Cir. May 25, 2010) (not precedential), is unpublished and is attached as Appendix A. The United States District Court for the Eastern District of Pennsylvania did not issue a written opinion. The judgment imposing Mr. Vazquez's 198-month sentence is attached as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the United States Court of Appeals for the Third Circuit affirming Petitioner's sentence was filed and entered on May 25, 2010. App. A. This petition is being timely filed by postmark on or before August 23, 2010 pursuant to Supreme Court Rule 13.3. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor be deprived of life, liberty, or property, without due process of law * * * .

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation * * * .

18 U.S.C. § 924(e)(1) provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for . . . a serious drug offense . . . committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years . . . .

STATEMENT OF THE CASE

This petition presents an important and recurring issue regarding the constitutionality of the Armed Career Criminal Act, 18 U.S.C. § 924(e) (ACCA). In particular, at issue is whether statutory maximum and mandatory minimum punishments may be increased based on judicial fact-finding regarding a defendant's criminal history. The district court exercised subject matter jurisdiction pursuant to 18 U.S.C. § 3231, and the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

On May 2, 2007, Mr. Vazquez was arrested by police after they found a handgun in his waistband. PSR ¶ 11.[1] The indictment alleged that Mr. Vazquez had been previously convicted of a "crime punishable by imprisonment for a term exceeding one year," but did not allege that he had three prior convictions for "serious drug offenses" as required for sentence enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e). (App. 20).[2] Mr. Vazquez pleaded guilty to the one-count indictment charging possession of a firearm by a convicted felon under 18 U.S.C. § 922(g), but made clear that he was not admitting to the prior convictions required under § 924(e). (App. 41-42).

At sentencing, the government argued that three of the prior convictions alleged in the

[1] "PSR" refers to paragraphs from the presentence report in this case filed by the Probation Office on June 3, 2008.

[2] "App." refers to pages from the Joint Appendix filed in the Court of Appeals in this case.

presentence report (PSR ¶¶ 36, 39, 42) qualified as "serious drug offenses" carrying maximum prison terms of ten years or more, and it introduced the certified court records for these offenses. (App. 126-182). Defense counsel objected on Fifth and Sixth Amendment grounds and argued that this Court's ruling to the contrary in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), was wrongly decided and had been undermined by subsequent decisions. (App. 91, 197). The district court overruled the objection and, upon finding by a preponderance of the evidence that the government had proven the prior convictions, ruled that the ACCA enhancement applied. (App. 213-14). The court sentenced Mr. Vazquez to 198 months in prison, five years supervised release, a fine of $1,500, and a special assessment of $100. (App. 9-11).

Mr. Vazquez appealed his sentence, arguing again that the ACCA enhancement violated his Fifth and Sixth Amendment rights because the prior convictions were not charged in the indictment or proven to a jury beyond a reasonable doubt. The Third Circuit affirmed, ruling that under *Almendarez-Torres*, "prior convictions that increase the statutory maximum sentence may be determined by the district court and need not be included in the indictment or established as an element of the offense." Opinion at 12 (Appendix A).

REASONS FOR GRANTING THE WRIT

The issue presented by this petition is important and ubiquitous. The statutory maximum punishment to which Mr. Vazquez was exposed for committing his offense was increased as a result of facts concerning his criminal history that were neither pleaded as elements of the charged offense nor admitted or proved to a jury. Indeed, a statutorily-enhanced minimum sentence of 15 years' imprisonment—5 years greater than the otherwise applicable statutory maximum—was *mandated* by the ACCA. This violated Mr. Vazquez's Fifth Amendment right to be subject to a maximum punishment based solely on facts charged in an indictment and his Sixth Amendment right to jury trial.

This case provides an ideal vehicle for the resolution of this issue. The issue was meticulously preserved below (through a refusal to admit to prior convictions), and there are no collateral factual or legal disputes that would encumber review.

This Case Presents an Important and Recurring Issue as to the Constitutionality of Increasing a Statutory Maximum Punishment Based on Judicial Fact-Finding Concerning a Defendant's Criminal History.

As the lower federal courts have recognized, there is considerable tension in this Court's recent Sixth Amendment jurisprudence. This case presents an opportunity for this Court to resolve that tension and make clear that prior convictions should be treated like all other facts that increase the penalty to which a defendant is exposed, i.e., they must, if not admitted, be charged in an indictment and proved to a jury beyond a reasonable doubt.

A. *Almendarez-Torres* Was Wrongly Decided.

In *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998), this Court held, in a 5-4 decision, that an indictment in an illegal reentry case need not allege a defendant's prior

"aggravated felony" conviction in order for a district court to sentence the defendant to an enhanced sentence under 8 U.S.C. § 1326(b)(2) based on the prior conviction. The majority held that Section 1326(b)(2) merely created a "sentencing factor" that need not be pleaded in the indictment in order to trigger an enhanced sentence based on a defendant's prior "aggravated felony" conviction. *Id.* at 243. Justice Scalia, joined by Justices Stevens, Souter, and Ginsburg, dissented, contending that Section 1326(b)(2) is not merely a "sentencing factor" but, instead, constituted a separate, aggravated offense. *Id.* at 270-71. As a result, the dissenters contended, the fact of a defendant's prior conviction had to be pleaded in the indictment in order for a district court to impose an "enhanced" sentence above the two-year maximum sentence provided for by 8 U.S.C. § 1326(a). *Id.*

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court adopted as its holding *dicta* from *Jones v. United States*, 526 U.S. 227 (1999) that "'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243 n.6). Although expressly excepting the fact of prior conviction from its holding, the Court cast doubt on the logical validity of that exception and on its decision in *Almendarez-Torres*. The Court made clear that the decision "represents at best an exceptional departure from the historic practice" of requiring that any factor that increases the sentence range be treated as an element that must be proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 487. The Court also acknowledged that *Almendarez-Torres* is arguably inconsistent with its reasoning in *Apprendi*:

> 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 course of our jurisprudence.

Id. at 489 (emphasis added). Moreover, the *Apprendi* Court endorsed Justice Scalia's dissent in *Almendarez-Torres*, and further concluded that its previous decision "virtually ignored the pedigree of the pleading requirement at issue." *Id.* at 489 n.15. The Court repeated the basic rule that "'[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted.'" *Id.* (quoting *United States v. Reese*, 92 U.S. 214, 232-233 (1875) (Clifford, J., dissenting)). That principle "pervades the entire system of the adjudged law of criminal procedure, as appears by all the cases." *Id.* (internal quotations and citation omitted).

Put simply, *Almendarez-Torres* was wrongly decided. Thus, a logical application of *Apprendi* should extend to any case, such as here, where the recidivist issue is contested. As *Apprendi* itself made clear, its reasoning applies broadly to all facts that may increase the statutory sentence range:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached.

Apprendi, 530 U.S. at 484.[3] The Court based this reasoning on an historical analysis of what the

courts have considered to be "elements" in our jurisprudence. After citing with approval Justice Thomas's lengthy historical account in his concurring opinion, the majority in *Apprendi* summed up by stating, "[p]ut simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." *Id.* at 483 n.10.

Justice Thomas, in his concurrence, noted that these "facts" included the fact of prior conviction. As Justice Thomas observed, numerous cases from the 1800s "make clear, by both their holdings and their language, that when a statute increases punishment for some core crime based on the fact of a prior conviction, the core crime and the fact of the prior conviction together create a new, aggravated crime." *Id.* at 507-08 (Thomas, J., concurring) (citations omitted). Furthermore, citing Bishop's 1872 treatise on criminal law, Justice Thomas noted that the author "made no exception for the fact of a prior conviction – he simply treated it just as any other aggravating fact . . . ." *Id.* at 511. And in the half century following publication of Bishop's treatise, numerous courts applied the principle that "every fact that was by law a basis for imposing or increasing punishment (including the fact of a prior conviction) was an element." *Id.* at 512.

The reasoning of the majority opinion in *Apprendi*, read together with Justice Thomas's historical analysis, leaves no doubt that when the fact of a prior conviction is used to increase the statutory sentencing range, it must be treated as an element: it must be charged in the indictment and, if not admitted, proved to a jury beyond a reasonable doubt.

This Court's subsequent decision in *Shepard v. United States*, 544 U.S. 13 (2005), moreover, strongly supports overruling *Almendarez-Torres*. In *Shepard*, this Court held that the

Sixth Amendment applies to disputes over facts about prior convictions, holding that a prior conviction for non-generic burglary based on a guilty plea can count as a qualifying violent felony only if the charging document, plea agreement, or plea colloquy make clear that the offense conduct actually constituted generic burglary. *Shepard* sharply limits the *Almendarez-Torres* exception to the fact of prior conviction as determined by the judicial record, and excludes facts about the conviction that are not contained in such conclusive records. In a plurality portion of its opinion, moreover, this Court termed "prescient" the following question from its decision in *Taylor v. United States*, 495 U.S. 575 (1990): "'If the sentencing court were to conclude, from its own review of the record, that the defendant [who was convicted under a non-generic burglary statute] actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?'" *Shepard*, 544 U.S. at 24 (quoting *Taylor*, 495 U.S. at 601). This Court noted this question's anticipation of the "very later rule imposed for the sake of preserving the Sixth Amendment right . . ." *Id.* (citing *Apprendi*, 530 U.S. at 490).

Shepard thus strongly suggests this Court's inclination to apply *Apprendi* to the fact of prior conviction. Justice Thomas, in his well-reasoned concurrence, noted this inclination expressly: "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." *Id.* at 27.[4] It is respectfully submitted that the time has come to apply the teachings of *Apprendi* where the Fifth and Sixth Amendments are offended by the lower courts on a daily basis—in applying recidivist enhancements such as the ACCA.[5]

B. The Courts of Appeals Have Uniformly Refused to View *Almendarez-Torres* as Implicitly Overruled.

The Court should grant the writ in this case because the Third Circuit, and every other Circuit to have addressed the issue, have refused to recognized the "logical application" of *Apprendi* to any case, such as this, where the recidivist issue has been contested.[6] In light of the lower courts' refusal to act, only this Court can make clear that *Almendarez-Torres* is no longer good law. *See Rangel-Reyes v. United States*, 126 S. Ct. 2873, 2875 (2006) (Thomas, J., dissenting from denial of writ of certiorari) ("The Court's duty to resolve this matter is particularly compelling, because we are the *only* court authorized to do so. . . . [citation omitted] And until we do so, countless criminal defendants will be denied the full protection afforded by the Fifth and Sixth Amendments, notwithstanding the agreement of a majority of the Court that this result is unconstitutional. There is no good reason to allow such a state of affairs to persist.").

CONCLUSION

For the foregoing reasons, petitioner Anthony Vazquez prays that this Court grant his petition for a writ of *certiorari*, and reverse the judgment of the United States Court of Appeals for the Third Circuit affirming his sentence in this matter.

Respectfully submitted,

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