No. 01-10864

In the Supreme Court of the United States

TRAVIS T. HITT, PETITIONER

v.

STATE OF KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THEODORE B. OLSON
Solicitor General
Counsel of Record
MICHAEL CHERTOFF
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
NINA GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether this Court's decision in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), should be overruled.

2. Whether a criminal defendant may be sentenced to a term of imprisonment in excess of the presumptive sentencing range established by state law, based on the sentencing judge's finding that the defendant had previously been determined in juvenile adjudications to have committed other criminal offenses, where those juvenile proceedings did not afford the defendant a right to jury trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 01-10864

TRAVIS T. HITT, PETITIONER

v.

STATE OF KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Under the Kansas Sentencing Guidelines Act (Act), Kan. Stat. Ann. §§ 21-4701 *et seq.* (1995 & Supp. 2001), sentences for felony offenses committed after July 1, 1993, are determined based on two factors: the "severity level" of the current offense, and the defendant's criminal history category. *Id.* § 21-4704; see *State* v. *Gould*, 23 P.3d 801, 811 (Kan. 2001); Kan. Sen-

tencing Guidelines Manual, Ch. I (2002). The statute defining a criminal offense states the severity level of the offense on a scale from 1 to 10, with 1 being the most severe. Kan. Sentencing Guidelines Manual, Ch. III (2002). The criminal history categories, which range from A (most serious) to I (least serious), are based on the defendant's history of prior adult convictions and juvenile adjudications. Kan. Stat. Ann. §§ 21-4709, 21-4710 (1995); Kan. Sentencing Guidelines Manual, Ch. IV (2002).

The presumptive sentencing ranges under the statutory guidelines are set forth in two grids (for drug offenses and nondrug offenses), with the severity levels listed on the vertical axis and the criminal history categories on the horizontal axis of each grid. Kan. Stat. Ann. § 21-4704 (1995 & Supp. 2001); see Kan. Sentencing Guidelines Manual, App. G (2002). The sentencing range contained in the grid box where the severity level of the offense of conviction and a defendant's criminal history category intersect is the defendant's "presumptive sentence." Kan. Stat. Ann. § 21-4703(q), 21-4704 (1995 & Supp. 2001); see *Gould*, 23 P.3d at 812.[1] Each grid is divided by a "dispositional line." For grid boxes above the line, the "presumptive disposition" is a term of imprisonment; for boxes below the line, the "presumptive disposition" is "nonimprisonment"

---

[1] Each grid box contains three numbers representing months of imprisonment. The Act provides that "[t]he sentencing court has discretion to sentence at any place within the sentencing range. The sentencing judge shall select the center of the range in the usual case and reserve the upper and lower limits for aggravating and mitigating factors insufficient to warrant a departure." Kan. Stat. Ann. § 21-4704(e)(1) (1995); see Kan. Sentencing Guidelines Manual, Ch. I (2002).

—typically, a term of probation. Kan. Stat. Ann. §§ 21-4703(h), 21-4704(f) (1995 & Supp. 2001).[2]

The sentencing court is required to impose a sentence within the presumptive guidelines range "unless the judge finds substantial and compelling reasons to impose a departure." Kan. Stat. Ann. § 21-4716(a) (1995 & Supp. 2001); see *id.* § 21-4719. The court may impose a "durational departure" by increasing or decreasing the length of the defendant's sentence above or below the presumptive sentencing range. *Id.* § 21-4703(i); Kan. Sentencing Guidelines Manual, Ch. VI (2002). The Act provides a "nonexclusive list of aggravating factors [that] may be considered in determining whether substantial and compelling reasons for [an upward] departure exist." Kan. Stat. Ann. § 21-4716(b)(2) (1995 & Supp. 2001). When the sentencing judge departs upward from the presumptive sentencing range set forth in the guidelines, "the presumptive term of imprisonment set in such departure shall not total more than double the maximum duration of the presumptive imprisonment term." *Id.* § 21-4719(b)(2) (1995); see *State* v. *Hernandez*, 944 P.2d 188, 194 (Kan. App. 1997). The sentencing court may also impose a "dispositional departure" by sentencing a defendant for whom the presumptive disposition is probation to a term of imprisonment, or by sentencing a defendant for whom the presumptive disposition is imprisonment to a term of probation. Kan. Stat. Ann. § 21-4703(g) (1995); Kan.

---

[2] Kansas law also establishes "border boxes," for which "the court may impose an optional nonprison sentence" if it makes certain findings. Kan. Stat. Ann. § 21-4704(f) (1995 & Supp. 2001); see Kan. Sentencing Guidelines Manual, Chs. I, VI (2002).

Sentencing Guidelines Manual, Ch. VI (2002); see *State* v. *Carr*, 53 P.3d 843, 848-849 (Kan. 2002).

2. Petitioner pleaded guilty in Kansas state court to conspiracy to commit aggravated battery, in violation of Kan. Stat. Ann. § 21-3414(a)(1)(A) and Kan. Stat. Ann. § 21-3302 (1995). Pet. App. A3. Under those statutes, the severity level of petitioner's offense was 6. *Id.* at B2; see Kan. Stat. Ann. § 21-3414(b) (1995) (aggravated battery under subsection (a)(1)(A) is a severity level 4 felony); *id.* § 21-3302(c) (conspiracy to commit nondrug felony is ranked at two severity levels below the level of the underlying crime). Petitioner had a prior adult conviction for burglary and six prior juvenile adjudications for burglary and theft, resulting in a criminal history score of C. Pet. App. A4, B2. Petitioner's presumptive sentencing range was 34-38 months' imprisonment, and the court sentenced him to 38 months' imprisonment. *Id.* at A4. If the juvenile adjudications had not been considered, petitioner's criminal history category would have been G, placing him in a "border box" (see note 2, *supra*) with a presumptive sentencing range of 22-26 months' imprisonment. See *id.* at B3.[3]

Petitioner appealed his sentence, claiming that the trial court's consideration of his juvenile adjudications in determining his criminal history category was unconstitutional under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, this Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior

[3] If neither the juvenile adjudications nor the prior adult conviction had been considered, petitioner's presumptive sentence would have been 17-19 months, and the presumptive disposition would have been probation. See Kan. Stat. Ann. § 4704 (1995 & Supp. 2001) (sentencing grid; severity level 6, criminal history category I).

conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Petitioner argued that his prior juvenile adjudications did not fall within *Apprendi*'s exception for recidivism because he did not have a right to jury trial with respect to those adjudications. Pet. App. A3, B3. The Kansas Court of Appeals rejected that claim, finding that *Apprendi* "limited the requirement for a jury determination to *facts other than a prior conviction* and [petitioner's] complaint involves only a prior conviction." *Id.* at B8.

3. The Kansas Supreme Court affirmed. Pet. App. A1-A24. The court acknowledged its prior holding in *Gould*, 23 P.3d at 812-814, that the statute authorizing upward departures based on the sentencing court's finding of aggravating factors by a preponderance of the evidence was unconstitutional under *Apprendi*. Pet. App. A19; see *Gould*, 23 P.3d at 814 (finding Kan. Stat. Ann. § 21-4716 to be "unconstitutional on its face").[4] The court declined, however, to extend *Gould* to increases in a defendant's sentence based on prior juvenile adjudications. Noting that "*Apprendi* clearly carved out an exception for prior convictions," the court

---

[4] After the decision in *Gould*, the Kansas legislature amended Kan. Stat. Ann. § 21-4716 (1995) to require that "any fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt." 2002 Kan. Sess. Laws Ch. 170, § 1; see *id.* § 2 (amending Kan. Stat. Ann. § 21-4718 to provide for determination by court whether evidence concerning facts that may increase statutory maximum should be presented to jury during trial or in bifurcated proceeding after jury returns its verdict).

concluded that "[j]uvenile adjudications are included within the historical cloak of recidivism and enjoy ample procedural safeguards; therefore, the *Apprendi* exception for prior convictions encompasses juvenile adjudications." *Id.* at A22-A23.

DISCUSSION

Petitioner contends (Pet. 5-7) that in light of *Apprendi*, this Court should overrule its earlier decision in *Almendarez-Torres* v. *United States*, 523 U.S. 224, 239-247 (1998), which holds that a defendant's prior conviction may constitutionally be treated as a sentencing factor rather than an element of the offense, even when that finding causes the defendant to receive a term of imprisonment longer than the statutory maximum that would otherwise apply. Petitioner also argues (Pet. 7-9) that the Court should grant review to resolve a conflict between the decision below and the decision in *United States* v. *Tighe*, 266 F.3d 1187 (9th Cir. 2001), concerning whether juvenile adjudications are properly regarded as prior convictions for purposes of the rule announced in *Almendarez-Torres* and preserved in *Apprendi*.

The questions raised by petitioner implicate important matters in the administration of criminal law and warrant resolution by this Court. In the government's view, however, this case presents an unsuitable vehicle for the Court's consideration of those issues. In a brief filed this same day, the government suggests that the Court grant the petition for certiorari in *Smalley* v. *United States*, No. 02-6693, in order to determine whether *Almendarez-Torres* should be reaffirmed and, if so, whether the rule announced in that case applies to juvenile adjudications. The petition in the instant case should be held pending the Court's disposition of the

petition in *Smalley* and then disposed of as appropriate.[5]

1. This Court's decision in *Almendarez-Torres* has not been overruled and therefore remains binding on all state and lower federal courts. The majority and a concurring opinion in *Apprendi*, however, have raised questions about whether the rule in *Almendarez-Torres* should continue to stand in light of the reasoning of *Apprendi*. See 530 U.S. at 489-490; *id.* at 520-521 (Thomas, J., concurring). If this Court were to grant review to determine the proper treatment of prior juvenile adjudications in a recidivist sentencing scheme, it would be appropriate for the Court also to consider whether the holding of *Almendarez-Torres* should be reaffirmed or overruled.

2. In *Tighe*, the Ninth Circuit held that the use of a defendant's prior juvenile adjudication to impose an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (Pub. L. No. 98-473, 98 Stat. 2185), violated the rule announced in *Apprendi*. 266 F.3d at 1191-1195. Noting that this Court has held that there is no federal constitutional right to a jury trial in a juvenile delinquency proceeding, *id.* at 1193 (citing *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971)), the court reasoned that "the 'prior conviction' exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt. * * * Thus, the 'prior conviction' exception does not include nonjury juvenile adjudications." *Id.* at 1194-1195. In a subsequent federal

---

[5] The government is providing the parties in this case with a copy of its brief in *Smalley*.

case involving a challenge to the use of prior juvenile adjudications to enhance a defendant's sentence under the ACCA, the Eighth Circuit disagreed with the Ninth Circuit, holding that "juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption." *United States* v. *Smalley*, 294 F.3d 1030, 1032-1033 (8th Cir. 2002), petition for cert. pending, No. 02-6693 (filed Oct. 3, 2002). In light of the square circuit conflict, which involves a question of recurring importance, see, *e.g.*, *United States* v. *Richardson*, No. 01-1517, 2002 WL 31513433, at *2-*6 (3d Cir. Nov. 13, 2002); *United States* v. *Morris*, 293 F.3d 1010, 1011-1013 (7th Cir.), cert. denied, 123 S. Ct. 428 (2002); cf. *United States* v. *Hall*, 77 F.3d 398, 401-402 (11th Cir.), cert. denied, 519 U.S. 849 (1996), review by this Court is warranted to determine whether a criminal defendant's sentence may be enhanced beyond the otherwise-applicable statutory maximum, based on the sentencing judge's finding that the defendant had sustained a prior juvenile adjudication in which the juvenile defendant was not afforded a right to jury trial.

3. The Eighth Circuit's decision in *Smalley* presents a more suitable vehicle than the instant case for this Court to determine the continuing validity of *Almendarez-Torres* and its application to juvenile adjudications. *Smalley* squarely presents the question whether a defendant's sentence may be increased "beyond the prescribed statutory maximum" (*Apprendi*, 530 U.S. at 490) based on the sentencing court's findings about the defendant's prior convictions. The statute at issue in *Smalley*, 18 U.S.C. 924(e), increases the sentence for possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1), from a maximum of 10 years' imprisonment to a term of "not less than" 15 years' im-

prisonment where the district court finds that the defendant has three prior convictions for "a violent felony or a serious drug offense." See 18 U.S.C. 924(a)(2); 18 U.S.C. 924(e)(1). The statute defines the term "violent felony" to include certain acts of juvenile delinquency. 18 U.S.C. 924(e)(2)(B) and (C).

In the instant case, by contrast, it is not clear that, for federal constitutional purposes, the trial court's finding that petitioner had prior juvenile adjudications actually caused petitioner to be sentenced to a term of imprisonment greater than the "prescribed statutory maximum" that would otherwise have applied. If those juvenile adjudications had not been considered, petitioner's presumptive sentencing range under the State's statutory guidelines would have been 22-26 months' imprisonment. See p. 4, *supra*. The Kansas Sentencing Guidelines Act, however, expressly authorizes the sentencing judge to depart from the guidelines range if "the judge finds substantial and compelling reasons to impose a departure." Kan. Stat. Ann. § 21-4716(a) (1995 & Supp. 2001). The Act identifies a "nonexclusive list of aggravating factors [that] may be considered in determining whether substantial and compelling reasons for departure exist," *id.* § 21-4716(b)(2), subject to the limitation that the trial court may not impose a sentence greater than "double the maximum duration of the presumptive imprisonment term," *id.* § 21-4719(b)(2) (1995). In the instant case, petitioner's sentence of 38 months' imprisonment was less than double the upper end (26 months' imprisonment) of the presumptive sentencing range to which petitioner would have been subject without regard to his prior ju-

venile adjudications.[6] It thus would seem that those juvenile adjudications were used at sentencing to "support[] a specific sentence *within the range* authorized" for the conspiracy offense to which petitioner pleaded guilty, rather than to effect "an increase beyond the maximum authorized statutory sentence." *Apprendi*, 530 U.S. at 494 n.19.

In *Gould*, the Kansas Supreme Court rejected that analysis and held that the statutory maximum sentence for *Apprendi* purposes is "the maximum sentence in the applicable grid box," 23 P.3d at 813, and that upward departures from that sentence based on findings made by the court are therefore unconstitutional, see *id.* at 812- 814. The Kansas Supreme Court has subsequently held, however, that "dispositional departures" (see pp. 3-4, *supra*) are subject to a different rule, and that a defendant may properly be sentenced to a term of imprisonment, rather than to the presumptive sentence of probation indicated by the guidelines, based on findings made by the court rather than by a jury. *Carr*, 53 P.3d at 850; see also *State* v. *Beasley*, 56 P.3d 803, 806-807 (Kan. 2002) (*Apprendi* does not apply to sentencing court's finding that defendant used a firearm in commission of felony, which requires presumptive prison term under Kan. Stat. Ann. § 21-4704a(h) (Supp. 2001)); *State* v. *Garcia*, 56 P.3d 797, 799 (Kan. 2002) (*Apprendi* does not apply to court's finding that defendant's offense is gang-related, which requires presumptive

---

[6] Petitioner's sentence of 38 months' imprisonment was exactly double the upper end of the guidelines sentencing range that would have applied if the trial judge had not considered petitioner's prior juvenile adjudications *or* his prior adult conviction. See note 3, *supra*.

prison term under Kan. Stat. Ann. § 21-4704a(k) (Supp. 2001)).

It thus appears that the Kansas Supreme Court is still working out the implications of *Apprendi* for the specific procedures and sentencing ranges of the State's sentencing scheme.[7] Equally important, while the Kansas Supreme Court is the definitive expositor of the *meaning* of Kansas law, its views about the federal constitutional implications of that law under *Apprendi* are not binding on this Court. Because there is at the very least a substantial question whether petitioner's prior juvenile adjudications were in fact used to enhance his sentence beyond the "statutory maximum" that would otherwise apply, the instant case presents an unsuitable vehicle for this Court's consideration of the more general constitutional questions that are worthy of this Court's review.

---

[7] The Kansas Supreme Court is itself divided about the application of *Apprendi* to the Kansas sentencing scheme. See *Carr*, 53 P.3d at 851-853 (Six, J., joined by Larson, J., dissenting); *Gould*, 23 P.3d at 814-815 (Abbott, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petition for a writ of certiorari in *Smalley* v. *United States*, No. 02-6693, and then disposed of as appropriate in light of the Court's action in that case.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

NINA GOODMAN
Attorney

DECEMBER 2002