No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD RAY BOLES,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

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

STEVEN L. BARTH
Assistant Federal Public Defender
Counsel of Record

MICHAEL L. DESAUTELS
Federal Public Defender
126 College Street, Suite 410
Burlington, Vermont 05401
802-862-6990
michael_desautels@fd.org
steven_barth@fd.org

QUESTIONS PRESENTED FOR REVIEW

Whether the holding of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which created a carve-out to the rule later adopted in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), should be reconsidered in light of *Apprendi* and its progeny which have, for the past two decades, called its holding into question perpetuating litigation in both state and federal courts.

TABLE OF CONTENTS

Contents of Appendices

TABLE OF AUTHORITIES

Federal Cases:

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

Petitioner, Donald Ray Boles, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 25, 2019.

OPINIONS AND ORDERS ENTERED BY THE COURTS BELOW

Following a jury trial, Mr. Boles was convicted of possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). The district court sentenced Mr. Boles to the minimum mandatory custodial sentence of ten years applicable to a § 2252(a)(4)(B) offense and its recidivist penalty provision found in § 2252(b)(2). Both before the court of appeals and the district court, Mr. Boles argued that his sentence to the minimum mandatory penalty would violate the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Fifth Amendment and the Sixth Amendment. The district court disagreed finding it was bound by Second Circuit precedent to sentence Mr. Boles to the minimum mandatory penalty.

On appeal, Mr. Boles again challenged the imposition of the minimum mandatory sentence. The United States Court of Appeals for the Second Circuit affirmed the custodial portion of Mr. Boles' sentence. The decision of the Second Circuit was entered on January 25, 2019, in Docket No. 17-1138 and is attached to this petition as Appendix A. The Second Circuit's decision is reported at *United States v. Boles*, 914 F.3d 95 (2d Cir. 2019).

STATEMENT OF JURISDICTION

A writ of certiorari is sought from the decision of the United States Court of Appeals for the Second Circuit decided on January 25, 2019, affirming the judgment of the United States District Court for the District of Vermont as it related to Mr. Boles' minimum mandatory sentence. *See* Appendix A.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1), which grants the Supreme Court of the United States jurisdiction to review by writ of certiorari all final judgments of the courts of appeals.

The time for filing a petition for a writ of certiorari began to run on January 25, 2019, when the Second Circuit issued its opinion affirming this aspect of Mr. Boles' direct appeal. The deadline for filing this petition is April 25, 2019.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "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." U.S. Const. amend. VI.

STATEMENT OF THE CASE

Proceedings in the United States District Court for the District of Vermont

On July 15, 2014, a single count indictment was filed against Mr. Boles in the District of Vermont, which charged possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). This was the second time Mr. Boles had been charged with possession of child pornography in violation of § 2252(a)(4)(B). Mr. Boles had been charged with, and convicted of, possessing child pornography, in the District of Vermont in 2000-2001. *See United States v. Boles*, Case No. 2:00-cr-16-wks (Dist. Vt. 2001).

With respect to the most recent charge, and the subject of this petition, Mr. Boles was ultimately tried on a second superseding indictment that charged three counts: one count of possessing child pornography and two counts of accessing and attempting to access child pornography, all in violation of 18 U.S.C. § 2252(a)(4)(B). The superseding indictment did not allege Mr. Boles' prior conviction and the question was not presented to the jury. Mr. Boles' jury trial commenced on May 31, 2016. On June 3rd, Boles was found guilty of Count 1 (possession) and acquitted of Counts 2 and 3 (access).

After his conviction, and most pertinent to this petition, the Pre-Sentence Report recommended a minimum penalty of ten years and a maximum of twenty. Section 2252(b)(2) provides that a person convicted of a § 2252(1)(4)(B) offense may be punished by up to ten years in prison. 18 U.S.C. § 2252(b)(2). However, it also provides that "if such person has a prior conviction under this chapter . . . such person shall be imprisoned for not less than 10 years nor more than 20 years."

Because Mr. Boles had suffered a prior conviction pursuant to 18 U.S.C. § 2252(a)(4)(B), the PSR recommended the increase to the maximum penalty (20 years) and the mandatory minimum (10 years).

Relying on *Apprendi*, Mr. Boles argued that the district court was free to sentence below the minimum mandatory because the fact of Mr. Boles' prior conviction had neither been pleaded in his indictment nor proven to a jury. The district court overruled his objection citing authority from the Second Circuit and enhanced Mr. Boles' sentence to the minimum mandatory penalty. Mr. Boles is in the custody of the Bureau of Prisons and has a projected release date of February 15, 2025.

Proceedings on Appeal

Mr. Boles filed an appeal with the Second Circuit Court of Appeals. Among the issues, Mr. Boles claimed that the minimum mandatory did not apply in his case because the fact of his prior conviction had neither been pleaded in an indictment nor proven to a jury. As he had before the district court, he argued to the Court of Appeals that the limited *Apprendi* carve-out created by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), had been so eroded by this Court's subsequent case law as to render it overruled. In a published opinion, the Second Circuit rejected Mr. Boles' claim:

> Boles argues that the district court's application of the ten-year mandatory minimum penalty, under 18 U.S.C. § 2252(b)(2), violated the Sixth Amendment because Boles's prior conviction was not found by the jury beyond a reasonable doubt. His argument, however, is expressly foreclosed by this Court's decision in *United States v. Arline*, 835 F.3d 277 (2d Cir. 2016) (per curiam), where we

> acknowledged that "[t]he fact of a prior conviction may be decided by a judge and need not be determined by a jury." *Id.* at 280 (citation omitted). Accordingly, the district court properly recognized that the mandatory minimum of ten years applied to Boles.

United States v. Boles, 914 F.3d 95, 110 (2d Cir. 2019).

REASONS FOR GRANTING THE PETITION

This case presents the question of whether *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)—which created a limited exception to the rule that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be pleaded in an indictment, submitted to a jury, and proved beyond a reasonable doubt—should be reconsidered in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny. While *Almendarez-Torres* created a limited exception for the existence of prior convictions, the exception has been consistently called into question over the past two decades. The *Almendarez-Torres* exception and this Court's consistent criticism of the exception has perpetuated litigation in both state and federal courts. To provide clarity and to preserve resources, additional guidance is required from this Court.

Mr. Boles' case presents an ideal vehicle to resolve this question because the issue was preserved and presented at every stage of the case. Equally important is the fact that Mr. Boles was convicted following a jury trial on an indictment that did not contain the allegation of a prior recidivist conviction. Nor was the issue presented to the jury at his federal trial.

A. Introduction.

In *Blakely v. Washington*, 542 U.S. 296 (2004), this Court held that the state of Washington's sentencing guideline scheme violated the Sixth Amendment and the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Because Blakely's sentence was enhanced based on facts found by the judge that were never presented to a jury or found to exist beyond a reasonable doubt, the Court held that Blakely's Sixth Amendment right to a jury trial was violated. *Blakely*, 542 U.S. at 305. In *United States v. Booker*, 543 U.S. 220, 243-245 (2005), the Court applied *Blakely* to the federal sentencing guidelines and held the same. While *Blakely* and *Booker* dealt with sentences enhanced by factors based on the defendant's alleged conduct, the logic of these decisions applies with equal force to proof of prior convictions. Just as the defendant's sentence in *Blakely* and *Booker* violated the Sixth Amendment, so too does Mr. Boles' sentence because it is the result of a recidivist enhancement, the fact of which was neither pleaded in an indictment nor found by a jury to exist beyond a reasonable doubt.

B. In a sharply divided opinion this Court created an exception to traditional Sixth Amendment requirements that attached to enhancements based on the fact of prior convictions.

The rule of *Apprendi*, as restated and applied in *Blakely* and *Booker* is 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." *Blakely*, 542 U.S. at 301; *see also Booker*, 543 U.S. at 244 (quoting *Apprendi*, 530 U.S. at 490). The phrase "other than the fact of

a prior conviction" is a vestigial remnant of the Court's decision in *Almendarez-Torres*. In *Almendarez-Torres*, the defendant pleaded guilty to illegally reentering the country after having been deported, in violation of 8 U.S.C. § 1326(a), which provides a statutory maximum penalty of two years. 523 U.S. at 227. However, § 1326(b) increases the statutory maximum for those convicted of illegal reentry after having been deported following the commission of certain offenses. The indictment in *Almendarez-Torres* contained no allegation of the defendant's prior criminal history. 523 U.S. at 227. Therefore, Almendarez-Torres argued that he could not be sentenced pursuant to any of the enhanced penalties found in § 1326(b). *Id.*

A sharply divided Court rejected Almendarez-Torres's argument, with Chief Justice Rehnquist and Justices O'Connor, Kennedy and Thomas joining Justice Breyer in that holding. In doing so, the majority found that the Constitution does not require Congress to treat recidivism as an element of the offense—irrespective of Congress' contrary intent. *Id.* at 239. Underlying the majority's opinion was a historical analysis showing that recidivism "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence," *Id.* at 243, with the majority arguing that to hold for Almendarez-Torres would "mark an abrupt departure from a longstanding tradition." *Id.* at 244. The majority also rejected Almendarez-Torres' argument that there was a tradition of treating recidivism as an element of the offense, because "such tradition is not uniform." *Id.* at 246.

In dissent, Justice Scalia, joined by Justices Stevens, Souter, and Ginsburg, refuted the majority's position as to the "tradition" of recidivism. Justice Scalia noted that "many State Supreme Courts have concluded that a prior conviction which increases maximum punishment must be treated as an element of the offense under either their State Constitutions or as a matter of common law." *Id.* at 256-257 (citations omitted). "At common law," Justice Scalia continued, "the fact of a prior conviction had to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination along with that crime." *Id.* at 261. The dissent concluded that "there is no rational basis for making recidivism an exception" to the protections of the Sixth Amendment. *Id.* at 258.

C. ***Almendarez-Torres* has been undermined by this Court's subsequent decisions that show it was wrongly decided and is no longer congruent with its current Sixth Amendment jurisprudence.**

This Court's holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), has always been controversial. Within three months of its publication, it again was called into question. *See Monge v. California*, 524 U.S. 721, 740-41 (June 26, 1998) (Scalia, J., dissenting) (noting that his preferred "disposition" of the case "would contradict, of course, the Court's holding in *Almendarez-Torres* that 'recidivism' findings do not have to be treated as elements of the offense, *even if* they increase the maximum punishment to which the defendant is exposed. That holding was in my view a grave constitutional error affecting the most fundamental of rights."). Since that time, this Court has repeatedly noted its discomfort with the decision.

Two years after this Court decided *Almendarez-Torres*, the decision came under attack in *Apprendi*, 530 U.S. 466. In *Apprendi*, this Court struck down a state statute that authorized a judge to increase the statutory maximum for an offense if the judge concluded that the crime was committed because of racial bias. *Id.* Justice Stevens, writing for the five-member majority, wrote that *Almendarez-Torres* "represents at best an exceptional departure from the historic practice that we have described," *id.* at 487, that any fact that increases a defendant's sentence beyond the statutory maximum must be proven to a jury beyond a reasonable doubt. *Id.* at 490. The majority conceded that "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." *Id.* at 489-490. Nevertheless, the Supreme Court declined to reach that issue because it was not raised by Apprendi and was not critical to the outcome of the case. *Id.* at 490.

Justice Thomas, one of the five members of the *Almendarez-Torres* majority, wrote a lengthy concurrence in *Apprendi* (joined by Justice Scalia) that effectively undermined the historical argument that recidivism should be an exception to the general *Apprendi* rule. Justice Thomas set out a history showing a "long line of essentially uniform authority" establishing that "a 'crime' includes every fact that is by law a basis for imposing or increasing punishment." *Id.* at 501. Therefore, "if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact—of whatever sort, *including the fact of a prior conviction*—the core crime and the aggravating

fact together constitute an aggravated crime." *Id.* (emphasis added). After discussing that tradition, Justice Thomas concluded that "what is noteworthy is not so much the fact of that tradition as the reason for it: Courts treated the fact of a prior conviction just as any other fact that increased the punishment by law." *Id.* at 507. Justice Thomas clarified that *Apprendi*, "far from being a sharp break with the past, marks nothing more than a return to the *status quo ante*--the status quo that reflected the original meaning of the Fifth and Sixth Amendments." *Id.* at 518. "The consequences of the above discussion" for *Almendarez-Torres*, Justice Thomas wrote, "should be plain enough." *Id.* He concluded:

> [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 issue. What matters is the way by which a fact enters into the sentence . . . . When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute.

Id. at 520-521. (citation omitted).

The same five-member majority of the Court that decided *Apprendi* also applied its holding to the Washington sentencing scheme in *Blakely*, 542 U.S. 296. In doing so, *Blakely* again repudiated the basic premise of *Almendarez-Torres*. In particular, while the Court in *Almendarez-Torres* focused on whether Congress intended the fact of a prior felony to be an "element" versus a "sentencing factor," such distinction was irrelevant to the holding in *Blakely*. Instead, *Blakely* held that if an increase in a defendant's punishment is contingent upon the finding of a fact, that fact, no matter how it is labeled—"element" or "sentencing factor"—must be

submitted to the jury and proved beyond a reasonable doubt. 542 U.S. at 306-07. This Court reaffirmed this holding in *Booker*. 543 U.S. at 231-32.

This Court's decision in *Shepard v. United States*, 544 U.S. 13 (2005), further signified the erosion of *Almendarez-Torres*. In *Shepard*, this Court strongly suggested that the prior conviction exception should be viewed narrowly and that *Almendarez-Torres* may soon be overturned. *Shepard*, 544 U.S. at 25-26. The Court noted that judicial factfinding about a prior conviction "raises the concern under *Jones*[1] and *Apprendi*: the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of *any* disputed fact essential to increase the ceiling of a potential sentence." *Id.* at 25 (emphasis added).

In his concurrence in *Shepard*, Justice Thomas went a step further and stated that "*Almendarez-Torres* . . . has been eroded by the Supreme Court's subsequent Sixth Amendment jurisprudence, and a majority of the Supreme Court now recognizes that *Almendarez-Torres* was wrongly decided." *Shepard*, 544 U.S. at 27 (Thomas, J., concurring). Justice Thomas found the ACCA unconstitutional as applied to Shepard because it required an increase in the sentence based on facts (the prior convictions) not admitted by the defendant or proven to a jury. *Id.*

---

[1] *Jones v. United States*, 526 U.S. 227 (1999) (precursor to *Apprendi* holding that provision of carjacking statute that established higher penalties to be imposed when offense resulted in serious bodily injury or death set forth additional elements of the crime not mere sentencing considerations).

Finally, in more recent holdings from this Court, the Court has continued to call into question the viability of the *Almendarez-Torres* exception to *Apprendi*. In *Alleyne v. United States*, 570 U.S. 99 (2013), the Supreme Court was asked to answer the question of whether the rule of *Apprendi* applied equally to minimum mandatory penalties. That *certiorari* was granted in *Alleyne* was somewhat unusual because the Supreme Court had already answered this question in the not-so-distant past. In *Harris v. United States*, 536 U.S. 545 (2002), the Supreme Court had held—in the § 924(c) context—that judicial factfinding that increases the mandatory minimum sentence imposed for a crime was permissible under the Sixth Amendment. *See id.* at 560-61. The Court in *Harris*, relying, in part, on a pre-*Apprendi* case—*McMillan v. Pennsylvania*, 477 U.S. 79 (1986)—held that because the judicial factfinding involved in *Harris* (whether a firearm had been brandished or merely possessed during a drug trafficking crime), did not alter the maximum penalty (life), the Sixth Amendment and the rule of *Apprendi* were not offended by judicial factfinding that merely increased the minimum mandatory.

The *Alleyne* Court did an about face, expanding the holding of *Apprendi* and overruling *Harris*. Specifically, the Court held: "*Any fact* that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 570 U.S. at 103 (emphasis added). In so holding, the Supreme Court once again recognized the "narrow" exception to the *Apprendi* rule laid out in *Almendarez-Torres* but noted it was not going to address "that decision's vitality" because the parties had not contested it. *Id.* at 2161, n 1.

In *Mathis v. United States*, 136 S.Ct. 2243, 2249-50 (2016), this Court was called upon to determine whether the familiar "modified categorical approach" could be employed to determine by what "means" a defendant had committed a crime. In *Mathis*, the subject of Mathis' claim was an Iowa burglary statute which made it a crime to unlawfully enter into a "any building, structure, [or] *land, water, or air vehicle*." *Id.* at 2250 (emphasis in original). The district court had found that a prior conviction under the Iowa statute could be used to enhance Mathis' sentence pursuant to the recidivist enhancement of the Armed Career Criminal Act ("ACCA"). This Court found that this list of places which would constitute a burglary if unlawfully entered, set out the "means" by which the locational element of Iowa's burglary statute could be satisfied. *Id.* at 2249-51. The Supreme Court found that the courts below erred in applying the "modified" categorical approach to the locational element of Iowa's burglary statute. The "means" (unlawfully entering any one of a building, structure, [or] land, water, or air vehicle) of satisfying the locational element were not elements but facts, and therefore, could not be used to determine whether Mathis' prior burglary qualified as a generic burglary or not. *Id.* at * 8 – 9. Instead, Iowa's burglary statute was simply overbroad and could not be used as an ACCA predicate violent felony. *Id.* at 2252. In so holding, this Court relied in large part on the rule of *Apprendi*. As it relates to this petition, with *Mathis* this Court again limited the reach of *Almendarez-Torres* by circumscribing the evaluation a district court may engage in when determining whether to enhance a defendant's sentence pursuant to the recidivist-based ACCA.

In his concurrence in *Mathis*, Justice Thomas again called into question the vitality of Almendarez-Torres: "I continue to believe that the exception in *Apprendi* was wrong, and I have urged that *Almendarez–Torres* be reconsidered." *Id.*, at 2259, 195 (Thomas, J. concurring). Today, the Court "at least limits the situations in which courts make factual determinations about prior convictions." *Id.*

Even more recently still, in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1253-54 (2018) (Thomas, J. dissenting), Justice Thomas again called the *Almendarez-Torres* holding into question: "The exception recognized in *Almendarez–Torres* for prior convictions is an aberration [to the rule of *Apprendi*], has been seriously undermined by subsequent precedents, and should be reconsidered."

In sum, it is clear that the holding of *Almendarez-Torres* is, at best, on shaky ground as "the fact of a prior conviction" exception to the *Apprendi* rule crashes headlong into the Supreme Court's current Sixth Amendment jurisprudence. In Mr. Boles' case, because the recidivist enhancement was neither pleaded in the indictment nor found by the jury, being bound to a minimum mandatory penalty runs afoul of the Sixth Amendment.

D. **This Court should revisit *Almendarez-Torres* to eliminate the confusion and continued litigation that the *Apprendi*-line of cases has created by calling its holding into question.**

The ongoing question regarding the vitality of *Almendarez-Torres* has not been lost on lower courts that have struggled with its holding. *See e.g. United States v. McDowell*, 745 F.3d 115, 124 (4th Cir. 2014). The Fourth Circuit has noted the following:

> [T]he Supreme Court's recent characterizations of the Sixth Amendment are difficult, if not impossible, to reconcile with *Almendarez–Torres's* lonely exception to Sixth Amendment protections. *See Alleyne,* 133 S.Ct. at 2160 ("any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime" that a jury must find beyond a reasonable doubt (quotation marks omitted)); *Shepard,* 544 U.S. at 25, 125 S.Ct. 1254 ("[T]he Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence.").

Id.; *see also United States v. Browning*, 436 F.3d 780, 782 (7th Cir. 2006) ("*Almendarez-Torres* is vulnerable to being overruled not because of *Shepard* but because of *United States v. Booker* [ ].").

A review of this Court's docket reveals that this Court still receives petition after petition challenging *Amendarez-Torres*. Even more challenges are made in the district courts and in the courts of appeals. This is true in state courts as well as federal courts. *See e.g. Matter of Rowley*, No. 51244-1-II, 2018 WL 4091736, at *1 (Wash. Ct. App. Aug. 28, 2018) (unpub.) ("Rowley also argues that the imposition of his sentence of life imprisonment without possibility of parole under the Persistent Offender Accountability Act, RCW 9.94A.570, violates the Sixth Amendment because it was based on the trial judge's finding that he had committed the requisite prior offense rather than a finding by a jury that he had committed the requisite prior offense. He supports his argument with what he describes as an inconsistency between *Apprendi* [ ], and *Almendarez-Torres* [ ]."); *see also People v. Norelli*, No. B278374, 2018 WL 4443804, at *2 (Cal. Ct. App. Sept. 18, 2018) (unpub.), *review denied* (Nov. 20, 2018) ("Norelli argues the trial court's finding that

his 1990 assault conviction under section 245, subdivision (a)(1), was for a serious felony violated his right to a jury trial under the Sixth Amendment.").

This Court should grant Mr. Boles' petition, erase the doubt surrounding the continued vitality of *Almendarez-Torres* and save the lower courts time and resources re-litigating the issue.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests that a writ of certiorari be issued.

DATED: April 24, 2019

Respectfully Submitted,

STEVEN L. BARTH
Assistant Federal Public Defender
Counsel of Record

MICHAEL L. DESAUTELS
Federal Public Defender
District of Vermont
126 College Street, Suite 410
Burlington, Vermont 05401
802-862-6990
michael_desautels@fd.org
steven_barth@fd.org