No. 10-314

In the Supreme Court of the United States

DEVIN WELCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether defense counsel was ineffective for not arguing that the district court violated the Sixth Amendment by imposing an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), based in part on a prior juvenile adjudication in which petitioner had no right to a jury trial.

2. Whether a prior felony conviction under Illinois law for aggravated vehicular flight from a law enforcement officer qualified as a "violent felony" under the ACCA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 604 F.3d 408. The opinion of the district court (Pet. App. 53a-61a) is not published in the *Federal Supplement* but is available at 2008 WL 2796953.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2010. On July 26, 2010, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including September 1, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a guilty plea in the United States District Court for the Central District of Illinois, petitioner was

convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to the mandatory minimum 15 years of imprisonment. The court of appeals affirmed. Petitioner subsequently filed a motion under 28 U.S.C. 2255 (Supp. II 2008) seeking to vacate his ACCA sentence. The district court denied the motion. The court of appeals affirmed.

1. In 2005, petitioner pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Pet. App. 2a. A violation of Section 922(g) is ordinarily punishable by imprisonment for "not more than 10 years." 18 U.S.C. 924(a)(2). The ACCA provides, however, that a defendant who commits a violation of Section 922(g) is subject to a mandatory minimum sentence of 15 years of imprisonment if the defendant has three prior convictions for "a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1).

The Act defines a "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). The ACCA also provides that "the term 'conviction' includes a finding that a person has committed an act of juvenile delinquency involving a violent felony." 18 U.S.C. 924(e)(2)(C).

Petitioner's Presentence Investigation Report (PSR) indicated that petitioner had four prior convictions that were "violent felonies" for purposes of the ACCA: two aggravated batteries, aggravated fleeing or attempting to elude a police officer, and a juvenile adjudication for attempted armed robbery. Pet. App. 2a; PSR ¶ 22.

At sentencing, petitioner's counsel made no objections to the PSR, but petitioner submitted a handwritten objection to the use of the previous convictions to enhance his sentence. The district court overruled that objection and sentenced petitioner to 15 years of imprisonment, to be followed by a five-year term of supervised release. Pet. App. 2a.[1]

On direct appeal, petitioner, through counsel, did not pursue his pro se objection to the use of his prior convictions for ACCA enhancement. He contended only that the trial court had erred in failing to specify the number of required drug tests during the period of supervised release. Pet. App. 3a. The court of appeals summarily affirmed the judgment of conviction and sentence. *United States* v. *Welch*, No. 06-3385 (7th Cir. Feb. 21, 2007).

2. Petitioner subsequently filed a pro se motion under 28 U.S.C. 2255 (Supp. II 2008) seeking to set aside his sentence. He contended that his conviction for aggravated fleeing or attempting to elude a police officer was not a violent felony for purposes of ACCA. He also

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[1] The district court did not rely on one of the aggravated battery convictions, which was for spitting. Pet. App. 2a.

contended that his counsel had been ineffective in failing to contend that the Sixth Amendment prohibited the district court's use of petitioner's juvenile adjudication to enhance petitioner's sentence under ACCA because petitioner had no right to a jury trial in that juvenile proceeding. Pet. App. 3a.

The district court denied the motion in relevant part. In rejecting petitioner's ACCA claim, it relied on Seventh Circuit precedent holding that flight to avoid arrest categorically created a serious potential risk of injury to another and thus was a violent felony. In rejecting petitioner's ineffective-assistance claim, the district court noted that, at the time of sentencing, the circuits were divided three-one against petitioner's position, with the Seventh Circuit silent. The court thus concluded that it was a reasonable tactical choice for counsel not to raise the issue. Pet. App. 3a-4a, 56a-61a.

3. The court of appeals initially granted a certificate of appealability only on the issue of ineffective assistance but subsequently expanded the certificate to include the issue of whether petitioner's conviction for aggravated fleeing or attempting to elude a police officer properly was classified as a violent felony. Pet. App. 4a. The court of appeals affirmed the district court's denial of petitioner's Section 2255 motion.

a. The court of appeals first accepted that a challenge to the application of the ACCA to sentence a defendant above the otherwise-applicable ten-year maximum was cognizable on collateral review and that retroactive application would be given to this Court's recent decisions in *Begay* v. *United States*, 553 U.S. 137 (2008), and *Chambers* v. *United States*, 129 S. Ct. 687 (2009). Pet. App. 4a-11a. These determinations are not at issue here.

The court of appeals then determined that the Illinois offense of aggravated fleeing or attempting to elude a police officer was a violent felony under the ACCA.[2] The court interpreted the Illinois statute as requiring a mens rea of intentional, purposeful conduct, although the statute did not explicitly provide for a mens rea. Pet. App. 17a-24a. The court then held that any such purposeful vehicular flight from a police officer's direction to stop was a violent felony. *Id.* at 24a-32a. It reasoned that although any such vehicular flight qualifies as a violent felony, the subcategories of the statutory offense (see note 2, *supra*) were designed to exclude from coverage those violations that did not involve at least one aggravating factor of high speed, significant injury or property damage, or disobedience of multiple traffic control devices such as traffic lights or stop signs. Pet. App. 27a-28a.

b. The court of appeals also rejected petitioner's contention that his counsel was ineffective for failing to

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[2] The Illinois statute under which petitioner was convicted provides:

> The offense of aggravated fleeing or attempting to elude a peace officer is committed by any driver or operator of a motor vehicle who flees or attempts to elude a peace officer, after being given a visual or audible signal by a peace officer in the manner prescribed in subsection (a) of Section 11-204 of this Code, and such flight or attempt to elude:
>
> (1) is at a rate of speed at least 21 miles per hour over the legal speed limit;
>
> (2) causes bodily injury to any individual;
>
> (3) causes damage in excess of $300 to property; or
>
> (4) involves disobedience of 2 or more official traffic control devices.

625 Ill. Comp. Stat. Ann. 5/11-204.1(a) (West Supp. 2010).

challenge the inclusion of petitioner's juvenile conviction as an ACCA predicate offense. Pet. App. 32a-40a. The court did not determine whether it was a reasonable tactical choice—and therefore not ineffective assistance—for counsel to elect not to raise an issue on which there was a circuit conflict, but no controlling Seventh Circuit precedent. Instead, the court ruled that petitioner was not prejudiced because such juvenile convictions are properly counted for purposes of imposing a sentence under the ACCA. Agreeing with decisions from the Third, Fourth, Sixth, Eighth, and Eleventh Circuits, the court of appeals concluded that "the protections juvenile defendants receive—notice, counsel, confrontation and proof beyond a reasonable doubt—ensure that the proceedings are reliable" and eliminate any Sixth Amendment problem with using such adjudications as a basis for a later sentence enhancement. Pet. App. 40a; see *id.* at 35a (discussing Ninth Circuit's contrary view).

In dissent, Judge Posner disagreed with the majority's decisions that the Illinois aggravated fleeing offense is a violent felony and that a juvenile conviction may be used as an ACCA predicate. Pet. App. 41a-52a.

DISCUSSION

Petitioner renews (Pet. 9-21) his argument that the Sixth Amendment barred the enhancement of his sentence under the ACCA based on his prior juvenile adjudication (and that his defense counsel was ineffective for not making the contention at the time of sentencing). Petitioner's argument lacks merit. There is a lopsided conflict in the lower courts on the question whether the fact of a prior juvenile adjudication may be found by a judge at sentencing as a predicate to enhancing a sen-

tence, but this Court has repeatedly declined review on that question, including on November 1, 2010. There has been no intervening change in circumstances that warrants a different result here. Petitioner also appears to assert a distinct and broader claim, *i.e.*, that the Sixth Amendment forbids all use of juvenile adjudications to which no jury trial right attached to trigger an increase in the maximum penalty for a subsequent offense. There is no circuit conflict on that contention, which lacks merit in any event.

Petitioner also asserts (Pet. 21-31) that the Illinois aggravated vehicular flight offense does not qualify as a violent felony under the ACCA. The question whether a prior felony conviction under Indiana law for intentional vehicular flight from a law enforcement officer is a violent felony for ACCA purposes is currently before the Court in *Sykes* v. *United States*, cert. granted, No. 09-11311 (Sept. 28, 2010). This Court's decision in *Sykes* would likely be relevant to whether petitioner's Illinois aggravated vehicular flight offense qualifies as a violent felony. Accordingly, the Court should hold this petition pending its decision in *Sykes* and then dispose of it as appropriate in light of that decision.

1. a. In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that, "*[o]ther than the fact of a prior 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 (emphasis added). As the emphasized language indicates, the Court in *Apprendi* left intact its prior holding in *Almendarez- Torres* v. *United States*, 523 U.S. 224 (1998), that the fact of a defendant's prior conviction may be treated as a sentencing factor to be found by the court—rather than an of-

fense element to be found by the jury—even where that finding results in a sentence greater than the statutory maximum that would otherwise apply. See *id.* at 239-247. The Court has since reaffirmed that rule on numerous occasions. See *Cunningham* v. *California*, 549 U.S. 270, 274-275 (2007); *Shepard* v. *United States*, 544 U.S. 13, 24 (2005) (plurality opinion); *United States* v. *Booker*, 543 U.S. 220, 244 (2005); *Blakely* v. *Washington*, 542 U.S. 296, 301 (2004); *Dretke* v. *Haley*, 541 U.S. 386, 395 (2004).

A sentencing judge's use of non-jury juvenile adjudications to enhance an adult sentence does not implicate *Apprendi*'s core concerns. It does not lead to "encroachment * * * by the judge upon facts historically found by the jury." *Oregon* v. *Ice*, 129 S. Ct. 711, 718 (2009). Like the fact of a prior adult conviction, the fact that a defendant has a prior juvenile adjudication involves recidivism—"a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Apprendi*, 530 U.S. at 488 (quoting *Almendarez-Torres*, 523 U.S. at 243).

Petitioner does not contest the Court's holding in *Almendarez-Torres* insofar as it applies to prior adult convictions. See Pet. 10 n.4. He contends, however, that because he was not entitled to trial by jury in the prior juvenile adjudication relied upon by the district court in his underlying criminal case, the use of that adjudication to enhance his sentence under the ACCA violated his Sixth Amendment right to a jury trial. See, *e.g.*, Pet. 16. In support of this contention, petitioner argues that the district court's reliance on the juvenile adjudication was inappropriate because there was no jury in that proceeding to guard against "government oppression," Pet. 19,

and because juries are better at fact-finding than judges, Pet. 20.

Petitioners' arguments about the process employed during juvenile adjudications have no logical connection to the question whether the rule of *Apprendi*—rather than the prior conviction exception to that rule—should apply to the fact of a juvenile conviction. The *Apprendi* rule is concerned with whether certain "fact[s]" used to increase a defendant's maximum punishment must be charged in an indictment and decided by a jury beyond a reasonable doubt. See 530 U.S. at 490. Contrary to petitioner's implicit suggestion, the rule of *Apprendi* does not embody any substantive limitations on what facts may be used to increase maximum punishment. Instead, it addresses the question of who decides those facts—judge or jury—and by what standard.

If petitioner were correct that the prior conviction exception to *Apprendi* did not apply to the fact of prior juvenile convictions, that would mean only that the fact of such convictions would have to be found by the jury beyond a reasonable doubt. See *People* v. *Nguyen*, 209 P.3d 946, 950-951 (Cal. 2009) ("The statutorily relevant sentencing 'fact' in this case is whether defendant's record includes a prior adjudication of criminal conduct * * * as a basis for enhancing his current sentence. Aside from any exception that might apply here, the literal *rule* of *Apprendi* thus required only that a jury in the current proceeding determine the existence of such an alleged prior adjudication."), cert. denied, 130 S. Ct. 2091 (2010); accord *State* v. *McFee*, 721 N.W.2d 607, 617-618 (Minn. 2006) ("[T]he role for a jury would be extremely limited in this context. * * * [T]he jury would simply verify the fact of the existence of the juvenile court adjudication, and the fact of the adjudication

would be proven (or disproven) through use of documentary evidence of the adjudication."). Application of *Apprendi* to juvenile adjudications would not mean that such adjudications could not be considered at all, or that the facts underlying them would have to be retried in the subsequent case. Accordingly, petitioner's efforts to impeach the reliability of juvenile adjudications based on the lack of a jury trial right are beside the point; even if petitioner's understanding of *Apprendi* were correct, the fact of those convictions could still be used—by the jury in the subsequent case—to increase a defendant's maximum punishment.

As petitioner notes (Pet. 10-15), there is a lopsided conflict among the courts of appeals and state high courts on the question whether prior juvenile adjudications in which the defendant had no right to a jury determination fall within the prior conviction exception to the *Apprendi* rule and thus may be used by a sentencing judge to enhance a statutory penalty. In *United States* v. *Smalley*, 294 F.3d 1030 (2002), cert. denied, 537 U.S. 1114 (2003), the Eighth Circuit held that "juvenile adjudications can rightly be characterized as 'prior convictions' for *Apprendi* purposes." *Id.* at 1033. In addition to the court below, the Third, Fourth, Sixth, and Eleventh Circuits have reached the same conclusion. See *United States* v. *Jones*, 332 F.3d 688, 696 (3d Cir. 2003), cert. denied, 540 U.S. 1150 (2004); *United States* v. *Wright*, 594 F.3d 259 (4th Cir. 2010), cert. denied, No. 10-5645 (Nov. 1, 2010); *United States* v. *Crowell*, 493 F.3d 744, 750 (6th Cir. 2007), cert. denied, 552 U.S. 1105

(2008); *United States* v. *Burge*, 407 F.3d 1183, 1190-1191 (11th Cir.), cert. denied, 546 U.S. 981 (2005).[3]

The Ninth Circuit, however, has held 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. Juvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof, therefore, do not fall within *Apprendi*'s "prior conviction" exception.

United States v. *Tighe*, 266 F.3d 1187, 1194 (2001).[4] In reaching this conclusion, the Ninth Circuit made the same error as petitioner. It found the prior-conviction exception to *Apprendi* inapplicable because the defendant before it did not have the right to a jury in his prior juvenile adjudications, see *id.* at 1194-1195, but failed to explain why that concern with the prior adjudication would be ameliorated by having the jury in the subsequent case (rather than the judge) find that the defendant had in fact been previously convicted.

This Court has repeatedly denied petitions for certiorari presenting the question whether prior juvenile adjudications fall within the prior conviction exception to

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[3] A number of state supreme courts have reached the same conclusion. See *State* v. *Weber*, 149 P.3d 646, 649-653 (Wash. 2006), cert. denied, 551 U.S. 1137 (2007); *McFee*, 721 N.W.2d at 616-619; *Ryle* v. *State*, 842 N.E.2d 320, 321-323 (Ind. 2005), cert. denied, 549 U.S. 836 (2006); *State* v. *Hitt*, 42 P.3d 732, 740 (Kan. 2002), cert. denied, 537 U.S. 1104 (2003).

[4] Two state supreme courts have reached the same conclusion. See *State* v. *Harris*, 118 P.3d 236, 246 (Or. 2005); *State* v. *Brown*, 879 So. 2d 1276, 1290 (La. 2004), cert. denied, 543 U.S. 1177 (2005).

the *Apprendi* rule, including on November 1, 2010. See, *e.g.*, *Wright* v. *United States*, No. 10-5645 (Nov. 1, 2010); *McCray* v. *United States*, 129 S. Ct. 570 (2008) (No. 08-5701); *Crowell* v. *United States*, 552 U.S. 1105 (2008) (No. 07-6742); *Sasouvong* v. *Washington*, 552 U.S. 816 (2007) (No. 06-1543); *Kirkland* v. *United States*, 549 U.S. 968 (2006) (No. 06-6307); *Burge* v. *United States*, 546 U.S. 981 (2005) (No. 05-5601); *Robinson* v. *United States*, 543 U.S. 890 (2004) (No. 04-5266); *Jones* v. *United States*, 540 U.S. 1150 (2004) (No. 03-6784); *Smalley* v. *United States*, 537 U.S. 1114 (2003) (No. 02-6693); see also *Nguyen*, 209 P.3d at 954 & n.10 (collecting additional examples). There has been no material change in circumstances since these denials of certiorari.

b. Petitioner appears to also be making a distinct and much broader claim, *i.e.*, that the Sixth Amendment precludes all use (whether by judge or jury) of the fact of a non-jury juvenile adjudication to increase maximum punishment in a subsequent case. Petitioner's contention that juvenile adjudications are not sufficiently "reliable" to provide a basis for subsequent increased punishment for recidivism, see Pet. 19-21, suggests that his view may be that "the state must prove to a jury [in the adult case] that the defendant actually committed the crime alleged in the juvenile adjudication to use it as a basis for sentence enhancement." Pet. 14. This contention lacks merit, and there is no conflict in the lower courts on it.

As noted above, the claim that a juvenile conviction secured without right to a jury trial can never provide the basis for a subsequent increase in punishment for recidivism finds no support in the holding of *Apprendi* or related cases, all of which involve not substantive pro-

hibitions on use of facts to increase punishment but instead the allocation of authority for finding those facts. See p. 9, *supra*. Petitioner nonetheless construes language in *Apprendi* and *Jones* v. *United States*, 526 U.S. 227 (1999), as supporting his view that his punishment could not be increased based on an adjudication during which he had no right to a jury trial. See Pet. 16-17; see also *Jones*, 526 U.S. at 249 ("One basis" for prior-conviction exception is that "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."); *Apprendi*, 530 U.S. at 496 ("[T]here 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.").

Neither *Apprendi* nor *Jones* involved increased punishment for recidivism, so the language on which petitioner relies is dicta. See *Nguyen*, 209 P.3d at 956. Moreover, as the Eighth Circuit has noted, *Apprendi* "established what constitutes sufficient procedural safeguards (a right to jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser standard of proof)," but "the Court did not take a position on possibilities that lie in between these two poles." *Smalley*, 294 F.3d at 1032; see *Nguyen*, 209 P.3d at 956 (neither *Jones* nor *Apprendi* "state[d] that each and every one of these guarantees, or any one of them in particular, is essential to the availability of a prior criminal adjudication to furnish * * *

proof" "of previous criminal misconduct"). Instead, the cited language in those cases is best read to mean that "a constitutionally reliable prior adjudication of criminality, obtained pursuant to *all procedural guarantees constitutionally due to the offender in the prior proceeding*—specifically including the right to proof beyond a reasonable doubt" may be among the "facts" that can "influence the maximum permissible sentence." *Ibid.* (emphasis in original); see *Wright*, 594 F.3d at 264-265; Pet. App. 39a-40a.

Petitioner makes no claim that he was not afforded all the constitutional guarantees he was due in his juvenile adjudication. That adjudication thus provided an appropriate basis for a finding of recidivism. "[I]t [would] make[] little sense to conclude * * * that a judgment of juvenile criminality which the Constitution deemed fair and reliable enough, when rendered, to justify confinement of the minor in a correctional institution is nonetheless constitutionally inadequate for later use to establish the same individual's recidivism as the basis for an enhanced adult sentence." *Nguyen*, 209 P.3d at 955; see *Wright*, 594 F.3d at 263-264 ("As a jury is not required in a juvenile adjudication on the merits, we see no reason to impose such a requirement through the back door.").

There is no conflict in the circuit courts or state supreme courts on petitioner's broad Sixth Amendment claim. The decisions that petitioner claims are on his side of a split decided only the distinct, narrower question addressed above, namely whether the fact of a prior juvenile adjudication secured without a jury trial guarantee may be found by a sentencing judge, or must instead be found by a jury.

In *Tighe*, the defendant's argument was that "*Apprendi* requires that the fact of his juvenile adjudication be charged in an indictment and found by a jury beyond a reasonable doubt." 266 F.3d at 1191. The court of appeals agreed, concluding that defendants' "prior juvenile adjudications" had to be "presented to the jury" (or be the subject of a stipulation). *Id.* at 1194 n.5. Likewise, the Louisiana Supreme Court in *Brown* held only that juvenile adjudications without a jury trial right fell outside "*Apprendi*'s narrow exception, which exempts only 'prior convictions' from its general rule that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *State* v. *Brown*, 879 So. 2d 1276, 1290 (La. 2004), cert. denied, 543 U.S. 1177 (2005). Finally, the Oregon Supreme Court, which held that the fact of prior juvenile adjudications had to be found by a jury before they could be used to increase maximum punishment in a subsequent case, made clear that there was no Sixth Amendment requirement that "the facts giving rise to those adjudications [be] presented to a jury and relitigated." *State* v. *Harris*, 118 P.3d 236, 243 (Or. 2005); see *ibid.* ("[T]he legislature [may] choose[] to designate, *inter alia*, a prior nonjury juvenile adjudication as an element that increases the seriousness of a crime or lengthens a criminal sentence."). A number of the petitions for writs of certiorari in this area raised this broad claim as well, see, *e.g.*, *Wright*, No. 10-5645; *McCray*, 129 S. Ct. 570; *Crowell*, 552 U.S. 1105; *Sasouvong*, 552 U.S. 816; *Burge*, 546 U.S. 981, and, as noted, the Court has denied all of them. See pp. 11-12, *supra*.

c. In all events, this petition is a poor vehicle for reviewing petitioner's Sixth Amendment claim.

First, the question comes to the Court in an unusual posture, as part of an ineffective assistance of counsel claim asserted in a petition for collateral relief. See Pet. App. 58a ("Unlike the cases cited from other circuits, this is not a direct appeal, but a motion to vacate a sentence under [Section] 2255, in which [p]etitioner's principal claim is ineffective assistance of counsel."); Pet. C.A. Br. 2 (issue presented was "[w]hether [p]etitioner was denied his constitutional right to effective assistance of counsel when his trial and appellate counsel failed to raise an *Apprendi* objection to the use of his nonjury juvenile adjudication for sentence enhancement under the Armed Career Criminal Act, 18 U.S.C. [] 924(e)").

Accordingly, even if petitioner were to prevail on his *Apprendi* claim, he would not be entitled to Section 2255 relief from his sentence unless he could show, among other things, that counsel's failure to raise this claim "was below an objective standard of reasonableness." Pet. App. 32a (citing *Strickland* v. *Washington*, 466 U.S. 668, 688 (1984)). The district court denied his Section 2255 motion on that basis, holding that "it was not outside the range of reasonable professional behavior for [p]etitioner's counsel to choose not to challenge the characterization of [p]etitioner's juvenile conviction" in light of the fact that the weight of authority at the time of petitioner's sentencing would have rejected this claim. *Id.* at 58a. The court of appeals reserved judgment on that question, *id.* at 32a, but could affirm the district court on that ground even if its substantive Sixth Amendment holding were reversed.

Second, petitioner's juvenile adjudication was the result of a guilty plea, see PSR ¶ 24, not a bench trial he was compelled to undergo in the absence of a jury trial right. He does not contend that he pleaded guilty in that

juvenile proceeding only because he could not be tried by a jury; nor does he contend that the plea was not knowing and voluntary. The fact that the adjudication that provided the basis for petitioner's sentence enhancement was the result of his own decision to plead guilty, rather than a jury-free trial process, undermines his Sixth Amendment claim regarding that adjudication.

Third, petitioner has not challenged the fact of his juvenile adjudication. He thus fails to explain why having a jury, rather than the sentencing judge, determine whether he was in fact convicted would have made any difference in this case. See *James* v. *United States*, 550 U.S. 192, 214 n.8 (2007) (finding claim that "the simple fact of [defendant's] prior conviction was required to be found by a jury" to be "baseless" in light of the fact that defendant had "admitted the fact of his prior conviction"); *Apprendi*, 530 U.S. at 488 ("[T]he reality that Almendarez-Torres did not challenge the accuracy of [the] 'fact' [of prior conviction] in his case * * * mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range.").

2. As noted above, disposition of petitioner's second question could be affected by this Court's decision in *Sykes*, *supra*. Accordingly, the Court should hold this petition pending its decision in *Sykes* and then dispose of it as appropriate in light of that decision.[5]

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[5] In the event *Sykes* were decided in a way that cast doubt on the court of appeals' disposition of petitioner's ACCA claim, the proper course would be to grant the petition, vacate the decision below, and remand for further proceedings in light of *Sykes*. There would be no basis at that point for review of petitioner's ineffective assistance of counsel claim. If post-remand proceedings resulted in a conclusion that

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Sykes* and then disposed of as may be appropriate.

Respectfully submitted.

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NOVEMBER 2010

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petitioner's conviction for aggravated fleeing/eluding an officer was not properly deemed an ACCA predicate, then petitioner would have only two ACCA-eligible prior convictions, even counting his juvenile adjudication, and would not be eligible for an ACCA sentence.