No. ___-_____

IN THE SUPREME COURT
OF THE UNITED STATES

LUIS REY GONZALEZ
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

Should this Court overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES

LUIS REY GONZALEZ,
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V.

UNITED STATES OF AMERICA,
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Petition for a Writ of *Certiorari* to the
United States Court of Appeals for the Fourth Circuit

Luis Rey Gonzalez, the petitioner, respectfully requests the issuance of a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

I. OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished and contained in the combined appendix. App. B-1. The judgment of the United States District Court for the Western District of Virginia is also attached. App. A-1.

II. JURISDICTION

The United States Court of Appeals for the Fourth Circuit denied the petitioner's direct appeal on September 20, 2018. App. C-1. The jurisdiction of this Court to review this petition is conferred by 28 U.S.C. §1254(1). The petition is being filed 90 days from the date of the decision of the Court of Appeals.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment V, states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

8 U.S.C. § 1326 states:

> (a) In general
>
> Subject to subsection (b), any alien who—
>
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,
>
> shall be fined under title 18, or imprisoned not more than 2 years, or both.
>
> (b) Criminal Penalties for Reentry of Certain Removed Aliens
>
> Notwithstanding subsection (a), in the case of any alien described in such subsection—
>
> (1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both;

IV. STATEMENT OF THE CASE

On November 6, 2016, employees of the Roanoke City Jail in Roanoke, Virginia alerted United States Immigration and Customs Enforcement (ICE) that one of its detainees, Luis Rey Gonzalez, may unlawfully be present in the United States. On February 2, 2017, following an ICE interview, investigation and fingerprinting of the petitioner, the Office of the United States Attorney for the Western District of Virginia filed an indictment charging Mr. Gonzales with a single violation of 8 U.S.C. § 1326 (a).

Although that statute states that subsection (a) is "[s]ubject to subsection (b)," the indictment the grand jury returned did not name or charge a violation of any code provision other than 8 U.S.C. § 1326 (a). 8 U.S.C. § 1326 (a) provides for a maximum penalty of two years in prison.

On November 20, 2017, the petitioner pled guilty to the offense charged in his indictment, admitting in court that he came "back to the U.S. without permission" and did so "after being deported." No information was adduced at his guilty plea regarding whether prior to his removal or deportation, he had been convicted of any criminal offenses.

A Presentence Report (PSR) prepared in January 2018, however, stated that at the time of his reentry into the United States, the petitioner had a number of prior convictions, including one 2009 felony conviction for

possession of a controlled substance in Franklin County, Virginia. Based on that conviction, the PSR stated that the petitioner should be sentenced under 8 U.S.C. § 1326 (b), a different provision of 8 U.S.C. § 1326 than the one named in the indictment, which was 8 U.S.C. § 1326 (a). Section 1326 (b) provides for up to 10 years in prison for "any [illegally reentering] alien described whose removal was subsequent to a conviction for commission of . . . a felony (other than an aggravated felony)."

The petitioner, through counsel, objected to the application of § 1326 (b) to his case, asserting that the maximum penalty he lawfully faced was two years in prison as provided in § 1326 (a). The district court overruled that objection, and sentenced the petitioner to 63 months in prison. App. A-1. The petitioner filed a timely appeal, claiming that his enhanced sentence was unconstitutional because the existence of a prior felony conviction "was not charged in the indictment or found by a jury beyond a reasonable doubt." App. B-1 at 2.

A panel of the United States Court of Appeals affirmed the petitioner's conviction, noting that the petitioner's argument was "foreclosed by authority from both the Supreme Court and this Court." App. B-1 at 2-4. The court noted that although the Supreme Court had only excluded the fact of a prior conviction from the Sixth Amendment's jury trial guarantee where a

defendant did not contest the conviction, the Fourth Circuit had gone further, and extended the rule of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), "to cases in which the defendant does not concede, or affirmatively disputes, the existence of a prior conviction." *Id*. at 3 (citing *United States v. McDowell*, 745 F.3d 115 (4th Cir. 2014). The Fourth Circuit recognized that its expansion in this way resulted in the application of the *Almendarez-Torres* rule *"even where the justifications originally animating that holding did not apply*." App. B-1 at 3 (emphasis added).

V. REASONS FOR GRANTING THE PETITION

1. The *Almendarez-Torres* decision is an outlier that cannot be reconciled with the rule of *Apprendi v. New Jersey*.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that "the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment" require that facts that increase the statutory penalty for a crime must be "charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 476 (internal quotation marks omitted). The Court initially recognized two exceptions to the *Apprendi* rule. First, the *Apprendi* Court itself recognized that the Court's prior decision in *Almendarez-Torres*—which upheld an enhanced

statutory maximum sentence that had been based on a judge's (rather than a jury's) finding of the "fact of a prior conviction"—stood as "a narrow exception to the general rule." 530 U.S. at 490. Second, in *Harris v. United States*, a plurality of the Court held that the *Apprendi* rule applies only to facts that increase the statutory maximum sentence, not to those that increase the statutory minimum. 536 U.S. 545, 557-68 (2002).

Both of the exceptions were widely criticized as logically incompatible with the *Apprendi* rule, and several Justices called for each to be re-considered.[1] In *Alleyne v. United States*, 570 U.S. 99 (2013), the Court ultimately overruled its prior case of *Harris v. United States*, 536 U.S. 545 (2002), as inconsistent with *Apprendi* and held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." 570 U.S. at 101. The *Alleyne* Court expressly noted that it did not revisit the *Almendarez-Torres* exception because the parties did not raise that issue. *Id.* at 109 n.1.

The time has come for a re-examination of *Almendarez-Torres*. Like the now defunct holding in *Harris*, the *Almendarez-Torres* rule has wobbled on a shaky foundation since its adoption. The four *Almendarez-Torres* dissenting

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[1] For criticism of Harris, see the petition for certiorari in Alleyne v. United States, No. 11-9335 (filed March 14, 2012), at pages 8-11.

Justices concluded that the majority's "view that recidivism need not be proved to a jury beyond a reasonable doubt . . . is precisely contrary to the common-law tradition." 523 U.S. at 258 (Scalia, J., dissenting). As a result, the dissent would have construed the relevant statute, 8 U.S.C. § 1326, as treating recidivism as an "element" of a separate offense rather than as a "sentencing factor" that need not be charged in the indictment or proven to the jury beyond a reasonable doubt. *Id.* at 248-60; *see also Monge v. California*, 524 U.S. 721, 741 (1998) (Scalia, J., joined by Souter, J. and Ginsburg, J., dissenting) (describing the holding in *Almendarez-Torres* as "a grave constitutional error affecting the most fundamental of rights").

Two years after *Almendarez-Torres*, the Court decided *Apprendi* and, in doing so, expressly questioned the correctness of *Almendarez-Torres*:

> Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset.

530 U.S. at 489-90; *see also id.* at 487 (observing that *Almendarez-Torres* "represents at best an exceptional departure from the historic practice that we have described").

Justice Thomas was the only Justice to vote with the majority in both

Almendarez-Torres and *Apprendi*. He acknowledged that his switch resulted not from a principled distinction between the two cases, but instead from an erroneous vote in *Almendarez-Torres*:

> [O]ne of the chief errors of *Almendarez-Torres*—an error to which I succumbed—was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. For the reasons I have given, it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment . . . it is an element.

530 U.S. at 520-21 (Thomas, J., concurring) (internal citation omitted). Since that time, Justice Thomas has repeatedly called for the Court to reconsider—and overrule—*Almendarez-Torres*:

> *Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and **a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.** *See* 523 U.S., at 248-249, 118 S.Ct. 1219 (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); *Apprendi*, supra, at 520-521, 120 S.Ct. 2348 (Thomas, J., concurring). The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.

Shepard v. United States, 544 U.S. 13, 27-28 (Thomas, J., concurring in part and concurring in the judgment) (internal quotation marks omitted)

(emphasis added); *see also Rangel-Reyes v. United States*, 547 U.S. 1200 (2006) (Thomas, J., dissenting from denial of certiorari).

Alleyne further eroded Almendarez-Torres. The Alleyne Court's decision to overrule Harris was based, at least in part, on the fact that the Apprendi rule has become firmly entrenched as the law of the land, making it appropriate to eliminate the anomaly created by the logically incompatible exception in Harris.[2] And the Court expressly noted that it was not revisiting the other anomaly—the prior-conviction exception in Almendarez-Torres—simply because the parties in Alleyne did not raise that issue. See 570 U.S. at 109 n.1 ("In Almendarez–Torres v. United States, we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today.") (internal citation omitted).

As articulated in *Alleyne*, principles of *stare decisis* should not prevent the Court from revisiting (and overruling) *Almendarez-Torres*. *See id.* at 2163 ("The force of *stare decisis* is at its nadir in cases concerning procedural rules

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570 U.S. at 119 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., concurring) (observing that the Apprendi "rule has become even more firmly rooted in the Court's Sixth Amendment jurisprudence in the decade since Harris"); id. at 2166 (Breyer, J., concurring in part and concurring in the judgment) ("Apprendi has now defined the relevant legal regime for an additional decade. And, in my view, the law should no longer tolerate the anomaly that the Apprendi/Harris distinction creates.")

that implicate fundamental constitutional protections. Because *Harris* is irreconcilable with the reasoning of *Apprendi* and the original meaning of the Sixth Amendment, we follow the latter."). Indeed, Justice Sotomayor observed in a concurrence in *Alleyne* that "[r]arely will a claim for *stare decisis* be as weak as it is here, where a constitutional rule of criminal procedure is at issue that a majority of the Court has previously recognized is incompatible with our broader jurisprudence." *Id.* at 2166 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., concurring). That rationale applies to this case as well because, at least since *Apprendi*, a majority of this Court has recognized that *Almendarez-Torres* was both wrongly decided and at odds with a well-developed historical practice.

Justice Sotomayor further observed that the *Harris* decision had depended for "its vitality . . . upon the possibility that the Court might retreat from *Apprendi*." *Id.* at 119 (Sotomayor, J., concurring). That retreat did not happen, and "[i]nstead . . . [*Apprendi's*] rule has become even more firmly rooted in this Court's Sixth Amendment jurisprudence in the decade since *Harris*." *Id.* This Court had applied *Apprendi* to strike down mandatory sentencing systems and had extended its reasoning to criminal fines. *Id.* (citations omitted). *Harris*, consequently, became "even more of an outlier" decision. *Id.*

Indeed, *Apprendi's* implications for *Almendarez-Torres'* "vitality" was recognized as early as the *Apprendi* decision itself. *See* 530 U.S. at 472 (Thomas, J., concurring) ("The consequence of the above discussion for our decisions[ ] in *Almendarez-Torres* . . . should be plain enough."). After *Alleyne*, *Almendarez-Torres* is now the single "outlier" to this Court's Sixth Amendment jurisprudence established in the *Apprendi* line of cases. 18 U.S.C. § 924(e) indisputably uses a fact to increase the statutory minimum and maximum terms of imprisonment for someone convicted of violating § 922(g). Application of the armed career criminal enhancement raises the mandatory *minimum* sentence five years above the *maximum* exposure a person faces without the enhancement. That doing so is permissible when the fact concerns a prior conviction has always been at tension with *Apprendi*. The stakes for a defendant are serious; five years is a long time. The armed career criminal enhancement is common in federal criminal court. That the government increased Petitioner's statutory penalties on the strength of the evidence it presented in this case would be unjustifiable in any other Sixth Amendment context. This Court should overrule *Almendarez-Torres*.

2. <u>This Case Presents An Ideal Vehicle For Overruling *Almendarez-Torres*</u>.

The petitioner's case involves the kind of judicial factfinding that brings to the fore the tension that has long-existed between *Almendarez-Torres* and the *Apprendi* line of cases. Even by the relaxed evidentiary standards that apply at sentencing hearings, it is troublesome that the petitioner's statutory maximum sentence increased by a factor of five through the a mere statement by the PSR and the government that the petitioner is the same person who was previously convicted of a felony in Franklin County, Virginia.

The fivefold increase in potential penalty without an indictment or proof beyond a reasonable doubt — or an admission by the petitioner that his reentry was subsequent to a felony conviction — is precisely what the Fifth and Sixth Amendments are meant to prevent. In this case, the district court made a factual finding about a prior conviction – specifically, that the petitioner had been the person convicted in Franklin County years earlier. The petitioner never agreed that he had a prior felony conviction, but the district court was permitted by Almendarez-Torres to find, not beyond a reasonable doubt but by a preponderance of the evidence, that he did.

The justification for the "prior conviction exception" has always been that convictions are the product of proceedings at which the defendant had

the full-range of Sixth Amendment protections. Indeed, before Apprendi, this Court said in Jones v. United States that "unlike virtually an 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." 526 U.S. 227, 249 (1999). Apprendi, moreover, observed 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." The assumption is that demonstrating a prior conviction is akin to a ministerial act – a simple inquiry that demands little more than looking at inherently-reliable judicial records. But as the Fourth Circuit's McDowell case demonstrates, the district court's factual findings are often much more than ministerial; they are, instead, precisely the kinds of findings the Sixth Amendment would have forbidden the court to make about any fact other than a disputed conviction.

This case involves a direct challenge to the prior-conviction exception. The parties in Alleyne did not "contest Almendarez-Torres' vitality," and thus the Court did not "revisit it for purposes of our decision today." This

petitioner's case affords this Court the opportunity to revisit Almendarez-Torres because the petitioner does "contest" that decision's continuing "vitality." Indeed, it is that fact distinguishes his case from Almendarez-Torres itself. See Apprendi, 530 U.S. at 453 ("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.").

In Rangel-Reyes v. United States, 547 U.S. 1200, Justice Stevens authored a statement respecting this Court's denial of certiorari to the petitioner's challenge to Almendarez-Torres. Justice Stevens wrote that, although he believed Almendarez-Torres to have been wrongly decided, "[t]he denial of a jury trial on the narrow issues of fact concerning a defendant's prior conviction history, unlike the denial of a jury trial on other issues of fact . . . will seldom create any risk of prejudice to the accused." 547 U.S. at 1201 (Stevens, J.). The petitioner comes to this Court as one who has in fact suffered prejudice because Almendarez-Torres permitted the district court to make factual findings and did not require the government to prove the prior conviction beyond a reasonable doubt.

The petitioner preserved his constitutional issue in his appeal to the Fourth Circuit, and the Court of Appeals recognized that it was bound to decide the issue against him on the basis of Almendarez-Torres. As the Court of Appeals correctly observed, however, only this Court may overrule Almendarez-Torres. Petitioner respectfully submits that it is time for this Court to do so. The Fourth Circuit recognized in McDowell, as it did again in this case, that "[a]pplication of the Almendarez-Torres exception to this case . . . untethers the exception from its justifications and lays bare the exception's incompatibility with constitutional principles that are by now well settled." 745 F.3d at 123-24.

The petitioner suffered prejudice as a result of the district court's application of enhanced maximum penalty. The petitioner received a term of imprisonment of 63 months, which is well over twice the maximum sentence the petitioner could have received but for the application of subsection (b) of 8 U.S.C. § 1326. A decision by this Court in the petitioner's favor would thus have a real impact upon the amount of time he will spend in prison.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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