No. 10-

In The
Supreme Court of the United States

BRICE M. GEORGE, ROBERT STEVENSON, IVORY GRACE
PETITIONERS,

V.

STATE OF LOUISIANA,
RESPONDENT.

On Petition for a Writ of Certiorari to the
Louisiana Fourth Circuit Court of Appeal,
State of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that a defendant has the right to a jury determination of any fact that increases the maximum sentence to which the defendant is exposed. Although *Almendarez-Torres v. United States,* 523 U.S. 224 (1998) had previously held that the maximum sentence could be increased by a judge's finding of a prior felony conviction, this Court explained in *Jones v. United States,* 526 U.S. 227 (1999) and again in *Apprendi* that this exception, if permissible at all, was tolerated because the prior conviction had itself been established through, *inter alia*, the "jury trial guarantees." This Court has left unresolved whether the maximum sentence to which an accused is exposed can be increased based upon an adjudication at which those jury trial guarantees did not exist. These consolidated cases give rise to the following question:

Is a defendant's constitutional right to trial by jury violated when prior non-jury triable adjudications are used to increase the maximum sentence from six months to twenty years?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Brice M. George, Robert Stevenson, and Ivory Grace respectfully petition for a writ of certiorari to the Louisiana Fourth Circuit Court of Appeal in *State of Louisiana v. Brice M. George* consolidated with *State v. Robert Stevenson* and *State v. Ivory Grace*, 2008-1193 (La. App. 4 Cir. 3/10/10), writ denied 2010-K-0812 (La. 11/05/2010).

The Louisiana Fourth Circuit's decision is based upon the Louisiana Supreme Court's full consideration of the issue in a prior case, *State v. Jefferson*, 26 So. 3d 112 (La. 2009), in which the Louisiana Supreme Court held that a prior conviction from proceedings where there was no right to a jury trial can be used to increase the maximum sentence from six months to five years, and to a maximum of twenty years based upon two prior adjudications of petty offenses at which the defendant had no right to a jury trial.

OPINIONS BELOW

The judgment of the Louisiana Fourth Circuit Court of Appeal is reported at *State v. George et al*, 2008-1193 (La. App. 4 Cir. 03/10/10); 34 So. 3d 941, and is reprinted at Pet. App. 1a. The Louisiana Supreme Court's order denying review of that decision is unpublished and is reprinted at Pet. App. B, at 14A.

The Louisiana Fourth Circuit Court of Appeal's decision in these consolidated cases is based upon the Louisiana Supreme Court's full consideration of the issue in *State v. Jefferson*, 26 So. 3d 112 (La. 2009), which is reprinted at Pet. App. C, at 15A.[1]

JURISDICTION

The Louisiana Fourth Circuit Court of Appeal entered judgment on March 10, 2010. Pet. App. at 13a. The Louisiana Supreme Court denied discretionary review on November 5, 2010. Pet. App. 14a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

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[1] *State v. Jefferson* was decided on pre-trial writs. A district court found the increase in the maximum sentence based upon a prior non-jury triable adjudication violated *Apprendi*. Certiorari from that case pre-trial was not possible. *Cf Bethley v. Louisiana*, 520 U.S. 1259 (1997) (Stevens J., statement concerning denial of certiorari) ("It is worth noting the existence of an arguable jurisdictional bar to our review. Our consideration of state-court decisions is confined to "final judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). Petitioner has been neither convicted of nor sentenced for any crime. As we have indicated, "in the context of a criminal prosecution, finality is normally defined by the imposition of the sentence."). This case presents the same legal issue that arose in *Jefferson* in a posture reviewable by this Court.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Louisiana Code of Criminal Procedure Article 779 provides:

> A. A defendant charged with a misdemeanor in which the punishment, as set forth in the statute defining the offense, may be a fine in excess of one thousand dollars or imprisonment for more than six months shall be tried by a jury of six jurors, all of whom must concur to render a verdict.
>
> B. The defendant charged with any other misdemeanor shall be tried by the court without a jury.

Section 40:966 of the Louisiana Revised Statutes provides, in pertinent part:

> E. Possession of marijuana.

(1) Except as provided in Subsections E and F of this Section, on a first conviction . . . the offender shall be fined not more than five hundred dollars, imprisoned in the parish jail for not more than six months, or both.

(2) Except as provided in Subsection F or G of this Section, on a second conviction . . . the offender shall be fined not more than two thousand dollars, imprisoned with or without hard labor for not more than five years, or both.

(3) Except as provided in Subsection F or G of this Section, on a third or subsequent conviction . . . the offender shall be sentenced to a term of imprisonment with or without hard labor for no more than twenty years, and may, in addition, be sentenced to pay a fine of not more than five thousand dollars.

STATEMENT OF THE CASE

Introduction

In *Blanton v. N. Las Vegas*, 489 U.S. 538 (1989), this Court explicitly reserved the question of "whether a repeat offender facing enhanced penalties may state a constitutional claim because of the absence of a[n opportunity for a] jury trial in a prior [] prosecution." *Id.* at n.12 (1989); *See also Johnson v. United States*, (08-6925) 2009 U.S. Trans. Lexis 44, at pg 49 (Justice Scalia: "Have we ever approved that, by the way, kicking it up to the felony category simply because of recidivism?"). This Petition presents that question.

Under Louisiana law, possession of marijuana, *first offense*, is a non-jury triable misdemeanor punishable by up to six months of imprisonment.[2] A conviction for marijuana possession, *second offense*, carries a maximum five-year term. A conviction for marijuana, *third offense*, carries a maximum of twenty years.[3] Therefore, under Louisiana law, prior non-jury triable adjudications are used to

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[2] The District Attorney has the discretion to charge possession of marijuana, first offense, even if the accused has one or more prior convictions for possession of marijuana

[3] The maximum penalties possession of marijuana, second offense, and marijuana, third offense, are available regardless of how small the amount of marijuana possessed.

increase the maximum punishment to which an accused is exposed. Petitioners each faced possible twenty-year prison sentences -- a nineteen and half year increase above the otherwise applicable statutory maximum sentence -- based solely on petty offense adjudications where the right to trial by jury did not exist.

This Court should grant certiorari and decide whether adjudications where there is no right to trial by jury may be used to increase the maximum punishment. In other words, should *Almendarez-Torres*' exception to the rule of *Apprendi* for prior felony convictions be extended to other adjudications where the right to trial by jury was not available.

Procedural History

Petitioners were charged with possession of marijuana in Orleans Parish, Louisiana. Under La. R.S. 40:966 (E) (1), first time possession of marijuana is a misdemeanor with a maximum sentence of six months in the parish jail. Petitioners, however, were each charged with the felony offense of possession of marijuana, *third* offense, under La. R.S. 40:966 (E) (3) based upon the fact that they had two prior misdemeanor convictions for possession of marijuana, first offense. As a result, instead of a maximum of six months in jail, each Petitioner faced up to twenty years in prison.

Under state law, petitioners had no right to a jury trial on the initial charges of possession of

marijuana, first offense." *See* La. R.S. 40:966 (E) (1) ("on a first conviction . . . the offender shall be fined not more than five hundred dollars, imprisoned in the parish jail for not more than six months, or both"); La. C. Cr. P. Art. 799 (B) ("The defendant charged with any other misdemeanor [i.e. one subject to six months or less of prison] shall be tried by the court without a jury."). Nevertheless, the prior non-jury triable misdemeanor convictions were used to increase the maximum sentence petitioners faced from a maximum of six months for a "marijuana first" to a maximum twenty years for a third offense.[4]

Petitioners challenged by *Motions to Quash* the use of their prior non-jury triable misdemeanor convictions to increase the statutory maximum sentence. The motions asserted that increasing the maximum sentence in this manner violated this Court's holding in *Apprendi* that a criminal defendant has the right to a jury determination of any fact that increases the maximum sentence to which the defendant is exposed. The motions were

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[4] There is no requirement that one be convicted of a second offense, punishable by up to five years in prison, *see* La. R.S. 40:966 (E) (2), before being charged with a third offense. Thus, an accused may face a felony charge of "marijuana third" with a penalty of up to twenty years, rather than the six month misdemeanor charge of "marijuana first" based solely on two prior "marijuana first" convictions, neither of which provided the accused access to a jury trial.

denied. Each of the Petitioners entered guilty pleas reserving the right to challenge the denial of the motions to quash.[5]

The Opinions Below

While Petitioners consolidated appeal to the Louisiana intermediate appellate court was pending, the Louisiana Supreme Court fully considered and ruled on this exact issue. *See State v. Jefferson,* 26 So. 3d 112 (La. 2009). After full briefing and oral argument, the Louisiana Supreme Court held that the Sixth and Fourteenth Amendments were not violated by the use of a prior non-jury triable misdemeanor conviction to increase the statutory maximum sentence. The Louisiana Supreme Court reasoned:

> Our examination of the *Apprendi* line of cases convinces us that reliability, assured through proceedings that included all the procedural protections

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[5] *See State v. Crosby*, 338 So. 2d 584 (La. 1976)(upholding review of assignments of error specifically reserved at the time of a plea of guilty, where the trial court accepts the plea of guilty so conditioned). The state and federal courts routinely review issues reserved under *Crosby*. *Shea v. Louisiana*, 470 U.S. 51, 53 (1985)(considering claim raised in pre-trial motion and reserved for appeal pending plea of guilty).

> the Constitution requires for those proceedings, is the *sine qua non* for use of prior convictions to enhance a sentence under the "prior conviction" exception, *and not the right to a jury trial.*

State v. Jefferson, 26 So. 3d 112, 120 (La. 2009); *see* Pet. App. at 34a.

Based upon the Louisiana Supreme Court's determination that judges are sufficiently "reliable" fact-finders for the imposition of punishment for petty offenses, it upheld a statutory scheme in which one non-jury petty offense increased the statutory maximum sentence from six months to five years, and to a maximum of twenty years where there are two prior non-jury petty offenses.

The Louisiana Fourth Circuit's ruling in this case simply follows the Louisiana Supreme Court's resolution in *Jefferson*. Specifically, the Court of Appeal relied on the Louisiana Supreme Court's holding in *Jefferson* that "where the misdemeanor proceeding[s]" "do not include the right to trial by jury", "Louisiana's statutory scheme satisfies the requirements of the Sixth and Fourteenth Amendments," because "states are allowed the presumption that in petty crimes and offenses, trial

judges are capable of reliable fact finding."[6] The Court of Appeal upheld the convictions, holding that the use of a prior non-jury misdemeanor conviction to increase the maximum sentence did not violate the Sixth or Fourteenth Amendments. *Id.* at *Pet App. A, at* 13a.

Petitioners sought discretionary review in the Louisiana Supreme Court, arguing that the use of non-jury triable adjudications to increase the maximum sentence from six months to twenty years violated the Sixth and Fourteenth Amendments. The Louisiana Supreme Court affirmed in a consolidated writ denial on November 5th, 2010. Pet. App. B at 14a. This petition ensues.

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[6] *State v. George et al,* Pet. App. A, *at* 12a (citing *State v. Jefferson, at* Pet. App. C, *at* 44a).

REASONS FOR GRANTING THE WRIT

This issue has been percolating in the courts for over twenty years, and was specifically left unresolved in *Blanton v. N. Las Vegas,* 489 U.S. 538, n.12 (1989). It exists not only in Louisiana, but in many other state jurisdictions as well in the federal context. *Cf Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (noting "Many state criminal codes, like the federal scheme, afford similar deference to prosecutorial discretion when prescribing recidivist enhancements.")[7]

In *Almendarez-Torres,* this Court upheld the use of a prior felony conviction -- at which the accused had the right to a trial by jury -- to increase the maximum penalty to which a defendant is exposed. *Almendarez-Torres v. United States,* 523 U.S. 224 (1998. One year later, this Court made clear that that the Sixth Amendment's guarantee of

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[7] The 6th Amendment issue was ultimately not reached by this Court in *Carachuri-Rosendo v. Holder.* A number of amicus briefs, however, noted that accepting the government's position would result in harsh consequences imposed on a defendant for multiple convictions of non-jury triable misdemeanors. *See e.g., Carachuri-Rosendo v. Holder, Brief of the American Bar Association* (noting the problem that arises "[i]f possession of marijuana in violation of section 221.10 [by one] who is facing removal proceedings in the Fifth Circuit could be treated as a felon, despite being unable to secure a trial by jury for the second offense in violation of her Sixth Amendment right to trial by jury.").

the right to trial by jury and the Fifth Amendment's Due Process Clause require that every fact increasing the maximum penalty must be treated like an element of the offense: that is, the fact must be alleged in the indictment, and proven to a jury beyond a reasonable doubt. *Jones v. United States*, 526 U.S. 227 (1999).

Jones let stand the narrow *Almendarez-Torres* exception for prior felony convictions because the prior convictions at issue in *Almendarez-Torres* were themselves obtained through procedures satisfying the constitutional requirements of notice (indictment), proof beyond a reasonable doubt, and the right to trial by jury. *Jones*, 526 U.S. at 249. In *Apprendi v. New Jersey*, this Court made clear that the rule of *Jones* applied with equal vigor in state courts. *Apprendi* acknowledged *Almendarez-Torres'* exception for prior felony convictions but, as in *Jones*, did not find it necessary to overrule *Almendarez-Torres* to decide the case before it. Rather, the Court simply emphasized that in *Alnendarez-Torres*, at least the jury trial right was available at the proceedings that generated the prior conviction.

Neither *Almendarez-Torres*, *Jones,* nor *Apprendi,* addressed the circumstance at play in this case: Petitioners faced an increase in the maximum sentence from six months to twenty years based upon two judicial determinations in proceedings at which they had no right to a jury. This is the exact

issue that was explicitly reserved in *Blanton v. N. Las Vegas*.

The question of whether a misdemeanor could be transformed into a felony based upon recidivism arose more recently in oral argument in *Johnson v. United States*, where at least one Justice expressed skepticism while noting that this Court has never expressly resolved this issue:

> JUSTICE SCALIA: I dare say that Congress in my view probably didn't even contemplate that something which is a misdemeanor could become a violent felony if you did it the second time.
>
> MS. KRUGER: Well --
>
> JUSTICE SCALIA: Have we ever approved that, by the way, kicking it up to the felony category simply because of recidivism?

Johnson v United States, (08-6925) 2009 U.S. Trans. Lexis 44, at pg 49.[8] Moreover, to the extent the

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[8] The Government responded to the question, observing, "Well, the Court in *United States v. Rodriquez* in analyzing the coordinate provision of the ACCA that covers serious drug offenses said that the felony aspect of that definition is satisfied by a recidivist enhancement." *Id.* This Court, in *United States v. Rodriquez*, had held that "a state drug-trafficking conviction qualifies as "a serious drug offense" if "a maximum term of imprisonment of ten years or more is prescribed by law" for the "offense," even where the length of the maximum sentence

Louisiana Supreme Court's decision is upheld, possession of marijuana, third offense, no matter how small the amount, based upon two non-jury triable adjudications, qualifies under the Armed Career Criminal Act as a "serious drug offense."

This issue is well developed in the lower courts. Ultimately, the Seventh Circuit's recent opinion in *Welch v. United States*, 604 F.3d 408 (7th Cir. 2010) makes clear that there is a well-defined split in the state and circuit courts, and it is mature with all of the arguments fully developed. Judge Posner's dissent in *Welch*, discussed in detail below, plainly demonstrates that the split in the circuits is a substantive one, of constitutional dimension, that is ripe for resolution by this Court. These consolidated cases squarely present the issue providing the proper vehicle for resolving this important constitutional question.

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depended upon recidivist enhancements. *United States v. Rodriquez*, 553 U.S. 377, 380 (2008). There was no issue, in that case, concerning whether the recidivist enhancement was based upon prior misdemeanors at which the defendant had no jury trial right.

I. THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO ADDRESS THE USE OF NON-JURY TRIABLE CONVICTIONS TO INCREASE MAXIMUM SENTENCES, AN ISSUE THAT IS UNRESOLVED, HAS SPLIT THE LOWER COURTS AND WHICH HAS LED TO A PLETHORA OF DECISIONS INCONSISTENT WITH *APPRENDI* AND ITS PROGENY.

This Court has held that the jury trial right attaches in both felony and misdemeanor cases.[9] The question arising in this case is whether a judge's determination concerning a petty offense can be used

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[9] *See Ballew v. Georgia*, 435 U.S. 223, 240 (1978) citing *Baldwin v. New York*, 399 U.S. 66 (1970). ("Only in cases concerning truly petty crimes, where the deprivation of liberty was minimal, did the defendant have no constitutional right to trial by jury."); *Rassmussen v. United States*, 197 U.S. 516, 528 (1905) ("the provision of the act of Congress under consideration depriving persons accused of a misdemeanor in Alaska of a right to trial by a common law jury, was repugnant to the Constitution and void."); *Callan v. Wilson*, 127 U.S. 540, 553 (1888) (noting the distinction between "'[v]iolations of municipal by-laws proper, such as fall within the description of municipal police regulations, as, for example, those concerning markets, streets, water-works, city officers, etc., and which relate to acts and omissions that are not embraced in the general criminal legislation of the State," as the only category that "are not crimes or misdemeanors to which the constitutional right of trial by jury extends.").

to increase the maximum sentence a defendant faces.[10]

A. This Court's jurisprudence in Almendarez-Torres, Jones, and Apprendi leaves unresolved whether a non-jury triable offense can be used to enhance a felony conviction.

In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), this Court held that a prior adult felony criminal conviction, could be used to increase a sentence beyond the statutory maximum for the crime charged without the necessity of being separately charged in the indictment.[11] *Almendarez-*

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[10] This case is different from those in which the defendant had a jury trial right with respect to his misdemeanor but did not exercise it. *United States v. Artis*, 132 Fed. Appx. 483, 485 (4th Cir. Va. 2005) ("It is undisputed that in 2003, Artis entered a guilty plea in Juvenile & Domestic Relations District Court of Virginia ("J&DR court") to one count of misdemeanor domestic violence. Under Virginia law, a defendant appearing before a J&DR court has no right to a jury trial in that court. Such a right exists only where the defendant exercises his right to appeal the judgment to a Virginia Circuit Court. Va. Sup. Ct. R. 3A: 13(a). Accordingly, we hold that Artis did not have a right to a jury trial in J&DR court, and that he did not invoke his right to a jury trial in a Circuit Court of Appeals because he failed to file a notice of appeal."); *United States v. Frechette*, 456 F.3d 1 (1st Cir. 2006)(defendant waived right to jury trial on misdemeanor).

[11] Notably, unlike *Jones*, *Apprendi*, *Ring v. Arizona*, 536 U.S. 584 (2002), and their subsequent progeny, Alemendarez-Torres

Torres was a closely divided 5-4 decision. The dissent in *Almendarez-Torres*, squarely raised for the first time the issue of what facts must be subjected to the constitutional requirements of fair notice (indictment), proof beyond a reasonable doubt, and proof to a jury. Thus, the dissent stated:

> That it is genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject, is clear enough from our prior cases resolving questions on the margins of this one.

Almendarez-Torres, 523 U.S. at 251 (Scalia, J. *dissenting*) (citing *In re Winship*, 397 U.S. 358

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did not challenge the identity of the fact-finder, (judge rather than jury), which is what is at issue here. He only challenged the government's failure to provide adequate notice by specifically indicting him under the enhancement provision with the prior conviction as an element of that offense. *See Almendarez-Torres*, 523 U.S. at 227; *see also Jones*, 526 U.S. at 248-49 ("the case is not dispositive of the question here . . . because we are concerned with the Sixth Amendment right to jury trial and not alone the rights to indictment and notice as claimed by Almendarez-Torres). Thus, the holding of *Almendarez-Torres*, does not, by its own terms, address the issue in this case regarding the jury trial guarantee.

(1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

One year later, in a federal case, *Jones v. United States*, 526 U.S. 227, this Court held that the Sixth Amendment's guarantee of the right to trial by jury and the Fifth Amendment's Due Process Clause required that *any fact* that increased the maximum penalty to which the defendant is exposed is an element of the offense that must be indicted and subject to proof beyond a reasonable doubt to a jury of one's peers. In so doing, this Court specifically explained *Almendarez-Torres*, and its holding regarding prior adult felony convictions on the basis that the prior adult conviction was itself previously established through procedures satisfying the constitutional requirements of notice (indictment), proof beyond a reasonable doubt and the right to trial by jury. As the Court put it:

> One basis for that possible constitutional distinctiveness [between prior adult felony convictions and other facts] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Almendarez-Torres* cannot,

> then, be read to resolve the due process and Sixth Amendment questions implicated . . . as the Government urges.

Jones, 526 U.S. at 249.

Thus, this Court explained that its holding in *Almendarez-Torres* regarding prior adult felony convictions is limited to facts "established through procedures satisfying the fair notice, reasonable doubt *and jury trial guarantees.*" Id. at 249-50 (emphasis added). Where prior adult felony convictions are concerned, at least the factual basis for the increase in the maximum punishment has already been determined in accord with the constitutional guarantees to notice, proof beyond a reasonable doubt, and the right to trial by jury. Therefore, it is arguable that none of those fundamental constitutional rights are offended by increasing the maximum sentence based upon a prior felony conviction.

The very next year, in *Apprendi v. New Jersey*, this Court, reaffirmed its holding in *Jones* and extended it to the States through the Fourteenth Amendment. This Court held that in any criminal prosecution where the Sixth Amendment right to trial by jury applies, any fact that the state seeks to use to increase the maximum penalty must be subject to the jury trial right and proven beyond a reasonable doubt:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*.... "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Apprendi, 530 U.S. at 491 (citing *Jones*, 526 U.S. at 252-253).

Once again, as in *Jones*, the Court took pains to explain why *Almendarez-Torres* did not control and reiterated its explanation in *Jones* regarding what distinguished *Almendarez-Torres*' holding on prior adult felony convictions:

> Rejecting Almendarez-Torres' objection, we concluded that sentencing him to a term higher than that attached to the offense alleged in the indictment did not violate the strictures of *Winship* in that case. Because Almendarez-Torres had admitted the three earlier convictions for aggravated felonies – all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own – no question concerning the right to a jury trial or the

> standard of proof that would apply to a contested issue of fact was before the Court.

Apprendi, 530 U.S. at 488.

Accordingly, *Apprendi* joined *Jones* in at least limiting *Almendarez-Torres'* prior conviction exception to convictions obtained in proceedings guaranteeing notice, proof beyond a reasonable doubt, *and the right to trial by jury.* [12]

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[12] It is unclear to what extent *Almendarez-Torres* and its exception for prior felony convictions remains good law. In *Apprendi*, this Court at least cast significant doubt on *Almendarez-Torres*, stating:

> [e]ven 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 (emphasis added). Moreover, *Almendarez-Torres* was decided by a narrow 5-4 majority that included Justice Thomas. By the time *Jones* and *Apprendi* were decided, Justice Thomas had revisited his position, *see Apprendi*, 530 U.S. at 519-21 (Thomas, J. concurring) (footnote omitted), and joined

Louisiana's statutory scheme for punishing marijuana possession at issue here clearly falls well outside this Court's holdings in *Almendarez-Torres*, *Jones*, and *Apprendi*. As described above, La. R.S. 40:966 (E) allows the use of prior non-jury misdemeanor marijuana first offense convictions to increase the statutory maximum sentence to which an accused is exposed. Moreover, it allows the use of the prior misdemeanor marijuana first to increase the statutory maximum from a maximum of six months in jail to a maximum of five years based on one prior misdemeanor marijuana first, and to a maximum of twenty years, for two or more prior misdemeanor firsts.

Jones, and Apprendi and their subsequent progeny, however, require that any fact that by law sets or increases punishment must be treated as an element and therefore subject to trial by jury. *Almendarez-Torres'* narrow exception, to the extent it retains any vitality at all in the wake of *Jones and*

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the *Jones* and *Apprendi* majority in rejecting the *Almendarez-Torres'* rationale. Indeed the validity of *Almendarez-Torres* is specifically before the Court in two cases, in which the Court called for a response from the government. *See e.g. Ayala-Segoviano v. United States, 10-5296 (Docket Entry 9/15/2010)*, and *Vazquez v. United States, 10-6117 (Docket entry 9/20/2010)*. The question here, however, in this Petition is whether the Constitution permits an extension of the *Almendarez-Torres* prior conviction exception to non-jury triable offenses.

Apprendi, is limited to prior felony convictions obtained in proceedings guaranteeing notice, proof beyond a reasonable doubt, *and the right to trial by jury*.[13]

B. The Tension between Almendarez-Torres and Apprendi Has Led To A Split Among The Federal Circuits And Lower Courts And Confusion About Whether A Prior Adjudication At Which A Defendant Had No Right To A Jury Trial Can Be Used To Increase The Maximum Sentence To Which The Defendant Is Exposed.

The federal appellate courts and state supreme courts are openly and intractably split, and indeed appear to be confused, over the use of non-

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[13] As Justice Scalia noted concurring in *Ring*:

> [A]s I wrote in my dissent in *Almendarez-Torres v. United States*, 523 U.S. 224, 248, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998), and as I reaffirmed by joining the opinion for the Court in *Apprendi*, I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives -- *whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt.*

Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J. concurring).

jury triable offenses. The split in the lower courts over this issue has fully matured. The arguments on either side are no longer developing any further. The Seventh Circuit Court of Appeals' recent split decision in *Welch* illustrates this entrenched disagreement on the meaning of *Apprendi* with respect to non-jury triable adjudications.

Welch first described the initial relationship (and tension) between *Almendarez-Torres* and *Apprendi*, upon which there is little disagreement:

> When the Supreme Court carved out of its holding in *Apprendi* an exception allowing for the use of prior convictions, the Court believed that the procedural safeguards surrounding such a conviction gave it sufficient reliability that further protections were not required. Specifically, the Court relied upon the "certainty that procedural safeguards attached to any 'fact' of prior conviction . . . mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum statutory range." *Id.* at 488. The Court further said that: there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to

> find the required fact under a lesser standard of proof.

Welch v. United States, 604 F.3d 408, 426 (7th Cir. 2010).

The majority opinion in *Welch* then outlined the split, and ultimately confusion, that has arisen in applying *Almendarez-Torres* and *Apprendi* to the use of non-jury triable adjudications that increase the maximum sentence to which a defendant is exposed. First, the *Welch* majority detailed the pro-*Apprendi* approach to the issue adopted first by the Ninth Circuit in *United States v. Tighe*:

> Our colleagues in the Ninth Circuit were the first to address whether the Supreme Court's discussion in *Apprendi* barred the use of any juvenile adjudication to enhance a sentence under the ACCA. *See United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001). A majority of the panel took the view that the Supreme Court intended to bar the use of such juvenile adjudications. In reaching its conclusion, the Ninth Circuit found particularly convincing a passage in the Supreme Court's opinion in *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999): "One basis for that constitutional distinctiveness [of prior convictions] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense . .

> . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees." *Tighe*, 266 F.3d at 1193 (quoting *Jones*, 526 U.S. at 249) (brackets and emphasis in *Tighe*).

Welch v. United States, 604 F.3d at 427 (7th Cir. 2010).

Nevertheless, the Seventh Circuit majority adopted the pro-*Almendarez-Torres* approach favored by a number of other courts. These courts – like the Louisiana Court in *Jefferson* -- based their holdings on the "reliability" of judicial fact-finding and the sufficiency of procedural protections deemed adequate only for non-jury levels of punishment. *See United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002) (procedural safeguards aside from the use of a jury "are more than sufficient to ensure the reliability that *Apprendi* requires"); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003) (holding a prior non-jury adjudication afforded "all constitutionally-required procedural safeguards can properly be characterized as a prior conviction for *Apprendi* purposes."); *United States v. Burge*, 407 F.3d 1183, 1191 (11th Cir. 2005) (holding a prior non-jury adjudication may be considered a prior conviction for *Apprendi* purposes where the defendant received "the totality of constitutional protections due"); *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007) (non-jury adjudications provide sufficient procedural safeguards to satisfy

the "reliability requirement that is at the heart of *Apprendi*."); *United States v. Bolin,* 239 Fed. Appx. 842, 843 (4th Cir. S.C. 2007) ("even assuming Bolin is correct, the fact that the misdemeanor convictions were found by the judge at sentencing does not undermine the validity of the felony convictions because the fact of a prior conviction need not be submitted to a jury and proved beyond a reasonable doubt."). *Accord People v. Nguyen*, 209 P.3d 946 (Cal. 2009); *State v. Weber*, 149 P.3d 646 (Wash. 2006); *State v. McFee*, 721 N.W.2d 607 (Minn. 2006); *Ryle v. State*, 842 N.E.2d 320 (Ind. 2005); *State v. Hitt*, 42 P.3d 732 (Kan. 2002); *People v. Huber*, 139 P.3d 628 (Colo. 2006). [14]

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[14] *People v. Huber*, 139 P.3d 628 (Colo. 2006) illustrates the confusion in the lower courts, and also identifies the split concerning this issue that has been fully developed. There, the Court rejected the defendant's argument that, because not all misdemeanor cases are tried to a jury, misdemeanor convictions could not qualify for use to enhance sentences under *Apprendi's* prior conviction exception. The Colorado courts have repeatedly noted the existence of this split in the circuits. *See Huber*; *see also People v. Mazzoni*, 165 P.4d 719, 722-723 (Colo. Ct. App. 2006) (also noting the split between the 9th Circuit and the 3rd, 8th, and 11th Circuit) ("we conclude that the prior-conviction exception to *Apprendi-Blakely* applies to all prior convictions that resulted from procedures consistent with the Sixth and Fourteenth Amendments. Where the Sixth and Fourteenth Amendments permit the government, in some circumstances, to convict and impose criminal penalties upon a defendant without a jury trial, does it make sense to hold that, should that defendant ever again find himself before a sentencing judge, the Sixth and Fourteenth Amendments prevent the later judge

As Judge Posner recognized in his dissent in *Welch*, the difficulty with the majority's pro-*Almendarez-Torres* approach is that it ignores two fundamental constitutional precepts. First, the Sixth Amendment jury trial guarantee is not satisfied by alternative procedures that promise "reliability." Rather the Sixth Amendment spells out the procedural mechanism concerning how that reliability is to be achieved. Second, Judge Posner recognized that the pro-*Almendarez-Torres* approach takes procedures that are sufficient for outcomes to which the jury trial right does *not* apply, and deems them adequate for degrees of punishment to which the jury trial guarantee *does* attach.[15] Judge Posner then illustrates these deficiencies in the pro-*Almendarez-Torres* approach:

> Suppose a military commission convicted a suspected terrorist of a military crime, in a proceeding in which the defendant had not been entitled to all the rights he would have

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from considering the fact of that conviction? We think not, and we therefore conclude that all convictions obtained in accordance with the Sixth and Fourteenth Amendments fall within the prior-conviction exception.").

[15] *See e.g. Maryland v. Craig*, 497 U. S. 836, 862 (1990) (Scalia, J., dissenting) ("This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures . . .").

> been entitled to in a conventional criminal proceeding, such as the right to a jury. Would it follow that because he had received all the rights to which military law entitled him, his conviction could be used to enhance a later conviction of a conventional crime? To answer in the affirmative would stretch *Apprendi* awfully far.

Welch v. United States, at 432 (Posner, J. *dissenting*). Nor is it easy to discern a difference in the quality of Sixth Amendment protection that must be supplied to a "suspected terrorist" and an alleged possessor of marijuana.

Judge Posner's observations concerning the difference between judge trials in juvenile court apply equally, if not more so, to the type of proceedings, designed for the mass processing of petty offenses by hired magistrates, to which petitioners were subject: "they hear the same stories from defendant's over and over again, leading them to treat defendants' testimony with skepticism; they become chummy with the police and apply a lower standard of scrutiny to the testimony of officers whom they have come to trust; and they make their decisions alone rather than as a group and so their decisions lack the benefits of group deliberation."[16]

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[16] Not only do defendants not have a right to a jury trial in these underlying proceedings, but they are not even entitled to an appeal from any adverse trial court rulings. *State v. Castillo*, 2009-KK-1358 (La. 1/28/2011), __ So. 3d __ ("Because

Most importantly, it also lacks the input of ordinary citizens, the jury of one's peers, that is contemplated by the Sixth Amendment of the Constitution.[17]

The Louisiana Supreme Court's jurisprudence is emblematic of the confusion that permeates the lower courts in this area. In *State v. Quincy Brown*, the Louisiana Supreme Court held that *Apprendi* forbid the use of juvenile adjudications to increase an adult maximum sentence because juvenile adjudications did not provide the right to trial by jury. *State v. Brown*, 879 So. 2d 1276 (La. 2004). Just a few years later, in *State v. Jefferson*, the

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Castillo was charged with misdemeanor offenses punishable by imprisonment of not more than six months, and thus not triable by a jury, Castillo had no right of direct appeal from his convictions."). And to the extent he is permitted to seek discretionary review of trial court decisions, the Louisiana Supreme Court has held that the misdemeanor defendant is not entitled to the assistance of counsel in an effort to secure discretionary review. *Id.* at __ ("We find no compelling reason to extend the holding of *Halbert* to Castillo's discretionary review of his petty misdemeanor traffic convictions.").

[17] As noted above, the Ninth Circuit has also rejected the view that non-jury adjudications fall within *Apprendi's* "prior conviction" exception. *See United States v. Tighe*, 266 F.3d 1187, 1192, 1194 (9th Cir. 2001). So too has the State of Oregon. *State v. Harris*, 118 P.3d 236 (Or. 2005) (holding held, "the Sixth Amendment requires that when such an adjudication is offered as an enhancement factor to increase a criminal sentence, its existence must either be proved to a trier of fact or be admitted by a defendant).

Louisiana Supreme Court turned around and found that non-jury triable misdemeanor convictions could be used to increase the maximum sentence without violating *Apprendi* or the Sixth and Fourteenth Amendment's jury trial guarantee.

All of these cases reflect, not only the confusion and disagreement that permeates the lower courts, but also that the issue has been thoroughly developed by the lower courts.

C. This Court Should Grant Certiorari To Resolve Whether The Constitution Allows The Use Of A Non-Jury Triable Conviction To Increase The Maximum Sentence From Six Months To Twenty Years

In *Jones v. United States*, this Court observed that from a historical perspective, the Sixth Amendment jury right was more important than the constitutional doubt rule:

> The question might well be less serious than the constitutional doubt rule requires if the history bearing on the Framers' understanding of the Sixth Amendment principle demonstrated an accepted tolerance for exclusively judicial factfinding to peg penalty limits. *But such is not the history.*

Jones v. United States, 526 U.S. 227, 244 (1999) (emphasis added). The Court went on to note how attacks on the jury trial right are predicated:

> not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by *justices of the peace, commissioners of the revenue, and courts of conscience.*

Id at 246. Yet, this is exactly how Petitioners were prosecuted and made to face up to twenty years in prison; with two-thirds of the essential elements of the offense already determined by a judge or hired magistrate.

It makes no constitutional difference that in these marijuana cases, the trial judge made factual findings on predicate matters whereas in *Apprendi* the trial judge made factual findings post-trial. Indeed, it would have been just as constitutionally offensive if the New Jersey statute in *Apprendi* had required the judge to make a finding pre-trial that the offense was part of a hate-crime, leaving it up to the jury to determine whether the defendant had committed the offense.

Louisiana attempts to justify this diminution of the jury trial right by claiming that this Court's jurisprudence, holding that a "jury trial is not required in petty crimes or offenses," means "that

this particular safeguard is not constitutionally essential to a fair and reliable adjudication in" Petitioners' cases where the maximum sentence is being increased by nineteen and a half years. *State v. Jefferson* at 121 (Pet App. C, at 36a). While noting the split in authority on the issue, the Louisiana Supreme Court ultimately ruled:

> In light of the above, we find, contrary to the conclusions of the district court, that the Sixth and Fourteenth Amendments, as construed in *Apprendi* and its progeny, do not preclude the sentence-enhancing use, against an adult, of a prior valid, fair and reliable conviction of a misdemeanor, obtained as an adult, where the misdemeanor proceeding included all the constitutional protections applicable to such proceedings, even though these protections do not include the right to a jury trial. . . .
>
> Louisiana's statutory scheme satisfies the requirement of due process because under the Sixth and Fourteenth Amendments, states are allowed the presumption that in petty crimes and offenses, trial judges are capable of reliable fact finding.

State v. Jefferson, at 122, 124 (Pet. App. C, at 39a, 44a).

The question presented in this case, however is not whether a judge rather than a jury can adjudicate a petty crime or offense, such as nuisance or a municipal ordinance. Nor is it whether judges provide "reliable" determinations of guilt or innocence. Rather, the question is whether it violates the Sixth Amendment's jury trial guarantee, where those findings are used to impose or increase a degree of punishment to which the jury trial guarantee attaches – in this case to increase the maximum sentence from six months to a maximum of twenty years.

II. THIS COURT SHOULD USE THESE CONSOLIDATED CASES TO DECIDE THIS IMPORTANT AND RECURRING ISSUE.

The question of whether a prior non-jury triable adjudication can be used to increase the maximum punishment for an offense has percolated in state and federal courts for more than a decade. Courts have addressed the issue in a variety of contexts— prior juvenile proceedings, prior non-jury triable misdemeanor offenses such as the marijuana possession cases at issue here, as well as the federal Armed Career Criminal Act —but the core dispute is the same: some courts adopt the pro-*Almendarez-Torres* approach and permit such adjudications to be used to increase the maximum sentence based on claims regarding the reliability of non-jury proceedings, and that such proceedings afford all the procedural protections required to support the consequences *at that time*.

Other courts (and Judge Posner), on the other hand, adopt the pro-*Apprendi* approach and require that the procedural guarantees specified in the Constitution, including the Sixth Amendment's guarantee of the right to trial by jury, be adhered to whenever the punishment at issue reaches the level to which the jury trial right has been held to apply – i.e. greater than six months. *See United States v. Tighe,* supra; *United States v. Welch*, supra (Posner, J. dissenting). Courts adhering to the latter, pro-*Apprendi* approach, at least limit the use of prior adjudications to increase the maximum sentence to those adjudications obtained through procedures that honor the Sixth Amendment right to trial by jury. Over the years, these two, divergent approaches have become both refined and well-settled producing an entrenched split as well as considerable confusion in the lower courts regarding the true meaning of *Apprendi* that can only be resolved by this Court.

Moreover, Petitioners cases do not suffer from any vehicle problems. First, the issues are well preserved. Second, these are not cases where the defendants had a right to a jury trial, on the predicate offenses, but waived it by pleading guilty. As in *Blanton*, the Louisiana statute here simply does not provide for the right to a jury trial on the predicate offense(s).[18] In fact, the statute allows the

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[18] The jurisdiction of this Court is specifically conferred under 28 U.S.C. § 1257 which provides for jurisdiction "where the

State to charge the misdemeanor possession of marijuana, first offense (no right to trial by jury) multiple times without asking for a recidivist enhancement, so that by the time the defendant faces a possession of marijuana, third offense charge and twenty-years imprisonment, the State does not need to prove to a jury beyond a reasonable doubt the facts accounting for nineteen and half of those years. This outcome goes beyond anything contemplated by *Almendarez-Torres*, *Jones* or *Apprendi*, and this Court should decide whether it squares with the Sixth and Fourteenth Amendments.

As a practical matter, the issue impacts thousands of accused citizens each year,[19] including hundreds charged in Louisiana under the same statute at issue here. According to the Vera Institute, in Orleans Parish alone, roughly 2,500 people each year are arrested for simple marijuana possession.[20]

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validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution."

[19] Each year police officers make more than 600,000 marijuana arrests nationally. *See Ryan S. King* and *Mark Mauer*, The War on Marijuana: The Transformation of the War on Drugs in the 1990s, The Sentencing Project, May 2005 (available at http://www.sentencingproject.org/doc/publications/dp_waronmarijuana.pdf).

[20] See e.g. *Proposals for New Orleans' Criminal Justice System*, The Vera Institute of Justice, 2007 available at http://www.vera.org/download?file=2849/no_proposals.pdf (last visited 1/31/11).

As in other large municipalities, the burden of processing this large number of offenses means that the proceedings for the non-jury eligible marijuana possession charge are cursory and the local public defender simply cannot thoroughly investigate each case as thoroughly as if the case carried a significant term of imprisonment. Nor are these courts able to carefully adjudicate each individual case. These initial charges are literally regarded as "petty" offenses, with any number of defendants pleading guilty simply to receive time-served and secure a release until such time as prosecutor decides to elevate the offense based upon the prior adjudications to a serious felony offense.

As Judge Posner notes, *supra* at I (B), judges assigned to preside over these misdemeanor possession cases "hear the same stories from defendant's over and over again, leading them to treat defendants' testimony with skepticism; they become chummy with the police and apply a lower standard of scrutiny to the testimony of officers whom they have come to trust; and they make their decisions alone rather than as a group and so their decisions lack the benefits of group deliberation." Facing a skeptical and overburdened trial judge, under-resourced lawyer, no opportunity to be judged by one's peers, and the possibility of spending six months in jail (versus going home with a guilty plea), many defendants choose the latter.

Making the matter more urgent still, so long as the Louisiana Supreme Court's decision is upheld,

possession of marijuana, third offense, -- no matter how small the amount -- based upon two prior non-jury adjudications -- qualifies under the Armed Career Criminal Act as a "serious drug offense.[21]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted

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[21] A "Serious drug offense" is defined as including "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . ., for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). *See United States v. Rodriquez*, 553 U.S. 377, 380 (2008).