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ALMENDAREZ-TORRES AND THE *ANDERS* ETHICAL DILEMMA

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I. INTRODUCTION

The Supreme Court has recognized the "ethical dilemma" confronting a criminal defense attorney in her decision whether to raise an apparently frivolous claim on appeal challenging the validity of a client's conviction or sentence.[1] On the one hand, counsel has an ethical duty to refrain from making frivolous arguments,[2] which can harm counsel's professional reputation and even lead to sanctions.[3] On the other hand, counsel has a

1. *See* Smith v. Robbins, 528 U.S. 259, 281–82 & n.11 (2000) ("'[A]n attorney confronted with the *Anders* situation has to do something that the Code of Professional Responsibility describes as unethical; the only choice is as to which canon he or she prefers to violate.'") (quoting Charles Pengilly, *Never Cry* Anders*: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal*, 9 CRIM. JUST. J. 45, 64 (1986)); *see also* Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1229–34 (2005).

2. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2007) ("A lawyer shall not bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous . . . ."); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(2) (1980) ("In his representation of a client, a lawyer shall not: . . . [k]nowingly advance a claim or defense that is unwarranted under existing law . . . ."); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-4 (1980) ("[A] lawyer is not justified in asserting a position in litigation that is frivolous."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110(1) (2000) ("A lawyer may not bring or defend a proceeding . . . unless there is a basis for doing so that is not frivolous . . . ."); *see also* McCoy v. Court of Appeals of Wis., 486 U.S. 429, 436 (1988) ("An attorney, whether appointed or paid, is . . . under an ethical obligation to refuse to prosecute a frivolous appeal.").

3. *See, e.g.*, United States v. Gaitan, 171 F.3d 222, 224 (5th Cir. 1999) (imposing a sanction on appointed appellate counsel for filing a "frivolous" brief in a federal criminal appeal; sanction was the denial of payment of court appointed attorney's fees and expenses); *In re* Becraft, 885 F.2d 547, 548–50 (9th Cir. 1989) (imposing $2,500 sanction on appellate counsel in federal criminal appeal for a frivolous filing); Smith v. Commonwealth, 574 A.2d 558, 562–64 (Pa. 1990) (requiring criminal defendant's appellate counsel to pay state's attorney's fees as a sanction for filing a frivolous brief). Although the vast majority of federal appeals involving the imposition of sanctions for frivolous filings are civil, *see* Kevin W. Brown, Annotation, *Award of Damages or Costs Under 28 USCS § 1912 or Rule 38 of Federal Rules of Appellate Procedure, Against Appellant Who Brings Frivolous Appeal*, 67 ALR FED. 319 (1984 & Supp. 2007) (collecting cases, the vast majority of which involve civil appeals), sanctions for frivolous filings in criminal appeals can be imposed. *See, e.g.*, United States v. Cooper, 170 F.3d 691, 691–92 (7th Cir. 1999) (holding that Federal Rule of Appellate Procedure 38, which permits

separate ethical "duty to further h[er] client's interests (which might not permit counsel to characterize h[er] client's claims as frivolous)."[4] The Court mentioned this dilemma in the context of counsel's decision whether to file an "*Anders* brief"—an appellate brief filed by a defense attorney who cannot identify any nonfrivolous issues to raise on appeal and who thus must move to withdraw from representing the defendant.[5]

Depending on the evolution of a particular legal issue over time, an extremely fine and ever-shifting line can exist between what is legally "frivolous" (and, thus, unethical to include in a brief) and what a defendant's counsel ethically is *obliged* to raise on appeal.[6] Some legal issues are considered frivolous at a particular point in time because extant appellate precedent unequivocally forecloses them; yet, as a result of subsequent jurisprudential developments, the same issues later become nonfrivolous or even meritorious.[7] The uncertainty that can

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sanctions for "frivolous" appeals, applies in criminal as well as civil cases). Pro se litigants also may be sanctioned for making frivolous legal arguments, although courts traditionally are much less likely to sanction them than attorneys. *See, e.g.*, Hughes v. Rowe, 449 U.S. 5, 14–15 (1980) (per curiam) (noting that the rule requiring a plaintiff's claim under Title VII of the Civil Rights Act of 1964 to have been frivolous before a defendant is entitled to recovery of attorney's fees applies with "special force" to pro se plaintiffs and should "rarely be awarded against" them). Likewise, prosecutors in criminal cases may be sanctioned for making frivolous arguments on appeal, *see, e.g.*, State v. Warren, 49 S.W.3d 103, 107 (Ark. 2001) ("We will not allow the State to pursue frivolous appeals of criminal matters without recourse when we have held that such actions in a civil case warrant sanctions."), yet such sanctions are extremely rare.

4. *Smith*, 528 U.S. at 281–82; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2007) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

5. *See* Anders v. California, 386 U.S. 738, 744 (1967) (declaring that if counsel determines his client's case to be wholly frivolous, counsel must request permission from the court to withdraw and submit a brief indicating any issues that might arguably support an appeal). *Anders* is further discussed at *infra* Part I.A.

6. *See* Neitzke v. Williams, 490 U.S. 319, 329 (1989) (supporting the proposition that a "criminal defendant has [a] right to appellate counsel even if his claims are ultimately unavailing so long as they are not frivolous" (citing Penson v. Ohio, 488 U.S. 75, 83–84 (1988))); Johnson v. State, 77 P.3d 11, 13–14 (Alaska Ct. App. 2003) (explaining that where at least one nonfrivolous issue appears in an appellate record, the defendant "is entitled to have an attorney zealously advocate this claim"); *see also* State v. Cigic, 639 A.2d 251, 252 (N.H. 1994) (noting that "zealous appellate advocacy" is required in criminal appeals).

7. Examples of such issues are discussed at *infra* Part III.B. It is important at the outset to distinguish—as the Supreme Court does, at least implicitly—between "frivolous," "nonfrivolous," and "meritorious" claims raised on appeal. A "meritorious" claim will succeed on appeal under current precedent governing a particular appellate court. A nonmeritorious yet nonfrivolous issue is one with little if any probability of success in front of a particular court at a given time but that might prevail in a higher court (at a later stage of the appellate process) or that might succeed if the current court were to adopt a different position (e.g., overrule its current adverse precedent and adopt a different court's contrary ruling on the issue). An outright "frivolous" issue has no chance

result from such a thin, changing demarcation between ethically prescribed and ethically proscribed only exacerbates the dilemma for counsel.

The dilemma is particularly acute for conscientious criminal defense counsel under the Supreme Court's current error preservation rules. Under those rules, counsel's failure to raise an issue for a client at one juncture of the appellate process[8] subjects that issue to being treated as "procedurally defaulted" if raised on a subsequent round of appeal.[9] If, after counsel forsook

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of prevailing at any time, in the present or in the foreseeable future, in front of any court in the appellate process. *See Neitzke*, 490 U.S. at 329 (recognizing that "not all unsuccessful claims are frivolous" and that a "criminal defendant has [a] right to appellate counsel even if his claims are ultimately unavailing so long as they are not frivolous" (citing *Penson*, 488 U.S. at 83–84)); *see also* Robert Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U. L. REV. 701, 705 (1972) ("[*Anders*] is seen as having established a rarefied distinction between appeals which are merely meritless and those which are wholly frivolous. Under *Anders*, so interpreted, the constitutional guarantee of effective assistance of counsel assures representation to criminal appellants for meritless but not for frivolous appeals.") (citations omitted); *cf.* Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 574 (E.D.N.Y. 1986) ("In the legal world, claims span the entire continuum from overwhelmingly strong to outrageously weak.").

8. The criminal appellate process—for both state and federal defendants—potentially involves several rounds of appeal. A typical state defendant initially can challenge his conviction or sentence before a state intermediate appellate court and then seek discretionary review by the state supreme court. If he is unsuccessful in the state courts, he then may file a petition for writ of certiorari with the Supreme Court of the United States. *See* 28 U.S.C. § 1257 (2000) ("Final judgments or decrees rendered by the highest court of a State . . . may be reviewed by the Supreme Court by a writ of certiorari . . . ."). After exhausting the "direct" appeal process, he may then seek state collateral (or "habeas corpus") review and, if unsuccessful on state collateral review, may proceed to challenge his conviction or sentence on federal collateral review at all levels of the federal courts under 28 U.S.C. § 2254 (2000). A federal defendant, if he is unsuccessful on direct appeal to a United States Court of Appeals, may file a petition for writ of certiorari with the Supreme Court. *See* 28 U.S.C. § 1254 (2000) ("Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari . . . ."). Thereafter, he can mount a collateral challenge to his conviction or sentence under 28 U.S.C. § 2255 (2000) (setting forth the equivalent of a state prisoner's federal habeas corpus remedy). The combined direct and collateral review process thus involves several distinct rounds of appeal for both state and federal criminal defendants. The entire process often takes well over a decade. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 471 (1991) ("Since his conviction, [the defendant] has pursued direct and collateral remedies for more than a decade."); Kuhlmann v. Wilson, 477 U.S. 436, 453 & n.15 (1986) ("[T]he delay between the crime and retrial following issuance of the writ often will be substantial.").

9. *See, e.g.*, O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999) (holding a state defendant's failure to raise a claim in a petition for discretionary review with the state's supreme court ordinarily results in a procedural default of the claim if later raised on federal habeas corpus review); Bousley v. United States, 523 U.S. 614, 621–22 (1998) (finding a federal defendant's failure to raise claim on direct appeal typically results in a procedural default of the claim if later raised on federal postconviction review); Coleman v. Thompson, 501 U.S. 722, 731–32 (1991) (holding a state defendant who fails to raise a claim properly in the state appellate process generally cannot raise the claim on subsequent federal habeas corpus review); Heath v. Alabama, 474 U.S. 82, 87 (1985)

raising a claim because it was considered frivolous, that same claim was later recognized as having merit in another case and counsel then sought to benefit from the intervening ruling by raising the issue during a subsequent stage of the appellate process, it is very likely that the courts would refuse to grant relief because of the earlier procedural default.[10] Counsel's argument that the failure to raise the claim at the earlier juncture of the appellate process should be forgiven because then-extant precedent entirely foreclosed the issue—thus making it "frivolous"—likely would fall on deaf ears under the Supreme Court's current error preservation rules.[11]

In literally thousands of recent cases,[12] criminal defense counsel across the country, almost all of them court appointed,[13] have faced this ethical dilemma as a result of the Supreme Court's closely divided 1998 decision in *Almendarez-Torres v. United States*[14] and subsequent jurisprudential developments during the ensuing decade. In *Almendarez-Torres*, over a vigorous dissent, a bare majority of the Court held a criminal defendant's prior conviction subjecting him to a greatly enhanced prison sentence as a recidivist is not an "element" of the "enhanced" crime charged in a subsequent case.[15] Therefore, the Court concluded, nothing in the Constitution requires a defendant's prior conviction to be alleged in an indictment or proved to a jury beyond a reasonable doubt—as "elements" of an

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(concluding the Supreme Court will not allow a state defendant to raise a claim for the first time before the Court when it was not first raised in and decided by the state supreme court).

10. *See, e.g.*, *Bousley*, 523 U.S. at 623 (holding that the mere fact that it would have been futile under then-extant appellate precedent to raise a particular legal claim generally will not excuse a procedural default if the claim later is recognized as having merit).

11. *See, e.g.*, Tucker v. Kemp, 481 U.S. 1073, 1077 (1987) (Brennan, J., dissenting from denial of certiorari and stay of execution) (criticizing the lower courts as "unreasonable" for "dismiss[ing] this second federal habeas petition on the ground that petitioner's failure to raise in his first petition what was [then] a frivolous claim barred him forever from asserting that claim once [a subsequent Supreme Court decision] made clear that it was viable"); *see also infra* Part III.A (discussing the Supreme Court's error preservation rules).

12. *See infra* note 192 and accompanying text (explaining that over 5,200 defendants have filed briefs seeking to benefit from a change in the law if the Supreme Court overrules Almendarez-Torres v. United States, 523 U.S. 224 (1998)).

13. The ethical dilemma discussed in this Article is the same whether counsel is retained or appointed. *See, e.g.*, United States v. Urena, 23 F.3d 707, 708 (2d Cir. 1994) (declaring that retained and appointed counsel "share the responsibility" not to raise frivolous arguments and "[a]lthough *Anders* motions are typically made by counsel appointed for indigent defendants . . . retained counsel may properly filed *Anders* motions").

14. *Almendarez-Torres*, 523 U.S. at 224.

15. *Id.* at 239–47.

offense must be—for an enhanced sentence to be imposed.[16] Rather than being an "element," the Court held a defendant's prior conviction is a "sentencing factor" that a trial judge may find by a mere preponderance of the evidence.[17] However, in a series of cases beginning in 2000, a total of five members of the Court—including Justice Thomas, who had joined the five-Justice majority in *Almendarez-Torres*—have since stated that it was wrongly decided.[18] Yet, despite countless opportunities to do so since 2000, the Court has not granted certiorari to reconsider *Almendarez-Torres*.

A decade after *Almendarez-Torres*, defense attorneys across the country face a Hobson's choice, ethically speaking: if, in the lower courts, they raise the claim rejected by a bare majority of the Supreme Court in 1998 as a precondition of giving the Supreme Court an opportunity to reconsider its decision,[19] they run what now has become a genuine risk of being sanctioned for raising a "frivolous" issue.[20] But if they do not raise the issue on their clients' initial appeals in the lower courts, the claim very likely would be treated as procedurally defaulted in any subsequent rounds of appeal, and such defendants would not be entitled to benefit from any future change in the law.[21]

The evolution of the legal issue first addressed by the Court in *Almendarez-Torres* presents a unique window through which to view the untenable ethical situation created by several different aspects of the Court's jurisprudence: its decisions concerning "frivolous" appeals; its error preservation and nonretroactivity doctrines; its decreasing adherence to stare decisis; and its willingness to allow important legal issues to

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16. *Id.* at 239.

17. *Id.* at 243–46.

18. *See, e.g.*, Rangel-Reyes v. United States, 547 U.S. 1200, 1202 (2006) (Thomas, J., dissenting from the denial of certiorari) (noting that "a majority of th[e] Court now rejects" *Almendarez-Torres* but has not yet overruled it).

19. Because the Supreme Court almost always exercises appellate jurisdiction, a legal claim ordinarily cannot be raised for the first time before the Court. Rather, in order for the Court to address a claim, it must first have been raised and decided in the lower courts. *See, e.g.*, Clingman v. Beaver, 544 U.S. 581, 598 (2005) (noting that "[the Supreme Court] ordinarily [does] not consider claims neither raised nor decided below"); Morrison v. Watson, 154 U.S. 111, 115 (1894) ("If [an issue] was not claimed in the trial court . . . or if it was not claimed in any form before judgment in the highest court of the State[,] it cannot be asserted in [the Supreme Court].").

20. *See, e.g.*, United States v. Pineda-Arrellano, 492 F.3d 624, 626 & n.1 (5th Cir. 2007) (making a veiled threat of sanctions against appellate counsel who continue to challenge *Almendarez-Torres* in the lower federal courts as a precondition of raising the issue in a petition for writ of certiorari), *cert. denied*, 128 S. Ct. 872 (2008).

21. *See supra* note 9 (citing Supreme Court cases explaining procedural default rules).

remain unresolved for many years as a result of the Court's self-imposed restraints on its discretionary certiorari docket. As explained below, the convergence of these various factors has created the "perfect [ethical] storm"[22] for criminal defense counsel with respect to the *Almendarez-Torres* issue and other important legal issues.

Part I of this Article will examine criminal defense counsel's constitutional and ethical duties on appeal when faced with a legal issue that could be characterized as "frivolous" by an appellate court and also will discuss the definition of "frivolous," both in this particular context and in related contexts. Part II will examine the evolution of the important legal issue first addressed by the Supreme Court in *Almendarez-Torres* in 1998 and thereafter repeatedly debated—but without reconsideration by the full Court—during the ensuing decade. Part III will address the multifaceted ethical dilemma for defense counsel posed by the Court's *Anders* jurisprudence, its mixed signals regarding the *Almendarez-Torres* issue, its stringent error preservation and nonretroactivity rules, and the Court's increasing willingness to abandon stare decisis and overrule settled precedents. Finally, Part IV will discuss the lessons learned from the litigation over the *Almendarez-Torres* issue and the broader implications of the ethical dilemma for other legal issues.

II. COUNSEL'S ETHICAL DUTY NOT TO RAISE "FRIVOLOUS" ISSUES ON APPEAL IN A CRIMINAL CASE

A. Anders *and Its Progeny*

In *Douglas v. California*, the Supreme Court initially recognized a criminal defendant's constitutional right to the assistance of counsel on the first appeal of his criminal conviction or sentence, and thereafter reaffirmed that right on several occasions.[23] The Court also held this right to appellate counsel

22. SEBASTIAN JUNGER, THE PERFECT STORM: A TRUE STORY OF MEN AGAINST THE SEA (1997).

23. Douglas v. California, 372 U.S. 353, 355–57 (1963); *see, e.g.*, Halbert v. Michigan, 545 U.S. 605, 610–11 (2005) (reiterating the Court's holding in *Douglas* that "in first appeals as of right, States must appoint counsel to represent indigent defendants"). The Court has refused to extend the constitutional right to the assistance of counsel beyond a defendant's initial appeal, *see* Coleman v. Thompson, 501 U.S. 722, 755–57 (1991) (declining to extend Supreme Court precedent to find an indigent defendant has a right to counsel beyond his first appeal from a criminal conviction), although legislation often provides for a statutory right to counsel on subsequent rounds of appeal. *See, e.g.*, 18 U.S.C. § 3006A (2006) ("Whenever . . . the court determines that the interests of justice so

includes the guarantee of the "effective" assistance of such counsel, whether appointed or retained.[24] To perform in a constitutionally effective manner, counsel must review the entire record carefully, research any legal issues apparent in the record, and raise in a brief any claims that are perceived to be meritorious, i.e., issues with at least a "reasonable probability" of success on appeal.[25] If no such seemingly meritorious issues are apparent from the record, counsel nonetheless is required to raise at least one "arguable" or "nonfrivolous" claim[26]—assuming it is apparent from the record—even if that claim appears foreclosed under the applicable appellate precedent governing the appeal.[27]

With one important exception, appellate counsel "must function in the active role of an advocate" for a defendant who chooses to appeal[28]—the same essential role defense counsel must perform in the trial court in our adversarial system of criminal justice.[29] That exception for criminal appellate lawyers occurs when there are no nonfrivolous challenges to a client's conviction or sentence for inclusion in an appellate brief and when the client insists on pursuing an appeal over counsel's advice that an

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require, representation may be provided for any financially eligible person who . . . is seeking [habeas] relief.").

24. *See* Smith v. Robbins, 528 U.S. 259, 285–89 (2000) (analyzing whether a defendant was denied his constitutional right to effective assistance of counsel on appeal); Evitts v. Lucey, 469 U.S. 387, 396 (1985) ("A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.").

25. *See* McCoy v. Court of Appeals of Wis., 486 U.S. 429, 438 (1988) ("The appellate lawyer must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal. In preparing and evaluating the case, and in advising the client as to the prospects for success, counsel must consistently serve the client's interest to the best of his or her ability."); Smith v. Murray, 477 U.S. 527, 535–36 (1986) (finding counsel who "surveyed the extensive transcript, researched a number of claims, and decided that . . . [thirteen] were worth pursuing" provided effective assistance as required by the Constitution).

26. Counsel has virtually unreviewable discretion to select which nonfrivolous issue or issues to include in the brief, assuming any omitted issue is not meritorious. *See* Jones v. Barnes, 463 U.S. 745, 751 (1983) (rejecting the argument that "the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points").

27. *See* Penson v. Ohio, 488 U.S. 75, 80 (1988) (indicating that even if counsel examines the record and believes the case is wholly frivolous, he nevertheless must file a brief with the court referring to any claim which might arguably be nonfrivolous).

28. Entsminger v. Iowa, 386 U.S. 748, 751 (1967); *accord* Ellis v. United States, 356 U.S. 674, 675 (1958) (per curiam) ("[R]epresentation in the role of an advocate is required.").

29. *See* Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy . . . will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

appeal is pointless.[30] In trial court proceedings, even if there are no nonfrivolous defenses to a criminal charge, a defense attorney ethically can[31]—and should[32]—argue to the fact finder that the prosecution has not overcome the presumption of innocence by proving the charged offense "beyond a reasonable doubt," assuming a clearly guilty client persists in pleading not guilty against counsel's advice to plead guilty. Conversely, on appeal, a defense attorney should not file a brief contending the appellate court should reverse the defendant's conviction or sentence when no nonfrivolous basis for such an argument exists.[33]

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30. It is commonplace for criminal defendants to insist on appealing their convictions or sentences even if their counsel has strongly advised there are no nonfrivolous issues to raise on appeal. Many courts have held, even if a defense attorney believes there are no nonfrivolous issues to raise on appeal, counsel still is obligated to file a notice of appeal or risk being found to have deprived the defendant of the effective assistance of counsel required under the Sixth Amendment. *See, e.g.*, United States v. Poindexter, 492 F.3d 263, 273 (4th Cir. 2007) (declaring even where counsel believes a defendant has waived his right to challenge his conviction or sentence on appeal as part of a plea agreement, counsel must still file a notice of appeal if the defendant so requests; citing cases from four other circuits). As discussed above, counsel is not thereafter required to include frivolous issues in a merits brief if the record does not reveal any nonfrivolous issues. Instead, in that situation, counsel must move to withdraw from representing the defendant on appeal. *McCoy*, 486 U.S. at 437.

31. *Id.* at 435 ("At the trial level, defense counsel's view of the merits of his or her client's case never gives rise to a duty to withdraw. That a defense lawyer may be convinced before trial that any defense is wholly frivolous does not qualify his or her duty to the client or to the court. Ethical considerations and rules of court prevent counsel from making dilatory motions, adducing inadmissible or perjured evidence, or advancing frivolous or improper arguments, but those constraints do not qualify the lawyer's obligation to maintain that the stigma of guilt may not attach to the client until the presumption of innocence has been overcome by proof beyond a reasonable doubt."); Freund v. Butterworth, 165 F.3d 839, 867–68 (11th Cir. 1999) (en banc) (noting that in a criminal trial, "it would certainly be ethical to argue reasonable doubt[ ] and put the State to its burden of proof" in a case in which defense counsel knows that a client is guilty, so long as counsel does not present perjured testimony or affirmatively contend that someone else committed the crime).

32. A complete failure to advocate for a clearly guilty client who insists on going to trial—in the sense of doing nothing to put the prosecution to its burden of proof and, instead, being a "potted plant"—can result in defense counsel being declared "ineffective" under the Sixth Amendment's right to counsel. *See, e.g.*, Haynes v. Cain, 298 F.3d 375, 381 (5th Cir. 2002) (en banc) (stating that, if defense counsel "*entirely* fail[s] to subject the prosecution's case to meaningful adversarial testing," such a complete failure deprives the defendant of the right to the effective assistance of counsel).

33. *See McCoy*, 486 U.S. at 436 ("After a judgment of conviction has been entered, however, the defendant is no longer protected by the presumption of innocence. . . . [C]ounsel for an appellant cannot serve the client's interest without asserting specific grounds for reversal. In so doing, however, the lawyer may not ignore his or her professional obligations. Neither paid nor appointed counsel may . . . consume the time and the energies of the court or the opposing party by advancing frivolous arguments. An attorney, whether appointed or paid, is therefore under an ethical obligation to refuse to prosecute a frivolous appeal.").

Nonetheless, in *Anders v. California*, the Supreme Court held, when a defendant insists on appealing, appellate counsel cannot simply withdraw from what counsel deems a frivolous appeal in a criminal case by making a mere conclusory statement to that extent.[34] Instead, announcing a "prophylactic" rule to protect a criminal defendant's constitutional right to appellate counsel,[35] the Court in *Anders* mandated certain procedures be followed before an attorney may withdraw from representing a defendant on his first appeal based on the belief that there are no nonfrivolous issues to raise.[36] In particular, the Court required counsel, before moving to withdraw and thereby refusing to present the defendant's case in an adversarial fashion on appeal, to certify she has carefully reviewed the entire record and then to file a brief identifying the legal issues counsel has deemed frivolous but that might be deemed nonfrivolous by the appellate court.[37]

In *Smith v. Robbins*, the Court later held the Constitution does not require appellate counsel to file a full-fledged "*Anders* brief" explicitly identifying specific issues deemed frivolous by counsel.[38] However, the Court reaffirmed *Anders* to the extent it prohibits counsel from refusing to file an adversarial "merits" brief without first reviewing the entire record and determining

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34. Anders v. California, 386 U.S. 738, 742–43 (1967).

35. *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). The Supreme Court has announced other such constitutional "prophylactic" rules governing criminal procedure. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 437–38 & n.2 (2000) (describing Miranda v. Arizona, 384 U.S. 436 (1966), as having announced a constitutionally-rooted "prophylactic" rule).

36. *Anders*, 386 U.S. at 744–45.

37. *Id.* at 744 ("[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of [the record], he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal."). In *Anders*, the Court also required lower appellate courts, after receiving an "*Anders* brief" from defense counsel, to independently review the record in order to determine whether any nonfrivolous issue exists in the case and, if so, require an adversarial presentation of the issue by counsel. *Id.*

38. Smith v. Robbins, 528 U.S. 259, 276 (2000). In *Smith*, the Supreme Court reviewed the constitutionality of the California Supreme Court's procedures mandated in *People v. Wende*, 600 P.2d 1071 (Cal. 1979). In *Wende*, the state court required appellate counsel in criminal cases to review the entire record and make a good faith determination that no nonfrivolous issue existed before refusing to file a traditional adversarial "merits brief"—but did not require counsel either to explicitly certify that no nonfrivolous issue existed or to file a full-fledged *Anders* brief specifically discussing why any issues identified in the record were frivolous. *Id.* at 1074–75. Instead, the court in *Wende* only required counsel to file a brief summarizing the procedural and factual history of the case, which was sufficient to trigger the court's own obligation to review the record to determine whether any nonfrivolous issues existed. *Id.*

that no nonfrivolous issue exists.[39] Since *Smith*, the federal courts of appeals have continued to require *Anders*-type "no-merit" briefs in federal appeals—i.e., briefs identifying any issues that, while frivolous in the eyes of counsel, might be deemed nonfrivolous by a court—if counsel wishes to withdraw, even though the Supreme Court in *Smith* held state appellate courts were not required to follow such a procedure.[40] Criticisms of such "no-merit" submissions by counsel, whether the full-fledged *Anders* variety or the simpler version approved in *Smith*, regularly have been voiced since *Anders*.[41] Yet this procedure remains the law, to a lesser or greater extent, in both state and federal criminal appeals.[42] Thus, criminal defense attorneys are regularly required to decide if legal issues are "frivolous"—which, as discussed below, is no easy task.

B. The "Frivolousness" Standard

1. The Supreme Court's Definition of "Frivolous." Justice Douglas correctly described "[t]he elusive nature of the frivolity standard,"[43] which results from the fine line "between the

39. *See Smith*, 528 U.S. at 276–81 & n.10 ("[A]n indigent does, in all cases, have the right to have an attorney, zealous for the indigent's interests, evaluate his case and attempt to discern nonfrivolous arguments.").

40. *See, e.g.*, United States v. Skurdal, 341 F.3d 921, 926 (9th Cir. 2003) ("In this Circuit, we require an attorney who wishes to withdraw from representing a person on appeal to follow the procedures outlined in *Anders* . . . ."); United States v. Marvin, 211 F.3d 778, 780 (3d Cir. 2000) ("The relevant Third Circuit rule tracks the *Anders* suggestion . . . ."). After *Anders*, some state supreme courts, viewing *Anders* as establishing a constitutional floor rather than a constitutional ceiling, held that defense counsel who believe that no nonfrivolous issues exist on appeal nevertheless must file an adversarial brief as opposed to moving to withdraw pursuant to *Anders* on the ground that there are only frivolous issues to raise. *See* Martha C. Warner, Anders *in the Fifty States: Some Appellants' Equal Protection Is More Equal Than Others'*, 23 FLA. ST. U. L. REV. 625, 643–51 (1996) (observing Missouri, Colorado, Indiana, Idaho, North Dakota, Massachusetts, and New Hampshire do not permit counsel to withdraw on the ground that the appeal is frivolous pursuant to *Anders*). After *Smith*, most state courts did not modify their procedures. *See Frivolous Appeals: No Rush in Most States for Alternatives to* Anders *Briefs Despite Implicit Invitation*, 16 CRIM. PRAC. REP. 210, 210 (Sept. 18, 2002) (observing most state courts continue to follow *Anders* despite the Supreme Court permitting them to institute a less demanding procedure).

41. *See, e.g.*, Randall L. Hodgkinson, *No-Merit Briefs Undermine the Adversary Process in Criminal Appeals*, 3 J. APP. PRAC. & PROCESS 55, 56–57 (2001) (criticizing a no-merit brief system as "allow[ing] a real breakdown of the adversary system" and providing "little motivation" for an appellate court to find error); Cynthia Yee, *The* Anders *Brief and the Idaho Rule: It Is Time for Idaho to Reevaluate Criminal Appeals After Rejecting the* Anders *Procedure*, 39 IDAHO L. REV. 143, 151–53 (2002) (citing several state supreme court decisions critical of *Anders*).

42. *See supra* note 40 and accompanying text (discussing application of the *Anders* procedure in various jurisdictions).

43. Cruz v. Hauck, 404 U.S. 59, 65 (1971) (Douglas, J., concurring).

tenuously arguable and the frivolous."[44] Simply as rhetorical flourish, judges occasionally label legal arguments with which they disagree—particularly in criminal cases—as "frivolous" even when such arguments clearly are not legally frivolous.[45] As discussed above, however, the label carries serious potential consequences in litigation for both lawyer and client and, therefore, should be carefully defined and appropriately used.[46]

At the outset of any discussion of the meaning of "frivolous," a distinction should be drawn between "legal" frivolousness and "factual" frivolousness.[47] The latter is much easier to define than the former: a claim is factually frivolous if, notwithstanding the nonfrivolous nature of the legal aspect of the issue involved, the underlying factual allegations are "irrational or wholly incredible."[48] Legal frivolity, as will be discussed below, is a considerably more complicated concept and is the primary focus of this Article. Furthermore, depending on the context in which it is used, the legal frivolity standard may have subjective and objective components.[49] Because legal frivolousness in the context

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44. Nagle v. Alspach, 8 F.3d 141, 145 (3d Cir. 1993) (quoting Finch v. Hughes Aircraft Co., 926 F.2d 1574, 1578 (Fed. Cir. 1991)); *see also* Khan v. Gallitano, 180 F.3d 829, 837 (7th Cir. 1999) ("There is a significant difference between making a weak argument with little chance of success . . . and making a frivolous argument with no chance of success.").

45. *See, e.g.*, Douglas v. California, 372 U.S. 353, 358 (1963) (Clark, J., dissenting) (hyperbolically claiming "the overwhelming percentage of *in forma pauperis* appeals are frivolous"); Turner v. Jabe, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring) (contending "[p]etitioner's claim should be recognized for the frivolous claim that it is," notwithstanding a recent statement by two Supreme Court Justices in Lackey v. Texas, 514 U.S. 1045, 1045–47 (1995) (statements of Stevens & Breyer, JJ., respecting the denial of certiorari), that the "novel" claim was an "important undecided one"); McKenzie v. Day, 57 F.3d 1461, 1465 & n.8 (9th Cir. 1995) (stating a "*Lackey* claim" that was clearly foreclosed by circuit precedent "arguably would have been frivolous to raise" in the lower courts, yet "so long as the claim was not finally addressed by the Supreme Court, a death row inmate would have been well within his rights in raising the issue to preserve it for Supreme Court review"), *adopted by* 57 F.3d 1493 (9th Cir. 1995) (en banc).

46. *See supra* note 3 and accompanying text (discussing numerous cases in which sanctions were imposed on counsel for making frivolous arguments).

47. *See, e.g.*, Edwards v. Snyder, 478 F.3d 827, 829–30 (7th Cir. 2007).

48. Denton v. Hernandez, 504 U.S. 25, 32–33 (1992) (elaborating on the Supreme Court's declaration in Neitzke v. Williams, 490 U.S. 319, 327 (1989), that facts are factually frivolous if they are "clearly baseless").

49. As the California Supreme Court has said in discussing the difference:

> The California cases discussing frivolous appeals [in terms of imposing sanctions] . . . apply standards that fall into two general categories: subjective and objective. . . . The subjective standard looks to the motives of the appellant and his or her counsel. . . . [T]he courts have frequently looked at the good faith of the appellant and have penalized appellants where the only purpose of the appeal was delay. . . . The objective standard looks at the merits of the appeal from a reasonable person's perspective. The problem involved in determining whether the appeal is or is not frivolous is not whether [the attorney] acted in

of *Anders* briefs does not have a subjective component,[50] only objective frivolousness will be discussed.

As early as the middle of the nineteenth century, the Supreme Court held "frivolous" issues deserved no meaningful judicial consideration—thus warranting summary dismissal[51]—and also could result in sanctions against counsel who raised them.[52] At that juncture in its history, the Court was required to confront frivolous issues on a regular basis because, before 1925, the majority of appeals to the Court were not discretionary in nature—as they are today—but were as "a matter of right."[53] Therefore, unlike in the modern era, the Court did not then have the luxury of cherry-picking the issues it decided.[54] The Court's early cases in which legal claims were deemed "frivolous" did not offer any meaningful discussion of what the Court meant by that term. The closest thing to an objective standard is found in the statement of the Court in *The Douro* that a legal claim is "frivolous" if it was raised on appeal "without some expectation of

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> the honest belief he had grounds for appeal, but whether any reasonable person would agree that the point is totally and completely devoid of merit, and, therefore, frivolous.

In re Marriage of Flaherty, 646 P.2d 179, 186–87 (Cal. 1982) (citations and internal quotation marks omitted).

50. *See id.* at 187 (citing Anders v. California, 386 U.S. 738 (1967), as an example of an application of the objective standard of frivolity).

51. *See, e.g.*, Parish v. United States, 75 U.S. 489, 490–91 (1869) (holding that "[t]he appeal is frivolous" after determining the alleged breach of contract had no legal or factual support in the record and, in any event, "it nowhere appears that the claimants suffered any damages from the supposed injury alleged"); United States v. Dashiel, 71 U.S. 182, 185 (1866) (concluding a trial court need not give a jury instruction on a defense "contrary to the law, and especially when the plea . . . constituted no defen[s]e to the action, but was frivolous and would have been stricken from the record as such on a proper motion in the court below").

52. *See, e.g.*, Whitney v. Cook, 99 U.S. 607, 607 (1878) ("Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages . . . .").

53. *See* The Douro, 70 U.S. 564, 566 (1865) ("An appeal is a matter of right . . . ."); *see also* Chanute City v. Trader, 132 U.S. 210, 214 (1889) (recognizing "that the reasons assigned for taking the writ of error are frivolous, and that it was taken for delay only," yet nevertheless entertaining the appeal). From 1891 through 1925, Congress increasingly passed legislation that made the Supreme Court's docket discretionary. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 67–69 (8th ed. 2002) (discussing various acts of Congress increasing the Court's discretionary certiorari docket). Eventually, in 1988, Congress virtually eliminated the mandatory portion of the Court's docket. *Id.* at 68–69.

54. For that reason, in the modern era it is extremely rare that the Supreme Court rejects a legal argument in a case in which it has granted certiorari by classifying the argument as legally "frivolous." *See, e.g.*, United States v. Grayson, 438 U.S. 41, 55 (1978) (rejecting an argument as "entirely frivolous"). *But see id.* at 57 (Stewart, J., dissenting, joined by Brennan & Marshall, JJ.) ("I fail to see how the Court can dismiss [the argument] as 'frivolous' . . . .").

reversal"[55]—thus suggesting a claim must find some support in extant precedent.

In *Anders*, which was decided over a century after *The Douro*, the Court did not define "frivolous" other than to say that "[frivolous] legal points [are not] arguable on their merits."[56] In a subsequent case interpreting *Anders*, the Court stated, to qualify as "frivolous" in the *Anders* context, a legal issue must be "*wholly* frivolous," which means "the appeal lacks *any* basis in law or fact."[57] Besides that generality, the Court has never further elaborated on the definition of "frivolous" in the *Anders* context.

However, the Supreme Court has addressed the legal meaning of "frivolous" more fully in several other analogous areas of the law: (1) in the related context of an indigent defendant's entitlement to appeal *in forma pauperis*—in a criminal or civil case—under 28 U.S.C. § 1915;[58] (2) in the context of a criminal defendant's filing an interlocutory appeal of a district court's pretrial denial of a double jeopardy claim;[59] (3) in the context of a federal habeas corpus petitioner's application under 28 U.S.C. § 2253 for the right to appeal an adverse judgment;[60] (4) in the context of a civil litigant being sanctioned for a frivolous appeal under Federal Rule of Appellate Procedure 38;[61] and (5) in the context of whether a federal law claim raised

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55. *The Douro*, 70 U.S. at 566. Similar language appeared in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries., Inc.*, 508 U.S. 49, 60–62 (1993) (discussing the meaning of a "baseless" lawsuit—i.e., a frivolous one—in the context of antitrust immunity for filing a lawsuit and stating, "[T]he lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.").

56. Anders v. California, 386 U.S. 738, 744 (1967).

57. McCoy v. Court of Appeals of Wis., 486 U.S. 429, 438–39 & n.10 (1988) (emphasis added). In another context in which the Court has discussed the meaning of "frivolous"—concerning the insubstantiality doctrine, *see infra* notes 86–88—the Court referred to the adjectives "*obviously* frivolous" and "*wholly* insubstantial" in that context as having "cogent legal significance." Goosby v. Osser, 409 U.S. 512, 518 (1973) (emphasis added).

58. *See, e.g.*, Neitzke v. Williams, 490 U.S. 319, 325 (1989) (defining the term "frivolous" in § 1915 as "lack[ing] an arguable basis either in law or in fact").

59. *See, e.g.*, Richardson v. United States, 468 U.S. 317, 322 (1984) (declaring that double jeopardy claims must be at least "colorable," and the Court will summarily dispose of "frivolous" claims).

60. *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880, 894 (1983) (stating a prisoner successfully obtaining a certificate of probable cause is an indication that his or her claim is not legally frivolous and cautioning the courts of appeals to be certain if they determine such a prisoner's claim is frivolous or "squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case").

61. *See, e.g.*, McKnight v. Gen. Motors Corp., 511 U.S. 659, 659–60 (1994) (per curiam) (finding an appeal whose argument was foreclosed by circuit precedent is not frivolous when district courts are divided and the Supreme Court has not yet made a ruling in the issue).

in a federal civil action is "substantial" enough for "federal question" subject matter jurisdiction to arise.[62] As discussed below, the Court's discussion of the concept of legal frivolity in these other contexts helps inform its meaning in the *Anders* context.

In interpreting 28 U.S.C. § 1915—the statute requiring an indigent criminal or civil litigant in federal court to obtain a certification from the district court that an appeal of an adverse judgment would be taken in "good faith" before proceeding without costs—the Supreme Court has held such good faith exists when the litigant "seeks appellate review of any issue [that is] not frivolous."[63] In *Neitzke v. Williams*, a civil appeal, the Court stated "frivolous" in this context has a similar meaning as in the *Anders* criminal context: that a claim "lacks an arguable basis either in law or in fact."[64] The Court specifically distinguished between an "outlandish legal theory" and a nonmeritorious yet nonfrivolous one.[65] In a criminal appeal interpreting § 1915, the Court also stated an indigent's appeal is nonfrivolous under § 1915 "if he makes a rational argument on the law or facts."[66]

In *Abney v. United States*, the Court held a criminal defendant generally is entitled to file an interlocutory appeal of a district court's pretrial rejection of a double jeopardy claim.[67] The exception to this general rule, the Court has held, is when a particular double jeopardy claim is not "colorable" or, put another way, is "frivolous."[68] In *Richardson v. United States*, the Court as a threshold matter held the defendant's double jeopardy claim

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62. *See, e.g.*, Hagans v. Lavine, 415 U.S. 528, 536–39 (1974) (finding a claim was not "frivolous or so insubstantial" when the Supreme Court had not addressed the issue and made a ruling; therefore, the invocation of federal question jurisdiction was proper). There are other areas of the law in which the Supreme Court has mentioned the concept of "frivolous" issues. *See, e.g.*, Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978) (declaring a prevailing defendant is not entitled to attorneys' fees in a federal civil rights lawsuit filed under Title VII of the Civil Rights Act of 1964 unless the plaintiff's lawsuit was "frivolous, unreasonable, or groundless"); Blackledge v. Allison, 431 U.S. 63, 76 (1977) (holding a summary dismissal of a habeas corpus claim is warranted if the petitioner's allegations are "patently frivolous" (citation and internal quotation marks omitted)). None of these other areas of the Court's jurisprudence warrant further discussion because the Court either simply announced a "frivolousness" standard without giving it any particular content or referred to factual frivolity.

63. Coppedge v. United States, 369 U.S. 438, 445 (1962).

64. Neitzke v. Williams, 490 U.S. 319, 325 (1989).

65. *Id.* at 327.

66. *Coppedge*, 369 U.S. at 448.

67. Abney v. United States, 431 U.S. 651, 662–63 (1977).

68. Richardson v. United States, 468 U.S. 317, 322 (1984) (quoting United States v. MacDonald, 435 U.S. 850, 862 (1978); *Abney*, 431 U.S. at 662 n.8).

was not frivolous—thereby permitting his interlocutory appeal to proceed—but ultimately rejected the claim on the merits over the dissent of two Justices.[69] In a footnote at the end of its opinion, the majority stated:

> It follows logically from our holding today that claims of double jeopardy such as petitioner's are no longer "colorable" [i.e., nonfrivolous] double jeopardy claims which may be appealed before final judgment. A colorable claim, of course, presupposes that there is some possible validity to a claim. *Cf. Jones v. Barnes*, 463 U.S. 745, 751–52 (1983); *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 694–95 (1982). Since no set of facts will support the assertion of a claim of double jeopardy like petitioner's in the future, there is no possibility that a defendant's double jeopardy rights will be violated by a new trial, and there is little need to interpose the delay of appellate review before a second trial can begin.[70]

Lower courts have interpreted *Richardson* to mean that a "conclusive ruling" by a majority of the Supreme Court rejecting what was previously a nonfrivolous double jeopardy claim renders frivolous an identical claim raised in other cases "in the future."[71]

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69. *Id.* at 322, 326. Justices Brennan and Marshall agreed with the Court's threshold holding that the defendant's claim was not frivolous but dissented from the Court's ultimate holding that the defendant had not presented a meritorious double jeopardy claim. *Id.* at 327–28.

70. *Id.* at 326 n.6. The Court's citation to *Jones* and *Treasure Salvors* clearly was intended to give meaning to "colorable." In *Jones*, the Court addressed "nonfrivolous" claims in the context of the requirements of *Anders*, while the plurality in *Treasure Salvors* determined the State of Florida possessed no "colorable claim" that the Eleventh Amendment afforded it immunity from a district court's order directing the United States Marshal to seize property in the possession of state officials. *See* Jones v. Barnes, 463 U.S. 745, 751–52 (1983) ("Neither *Anders* nor any other decision of this Court suggests . . . a constitutional right to compel appointed counsel to press nonfrivolous points . . . ."); Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 694–95 (1982) ("[T]he State does not have even a colorable claim to the artifacts pursuant to these contracts.").

71. United States v. Angleton, 221 F. Supp. 2d 696, 737 (S.D. Tex. 2002); *see also* United States v. Bradley, 905 F.2d 1482, 1485 (11th Cir. 1990) (citing *Richardson* as the standard for determining whether a double jeopardy claim is frivolous). In *Angleton*, the district court held the defendant's argument—that the Supreme Court's "dual sovereignty" exception to the Double Jeopardy Clause's protections, *see* Abbate v. United States, 359 U.S. 187, 194–95 (1959) (reaffirming the established "general principle that a federal prosecution is not barred by a prior state prosecution of the same person for the same acts"), was undermined by subsequent jurisprudential developments—was nonfrivolous under *Richardson*'s definition. *Angleton*, 221 F. Supp. 2d at 738–40. The district court reasoned, notwithstanding the fact that lower courts "repeatedly" and "consistently" had rejected the defendant's argument in other cases, *Abbate* was decided by a "closely divided" Court and also was decided before subsequent developments that would permit its overruling or modification by the Supreme Court. *Id.*

In *Barefoot v. Estelle*, a federal habeas corpus appeal, the Court—in a somewhat roundabout manner—defined "frivolous" in announcing the legal standard under 28 U.S.C. § 2253, the statute governing whether a federal habeas corpus petitioner was entitled to a "certificate of probable cause" (CPC) authorizing an appeal from an adverse judgment.[72] The Court held issuance of a CPC required a "substantial showing of the denial of [a] federal right."[73] Such a showing, the Court held, required "more than the absence of frivolity" and, thus, demanded a greater showing of nonfrivolity than what is required under 28 U.S.C. § 1915 to appeal without costs in an ordinary civil or criminal case in federal court.[74] The Court discussed what such a showing necessitates:

> In requiring . . . a substantial showing of the denial of [a] federal right, obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . We caution that the issuance of a certificate of probable cause generally should indicate that an appeal is not legally frivolous, and that a court of appeals should be confident that petitioner's claim is squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case, before dismissing it as frivolous.[75]

Therefore, the Court in *Barefoot* held a legal issue is "legally frivolous" if it "is squarely foreclosed by statute, rule, or authoritative court decision."[76] Conversely, an issue is necessarily nonfrivolous if it is "debatable among jurists of reason" or, put another way, if some other "court *could* resolve the issue[ ] [in a

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72. Barefoot v. Estelle, 463 U.S. 880, 892–93 (1983). The former version of § 2253 required issuance of a "certificate of probable cause" (CPC) to appeal in order to vest appellate jurisdiction in a federal habeas corpus case in a Court of Appeals. *Id.* at 892. In 1996, Congress amended § 2253 by renaming a CPC as a "certificate of appealability" (COA) but did not modify the legal standard governing whether such a certificate should be issued. *See* Slack v. McDaniel, 529 U.S. 473, 483 (2000) ("Except for substituting the word 'constitutional' for the word 'federal,' § 2253 is a codification of the CPC standard announced in *Barefoot* . . . .").

73. *Barefoot*, 463 U.S. at 893.

74. *Id.*

75. *Id.* at 893–94 & n.4 (citations and quotation marks omitted; bracketed words in original).

76. *Id.* at 894.

different manner]."[77] In a subsequent federal habeas case, *Lozada v. Deeds*, the Court held a claim raised by a habeas petitioner on appeal to a federal circuit court is, by definition, nonfrivolous if it finds direct support in a decision of another circuit court and the issue has not yet been foreclosed by a decision of the Supreme Court itself—even if governing circuit precedent squarely forecloses the claim.[78] In *Lozada*, the Court found that, at the time the Ninth Circuit had refused to grant the habeas petitioner a CPC under § 2253, the claim raised by the petitioner had direct support in an earlier, contrary decision of another circuit, and therefore, the issue was necessarily "debatable among jurists of reason" under the *Barefoot* standard.[79]

The Supreme Court took a similar approach in *McKnight v. General Motors Corp.*, in which the Court addressed the meaning of "frivolous" in the context of sanctions imposed on appellate counsel under Federal Rule of Appellate Procedure 38.[80] The

77. *Id.* at 893 n.4 (second bracket in original).

78. Lozada v. Deeds, 498 U.S. 430, 431–32 (1991) (per curiam).

79. *Id.*

80. McKnight v. Gen. Motors Corp., 511 U.S. 659, 659–60 (1994) (per curiam). Rule 38 provides: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." FED. R. APP. P. 38.

The Supreme Court's own rules similarly provide that sanctions can be imposed on attorneys or litigants who submit "frivolous" filings with the Court. SUP. CT. R. 42.2 (formerly R. 49.2). Only rarely in the past has the Court actually imposed such sanctions and only for the most egregious cases where the Court has not felt it was necessary to explain why the issues raised were frivolous. *See, e.g.*, Hyde v. Van Wormer, 474 U.S. 992, 992 (1985) (imposing $500 damages). Justices Brennan, Marshall, and Stevens dissented from the order in *Hyde* on the ground that the Court's rule against "frivolous" filings "sets no standards for determining when a petition for certiorari is 'frivolous.'" *Id.* at 992–93 (Brennan, J., dissenting). The patently frivolous litigation pursued by attorney John A. Hyde—in the course of representing federal income tax protestors—is discussed in *Lepucki v. Van Wormer*, 765 F.2d 86, 87–89 (7th Cir. 1985) (per curiam). Former Chief Justice Burger regularly called on the Court to impose sanctions for what he considered "frivolous" filings but rarely convinced the Court to do so. *See, e.g.*, Hagerty v. Keller, 474 U.S. 968, 968–70 (1985) (statement of Burger, C.J.) (calling for $1,000 award against petitioner's attorney); Crumpacker v. Ind. Supreme Court Disciplinary Comm'n, 470 U.S. 1074, 1074–75 (1985) (statement of Burger, C.J.) (calling for $1,000 sanction in addition to dismissing the appeal); Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1072–73 (1985) (statement of Burger, C.J., joined by Rehnquist & O'Connor, JJ.) (calling for $1,000 award). More recently, rather than retrospectively imposing monetary sanctions on pro se litigants (who file the most frivolous petitions and applications with the Court), the Court has directed the clerk of the Court to refuse to allow future *in forma pauperis* filings in civil cases by pro se litigants who in the past have filed several clearly frivolous petitions. *See* Cristina Lane, Comment, *Pay Up or Shut Up: The Supreme Court's Prospective Denial of In Forma Pauperis Petitions*, 98 NW. U. L. REV. 335, 335–36, 344 (2003) (explaining that in doing so, the Court relies "on its own procedural Rule 39.8, which states that '[i]f satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ is frivolous or malicious, the Court may deny leave to proceed in forma pauperis'").

Court in *McKnight* reversed the Seventh Circuit's imposition of sanctions on an appellate attorney who, in 1992, had argued the Civil Rights Act of 1991 applied retroactively to cases then pending on appeal.[81] The appellee in the Court of Appeals had moved to dismiss the appeal as frivolous in light of prior Seventh Circuit precedent holding the 1991 Act was not retroactive.[82] In reversing the Seventh Circuit, the Supreme Court, which in 1994 held the Act was not retroactive,[83] reasoned:

> [I]f the only basis for the order imposing sanctions on petitioner's attorney was that his retroactivity argument was foreclosed by Circuit precedent, the order was not proper. As petitioner noted in his memorandum opposing dismissal and sanctions, this Court [in 1992] had not yet ruled on the application of [the Act] to pending cases. Filing an appeal was the only way petitioner could preserve the issue pending a possible favorable decision by this Court. Although, as of September 30, 1992, there was no circuit conflict on the retroactivity question, that question had divided the District Courts and its answer was not so clear as to make petitioner's position frivolous.[84]

A final relevant area of the law in which the Supreme Court has addressed the meaning of "frivolousness" involves cases in which a defendant being sued for an alleged federal law violation challenges the plaintiff's claim as not providing a sound basis for invoking federal jurisdiction.[85] The Court has long held, in order

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81. *McKnight*, 511 U.S. at 659–60.

82. *Id.* at 659.

83. Landgraf v. USI Film Prods., 511 U.S. 244, 286 (1994).

84. *McKnight*, 511 U.S. at 660; *cf.* Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 65 (1993) (deciding a litigant's lawsuit was not "baseless"—i.e., legally frivolous—for purposes of determining whether the lawsuit was immune from antitrust liability and stating "at the very least [the lawsuit] was based on an objectively good faith argument for the extension, modification, or reversal of existing law" in view of a circuit split on the governing legal issue (citation and internal quotation marks omitted)); Louisville & Nashville R.R. Co. v. Melton, 218 U.S. 36, 49 (1910) (deciding whether a constitutional issue was "substantial" enough to result in vesting of "[f]ederal question" jurisdiction and concluding "the division in opinion of the lower [state and federal] court[s]" about the legal issue raised in the case "suggests that the controversy on the subject here presented should not be treated as . . . frivolous").

In addition to FED. R. APP. P. 38, FED. R. CIV. P. 11(b)(2) and (c) permit sanctions for frivolous filings in federal district court proceedings. The Supreme Court has not yet had occasion to specifically discuss the meaning of "frivolous" in that context, but there is no reason to believe that the Court would take a different approach from its application of FED. R. APP. P. 38.

85. *See, e.g.*, Bell v. Hood, 327 U.S. 678, 682–83 (1946) ("[A] suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."). The Supreme Court employed essentially the same "substantiality" standard in deciding

to vest a federal district court with "federal question" jurisdiction under 28 U.S.C. § 1331, there must be a "substantial" federal question.[86] An insubstantial question in this context is equivalent to an "obviously frivolous" legal claim[87]—one "absolutely devoid of merit."[88]

In these cases, the Court addressed the situation in which the Court's own precedent may or may not render a particular legal issue "frivolous." The Court has stated a legal argument is frivolous if it has been so "explicitly" and "conclusively foreclosed by prior decisions of this [C]ourt" as to "leave no room for contention on the subject"[89] or "leave no room for the inference that the question sought to be raised can be the subject of controversy."[90] Put another way, the legal question is "'no longer open to discussion.'"[91]

While informative of the *Anders* issue discussed in this Article, the foregoing decisions of the Supreme Court, discussing the concept of legal frivolity in these other contexts, have not squarely addressed the scenario in which a criminal defense attorney wishes to raise the issue of whether an adverse decision of the Supreme Court should be overruled based on subsequent legal developments—by initially making such an argument in the lower courts as a prerequisite to raising it in a certiorari petition. This issue will be further addressed below.

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whether appeals to the Court under the former mandatory appellate jurisdiction regime (abolished in 1925) vested appellate jurisdiction in the Court. *See, e.g.*, Am. R.R. Co. of Porto Rico v. Castro, 204 U.S. 453, 455 (1907) ("[T]he mere assertion of a Federal right and its denial do not justify our assuming jurisdiction where it indubitably appears that the Federal right asserted is frivolous . . . .").

86. Hagans v. Lavine, 415 U.S. 528, 536 (1974). The Court employed the same "substantiality" standard in cases in which the question was whether a three-judge federal district court should be empaneled under the former 28 U.S.C. § 2281 (repealed 1976) when a litigant raised a constitutional challenge to a state statute. *See, e.g.*, Goosby v. Osser, 409 U.S. 512, 518 (1973) ("[C]laims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; [whereas] previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281.").

87. *Hagans*, 415 U.S. at 537.

88. Baker v. Carr, 369 U.S. 186, 199 (1962).

89. *Melton*, 218 U.S. at 49.

90. *Ex parte* Poresky, 290 U.S. 30, 32 (1933) (citation and internal quotation marks omitted).

91. *Hagans*, 415 U.S. at 537 (quoting McGilvra v. Ross, 215 U.S. 70, 80 (1909)); *see also id.* at 538 ("In the context of the effect of prior decisions upon the substantiality of constitutional claims . . . [such] claims are constitutionally insubstantial only if the prior decisions *inescapably* render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial . . . ." (emphasis added)).

2. The Meaning of "Frivolous" Under the Canons of Legal Ethics. Consistent with the Supreme Court's discussion of legal frivolity, the established canons of legal ethics applicable in every American jurisdiction prohibit attorneys from asserting "frivolous" claims or defenses in civil or criminal matters, whether in trial or appellate courts.[92] Significantly, the universally adopted definition of "nonfrivolous" includes "a good faith argument for an extension, modification *or reversal* of existing law."[93] Section 110 of the Restatement (Third) of the Law Governing Lawyers is similar to the relevant provisions in the Model Rules and Model Code, although the Restatement specifically provides that an argument seeking to overrule precedent is frivolous if "there is no *substantial possibility* that the [appellate court] would accept" the argument that the prior precedent should be overruled.[94]

With respect to an attorney's right to make a "good-faith argument for an extension, modification, or reversal of existing law," the Restatement provides two illustrative examples:

> 1. The supreme court of a jurisdiction held 10 years ago that only the state legislature could set aside the employment-at-will rule of the state's common law. In a subsequent decision, the same court again referred to the employment-at-will doctrine, stating that "whatever the justice or defects of that rule, we feel presently bound to continue to follow it." In the time since the subsequent decision, the employment-at-will doctrine has been extensively discussed, often critically, in the legal literature, and courts in some jurisdictions have overturned or limited the older

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92. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2007) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . ."); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(2) (1980) ("[A] lawyer shall not: . . . [k]nowingly advance a claim or defense that is unwarranted under existing law . . . ."). "Each state maintains its own code of conduct for lawyers, either through adoption by the state courts or enactment by the state legislature, but every state code is based, in large part, on either the *Model Code of Professional Responsibility* or the *Model Rules of Professional Conduct*." Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 227 n.19 (2006).

93. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2007) (emphasis added); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(2) (1980). *See generally* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 85-352 (1985) (discussing the foregoing provisions of the Model Rules and Model Code); *cf.* FED. R. CIV. P. 11(b)(2) (requiring civil attorney or pro se litigant in civil case to certify claims or defenses in pleadings are "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law").

94. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. d (2000) (emphasis added).

> decisions. Lawyer now represents an employee at will. Notwithstanding the earlier rulings of the state supreme court, intervening events indicate that a candid attempt to obtain reversal of the employment-at-will doctrine is a nonfrivolous legal position in the jurisdiction. On the other hand, if the state supreme court had unanimously reaffirmed the doctrine in recent months, the action would be frivolous in the absence of reason to believe that there is a substantial possibility that, notwithstanding the recent adverse precedent, the court would reconsider altering its stance.
>
> 2. Following unsuccessful litigation in a state court, Lawyer, representing the unsuccessful Claimant in the state-court litigation, filed an action in federal court seeking damages under a federal civil-rights statute, 42 U.S.C. § 1983, against the state-court trial judge, alleging that the judge had denied due process to Claimant in rulings made in the state-court action. The complaint was evidently based on the legal position that the doctrine of absolute judicial immunity should not apply to a case in which a judge has made an egregious error. Although some scholars have criticized the rule, the law is and continues to be well settled that absolute judicial immunity under § 1983 extends to such errors and precludes an action such as that asserted by Claimant. No intervening legal event suggests that any federal court would alter that interpretation. Given the absence of any basis for believing that a substantial possibility exists that an argument against the immunity would be accepted in a federal court, the claim is frivolous.[95]

Neither example specifically addresses the situation where members of the Supreme Court of the United States have called into doubt one of the Court's own precedents, but cases where the full Court has not yet reconsidered the precedent. However, the two illustrations do provide some meaningful guidance by focusing on factors such as whether there has been scholarly criticism of a particular precedent, whether judges on other courts have criticized it, and whether the highest appellate court in a jurisdiction recently has reaffirmed the precedent without any recorded dissent. The commentary to the Restatement also

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95. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. d, illus. 1 & 2 (2000).

states "a change in the composition of a multi-member [appellate] court" might support a good faith argument for overruling a precedent of that court.[96]

III. *ALMENDAREZ-TORRES* AND ITS AFTERMATH

A. Supreme Court Jurisprudence: 1998–2007

In *Almendarez-Torres*, a closely divided Supreme Court held a recidivist or habitual sentencing enhancement in a criminal case based on a defendant's prior conviction need not be treated as an "element" that must be alleged in an indictment[97] and proved beyond a reasonable doubt to a jury in the trial of the subsequent offense.[98] *Almendarez-Torres* involved the enhancement provision in 8 U.S.C. § 1326, which criminalizes an alien's unauthorized reentry into the United States following deportation.[99] Section 1326(a) punishes "simple" illegal reentry by an alien with no prior criminal record at the time of his reentry with a maximum term of imprisonment of two years, while § 1326(b)(1) and (2) raise the maximum punishment to ten or twenty years depending on the extent of the alien's criminal record.[100] Section 1326(b) is one of hundreds of recidivist or habitual "enhancement" provisions in the state and federal criminal codes.[101] Such statutory enhancements have existed

96. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. d (2000).

97. Because the Grand Jury Clause of the Fifth Amendment does not apply to state criminal prosecutions, states need not employ grand juries to bring formal criminal charges. *See* Beck v. Washington, 369 U.S. 541, 545 (1962) (noting the Supreme Court "has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions" since 1884). Therefore, the constitutional rule that an "element" of a criminal charge must be alleged by a grand jury in an indictment, *see* Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998), does not apply in state criminal cases and only applies in federal prosecutions. As discussed at *infra* note 107, the related constitutional rule that each element must be proved beyond a reasonable doubt to a jury—unless the defendant waives this constitutional requirement by pleading guilty—applies equally in state and federal prosecutions.

98. *See Almendarez-Torres*, 523 U.S. at 239.

99. *Id.* at 226.

100. Section 1326(b)(1) provides for a ten-year maximum term of imprisonment if an alien had a prior record consisting of a felony or three or more convictions for drug related or violent misdemeanors; Section 1326(b)(2) provides for a twenty-year maximum if an alien had a prior conviction for an "aggravated felony." 8 U.S.C. § 1326(b)(1)–(2) (2006). In immigration law, "aggravated felonies" include various types of serious offenses, including murder, drug trafficking, robbery, and rape. 8 U.S.C. § 1101(a)(43) (2006).

101. *See, e.g.*, 18 U.S.C. § 924(e) (2006) (establishing enhanced punishment if a defendant convicted under 18 U.S.C. § 922(g) has "three previous convictions . . . for a violent felony or a serious drug offense, or both"); 21 U.S.C. §§ 841(b), 851 (2006) (detailing enhanced punishment for drug offenses if "a prior conviction for a felony drug offense has become final" and "the United States attorney files an information with the

since at least the nineteenth century, both in the United States[102] and in England.[103]

The majority of the Court in *Almendarez-Torres*—in an opinion written by Justice Breyer and joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas—held that nothing in the Constitution requires a defendant's prior conviction to be pleaded in an indictment or proved to a jury beyond a reasonable doubt in order to subject the defendant to an enhanced penalty beyond the maximum prison term otherwise applicable to a violation of the underlying penal statute.[104] In *Almendarez-Torres*, the defendant's indictment did not allege he had any prior convictions before illegally reentering the United States—thus, charging an offense only under § 1326(a)—but the district court, at the sentencing hearing, applied the statutory enhancement in 8 U.S.C. § 1326(b)(2) and imposed a prison sentence of eighty-five months, well above the two year maximum sentence authorized by § 1326(a).[105] The majority held the recidivism enhancement in the statute was a "sentencing factor" rather than an "element" of an "enhanced" offense of illegal reentry following deportation.[106] Thus, under the Court's "elements" jurisprudence,[107] the defendant's prior conviction need not be alleged in an indictment or proved to a jury beyond a reasonable doubt to permit an enhanced penalty and, instead,

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court . . . stating in writing the previous convictions to be relied upon"). *See generally* Cynthia L. Sletto, Annotation, *Chronological or Procedural Sequence of Former Convictions as Affecting Enhancement of Penalty Under Habitual Offender Statutes*, 7 A.L.R.5th 263, 263 (1992) ("Many states have habitual offender statutes that mandate enhanced punishment of a convicted offender who has previously been convicted of a specified number of offenses.").

102. *See, e.g.*, United States v. Thompson, 28 F. Cas. 90, 90 (C.C.D.C. 1833) (No. 16,485) (analyzing a prisoner's sentence for an alleged second offense under an 1831 statute); People v. Sickles, 51 N.E. 288, 289 (N.Y. 1898) (stating the penal code "provides for an increased penalty where there is the commission of a crime after a previous conviction of the offender").

103. *See, e.g.*, Regina v. Clark, 169 Eng. Rep. 694, 695 (1853) (explaining a "previous conviction . . . may affect the punishment").

104. *Almendarez-Torres*, 523 U.S. at 239–47.

105. *Id.* at 227.

106. *Id.* at 226–27.

107. *See, e.g.*, United States v. Gaudin, 515 U.S. 506, 510 (1995) (reiterating, under the Sixth Amendment, each element of a charged offense must be found by a jury unless that right is waived by the defendant); *In re* Winship, 397 U.S. 358, 364 (1970) (holding, under the Due Process Clause, that each element of a charged offense must be proved beyond a reasonable doubt); Stirone v. United States, 361 U.S. 212, 218 (1960) (explaining each element of a federal felony offense must be alleged in an indictment by a federal grand jury). *See generally* Note, *The Unconstitutionality of Determinate Sentencing in Light of the Supreme Court's "Elements" Jurisprudence*, 117 HARV. L. REV. 1236 (2004).

could be found by the trial judge by a mere preponderance of the evidence.[108]

Justice Scalia, joined by Justices Stevens, Souter, and Ginsburg, dissented.[109] Rather than directly answer the constitutional question—as the majority had done (in rejecting the defendant's argument)—Justice Scalia's dissenting opinion instead applied the "constitutional doubt" canon of statutory construction in interpreting the enhancement provision of § 1326(b).[110] In doing so, he contended the defendant's prior conviction constituted an "element" of the "greater" offense of illegal reentry by an aggravated felon rather than being a mere "sentencing factor."[111] In reaching the conclusion that there was a serious constitutional question to avoid in interpreting the statute, Justice Scalia observed, although the Court had never directly addressed the question presented in *Almendarez-Torres*, the Court had resolved related issues in favor of defendants when a disputed "fact [other than the elements of the underlying, lesser offense] . . . increases the maximum penalty to which a criminal defendant is subject."[112] Justice Scalia also noted "the rule at common law," as reflected in the "near-uniform practice" of the states, supported Almendarez-Torres's position: traditionally, in both the United States and England, a defendant's prior conviction, if used for enhancement of his sentence in a subsequent criminal prosecution, was not treated as a mere "sentencing factor" to be decided by a judge based on a preponderance of the evidence but, instead, was treated "as an element of a separate [greater] offense" that had to be pleaded and proved like any other "element."[113] "As [the] Court has stated

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108. *Almendarez-Torres*, 523 U.S. at 247.

109. *Id.* at 248–71 (Scalia, J., dissenting).

110. *Id.* at 250.

111. *Id.* (citing well-established precedent for the proposition that "[w]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter").

112. *Id.* at 251–60 (discussing the Court's due process decisions such as Mullaney v. Wilbur, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358; and Specht v. Patterson, 386 U.S. 605 (1967)). These cases addressed related issues concerning whether certain alleged facts were "elements" of an offense that were subject to the traditional constitutional requirement of proof beyond a reasonable doubt by a jury (absent a waiver by the defendant) and (only in federal cases) the additional requirement that such facts be pleaded in an indictment. *See id.* (reviewing the Court's previous decisions on recidivism and concluding "the answer to the constitutional question is not clear").

113. *Id.* at 261. The majority in *Almendarez-Torres* disputed Justice Scalia's claim by contending that "any such tradition is not uniform" and, in any event, "nowhere . . . rested upon a federal constitutional guarantee." *Id.* at 246–47.

Justice Scalia clearly was correct about the overwhelming majority of American

from its first due process cases, traditional practice provides a touchstone for constitutional analysis."[114]

A few months after *Almendarez-Torres*, the Court again addressed the issue of whether the Constitution ever requires a defendant's prior conviction to be treated as an "element" as opposed to a mere "sentencing factor." In *Monge v. California*, the question was whether the Double Jeopardy Clause prohibited a state from retrying a defendant on the allegation that he was a habitual offender when, at the sentencing phase of the first trial, the prosecution offered insufficient proof that the defendant had the requisite predicate convictions.[115] The same five-Justice majority that had rejected the defendant's argument in *Almendarez-Torres* also rejected the defendant's argument in *Monge*. In particular, the majority denied his claims that he had been effectively "acquitted" of the "greater offense" because the prosecution had offered insufficient evidence of his alleged habitual status at the first trial and that the state was barred under the Double Jeopardy Clause from again seeking to prove his recidivist status at the second trial.[116]

Although the defendant in *Monge* had not specifically argued his status as a habitual offender was an "element" of the enhanced version of the offense for which he was prosecuted,

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jurisdictions that traditionally treated a defendant's prior conviction—actually or functionally—as an "element" that had to be pleaded in an indictment and proved beyond a reasonable doubt to a jury in order to permit an enhanced penalty. As was noted in an exhaustive study in 1929, "It has been generally held that, in order to subject an accused to the enhanced punishment for a second or subsequent offense, or as a habitual criminal, it is necessary to allege in the indictment the fact of a prior conviction or convictions." Annotation, *Constitutionality and Construction of Statute Enhancing Penalty for Second or Subsequent Offense*, 58 A.L.R. 20, 64–78 (1929) (citing numerous decisions of federal circuit courts and state supreme courts so holding). Furthermore, "[i]t is held in general that, on a charge of a 'second' or 'subsequent' offense, the question of a prior conviction is an essential element of the offense charged, and is an issue of fact to be determined by the jury." *Id.* at 59–63 (citing numerous decisions of federal circuit courts and state supreme courts so holding). The same traditional practice was followed in England. *See* Crown v. Smith, (1909) 3 Crim. App. 40, 46 (noting the requirement that an indictment allege the defendant's status as an "habitual criminal" while also charging the subsequent alleged offense and observing that "[t]he rules of pleading in criminal cases have always been very strict in regard to these matters"); *see also Constitutionality and Construction of Statute Enhancing Penalty for Second or Subsequent Offense*, *supra*, at 108–14 (citing numerous English cases for this proposition as well as the related proposition that the jury must find the existence of the defendant's prior conviction at the trial of the case in order for an enhanced penalty to be imposed).

114. Honda Motor Co. v. Oberg, 512 U.S. 415, 430 (1994) (citations omitted); *see also* Montana v. Egelhoff, 518 U.S. 37, 43 (1996) (plurality opinion) ("[The] primary guide in determining whether the principle in question is fundamental [with respect to a due process analysis] is, of course, historical practice.").

115. Monge v. California, 524 U.S. 721, 725–28 (1998).

116. *Id.* at 729.

Justice Scalia made that very argument in dissent as part of his analysis of the defendant's double jeopardy claim.[117] Noting he had avoided directly answering the serious constitutional question in *Almendarez-Torres* by invoking the constitutional doubt doctrine, Justice Scalia in his dissent in *Monge* stated he was required to "answer the constitutional question" based on the manner in which the double jeopardy issue was presented to the Court.[118] He did so by contending the factual question of whether a defendant has a prior conviction—used to enhance his sentence in a subsequent prosecution—is an "element" in the subsequent case within the meaning of the Court's "elements" jurisprudence.[119] The five-Justice majority in *Monge*, however, responded that Justice Scalia's argument was "squarely foreclosed by our decision in *Almendarez-Torres*."[120]

The following year, in *Jones v. United States*,[121] the five-to-four division of the Court apparent in *Almendarez-Torres* and *Monge* shifted. The issue in *Jones* was whether the enhancement provisions of the federal carjacking statute, 18 U.S.C. § 2119—permitting increased maximum sentences if the carjacking caused serious bodily injury or death—were, constitutionally speaking,[122] "sentencing factors" or "elements" within the meaning of *Almendarez-Torres*.[123] In enacting § 2119(2) and (3), which raised the maximum penalty otherwise applicable based on harm to the victim, Congress did not specify whether a trial judge could find this fact as a "sentencing factor" or, instead, whether the factual allegations regarding harm to the victim had to be submitted to the jury and proved beyond a reasonable doubt

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117. *See id.* at 737–41 (Scalia, J., dissenting, joined by Souter & Ginsburg, JJ.) (criticizing the "holding in *Almendarez-Torres* that 'recidivism' findings do not have to be treated as elements of the offense," calling the decision "a grave constitutional error affecting the most fundamental of rights"). Although Justice Stevens—who had joined Justice Scalia's dissenting opinion in *Almendarez-Torres*—did not join Justice Scalia's dissenting opinion in *Monge*, Justice Stevens's separate dissent implied his agreement with Justice Scalia. *See id.* at 735–37 & nn.5–8 (Stevens, J., dissenting) ("Justice Scalia accurately characterizes the potential consequences of today's decision as 'sinister.'").

118. *Id.* at 740.

119. *Id.*

120. *Id.* at 728.

121. Jones v. United States, 526 U.S. 227 (1999).

122. The constitutional issue in *Jones* was threefold: whether the trial judge's enhancement of Jones's sentence by finding serious bodily injury by a preponderance of the evidence violated (i) the due process requirement of proof beyond a reasonable doubt; (ii) the Sixth Amendment right to a jury trial; and (iii) the Fifth Amendment right to a grand jury indictment in a federal case. *See id.* at 232 ("Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment [in federal cases], submitted to a jury, and proven by the Government beyond a reasonable doubt.").

123. *Id.* at 232–33.

for an enhanced sentence.[124] The five-Justice majority in *Jones*, believing the case raised a serious constitutional question, avoided answering it by interpreting the statute to treat such facts as "elements" rather than as "sentencing factors."[125] That majority in *Jones* included all four of the *Almendarez-Torres* dissenters together with Justice Thomas, who had been in the majority in *Almendarez-Torres*.[126] The four dissenters in *Jones* were the remaining four members of the *Almendarez-Torres* majority—Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Breyer.[127]

Justice Souter's majority opinion in *Jones* concluded that a serious constitutional question was raised by a trial judge's enhancement of a defendant's sentence based on the judge's factual finding about the victim's injuries (using a mere preponderance of the evidence standard) beyond that otherwise statutorily authorized without such a finding.[128] The four dissenters in *Jones*, however, contended the issue was foreclosed by *Almendarez-Torres*.[129] The dissenters argued, although *Almendarez-Torres* concerned a defendant's recidivism rather than harm to his victim during the commission of the offense, the latter was as much of a traditional "sentencing factor" as the former and, thus, need not be treated as an "element."[130] The majority in *Jones* distinguished *Almendarez-Torres* by pointing out "the holding last Term rested in substantial part on the tradition of regarding recidivism as a sentencing factor, not as an element."[131] In addition to noting "the distinctive significance of recidivism," the majority in *Jones* further stated, "unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."[132]

The next year, in *Apprendi v. New Jersey*, the Court, with the same reconstituted five-to-four division as *Jones*, went one

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124. *Id.* at 232.

125. *Id.* at 239.

126. *Id.* at 229.

127. *Id.* at 254 (Kennedy, J., dissenting, joined by Rehnquist, C.J., and O'Connor & Breyer, JJ.).

128. *Id.* at 242–44.

129. *Id.* at 254.

130. *Id.* at 256–57.

131. *Id.* at 248–49. As discussed at *supra* note 113 and accompanying text, Justice Scalia's dissenting opinion in *Almendarez-Torres* cogently disputed the majority's claim that recidivism enhancements were traditionally considered mere "sentencing factors" to be decided by judges rather than "elements" to be alleged in indictments by grand juries and found beyond a reasonable doubt by petit juries.

132. *Jones*, 526 U.S. at 249.

step further and held, as a matter of constitutional law, "Other 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."[133] The Court was faced with a state "hate crime" statute that increased the defendant's maximum prison sentence by two years for the offense of conviction (unlawful possession of a weapon in Apprendi's case) if the trial judge found by a preponderance of the evidence at sentencing that the defendant acted with a racist motivation in committing the underlying offense.[134] The trial judge applied the statutory enhancement after finding by a mere preponderance that Apprendi acted with a racist motivation in possessing (and firing) the firearm.[135] The majority held this enhancement was unconstitutional because it had not been proved to a jury beyond a reasonable doubt.[136]

Justice Stevens's opinion for the Court in *Apprendi* explicitly called into question the continuing validity 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. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence. . . . In addition to the reasons set forth in Justice Scalia's dissent [in *Almendarez-Torres*], 523 U.S., at 248–260, 118 S. Ct. 1219, it is noteworthy that the Court's extensive discussion of the term "sentencing factor" virtually ignored the pedigree of the pleading requirement at issue. The rule was succinctly stated by Justice Clifford in his separate opinion in *United States v. Reese*, 92 U.S. 214, 232–233 (1876): "[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." As he explained in "[s]peaking of that principle, Mr. Bishop says it pervades the entire system of the adjudged law of criminal procedure, as appears by all the cases; that, wherever we move in that department of our jurisprudence, we come in contact with it; and that we can no more escape from it than from the

133. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

134. *Id.* at 468–69.

135. *Id.* at 471.

136. *Id.* at 496–97.

> atmosphere which surrounds us. 1 Bishop, Cr. Pro., 2d ed., sect. 81; Archbold's Crim. Plead., 15th ed., 54; 1 Stark Crim. Plead., 236; 1 Am. Cr. Law, 6th rev. ed., sect. 364; *Steel v. Smith,* 1 Barn. & Ald. 99."[137]

In a separate concurring opinion in *Apprendi*, Justice Thomas, who had been the critical fifth vote in *Almendarez-Torres*, specifically repudiated his prior concurrence in the *Almendarez-Torres* majority opinion.[138] His concurring opinion in *Apprendi* offered an extensive exegesis concerning the American "tradition of treating recidivism as an element" of a new offense for which a defendant's prior criminal record would result in an enhanced punishment upon conviction of the new offense.[139] Noting case law from the early part of the nineteenth century, Justice Thomas correctly observed this "tradition stretches back to the earliest years of the Republic . . . . Courts treated the fact of a prior conviction just as any other fact that increased the punishment by law . . . . [T]he fact of a prior conviction was an element, together with the facts constituting the core crime of which the defendant was charged, of a new, aggravated crime."[140]

After *Apprendi*—which had profound effects in both state and federal courts regarding a wide variety of sentencing enhancements[141]—the Supreme Court did not have occasion to

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137. *Id.* at 489–90 & n.15.

138. *See id.* at 520 (Thomas, J., concurring) ("[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.").

139. *Id.* at 506–08.

140. *Id.* at 506–07 (citations omitted); *see also* United States v. Thompson, 28 F. Cas. 90, 90 (C.C.D.C. 1833) (No. 16,485) (concluding averment of previous conviction in indictment insufficient for court to assess enhanced punishment in accordance with an 1831 statute).

141. *See, e.g.*, Blakely v. Washington, 542 U.S. 296, 303 (2004) (applying *Apprendi* to sentencing enhancements under mandatory state sentencing guidelines); Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding *Apprendi* applied to state death penalty statutes' "eligibility" aggravating factors, thereby overruling Walton v. Arizona, 497 U.S. 639 (1990)); United States v. Cotton, 535 U.S. 625, 632, 633 n.3 (2002) (determining *Apprendi* applied to the sentencing enhancement provisions in 21 U.S.C. § 841(b), whereby a defendant's maximum sentence depends on the amount and type of controlled substance involved). A commentator has contended that the Court's decision in *Blakely*—which addressed the application of *Apprendi* to sentencing guidelines rather than to recidivism enhancements—further undermined the validity of *Almendarez-Torres*:

> After *Blakely*, the recidivism exception becomes even more problematic, since the decision appears to have eliminated completely the distinction between a traditional sentencing factor and an element of a greater offense, such that now, "any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense," even if that fact was a traditional basis for increasing an offender's sentence. [citing *Blakely*, 542 U.S. at 318 (O'Connor, J., dissenting).] . . . [T]he fact that recidivism is "a traditional bas[i]s for increasing

address the recidivism issue again until 2004. In *Dretke v. Haley*, a state inmate serving a lengthy prison sentence after being treated as a "three strikes" habitual offender under Texas law contended there was insufficient evidence to support the recidivism enhancement.[142] The state courts erroneously had treated the defendant as having two prior *sequential* offenses of conviction when, in fact, his second prior conviction was based on an offense that occurred *prior* to the commission of his first offense.[143] Under the state's three strikes law, the first offense of conviction had to precede the second offense for the habitual enhancement to apply.[144]

In *Dretke*, the state asked the Supreme Court to reverse the lower federal courts, which had granted the inmate habeas corpus relief. Relying on the Court's decisions in *Almendarez-Torres* and *Monge*, the state asserted there is no constitutional requirement for a prosecutor to prove habitual offender allegations in the same manner that a state prosecutor must prove the "elements" of the underlying offense.[145] The inmate responded that "*Almendarez-Torres* should be overruled or, in the alternative, that it does not apply because the recidivist statute at issue required the jury to find not only the existence of his prior convictions but also the additional fact that they were sequential."[146]

The Court in *Dretke*, in an opinion written by Justice O'Connor—a member of the *Almendarez-Torres* majority—refused to address the issue of whether *Almendarez-Torres*

> an offender's sentence," and thus a traditional sentencing factor, appears to be the primary reason that the *Almendarez-Torres* Court held that recidivism need not be proved beyond a reasonable doubt when it is grounds for a sentence enhancement. *Blakely* seems to have eliminated the principal reason the *Almendarez-Torres* Court held that recidivism need not be included in the indictment nor proved beyond a reasonable . . . doubt. Therefore, *Blakely* casts further doubt as to the stare decisis value of *Almendarez-Torres*.

Amy Luria, *Traditional Sentencing Factors v. Elements of an Offense: The Questionable Viability of* Almendarez-Torres v. United States, 7 U. PA. J. CONST. L. 1229, 1233–34 (2005); *see also* Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1361 (2007) (contending that *Almendarez-Torres* "conflicts with *Blakely*'s animating principles"); Molly Gulland Gaston, *Never Efficient, But Always Free: How the Juvenile Adjudication Question Is the Latest Sign That* Almendarez-Torres v. United States *Should Be Overruled*, 45 AMER. CRIM. L. REV. 1167, 1179 (2008) (arguing that the logic employed in *Almendarez-Torres* has been undermined by the Court's more recent formalist view that all punishment-increasing factors must be proved beyond a reasonable doubt).

142. Dretke v. Haley, 541 U.S. 386, 390 (2004).

143. *Id.* at 389–90.

144. *Id.* at 389.

145. *Id.* at 395.

146. *Id.*

should be limited or overruled. The Court instead found an alternative ground potentially supporting the lower court's judgment: a likely meritorious claim that the prisoner's attorney at trial provided ineffective assistance of counsel by not objecting to the erroneous application of the state's recidivist enhancement.[147] Justice O'Connor's majority opinion took this approach as a means of avoiding what the Court acknowledged were "difficult constitutional questions" concerning *Almendarez-Torres*'s continuing validity.[148] Her opinion also specifically characterized *Apprendi* as having "reserv[ed] judgment as to the validity of *Almendarez-Torres*."[149]

The following year, in *Shepard v. United States*,[150] the Court had another occasion to discuss *Almendarez-Torres*. At issue was whether the federal defendant—a felon who possessed a firearm[151]—was a recidivist offender under the "three strikes" enhancement of 18 U.S.C. § 924(e).[152] The specific question was whether the defendant's four prior Massachusetts burglary convictions qualified as predicate "burglary" convictions within the meaning of § 924(e).[153] Relying on *Almendarez-Torres*, the prosecution contended that whether Shepard's prior burglary convictions qualified as predicate convictions did not concern an "element" of a "greater" offense set forth in § 924(e) and, thus, a trial judge could find the existence, vel non, of the prior convictions based on facts (such as hearsay statements in police

147. *Id.* at 394–96.

148. *Id.* at 395–96.

149. *Id.* at 395 (citing Apprendi v. New Jersey, 530 U.S. 466, 488–90 (2000)).

150. Shepard v. United States, 544 U.S. 13 (2005) (plurality opinion).

151. Felons are prohibited from possessing firearms. 18 U.S.C. § 922(g)(1) (2006).

152. *Shepard*, 544 U.S. at 16. That enhancement statute dramatically increases both the statutory minimum and maximum punishments for defendants who unlawfully possess firearms after being convicted of three or more felony offenses involving drug trafficking or violence. Such "violent" felonies include certain enumerated offenses (e.g., "burglary") as well as felony offenses that have "as an element the use, attempted use, or threatened use of physical force against the person of another" or that "otherwise involve[ ] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B) (2006). Defendants with less than three prior felony convictions of such type face a sentencing range of probation to ten years of imprisonment, while defendants with three or more such prior convictions face a range of imprisonment from fifteen years to life. *Compare* 18 U.S.C. § 924(a)(2) (2006) (providing sentencing range for defendants with less than three prior felony convictions), *with* 18 U.S.C. § 924(e) (2006) (providing range for defendants with three or more prior convictions).

153. *See Shepard*, 544 U.S. at 16. Earlier, in *Taylor v. United States*, the Court interpreted "burglary" in § 924(e) to require a state's burglary statute to, at a minimum, require "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." Taylor v. United States, 494 U.S. 575, 598 (1990). Any state "burglary" statute that did not include such elements could not be a predicate offense under the definition of § 924(e). *Id.* at 599, 602.

reports) not admitted by the defendant or proved to a jury beyond a reasonable doubt.[154] The defendant, conversely, contended *Almendarez-Torres* should be limited to the simple fact of the existence, vel non, of the prior convictions and the Court, as a means of avoiding constitutional doubt, should interpret § 924(e) to treat any additional fact about an alleged predicate offense—such as whether it met the statutory definition of "burglary"—as an "element."[155]

A plurality of the Court—in an opinion written by Justice Souter, joined by Justices Stevens, Scalia, and Ginsburg—agreed with the defendant that *Almendarez-Torres* did not resolve the issue in *Shepard* because the rule of *Almendarez-Torres* was limited to the mere fact of whether a defendant had a prior conviction and did not concern additional facts about the prior offense that could only be proved by reliance on extrinsic evidence such as police reports.[156] The plurality stated there was a serious constitutional doubt the Court could avoid by interpreting § 924(e) to require a trial judge to consider facts about a prior conviction—beyond the simple fact of the prior conviction's existence—only if admitted by the defendant or proved to a jury beyond a reasonable doubt.[157] "While the disputed fact here can be described as a fact *about* a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute."[158]

The dissenting opinion written by Justice O'Connor and joined by Justices Kennedy and Breyer, contended "today's decision reads *Apprendi* to cast a shadow possibly implicating recidivism determinations," thus threatening to undermine the *Almendarez-Torres* "exception" to *Apprendi*.[159] The plurality responded to the dissent's alarm by stating, "It is up to the future to show whether the dissent is good prophesy."[160] Justice Thomas,

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154. *See* Brief for the United States at 16–18, *Shepard*, 544 U.S. 13 (No. 03-9168), 2004 WL 2308580 (arguing the narrow examination of state court documents to determine whether the defendant's previous burglary conviction involved a building was consistent with *Taylor*).

155. *See* Brief for the Petitioner at 29–32, 32 n.14, *Shepard*, 544 U.S. 13 (No. 03-9168), 2004 WL 1967055 (asserting that any additional fact beyond the existence of a prior conviction must be proved beyond a reasonable doubt pursuant to Jones v. United States, 526 U.S. 227 (1999)).

156. *Shepard*, 544 U.S. at 24–26.

157. *Id.*

158. *Id.* at 25 (emphasis added).

159. *Id.* at 37 (O'Connor, J., dissenting).

160. *Id.* at 26 n.5.

who filed a separate opinion concurring in part and concurring in the judgment in *Shepard*, more directly sought to confirm the dissenters' concern: "*Almendarez-Torres* . . . has been eroded by th[e] Court's subsequent [actions]"—citing his own concurring opinion in *Apprendi* and the four-Justice dissenting opinion in *Almendarez-Torres*—and noted "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."[161] Justice Thomas also stated, "The parties do not request it here, but in an appropriate case, th[e] Court should consider *Almendarez-Torres*' continuing viability."[162] Shortly after *Shepard*, the Third Circuit observed, "The various opinions in *Shepard* appear to agree on one thing: the door is open for the Court one day to limit or overrule *Almendarez-Torres*."[163]

In 2006, in *Rangel-Reyes v. United States*,[164] numerous defendants who had received enhanced prison sentences under 8 U.S.C. § 1326(b)(2) based on their trial judges' treatment of their prior convictions as "sentencing factors" rather than "elements" asked the Supreme Court to grant certiorari and overrule *Almendarez-Torres*.[165] Although the Court denied certiorari without offering any reasons for doing so, two Justices—Justices Stevens and Thomas—filed individual opinions. Justice Thomas dissented from the denial of certiorari.[166] He repeated his past criticism of the majority opinion in *Almendarez-Torres*, noted a current majority of the Court's members had stated their disagreement with it, and repeated his suggestion (initially made in his concurring opinion in *Shepard*) that the Court should grant certiorari and reconsider *Almendarez-Torres*.[167] He stated:

> Petitioners, like many other criminal defendants, have done their part by specifically presenting this Court with opportunities to reconsider *Almendarez-Torres.* It is time for this Court to do its part. The Court's duty to resolve this matter is particularly compelling, because we are the *only* court authorized to do so. . . . And until we do so, countless criminal defendants will be denied the full protection afforded by the Fifth and Sixth Amendments, notwithstanding the agreement of a majority of the Court

161. *Id.* at 27–28 (Thomas, J., concurring in part and concurring in the judgment).

162. *Id.* at 28.

163. United States v. Francisco, 165 F. App'x 144, 148 (3d Cir. 2006).

164. Rangel-Reyes v. United States, 547 U.S. 1200 (2006).

165. *See* Petition for Writ of Certiorari at 6–12, *Rangel-Reyes*, 547 U.S. 1200 (No. 05-10706) (explaining that petitioners' charges would be reduced if the prior convictions were treated as elements to be proved beyond a reasonable doubt).

166. *Rangel-Reyes*, 547 U.S. at 1202 (Thomas, J., dissenting).

167. *Id.* at 1202.

> that this result is unconstitutional. There is no good reason to allow such a state of affairs to persist.[168]

Justice Thomas specifically remarked that the *Almendarez-Torres* "exception" to the *Apprendi* rule "finds its basis not in the Constitution, but in a precedent of this Court."[169] A commentator has observed: "By demoting the prior conviction exception from constitutional rule to mere precedent, [Justice] Thomas set the stage for possibly overruling the exception. . . . [T]he *Almendarez-Torres* exception could be overruled as a court-made rule."[170]

Justice Stevens responded with his own opinion respecting the denial of certiorari in *Rangel-Reyes*.[171] "While I continue to believe that *Almendarez-Torres* . . . was wrongly decided," he said, "that is not a sufficient reason for revisiting the issue."[172] He opined the constitutional violation occurring when a defendant's sentence is increased based on a trial judge's finding of a defendant's prior criminal conviction as a "sentencing factor" will "seldom create any significant risk of prejudice to the accused"[173] and, for that reason, there was "no special justification for overruling *Almendarez-Torres*."[174] Finally, Justice Stevens added,

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168. *Id.* at 1202–03.

169. *Id.* at 1202.

170. Appleman, *supra* note 141, at 1362.

171. *Rangel-Reyes*, 547 U.S. at 1201–02 (Stevens, J., respecting the denial of certiorari).

172. *Id.* at 1201.

173. *Id.* Although his opinion did not elaborate, Justice Stevens apparently believed, as a general matter, the prosecution could easily allege a defendant's prior conviction in an indictment and prove it to a petit jury beyond a reasonable doubt. Thus, allowing a trial judge to find the existence of a prior conviction by a preponderance of the evidence—as a "sentencing factor"—would not create a "risk of prejudice" to a defendant. Although Justice Stevens may well be correct as a general matter, *but cf.* United States v. Jackson, 368 F.3d 59, 63–65, 67–68 (2d Cir. 2004) (finding prosecution failed to prove existence of defendant's prior conviction beyond a reasonable doubt in a case where a statute, 18 U.S.C. § 922(g)(1), made defendant's prior conviction an "element" during the guilt-innocence phase), the same could be said of the evidence required to prove many, if not most, criminal charges. *See* David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1155 n.37 (2007) (noting conviction rates at trials in state and federal courts around the country traditionally have been near 75% and 80%, respectively). In other words, the prosecution's ease in proving a defendant's guilt of one or more elements of a crime is no reason to relieve the prosecution of its constitutional burden to prove each element beyond a reasonable doubt. Clearly, the Supreme Court would not hold that the "lack of prejudice" to a particular defendant in having a judge find his guilt by a mere preponderance of the evidence—when the evidence of guilt was overwhelming—would justify violating the defendant's constitutional right to have each element of his offense proved to a jury beyond a reasonable doubt. *Cf.* Sullivan v. Louisiana, 508 U.S. 275, 281–82 (1993) (jury instruction that erroneously diminished the "reasonable doubt" standard was "structural" constitutional error that required defendant's conviction to be reversed without any inquiry into whether the error harmed the defendant).

174. *Rangel-Reyes*, 547 U.S. at 1201 (Stevens, J., respecting the denial of certiorari).

because "countless judges in countless cases have relied on *Almendarez-Torres* . . . *stare decisis* provides a sufficient basis for the denial of certiorari."[175] No other Justice filed a separate opinion or joined either Justice Thomas's or Justice Stevens's opinions in *Rangel-Reyes*.[176]

The following year—by which time Chief Justice Roberts and Justice Alito had replaced the late Chief Justice Rehnquist and Justice O'Connor[177]—the Court addressed an issue that, in the parties' submissions, did not appear to implicate *Almendarez-Torres*. In *James v. United States*, the defendant contended the district court had erred by finding his Florida attempted burglary conviction qualified as a predicate offense under 18 U.S.C. § 924(e).[178] The defendant's primary argument, which did not concern *Apprendi* or *Almendarez-Torres*, was that his prior conviction did not qualify as a "violent" predicate offense under § 924(e) because, under state law, a person can commit that offense by merely unlawfully entering the curtilage of another's property.[179] The defendant's secondary argument was that *Apprendi* was violated by the district court's factual "findings" about the "violent" nature of his prior conviction and, thus, the Court should interpret § 924(e) to avoid constitutional doubt by requiring such a finding to be by a jury under the reasonable doubt standard.[180] The Court in *James* rejected the primary argument as a matter of state law—without any reference to *Apprendi* or *Almendarez-Torres*—and rejected the secondary argument on the ground that no *factual* "findings" were made about the defendant's attempted burglary offense because the only issue was a legal one (i.e., statutory interpretation).[181] Therefore, the majority reasoned, *Apprendi* was not implicated.[182]

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175. *Id.* at 1201–02.

176. *Id.* The other Justices' decision not to join Justice Stevens's opinion stands in contrast to other cases in which other Justices have joined one of Justice Stevens's occasional opinions respecting the denial of certiorari—where the Justices have intended to send a message concerning the Court's future treatment of a particular legal issue. *See, e.g.*, Brown v. Texas, 522 U.S. 940, 940 (1997) (Stevens, J., respecting the denial of certiorari, joined by Souter, Ginsburg & Breyer, JJ.) (discussing an arguable constitutional defect in Texas' death penalty statute); Bethley v. Louisiana, 520 U.S. 1259, 1259 (1997) (Stevens, J., respecting the denial of certiorari, joined by Ginsburg & Breyer, JJ.) (discussing Louisiana's statute authorizing capital punishment for rape of a child).

177. Both Chief Justice Rehnquist and Justice O'Connor joined the majority opinion in *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998).

178. James v. United States, 127 S. Ct. 1586, 1590 (2007).

179. *Id.* at 1593–1600.

180. *Id.* at 1600 & n.8.

181. *Id.* at 1600.

182. *Id.*

In a footnote, however, the majority added:

> To the extent that James contends that the simple fact of his prior conviction was required to be found by a jury, his position is baseless. James admitted the fact of his prior conviction in his guilty plea, and in any case, we have held that prior convictions need not be treated as an element of the offense for [constitutional] purposes.[183]

The *James* Court's citation of *Almendarez-Torres* for the proposition that "we have held that prior convictions need not be treated as an element of the offense" for constitutional purposes was inapropos dicta.[184] The only question on which certiorari was granted in *James* was "[w]hether the Eleventh Circuit erred by holding that all convictions in Florida for attempted burglary qualify as a violent felony under 18 U.S.C. § 924(e), creating a circuit conflict on this issue."[185] The defendant's briefing did not argue 18 U.S.C. § 924(e) was unconstitutional because it permitted the simple fact of a defendant's predicate conviction to be found by a trial judge or even mention *Almendarez-Torres*. He instead argued the Court should avoid constitutional doubt by interpreting § 924(e) to prohibit a district court from making factual findings that a defendant's conviction for attempted burglary was a "violent" crime under § 924(e).[186] Perhaps that explains why the Court in the footnote used the phrase: "*[t]o the extent that* James contends that the simple fact of his prior conviction was required to be found by a jury."[187] Yet, even with

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183. *Id.* at 1600 n.8 (citing Almendarez-Torres v. United States, 523 U.S. 224 (1998)).

184. The statement in the footnote was dicta as it "was clearly not necessary for decision" in *James*. *See* McCray v. Illinois, 386 U.S. 300, 311 n.11 (1967); *see also* BE & K Constr. Co. v. NLRB, 536 U.S. 516, 528 (2002) (reiterating the Court's refusal to be bound by dicta).

185. *See* Petition for Writ of Certiorari at i, *James*, 127 S. Ct. 1586 (No. 05-9264), 2006 WL 1594056 (second question presented); *see also* James v. United States, 547 U.S. 1191, 1191 (2006) (limiting grant of certiorari to second question presented).

186. *See* Brief of Petitioner at 33–39, *James*, 127 S. Ct. 1586 (No. 05-9264), 2006 WL 2415460; Reply Brief for Petitioner at 17–20, *James*, 127 S. Ct. 1586 (No. 05-9264), 2006 WL 3089916. In fact, the petitioner repeatedly cited *Apprendi* for the proposition 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.'" Brief of Petitioner, *supra*, at 11 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)) (emphasis added). The brief for the United States also did not mention *Almendarez-Torres*, nor was it mentioned at any point during the oral argument. *See* Brief for the United States, *James*, 127 S. Ct. 1586 (No. 05-9264), 2006 WL 3230270; Transcript of Oral Argument, *James*, 127 S. Ct. 1586 (No. 05-9264), 2006 WL 3230270.

187. *James*, 127 S. Ct. at 1600 n.8 (emphasis added).

this qualifier, the footnote entirely mischaracterized James's argument and, thus, was dicta predicated on an erroneous view of the defendant's secondary argument.

Justice Scalia, joined by Justices Stevens and Ginsburg, filed a dissenting opinion in *James*, in which he disagreed with the majority's holding that the Florida offense of attempted burglary was a "violent" crime under § 924(e) but did not address the dicta in footnote 8.[188] Justice Thomas filed a separate dissenting opinion, which did not explicitly mention *Almendarez-Torres*, but relied on the arguments he had made earlier in his concurring opinion in *Shepard*—namely, that *Apprendi* prohibits trial judges from increasing a defendant's maximum sentence based on *any* facts not admitted by a defendant or found beyond a reasonable doubt by a jury (including the fact of a defendant's prior convictions).[189]

B. Challenges to Almendarez-Torres *Raised in the Lower Courts*

Following the *Apprendi* majority's recognition that it is "arguable that *Almendarez-Torres* was incorrectly decided"[190] and Justice Thomas's outright repudiation of his earlier vote in *Almendarez-Torres*,[191] several thousands of defendants whose sentences were increased by federal or state trial judges who treated recidivist enhancements as "sentencing factors" have raised the issue of whether *Almendarez-Torres* remains good law.[192] Typically, defense counsel in such cases acknowledged that lower courts have no authority to overrule *Almendarez-Torres* and stated the issue was being raised in the lower courts solely as a prerequisite for raising the issue in a petition for writ of certiorari.[193] In response to such lower court briefs, numerous

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188. *Id.* at 1601–10 (Scalia, J., dissenting, joined by Stevens & Ginsburg, JJ.).

189. *Id.* at 1610 (Thomas, J., dissenting).

190. *Apprendi*, 530 U.S. at 489 & n.15.

191. *See* Shepard v. United States, 544 U.S. 13, 27 (2005) (Thomas, J., concurring in part and concurring in the judgment) (recognizing that a majority of the Court now believes *Almendarez-Torres* was wrongly decided); *Apprendi*, 530 U.S. at 520–21 (Thomas, J., concurring) (describing his vote in *Almendarez-Torres* as "an error to which I succumbed").

192. In the federal circuit courts alone, over 5,200 federal defendants have filed appeals ultimately seeking to have *Almendarez-Torres* overruled. That figure was derived from the following word-search in the "allfeds" database on Westlaw: "Almendarez-Torres /10 foreclos! or binding or bound." As of September 5, 2008, that search revealed 5,220 such cases. An examination of a representative sample of those cases revealed the defendants in those cases were raising claims ultimately seeking to benefit from a potential decision by the Supreme Court overruling *Almendarez-Torres*.

193. *See, e.g.*, United States v. Solis-Herrera, 206 F. App'x 375, 376 (5th Cir. 2006) ("[The defendant] acknowledges that this argument is foreclosed by *Almendarez-Torres*,

state appellate courts[194] and every federal court of appeals with jurisdiction over federal criminal cases[195] have affirmed the defendants' enhanced sentences on the ground that only the Supreme Court itself can overrule one of its own precedents, no matter how shaky its jurisprudential foundations may appear to lower court judges.[196] In the words of one of the lower courts: "Though wounded, *Almendarez-Torres* still marches on and we

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but raises it to preserve it for further review.") (citation omitted).

194. *See, e.g.*, Minor v. State, 914 So. 2d 372, 434 (Ala. Crim. App. 2004) (capital murder); State v. Avery, 130 P.3d 959, 964 & n.7 (Alaska Ct. App. 2006) (Coats, C.J., concurring) (possession of cocaine); State v. Ring, 65 P.3d 915, 938–39 (Ariz. 2003) (first degree murder, conspiracy to commit armed robbery, armed robbery, burglary and theft); People v. Black, 161 P.3d 1130, 1143–44, 1143 n.8 (Cal. 2007), *cert. denied*, 128 S. Ct. 1063 (2008) (sexual offenses involving a minor); People v. Heimann, 186 P.3d 77, 79 (Colo. Ct. App. 2007) (parole violation); People v. James, 838 N.E.2d 1008, 1012–13 (Ill. App. Ct. 2005) (armed robbery); Howell v. State, 859 N.E.2d 677, 682–83 (Ind. Ct. App. 2006) (reckless homicide); State v. Ivory, 41 P.3d 781, 782–83 (Kan. 2002) (theft); State v. Washington, 931 So. 2d 1120, 1125 (La. Ct. App. 2006) (possession of cocaine); State v. Stewart, 791 A.2d 143, 151–52 (Md. 2002) (possession and distribution of crack cocaine); State v. Thomas, 902 A.2d 1185, 1190–94 (N.J. 2006) (third degree possession of heroin with intent to distribute within 1000 feet of school property); People v. Rivera, 833 N.E.2d 194, 198 (N.Y. 2005) (unauthorized use of a motor vehicle); Commonwealth v. McClintic, 851 A.2d 214, 221 & n.6 (Pa. Super. Ct. 2004), *rev'd on other grounds*, 909 A.2d 1241 (Pa. 2006) (robbery, burglary, and indecent assault); State v. Ramirez, 936 A.2d 1254, 1270 (R.I. 2007) (first-degree murder); State v. Cole, 155 S.W.3d 885, 904 & n.7 (Tenn. 2005) (murder); Heathcock v. State, No. 14-02-00899-CR, 2003 WL 21710468, at *2 (Tex. App.—Houston [14th Dist.] July 24, 2003, pet. ref'd) (mem op.) (forgery); Totten v. Commonwealth, No. 0259-05-3, 2006 WL 1222645, at *4–5 (Va. Ct. App. May 9, 2006) (unpublished) (attempted robbery with a firearm); State v. Rudolph, 168 P.3d 430, 432 (Wash. Ct. App. 2007) (robbery); State *ex rel.* Appleby v. Recht, 583 S.E.2d 800, 809–10 (W. Va. 2002) (driving under the influence).

195. *See, e.g.*, United States v. Aguirre-Calles, 262 F. App'x 855, 857 (9th Cir. 2008) (illegal reentry after deportation); United States v. Upton, 512 F.3d 394, 403 n.2 (7th Cir. 2008) (possession of a firearm and possession with intent to distribute cocaine base and cocaine); United States v. Waycaster, 261 F. App'x 464, 465 (4th Cir. 2008) (possession with intent to distribute methamphetamine and cocaine); United States v. Maya-Linares, No. 06-14609, 2008 WL 43953, at *1 (11th Cir. Jan. 3, 2008) (illegal reentry after deportation); United States v. Andujar-Arias, 507 F.3d 734, 749 (1st Cir. 2007) (illegal reentry after deportation); United States v. Murray, No. 06-2950-CR, 2007 WL 4103539, at *1 (2d Cir. Nov. 19, 2007) (felon in possession of a firearm); United States v. Kama, 251 F. App'x 121, 124 (3d Cir. 2007) (distribution of cocaine base, conspiracy to deal firearms without a license, and possession of a firearm); United States v. Calderon, No. 05-6723, 2007 WL 2913874, at *3 (6th Cir. Oct. 3, 2007) (illegal reentry after deportation); United States v. Pineda-Arrellano, 492 F.3d 624, 625–26 (5th Cir. 2007) (illegal reentry after deportation); United States v. Sanchez-Juarez, 240 F. App'x 259, 264 n.4 (10th Cir. 2007) (illegal reentry after deportation); United States v. Hayes, 231 F. App'x 1, 2 (D.C. Cir. 2007) (possession of a firearm by a convicted felon); United States v. Torres-Villalobos, 487 F.3d 607, 613 (8th Cir. 2007) (illegal reentry after deportation).

196. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

are ordered to follow. We will join the funeral procession only after the Supreme Court has decided to bury it."[197]

In the wake of *Apprendi*, the lower courts, while believing themselves powerless to overrule Supreme Court precedent, nevertheless did not consider defendants' arguments to be frivolous. Typical was the following statement of the Seventh Circuit:

> [W]e are not in a position to determine that *Almendarez-Torres* will inevitably be—or effectively has been—overruled. . . . [T]he issue [the defendant] raises, while effectively a settled one, is one on which reasonable minds might disagree. It is not out of the question that the issue might be reexamined by the Supreme Court.[198]

Because "reasonable minds [i.e., a majority of the Supreme Court] might disagree" with *Almendarez-Torres* in a future case, the issue was necessarily deemed nonfrivolous.[199] Because at least five Justices appeared willing to reconsider *Almendarez-Torres*, several lower courts during that time period refused to allow defense counsel to withdraw from an appeal by filing an *Anders* brief when the case involved a recidivist enhancement found by a trial judge as a sentencing factor.[200]

After the Supreme Court's denial of certiorari in *Rangel-Reyes*, at which point the Court had denied hundreds, if not thousands, of certiorari petitions asking the Court to grant certiorari and reconsider *Almendarez-Torres*,[201] some lower courts began to deem the argument frivolous. Initially, such courts did so passively by allowing defense counsel to withdraw on appeal when their *Anders* briefs had identified the issue of whether the defendant's sentencing enhancement was invalid because it had not been pleaded in the indictment or proved to a jury beyond a

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197. United States v. Gibson, 434 F.3d 1234, 1247 (11th Cir. 2006).

198. United States v. Bock, 312 F.3d 829, 831 (7th Cir. 2002).

199. *Id.*; *see also supra* Part II.B.1 (discussing the legal frivolity standard).

200. *See, e.g.*, United States v. Ubaldo-Hernandez, 271 F.3d 78, 79 (2d Cir. 2001); United States v. Vazquez-Loredo, 73 F. App'x 80, No. 02-51212, 2003 WL 21756786, at *1 (5th Cir. June 24, 2003) (per curiam) (unpublished table opinion); *cf.* United States v. Cervantes-Garcia, 260 F.3d 621, No. 00-11169, 2001 WL 650204, at *1 (5th Cir. May 22, 2001) (per curiam) (unpublished table opinion) (rejecting a motion to dismiss the appeal because the argument was not frivolous).

201. No data is available about the precise number of certiorari petitions seeking *Almendarez-Torres*' reconsideration that were filed after *Apprendi*. Judging from the thousands of lower court appellate opinions noting that defendants had raised the issue after *Apprendi*, *see supra* note 192 and accompanying text, it is fair to assume that many, if not most, of those defendants proceeded to file certiorari petitions.

reasonable doubt.[202] Yet, by 2007, one federal appellate court, the Fifth Circuit, began to take a more confrontational approach.

In *Pineda-Arrellano*, the Fifth Circuit was the first court since the debate began to rage about *Almendarez-Torres*'s continuing validity to threaten sanctions for attorneys who continued to litigate the issue in the lower courts as a precondition of raising the issue in a certiorari petition.[203] While noting the defendant's statements that "his argument is foreclosed by *Almendarez-Torres* and [Fifth] [C]ircuit precedent" and that he "raised it as his sole appellate issue to preserve it for Supreme Court review," the opinion revealed the Fifth Circuit no longer considers the issue a viable one to raise on appeal—even for the limited purpose of error preservation.[204] The Fifth Circuit in particular pointed to footnote 8 in the Supreme Court's decision in *James* and Justice Stevens's single-Justice opinion in *Rangel-Reyes*[205] as evidence that future challenges to *Almendarez-Torres* were hopeless.[206] "[I]t is time to admit that the Supreme Court has spoken."[207] In a final passage, the Fifth Circuit made a thinly veiled threat of sanctions for counsel who continue to raise the issue:

> In the future, barring new developments in Supreme Court jurisprudence, arguments seeking reconsideration of *Almendarez-Torres* will be viewed with skepticism, much like arguments challenging the constitutionality of the federal income tax. . . . Who doubts that if, instead of receiving hundreds of *Almendarez-Torres* briefs each year, this court received a similar number of income tax protestor appeals, we would hesitate to limit these meritless filings? . . . It would be prudent for appellant and their counsel not to damage their credibility with this court by asserting non-debatable arguments.[208]

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202. *See, e.g.*, United States v. McIntosh, No. 06-4356, 2008 WL 744561, at *1–2 (7th Cir. Mar. 19, 2008) (not designated for publication) (allowing counsel to withdraw on appeal under *Anders* despite the *Almendarez-Torres* issue); United States v. Barrera, 261 F. App'x 570, 571 (4th Cir. 2008) (granting *Anders* motion after discussing the *Almendarez-Torres* issue); United States v. Godley, 257 F. App'x 657, 657–58 (4th Cir. 2007) (same); United States v. Townsend, 242 F. App'x 885, 886–87 (3d Cir. 2007) (same); United States v. Westry, 186 F. App'x 351, 353 (4th Cir. 2006) (same); United States v. Smith, 186 F. App'x 666, 668–670 (7th Cir. 2006) (same).

203. *See* United States v. Pineda-Arrellano, 492 F.3d 624, 626 (5th Cir. 2007).

204. *Id.* at 625–26.

205. *James* is discussed at *supra* notes 178–89 and accompanying text, and *Rangel-Reyes* is discussed at *supra* notes 164–76 and accompanying text.

206. *Pineda-Arrellano*, 492 F.3d at 625–26.

207. *Id.* at 626.

208. *Id.* at 626 & n.1. As discussed at *supra* note 80, tax protester litigation regularly has resulted in sanctions on attorneys and parties for raising frivolous legal issues. *See*

In a lengthy concurring opinion, Fifth Circuit Judge Dennis vigorously disagreed with the majority's direct implication—by comparison to tax protest litigation—that the defendant's legal argument was frivolous.[209] Judge Dennis contended footnote 8 in the Supreme Court's decision in *James* was "peripheral dictum" that in no way resolved the "conflict between *Almendarez-Torres* and the *Apprendi* line of case law."[210] He thus opined, "[A]n argument that the Supreme Court should reconsider *Almendarez-Torres* does not on its face appear to be irrational or an indisputably meritless legal theory;"[211] and "[u]ntil the *Almendarez-Torres* issue is squarely addressed by a Supreme Court majority, I believe there is a rational, non-frivolous basis to appeal and challenge the holding in that case."[212] In concluding, Judge Dennis observed "even long standing precedents can yield to rational but unlikely-to-succeed arguments, and that the incidence of these waxes with each change in the [Supreme Court]'s composition, which in our world of mortals can occur at any time."[213]

The defendant in *Pineda-Arrellano* filed a petition for writ of certiorari asking the Supreme Court to address whether *Almenadarez-Torres* remains good law or, at the very least, disapprove the Fifth Circuit's apparent threat that sanctions will be imposed on attorneys who continue to raise the issue in the future.[214] The Supreme Court summarily denied certiorari without any recorded dissent.[215]

Szopa v. United States, 453 F.3d 455, 456–58, *after reconsideration*, 460 F.3d 884, 887 (7th Cir. 2006) (sanctioning the taxpayer for "[p]iling frivolous litigation on frivolous argumentation"); *In re* Becraft, 885 F.2d 547, 549–50 (9th Cir. 1989) (sanctioning an attorney for "repeatedly breach[ing] his professional responsibility to the court" by filing numerous frivolous petitions); McDougal v. Comm'r, 818 F.2d 453, 454–55 (5th Cir. 1987) ("In response to the continuing flow of frivolous tax case appeals, we have been compelled to impose sanctions . . . ."). *See generally* John W. Wright, Note, *Frivolous Tax Litigation: Pecuniary Sanctions Against Taxpayers and Their Attorneys*, 39 OKLA. L. REV. 156 (1986).

209. *Pineda-Arrellano*, 492 F.3d at 628–29 (Dennis, J., concurring in judgment only).

210. *Id.* at 632–33.

211. *Id.* at 630.

212. *Id.* at 629 n.5.

213. *Id.* at 632. Although at the time this Article went to press, the Fifth Circuit had not yet imposed sanctions on any attorneys who continued to raise the *Almendarez-Torres* issue, two three-judge panels have implied threats of sanctions. *See* United States v. Rosas-Pulido, 526 F.3d 829, 836 & nn.39–42 (5th Cir. 2008) (declining to impose sanctions because the case was briefed before the threat of sanctions was given); United States v. Gutierrez-Bautista, 507 F.3d 305, 309 (5th Cir. 2007) (stating the issue would be viewed with skepticism and was fully foreclosed from further debate).

214. *See* Petition For Writ of Certiorari at i–ii, *Pineda-Arrellano*, 128 S. Ct. 872 (No. 07-6202) (urging the Court to grant certiorari because the Fifth Circuit's opinion conflicted with counsel's duties as an advocate).

215. *Pineda-Arrellano*, 128 S. Ct. 872 (2008).

IV. THE ETHICAL DILEMMA CREATED BY *ALMENDAREZ-TORRES* AND ITS AFTERMATH

No better example of the ethical dilemma identified by the Supreme Court in *Smith v. Robbins*[216] exists than in recent appellate litigation concerning the *Almendarez-Torres* issue. On the one hand, as noted, since 2006 an increasing number of lower courts have begun treating the argument that *Almendarez-Torres* should be overruled as legally frivolous, and at least one federal circuit court has made a thinly veiled threat of sanctions if the issue is raised in future cases.[217] Yet on the other hand, a conscientious counsel representing a defendant subjected to a recidivist enhancement—where the defendant's predicate conviction was not treated as an "element"—objectively has reason to believe a challenge to *Almendarez-Torres* is nonfrivolous and, thus, must be raised on appeal if the only other option facing counsel is filing an *Anders* brief.[218]

In none of the many different contexts in which the Supreme Court has defined "frivolous" would this legal issue be deemed as such, at least under the current state of the law. The claim that, under the Supreme Court's "elements" jurisprudence, a defendant's prior conviction is an "element" under a recidivist enhancement statute certainly is "arguable on [its] merits":[219] it does not "lack[ ] *any* basis in law"[220] or, put another way, "a rational argument on the law"[221] can be made based on repeated statements of individual Justices and the Supreme Court itself.[222]

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216. Smith v. Robbins, 528 U.S. 259, 281–82, 282 n.11 (2000); *see also supra* notes 38–41 and accompanying text (explaining that the Court prohibits counsel from withdrawing until after it reviews the record and determines there are no nonfrivolous issues on which to appeal).

217. *See, e.g.*, *Gutierrez-Bautista*, 507 F.3d at 309 (dismissing the challenge to the validity of *Almendarez-Torres* because the argument is "fully foreclosed from debate"); United States v. Pineda-Arrellano, 492 F.3d 624, 626 (5th Cir. 2007) (stating that arguments challenging the validity of *Almendarez-Torres* would be "viewed with skepticism, much like arguments challenging the constitutionality of the federal income tax").

218. Of course, there must be a *factual* basis for such a legal argument for it to be nonfrivolous. For instance, if a defendant admitted to having a predicate conviction during the proceedings, there likely would not be a factual basis for the claim that the Constitution prohibits an enhanced sentence based on that prior conviction. *See, e.g.*, United States v. Pittman, 418 F.3d 704, 709 (7th Cir. 2005) ("We note that even absent *Almendarez-Torres*, Pittman's argument would fail because he in fact admitted to those two prior convictions at the sentencing hearing.").

219. Anders v. California, 386 U.S. 738, 744 (1967).

220. McCoy v. Court. of Appeals of Wis., 486 U.S. 429, 438–39, 438 n.10 (1988) (emphasis added).

221. Coppedge v. United States, 369 U.S. 438, 448 (1962).

222. *See, e.g.*, Rangel-Reyes v. United States, 547 U.S. 1200, 1202 (2006) (Thomas, J.,

The issue is thus not "squarely foreclosed by . . . [an] authoritative court decision" because it is still "debatable among jurists of reason."[223] Although the Court has to date refused to grant certiorari and reconsider the validity of *Almendarez-Torres*—despite having repeated opportunities to do so[224]—it is not as if there is "no room for the inference that the question sought to be raised can be the subject of controversy,"[225] or the issue is "no longer open to discussion."[226] Notably, the Court has not sought to end the debate the Court itself started in *Apprendi*[227] by specifically declaring the issue will be legally frivolous if raised in future cases.[228] Therefore, defense lawyers act ethically by raising the issue in the lower courts as a prerequisite to raising the issue in a certiorari petition because, as discussed below,[229] only the Supreme Court itself can overrule *Almendarez-Torres*. In sum, until the Supreme Court ends the debate, defense counsel, acting ethically in zealously representing their clients, can continue to make "a good faith argument for . . . reversal of" *Almendarez-Torres*.[230] Yet, despite

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dissenting from the denial of certiorari) (stating it "is time for this Court to do its part" and "reconsider *Almendarez-Torres*"); Dretke v. Haley, 541 U.S. 386, 395 (2004) (adhering to the holding of *Almendarez-Torres* despite the erosion of the *Almendarez-Torres* jurisprudence by subsequent decisions).

223. Barefoot v. Estelle, 463 U.S. 880, 893–94, 893 n.4 (1983).

224. Neither Justice Stevens's opinion respecting the denial of certiorari in *Rangel-Reyes*, 547 U.S. at 1201–02, nor footnote 8 in *James v. United States*, 127 S. Ct. 1586, 1600 n.8 (2007), can be considered "authoritative." Justice Stevens's opinion in *Rangel-Reyes* reflected only the views of a single Justice. And even if footnote 8 in *James* were not treated as dicta, *but see supra* notes 184–87 and accompanying text (explaining why the footnote clearly was dicta), it cannot be fairly interpreted as ending the debate because the *James* Court did not say it would not reconsider *Almendarez-Torres* in the future. In this regard, similar approving citations to *Almendarez-Torres* in past cases were followed in subsequent cases by statements casting doubts about its continuing validity. *Compare* Blakely v. Washington, 542 U.S. 296, 301 (2004) (stating the "rule" in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), as follows: "'*Other 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.'") (emphasis added), *with* Shepard v. United States, 544 U.S. 13, 26 n.5 (2005) (stating it is an open question whether *Almendarez-Torres* will be overruled in the future).

225. Hagans v. Lavine, 415 U.S. 528, 537 (1974) (quoting *Ex parte* Poresky, 290 U.S. 30, 31–32 (1933)).

226. *Id.* (quoting McGilvra v. Ross, 215 U.S. 70, 80 (1909)).

227. *See Apprendi*, 530 U.S. at 489 (stating that it was "arguable" that *Almendarez-Torres* was "incorrectly decided").

228. *Cf.* Richardson v. United States, 468 U.S. 317, 326 n.6 (1984) (making such a statement regarding a double jeopardy issue).

229. *See infra* notes 266–267 and accompanying text.

230. *See* MODEL RULES PROF'L CONDUCT R. 3.1 (2007) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); RESTATEMENT (THIRD) OF THE LAW

this assurance from the Supreme Court's own cases defining "frivolous," attorneys still face the real threat of sanctions from lower courts that have grown tired of the argument that *Almendarez-Torres* might be overruled one day.

As addressed further below, this ethical dilemma not only has been a function of the conflicting ethical duties identified by the Court in *Smith* but also has been a function of other factors: the Court's stringent error preservation requirements (compounded by the Court's nonretroactivity doctrine); its decreasing adherence to stare decisis; and its increasingly limited discretionary docket. These other factors will be discussed below.

A. The Need to Preserve Nonfrivolous Issues in the Event of a Future Appeal

Justice Stevens has accused the modern Supreme Court of having a "preoccupation with procedural hurdles" and error preservation, particularly in criminal cases.[231] Considering the number of cases in the past three decades that have erected various error preservation requirements for state and federal criminal defendants—on both direct[232] and collateral (i.e., habeas corpus) review[233]—Justice Stevens's accusation seems a fair one.

The Court's preoccupation has impacted the way conscientious criminal defense attorneys practice law. Defense counsel know failure to raise a legal claim both in the trial court and at each juncture of appellate process runs the substantial

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GOVERNING LAWYERS § 110(1) (2000) (same).

231. Engle v. Isaac, 456 U.S. 107, 136 (1982) (Stevens, J., concurring in part and dissenting in part).

232. *See, e.g.*, United States v. Dominguez-Benitez, 542 U.S. 74, 76 (2004) ("Because the claim of Rule 11 error was not preserved by timely objection, the plain error standard of Rule 52(b) applies . . . ."); Johnson v. United States, 520 U.S. 461, 464–66 (1997) (affirming the Eleventh Circuit's decision that, because petitioner had not objected to the judge's determination that materiality was a matter for the judge to decide, there was no plain error under Rule 52(b)); United States v. Olano, 507 U.S. 725, 730 (1993) ("Because respondents had not objected to the [alternate jurors'] presence, the court applied a 'plain error' standard under Rule 52(b).").

233. *See, e.g.*, O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) ("[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."); Bousley v. United States, 523 U.S. 614, 622 (1998) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is actually innocent." (citations omitted)); Murray v. Carrier, 477 U.S. 478, 492 (1986) ("Attorney error short of ineffective assistance of counsel does not constitute cause for procedural default even when that default occurs on appeal rather than at trial."); Wainwright v. Sykes, 433 U.S. 72, 86–87 (1977) (holding procedural default applies when there was no objection to the admission of defendant's confession at trial).

risk of having an appellate court treat that claim as "procedurally defaulted."[234] A procedural default can cause a client with a meritorious claim to be denied relief on appeal, and the attorney who procedurally defaulted the claim may be subjected to a claim of ineffective assistance of counsel.[235] Therefore, in deciding whether to move to withdraw from representing a defendant on appeal under *Anders*, counsel must consider the implications under the procedural default doctrine: might an issue then possibly considered "frivolous" one day in the future be found to possess merit and, if so, is it worth preserving the claim for a later round of appeal?[236]

A possible exception to the Supreme Court's procedural default rule is that, because the Court's precedent entirely foreclosed a particular issue at a given time, failure to raise that issue in a lower court when it was entirely foreclosed would constitute "cause" for the default. The Court repeatedly has held the mere fact that it would be "futile" to raise a particular legal claim at a given time based on adverse controlling *lower court* precedent is not a basis to excuse a procedural default based on a subsequent change in the law by the Supreme Court.[237] However, a bare majority of the Court

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234. *See, e.g.*, Henry J. Bemporad & Sarah P. Kelly, *Novel Issues, Futile Issues & Appellate Advocacy: The Troubling Lessons of* Bousley v. United States, 35 ST. MARY'S L.J. 93, 102–04 (2003) (discussing the Supreme Court's decision in *Bousley*, 523 U.S. at 614, that a change in the judicial interpretation of the law while on appeal does not constitute cause under the procedural default doctrine); Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167, 1177–78 (2003) ("It is . . . crucial that in any capital case, 'any and all conceivable errors' be preserved for review."); J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority*, 59 U. MIAMI L. REV. 341, 382–83 (2005) ("[E]ffective representation requires recognition and respect for existing preservation rules, although appellate counsel may well decide to argue for the overruling of precedent as a matter of fundamental error.").

235. *See, e.g.*, Davis v. Sec'y for the Dep't of Corrs., 341 F.3d 1310, 1314–17 (11th Cir. 2003) (finding counsel's failure to correctly preserve a challenge amounted to ineffective assistance of counsel).

236. *Cf.* Nichols v. United States, 501 F.3d 542, 544–48 (6th Cir. 2007) (finding that defense attorney provided federal defendant ineffective assistance of counsel in 2002 by failing to raise an *Apprendi* challenge to uncharged facts used to enhance his sentencing range under the United States Sentencing Guidelines, even though at that time the Supreme Court had not extended *Apprendi* to sentencing guidelines enhancements), *reh'g en banc granted*, *vacated*, (2008). Notably, at the very time prior counsel in *Nichols* failed to raise the *Apprendi* issue, other courts were treating that same issue as "frivolous." *See, e.g.*, United States v. Jackson, 41 F. App'x 848, 853 (7th Cir. 2002) (characterizing the argument that enhancements under the United States Sentencing Guidelines were subject to the requirements of *Apprendi* as "frivolous"); United States v. Miller, 17 F. App'x 431, 433 (7th Cir. 2001) (same); United States v. Morrison, 248 F.3d 1161, No. 00-2343, 2000 WL 1742525, at *1 (7th Cir. Nov. 20, 2000) (per curiam) (unpublished table opinion) (same).

237. *See Bousley*, 523 U.S. at 623 ("[F]utility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'").

in *Reed v. Ross* suggested in dicta that if the Court's *own* precedent entirely foreclosed a claim at a given point in time, that type of futility could excuse a procedural default in a lower court.[238] Yet even this possible exception would not apply on federal direct review under the "plain error" exception[239] but, instead, would only apply on postconviction collateral review.[240]

Even if a currently foreclosed claim were to become meritorious in the future because of a change in the Supreme Court's position on a particular legal issue, the Court's nonretroactivity jurisprudence likely would foreclose any relief for defendants on collateral review, even assuming they could jump over the procedural default hurdle. In *Teague v. Lane*, the Court addressed the issue of what type of retroactive effect would be given to a "new rule" of constitutional criminal procedure announced in a judicial decision.[241] The Court held, unless such a new rule falls within one of two extremely narrow exceptions, the rule will not be applied retroactively to defendants whose convictions and sentences already have become final on direct

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See generally Brent E. Newton, *An Argument for Reviving the Actual Futility Exception to the Supreme Court's Procedural Default Doctrine*, 4 J. APP. PRAC. & PROCESS 521, 527–44 (2002) (discussing the Supreme Court's decisions concerning futility and error preservation).

238. Reed v. Ross, 468 U.S. 1, 17 (1984). In *Reed*, the Court distinguished between "futility" and "novelty" as bases for excusing a procedural default—with the latter, but not the former, constituting an excuse for a procedural default. *Id.* at 16–20. If a "'new' constitutional rule, representing 'a clear break with the past' . . . emerge[d] from this Court," i.e., "a decision of this Court . . . explicitly overrul[ing] one of our precedents," then such a rule would be deemed novel. *Id.* at 17. "By definition, when a case fall[s] into [this] categor[y] . . . there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a [lower] court to adopt the position that this Court has ultimately adopted. Consequently, the failure of a defendant's attorney to have pressed such a claim before a state court is sufficiently excusable . . . ." *Id.* at 17.

> [I]f we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt [lower] court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition. . . . For instance, in *Hurtado v. California*, 110 U.S. 516 (1884), this Court held that indictment by a grand jury is not essential to due process under the Fourteenth Amendment. Surely, we should not encourage criminal counsel in state court to argue the contrary in every possible case, even if there were a possibility that some day *Hurtado* may be overruled.

Id. at 15–16 & n.11.

239. *See* FED. R. CRIM. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.").

240. *See* Johnson v. United States, 520 U.S. 461, 466 (1997) (refusing to make any type of exception to Rule 52(b)'s plain error standard).

241. Teague v. Lane, 489 U.S. 288, 300–01 (1989). *See also* Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that a "new rule" of constitutional criminal procedure must apply to all cases pending on direct appeal at the time of the new decision).

appeal and who have filed habeas corpus appeals seeking to benefit from a new rule.[242]

In *Schriro v. Summerlin*, the Court held the constitutional doctrine first announced in *Apprendi v. New Jersey*[243] and later applied in the capital sentencing context in *Ring v. Arizona*[244] was a "new rule" under *Teague* that did not fit within either of the *Teague* exceptions.[245] Therefore, if the Supreme Court ever were to overrule *Almendarez-Torres* based on *Apprendi*, *Summerlin* would foreclose habeas corpus relief to defendants whose convictions and sentences already had become final by that time.[246] With that in mind, defense counsel have an even greater incentive to raise the *Almendarez-Torres* issue on a client's direct appeal in the hope that a change in law might occur during the pendency of the direct appeal process.[247]

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242. *See Teague*, 489 U.S. at 310. The two exceptions to this general rule are: (1) a new rule that places certain action beyond the power of the law to punish and (2) a "watershed" rule of criminal procedure that is central to the accurate determination of guilt or innocence. *Id.* at 311.

243. Apprendi v. New Jersey, 530 U.S. 466 (2000).

244. Ring v. Arizona, 536 U.S. 584 (2002).

245. Schriro v. Summerlin, 542 U.S. 348, 354–58 (2004).

246. As a court cogently observed in a different context:

> Given the similarity between the test for a 'novel' claim under *Reed* and a 'new rule' under *Teague*, it is difficult to imagine that a petitioner could discover a legal development that did not announce a new rule under *Teague*, but was sufficiently novel under *Reed* to qualify as an 'intervening change in law' [under *Reed*].

Byrd v. Delo, 733 F. Supp. 1334, 1340 n.7 (E.D. Mo. 1990), *aff'd*, 917 F.2d 1037 (8th Cir. 1990), *on reh'g*, 942 F.2d 1226 (8th Cir. 1991).

247. Occasionally, when the Supreme Court has announced a "new rule" during the pendency of a direct appeal in a particular defendant's case, the defendant has raised the issue for the first time in a petition for writ of certiorari and asked the Supreme Court summarily to grant the petition, vacate the judgment of the lower appellate court, and remand for reconsideration in view of the intervening decision. Increasingly, in such cases the lower federal courts are treating the claim as "procedurally defaulted" when the issue is addressed on remand from the Supreme Court. *See, e.g.*, United States v. Ogle, 415 F.3d 382, 383–84 (5th Cir. 2005); United States v. Ardley, 242 F.3d 989, 990 (11th Cir. 2001); *see also* United States v. Hernandez-Gonzalez, 405 F.3d 260, 261–62 (5th Cir. 2005) (refusing to allow a defendant to raise such an issue based on intervening Supreme Court decision for the first time in a petition for rehearing); United States v. Levy, 379 F.3d 1241, 1241–42 (11th Cir. 2004) (same).

B. The Supreme Court's Increasing Willingness To Overrule Constitutional Precedent

Particularly in the criminal context,[248] but elsewhere as well,[249] the Supreme Court in the past two decades has demonstrated a renewed willingness to overrule its constitutional precedent—in most cases, in a manner that benefits criminal defendants.[250] In addition, certain Justices—on both ends of the ideological spectrum—repeatedly have called for the Court to overrule certain constitutional decisions, notwithstanding the number of times such precedent has been upheld during previous decades.[251] Such "perpetual

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248. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 574–75 (2005) (overruling Stanford v. Kentucky, 492 U.S. 361 (1989), and declaring the execution of juveniles violates the Eighth Amendment); Crawford v. Washington, 541 U.S. 36, 67–69, 68 n.10 (2004) (overruling Ohio v. Roberts, 448 U.S. 56 (1980), and holding admission of "testimonial" hearsay violates the Confrontation Clause where a defendant did not have an opportunity to cross examine declarant); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986), and holding criminalization of consensual sodomy is unconstitutional); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (overruling Penry v. Lynaugh, 492 U.S. 302 (1989), and declaring the execution of mentally retarded persons violates Eighth Amendment); Ring v. Arizona, 536 U.S. 584, 609 (2002) (overruling Walton v. Arizona, 497 U.S. 639 (1990), and holding judges cannot find the existence of an "eligibility" aggravating factor in capital case where defendant has not admitted it or where jury has not found its existence beyond a reasonable doubt); United States v. Dixon, 509 U.S. 688, 704 (1993) (overruling Grady v. Corbin, 495 U.S. 508 (1990), and reformulating double jeopardy standard); Payne v. Tennessee, 501 U.S. 808, 830 (1991) (overruling Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989), and holding "victim impact" evidence is admissible in capital sentencing phase); Batson v. Kentucky, 476 U.S. 79, 100 & n.25 (1986) (overruling Swain v. Alabama, 380 U.S. 202 (1965), and prohibiting the use of peremptory strikes to remove prospective jurors based solely on their race).

249. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 65–66 (1996) (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), and determining Congress lacks authority to expand the federal courts' constitutional jurisdiction); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (overruling in part Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990), and concluding all governmental action based on race, whether benign or malign, should be subject to strict scrutiny).

250. During the Warren Court's "criminal procedure revolution," the Court displayed an even greater willingness to overrule its precedent and expand criminal defendants' rights. *See* Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 403 (1988) (describing "the Warren Court's unprecedented string of constitutional overrulings"); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1363–64 (2004) (examining the Warren Court's willingness to provide vast protections to "unpopular and politically powerless criminal defendants").

251. *See, e.*g., Gonzales v. Carhart, 127 S. Ct. 1610, 1639–40 (2007) (Thomas, J., concurring) (calling for the Court to overrule its abortion precedent, for example, Roe v. Wade, 410 U.S. 113 (1973)); Tennard v. Dretke, 542 U.S. 274, 293 (2004) (Scalia, J., dissenting) (calling for the Court to overrule its Eighth Amendment mitigation precedent, for example, Lockett v. Ohio, 438 U.S. 586 (1978)); *Id.* at 294–95 (Thomas, J., dissenting) (same); Tuilaepa v. California, 512 U.S. 967, 984 (1994) (Blackmun, J., dissenting)

dissents"[252] appear to have the potential to cause the Court eventually to reconsider—and overrule or at least modify—its precedents.[253] The modern Court's decreasing allegiance to stare decisis, at least in the constitutional context,[254] has inspired a robust academic debate.[255]

The mere fact that precedent has been on the books for many years—and the Court repeatedly has denied certiorari petitions

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(contending capital punishment is a per se violation of the Eighth Amendment in all cases); Boggs v. Muncy, 497 U.S. 1043, 1043 (1990) (Brennan, J., dissenting) (same).

252. Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 450–51 (2008) ("The critical feature of a perpetual dissent . . . is when a Justice refuses to accept the rule of a prior decision (one in which he originally dissented) as controlling authority."). Such "perpetual dissents," although certainly more common in recent decades, are not entirely a modern phenomenon. *See, e.g.*, Radovich v. NFL, 352 U.S. 445, 455 (1957) (Frankfurter, J., dissenting) (although recognizing "[i]t would disregard the principle for a judge stubbornly to persist in his views on a particular issue after the contrary had become part of the tissue of the law," contending "[u]ntil then, full respect for *stare decisis* does not require a judge to forego his own convictions promptly after his brethren have rejected them").

Justice Frankfurter's dissent in *Radovich*—from the majority's refusal to extend the judicially created "baseball exception" to the antitrust laws, *see* Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208–09 (1922) (holding baseball exhibitions did not amount to interstate commerce), to other sports—brings to mind a classic example of litigants' (and dissenting Justices') willingness to challenge precedent that had been on the books for many decades. After the Supreme Court's 1922 decision in *Federal Baseball Club of Baltimore*, baseball players continued to challenge it as having been erroneously decided. Although a majority of the Supreme Court adhered to the 1922 decision by invoking stare decisis during the following five decades, dissenting Justices repeatedly contended the 1922 decision should be overruled. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting); Toolson v. N.Y. Yankees, 346 U.S. 356, 357 (1953) (Burton, J., dissenting).

253. *See* Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 424–29 (2007) (discussing the Roberts Court's recent decisions dramatically limiting the Court's earlier decisions in the areas of abortion and school desegregation).

254. The Court has been much less willing to overrule its nonconstitutional precedent that merely interpreted a statute. *See, e.g.*, John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750, 756 (2008) (refusing to overrule a long line of precedent interpreting a statute and noting that "*stare decisis* in respect to statutory interpretation has 'special force'" because Congress is free to correct a flawed judicial interpretation of a statute, in contrast to Congress' inability to correct flawed constitutional precedent).

255. *See, e.g.*, Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1012 (2003) ("[T]he preclusive effect of precedent raises due process concerns, and, on occasion, slides into unconstitutionality."); Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 582 (2002) (discussing the courts' "special justification" approach to stare decisis in constitutional cases); Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 3 (2001) (suggesting one can readily develop a coherent doctrine of stare decisis that does not include a presumption against overruling demonstrably erroneous precedent); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 159 (2006) ("[I]nstrumentalist accounts of precedent are inherently unsatisfying and . . . the Supreme Court should abandon adherence to the doctrine that it is free to overrule its own prior decisions.").

in other cases seeking reconsideration of that precedent[256]—has not prevented the Court from changing the law.[257] For instance, in *Abdul-Kabir v. Quarterman* and *Brewer v. Quarterman*, the Court held mitigating evidence of child abuse and mental illness could not be given "full" mitigating effect under Texas's former capital sentencing statute, and thus, the inmates' death sentences violated the Eighth Amendment.[258] Fourteen years earlier, a majority of the Court in *Johnson v. Texas* held Texas's former capital sentencing statute was not unconstitutional simply because it deprived a capital sentencing jury of the ability to give "full" effect to a defendant's mitigating evidence of his relative youth—so long as it gave jurors the ability to give "some" meaningful effect to it.[259] In *Abdul-Kabir*, Justice Scalia dissented and criticized the majority not only for effectively overruling *Johnson* but also for having failed to give the same benefit to numerous other identically situated Texas death row inmates who were executed in the period between *Johnson* and those two 2007 decisions:

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256. It is well established that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case." Teague v. Lane, 489 U.S. 288, 296 (1989).

257. *See* United States v. Pineda-Arrellano, 492 F.3d 624, 632 (5th Cir. 2007) (Dennis, J., concurring in judgment) ("[E]ven long standing precedents can yield to rational but unlikely-to-succeed arguments . . . . [T]he incidence of these waxes with each change in the [Supreme Court's] composition, which in our world of mortals can occur at any time.").

258. Abdul-Kabir v. Quarterman, 127 S. Ct. 1654, 1672–75 (2007); Brewer v. Quarterman, 127 S. Ct. 1706, 1713–14 (2007). The "full effect" standard was articulated by Justice O'Connor's dissenting opinion in *Johnson v. Texas*, 509 U.S. 350, 381 (1993) (O'Connor, J., dissenting), and first mentioned by a majority of the Court in *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (citing Justice O'Connor's dissenting opinion in *Johnson*).

259. *Johnson*, 509 U.S. at 369–70 ("Petitioner does not contest that the evidence of youth could be given some effect under the second special issue. Instead, petitioner argues that the forward-looking perspective of the future dangerousness inquiry did not allow the jury to take account of how petitioner's youth bore upon his personal culpability for the murder he committed. . . . Contrary to petitioner's suggestion, however, this forward-looking inquiry is not independent of an assessment of personal culpability. It is both logical and fair for the jury to make its determination of a defendant's future dangerousness by asking the extent to which youth influenced the defendant's conduct. . . . It is true that Texas has structured consideration of the relevant qualities of petitioner's youth, but in so doing, the State still allow[s] the jury to give effect to [this] mitigating evidence in making the sentencing decision. . . . Although Texas might have provided other vehicles for consideration of petitioner's youth, no additional instruction beyond that given as to future dangerousness was required in order for the jury to be able to consider the mitigating qualities of youth presented to it.") (internal quotation marks and citations omitted). Justice O'Connor dissented on the ground that Texas's statute was unconstitutional in *Johnson* because it deprived the jury of the ability to give "full effect" to petitioner's mitigating evidence of his youth. *Id.* at 374 (O'Connor, J., dissenting).

> Today the Court overrules *Johnson sub silentio*, and reinstates the "full effect" [test] . . . . As the Court's opinion effectively admits, nothing of a legal nature has changed since *Johnson*. What *has* changed are the moral sensibilities of the majority of the Court. For those in Texas who have already received the ultimate punishment, this judicial moral awakening comes too late. *Johnson* was the law, until today. And in the almost 15 years in-between, the Court today tells us, state and lower federal courts in countless appeals, and this Court in numerous denials of petitions for writ of certiorari, have erroneously relied on *Johnson* to allow the condemned to be taken to the death chamber. *See, e.g.*, *Robison v. Johnson*, 151 F.3d 256, 269 (C.A.5 1998) (denying petition for rehearing), cert. denied, 526 U.S. 1100 . . . (1999) (petitioner executed Jan. 21, 2000); *Motley v. Collins*, 18 F.3d 1223, 1233-1235 (C.A.5), *cert. denied sub nom. Motley v. Scott*, 513 U.S. 960 . . . (1994) (petitioner executed Feb. 7, 1995).[260]

Remarkably, in several of those cases litigated between *Johnson* and *Abdul-Kabir,* the Fifth Circuit essentially found the defendants' claims legally frivolous by denying a certificate of appealability.[261]

In view of the Court's willingness to overrule precedent, conscientious criminal defense attorneys realize the need to preserve for appeal constitutional issues that, although foreclosed under current precedent, might one day become meritorious. The *Almendarez-Torres* issue is a prime example.

C. The Supreme Court's Shrinking Certiorari Docket as a Factor in the Court's Delay in Overruling Precedent

As evidenced by the evolution of the legal issue in *Abdul-Kabir* and *Brewer* from 1993 to 2007, the mere fact that the Supreme Court has not granted certiorari to reconsider a controversial precedent over a significant period of time by itself does not cause an otherwise nonfrivolous legal issue to become

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260. *Abdul-Kabir*, 127 S. Ct. at 1685–86 (Scalia, J., dissenting).

261. *See, e.g.*, Zimmerman v. Cockrell, No. 01-40591, 2002 WL 32833097, at *6–8 (5th Cir. Aug. 1, 2002) (denying COA on death row inmate's claim, which was based on mental illness and child abuse); Mitchell v. Johnson, 252 F.3d 434, No. 00-20863, 2001 WL 360655, at * 5 (5th Cir. March 12, 2001) (per curiam) (unpublished table opinion) (denying COA on death row inmate's claim, which was based on evidence of low I.Q.); Cruz v. Johnson, 228 F.3d 409, No. 00-50027, 2000 WL 1056141, at *6 (5th Cir. July 21, 2000) (per curiam) (unpublished table opinion) (denying a COA on death row inmate's claim, which was based upon evidence of low I.Q. and troubled childhood). As previously discussed, a federal habeas court's denial of a COA is essentially equivalent to a finding that the claim is frivolous. *See supra* notes 72–77 and accompanying text.

frivolous.[262] "Incremental changes in settled rules of law often result from litigation."[263] This proposition is a corollary to the truism that "[i]t is in the nature of our legal system that legal concepts, including constitutional concepts, develop slowly."[264]

Criminal defense attorneys are aware of this, and they also are aware of the current Court's increasingly niggardly standard for granting certiorari. The Court's small discretionary docket—seventy to eighty cases afforded plenary consideration per year out of more than eight thousand certiorari petitions, compared to three to four times as many cases decided in past decades[265]—may cause increased pessimism about a particular petition's chances for plenary review. Yet it also is a basis to believe that just because the Court has denied certiorari on a particular issue repeatedly in the past does not mean the Court will not grant review in the future.

Lawyers also know, at least since 1989, the Supreme Court has instructed the lower courts: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[266] Before 1989, most

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262. *See In re* McDonald, 489 U.S. 180, 187–88 (1989) (Brennan, J., dissenting) ("It is rare, but it does happen on occasion that we grant review and even decide in favor of a litigant who previously had presented multiple unsuccessful petitions on the same issue.").

263. Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1070 (1985) (Stevens, J., concurring). Another recent example of this phenomenon can be seen in the fifteen-year history of litigation that culminated in the Supreme Court's decision in *Lopez v. Gonzalez*, 127 S. Ct. 625 (2006). In *Lopez*, the Court, in an 8–1 decision, held an alien's state felony conviction for simple possession of drugs is not a "drug trafficking" offense under the immigration law that automatically would result in the alien's deportation as an "aggravated" felon. *Id.* at 629–33. The issue was first addressed by a federal circuit court in the early 1990s and thereafter—during the first decade of its litigation—resulted in a unanimous rejection of the aliens' argument by several federal circuit courts. Brent E. Newton, Lopez v. Gonzales*: A Window on the Shortcomings of the Federal Appellate Process*, 9 J. APP. PRAC. & PROCESS 143, 144 (2007). Only a decade later did the lower federal courts begin to reach conflicting decisions that eventually led the Supreme Court to grant certiorari and resolve the circuit split in 2006. *Id.* Notably, the Fifth Circuit, which was one of the federal circuit courts to reject the aliens' argument, at one point deemed the argument to be legally "frivolous" and threatened to impose sanctions on attorneys who continued to raise the issue. *Id.* at 144 & n.6 (citing United States v. Sanchez-Zuniga, 232 F.3d 209, No. 99-20933, 2000 WL 1273341, at *1 (5th Cir. Aug. 23, 2000) (per curiam) (unpublished table opinion)).

264. Reed v. Ross, 468 U.S. 1, 15 (1984).

265. *See, e.g.*, David C. Vladeck, *Keeping Score*: *The Utility of Empirical Measurements in Judicial Selection*, 32 FLA. ST. U. L. REV. 1415, 1436 & n.93 (2005) ("[T]he Court has reduced its docket from approximately 150 cases per year to about 80 in the span of just a few years.").

266. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

lower courts believed they possessed the authority to disregard Supreme Court decisions that appeared to have lost their precedential value (although never directly overruled by the high Court).[267] Thus, today, in order to afford the Supreme Court the opportunity to overrule one of its earlier decisions, lawyers and litigants must first raise the admittedly foreclosed issue in the lower courts as a precondition to raising the issue in a certiorari petition.

V. CONCLUSION

A combination of all of the factors discussed above has resulted in criminal defense attorneys' feeling compelled to preserve and litigate nonfrivolous issues in the lower courts as a prerequisite to petitioning the Supreme Court—issues that, although foreclosed by current Supreme Court precedent, might be reconsidered in the future. Yet attorneys realize, eventually, lower courts will lose their patience in seeing such issues raised again and again, however theoretically nonfrivolous the issues may be. Therein lies the ethical dilemma for attorneys, particularly appointed criminal defense counsel who increasingly have been faced with the difficult choice of raising such issues on appeal and risking sanctions or instead filing *Anders* briefs.

Although exemplified by it, this ethical dilemma is not limited to the *Almendarez-Torres* issue. It exists in any situation where jurisprudential developments have called into doubt adverse appellate precedent in criminal cases but where a superior appellate court, over a significant period of time, has failed to reconsider its questionable (but still binding) precedent, and inferior courts lack the authority to do so. Another prime example of the dilemma is seen in the lower court litigation in the decade following the Supreme Court's controversial decisions in *United States v. Lopez*[268] and *United States v. Morrison*,[269]

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267. *See* Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 697–98, 698 n.13 (3d Cir. 1991) ("If [a] standard is replaced, decisions reached under the old standard are not binding."), *rev'd in part & aff'd in part*, 505 U.S. 833 (1992); *see also* C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 42 (1990) ("According to the Supreme Court, lower courts owe absolute allegiance to Supreme Court opinions, doubtful or not, until the Supreme Court expressly overrules them.").

268. United States v. Lopez, 514 U.S. 549, 561 (1995) (invalidating federal statute that outlawed possession of a firearm near a school on the ground that the statute exceeded Congress' authority under the Commerce Clause).

269. United States v. Morrison, 529 U.S. 598, 627 (2000) (invalidating federal statute that allowed for a federal cause of action for gender motivated violence on the ground that the statute exceeded Congress's authority under the Commerce Clause).

which called into question a large body of the Court's previous Commerce Clause jurisprudence,[270] thereby inviting constitutional challenges to several federal penal statutes predicated on the Commerce Clause.[271] The lower courts almost invariably have rejected these arguments—typically on the ground that the Supreme Court has not specifically extended *Lopez* and *Morrison* to other federal statutes and that pre-*Lopez* precedent thus controls—and the Supreme Court has denied certiorari without comment in countless cases in which the defendants have asked for reconsideration of pre-*Lopez* Supreme Court decisions.[272] Just as with the *Almendarez-Torres* issue, some lower courts have begun to treat these frequently raised Commerce Clause arguments as "frivolous" (in allowing appellate counsel to withdraw under *Anders*).[273] Whether lower courts will

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270. *See, e.g.*, Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1219–28 (2003) (discussing the "Return of Unidimensionality"—i.e., the limits imposed by the Supreme Court on the Commerce Power since *Lopez* and *Morrison*).

271. *See, e.g.*, United States v. Baylor, 517 F.3d 899, 904 (6th Cir. 2008) (Suhrheinrich, J., concurring) ("I acknowledge that the Supreme Court has held that Congress intended to include within the scope of the Hobbs Act [18 U.S.C. § 1951 (2006)] [intrastate] conduct that was already punishable under the state robbery and extortion statutes. . . . [I] hope that the Supreme Court will [re]consider the issue . . . [in view of] *Lopez* and *Morrison*."); United States v. Patton, 451 F.3d 615, 634 (10th Cir. 2006) (requesting the Supreme Court overrule its decision in Scarborough v. United States, 431 U.S. 563 (1977), in view of its subsequent decisions in *Lopez* and *Morrison* and require more of an effect on interstate commerce than the fact that a prohibited item such as a firearm or body armor previously traveled across state lines); United States v. McFarland, 311 F.3d 376, 377, 409 (5th Cir. 2001) (en banc) (equally divided en banc Fifth Circuit upheld conviction of a defendant under 18 U.S.C. § 1951 (2000), which prohibits robberies that affect interstate commerce, when the evidence of a robbery's effect on interstate commerce was *de minimis*; dissent contended statute as applied was unconstitutional under *Lopez* and *Morrison*); United States v. Kirk, 105 F.3d 997, 1005 (5th Cir. 1997) (en banc) (equally divided en banc Fifth Circuit upheld constitutionality of 18 U.S.C. § 922(o), which outlaws the intrastate possession of a machine gun; dissent contended the statute was unconstitutional under *Lopez*); United States v. Rybar, 103 F.3d 273, 286–87 (3d Cir. 1996) (Alito, J., dissenting) (contending 18 U.S.C. § 922(o) was unconstitutional under *Lopez*); United States v. Rawls, 85 F.3d 240, 243 (5th Cir. 1996) (Garwood, J., specially concurring) (acknowledging that *Scarborough* foreclosed the argument, but stating that, under *Lopez*, 18 U.S.C. § 922(g)(1) cannot constitutionally be applied to prohibit a felon's possession of a firearm when the only effect on interstate commerce was the fact that firearm crossed state lines at some unknown point in the past).

272. *See, e.g.*, United States v. Rutherford, 236 F. App'x 835, 841 (3d Cir. 2007) (rejecting defendant's argument that *Lopez* and its progeny invalidate his conviction under the Hobbs Act), *cert. denied*, 128 S. Ct. 944 (2008).

273. *See, e.g.*, United States v. Santiago, 250 F. App'x 736, 738 (7th Cir. 2007) (deeming frivolous a constitutional challenge to 18 U.S.C. § 922(g)(1) as applied to a felon's purely intrastate possession of a firearm that had been manufactured out of state); United States v. Thacker, 206 F. App'x 580, 584 (7th Cir. 2006) (finding frivolous a constitutional challenge to 18 U.S.C. § 1951 as exceeding Commerce Clause powers when applied to intrastate robberies); United States v. Amuda, 160 F. App'x 476, 477 (7th Cir. 2005) (holding that a constitutional challenge to 18 U.S.C. § 922(o) on the ground that

go one step further—by imposing sanctions on counsel who seek to raise these issues rather than file *Anders* briefs—remains to be seen.

The ethical dilemma resulting from such lingering legal issues is not the only untoward consequence. The costs, in terms of the expenditure of judicial resources and taxpayer dollars, are enormous.[274] For example, as noted above, the *Almendarez-Torres* issue has been raised in the federal circuit courts alone in well over 5,200 cases—and likely in many hundreds, if not thousands, of certiorari petitions—during the past decade.[275] Of course, the filing of an *Anders* brief, as opposed to a merits brief, entails similar costs per appeal,[276] but without the existence of an unresolved legal question of national importance like the *Almendarez-Torres* issue, it is highly doubtful such a large volume of appeals would have been filed in the first place. Furthermore, even if *Anders* briefs had been filed in those cases, there would not have been certiorari petitions filed with the Supreme Court—which itself would have avoided a tremendous cost.

Can this costly ethical dilemma be avoided—and, if so, how? To some extent, the dilemma is unavoidable in a modern criminal

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Congress had no authority under the Commerce Clause to outlaw intrastate possession of a machine gun was frivolous); United States v. Couch, 94 F. App'x 373, 375 (7th Cir. 2004) (deeming frivolous a constitutional challenge to 18 U.S.C. § 922(g)(1) as applied to a felon's purely intrastate possession of a firearm manufactured out of state); United States v. Binion, 55 F. App'x 369, 370–71 (7th Cir. 2002) (same); United States v. Valentin, 50 F. App'x 98, 98–99 (3d Cir. 2002) (deeming frivolous an argument that jury instructions in a § 922(g)(1) prosecution must prove a felon's intrastate possession of a firearm "substantially" affected interstate commerce beyond the mere fact that the firearm had been manufactured out of state); United States v. Williams, 162 F.3d 95, No. 98-10439, 1998 WL 771283, at *1 (5th Cir. Oct. 22, 1998) (per curiam) (unpublished table decision) (deeming frivolous a constitutional challenge to 18 U.S.C. § 1951 as exceeding Commerce Clause powers when applied to intrastate robberies).

274. There does not appear to be any available data concerning what a typical federal criminal appeal costs taxpayers. Considering that such appeals, even ones involving only a single foreclosed claim like the *Almendarez-Torres* issue, consume some amount of time by many government-paid employees—three judges, one or more staff attorneys or law clerks, personnel in the clerk's office, at least one prosecution attorney, at least one court appointed defense attorney, and clerical assistants for the attorneys—an average appeal surely costs several thousands of tax dollars. *Cf.* People v. Olson, 264 Cal. Rptr. 817, 819 (Cal. Ct. App. 1989) (estimating in 1989 that "the average cost of a criminal appeal [in California's state court system] with no meritorious issues may be something in the neighborhood of $6,000.00").

275. *See supra* Part II.B (discussing challenges raised against the *Almendarez-Torres* decision in the lower courts).

276. Some would contend that *Anders* briefs often are *more* costly per appeal than a single-issue brief raising an admittedly foreclosed claim because the typical *Anders* brief requires a greater amount of time—from both defense counsel's and the court's perspective—than a short merits brief that is filed solely to preserve an issue for further appellate review.

justice system with burgeoning criminal caseloads,[277] high rates of incarceration,[278] and free attorneys for indigent defendants.[279] From the perspective of the vast majority of convicted defendants, there is no reason *not* to appeal their convictions or sentences—especially for indigent defendants,[280] who pay nothing to appeal and who can cling to the hope that, even if their attorneys advise against appealing, perhaps appellate courts will grant them relief of some sort. And it is not as if appeals in criminal cases have rarely borne fruit for defendants in the modern era. Supreme Court decisions granting relief to large classes of criminal defendants in the past decade abound, including decisions overruling prior adverse precedent that had been on the books for many years.[281] Criminal appeals are going to continue in large numbers in the future, and conscientious defense attorneys will continue to raise issues that are not "wholly frivolous"[282] so as to avoid filing ethically problematic *Anders* briefs.

While the costly dilemma cannot be entirely avoided for these reasons, it can be mitigated. The one factor that has contributed more than any other to the dilemma in the decade after *Almendarez-Torres* has been the repeated statements by

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277. *See* Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns-Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 341 n.185 (2007) ("Between 1980 and 2003, the number of cases and defendants in the federal system had more than doubled, with the number of criminal cases increasing 240 percent and the number of criminal defendants increasing 230 percent.").

278. Adam Liptak, *More Than 1 in 100 Adults Are Now in Prison in U.S.*, N.Y. TIMES, Feb. 29, 2008, at 14.

279. *See, e.g.*, Douglas v. California, 372 U.S. 353, 357 (1963) (finding that indigent defendants are entitled to counsel on their first appeal); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (stating the Sixth Amendment's guarantee of counsel is a fundamental right and is therefore obligatory upon the states through the Fourteenth Amendment in felony cases).

280. *See* Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 114 (2007) ("Close to eighty percent of criminal defendants are indigent.").

281. *See, e.g.*, United States v. Booker, 543 U.S. 220, 243–44 (2005) (extending *Apprendi* to the Federal Sentencing Guidelines); Blakely v. Washington, 542 U.S. 296, 301–05 (2004) (extending *Apprendi* to state's sentencing guidelines); Crawford v. Washington, 541 U.S. 36, 68–69, 68 n.10 (2004) (overruling Ohio v. Roberts, 448 U.S. 56 (1980), and holding admission of "testimonial" hearsay violates Confrontation Clause where a defendant did not have an opportunity to cross examine declarant); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (ruling that the Sixth Amendment right to a jury trial prohibited judges from enhancing criminal sentences beyond statutory maximums based on facts other than those decided by a jury beyond a reasonable doubt). *See generally* Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 931–41 (2006) (discussing recent cases where the Supreme Court overturned settled law with regard to recurring issues).

282. McCoy v. Court of Appeals of Wis., 486 U.S. 429, 438 n.10 (1988).

individual Justices and the Court itself calling *Almendarez-Torres*'s continuing validity into doubt,[283] followed by the Court's prolonged failure to resolve the issue one way or the other. If the Court agrees with Justice Stevens that stare decisis is a sufficient basis to make *Almendarez-Torres* a permanent fixture, the Court easily could say so in a brief per curiam decision[284] or, at the very least, in an unequivocal statement in an appropriate case raising a related issue.[285] If the Justices believe the issue warrants the type of fuller submissions and deliberation that occur in a typical case in which certiorari is granted and plenary consideration is given, then the Court should act accordingly. The point is that it should *do something* to resolve the issue rather than leave litigants, lawyers, and lower courts floating farther out in a jurisprudential sea without any anchor. In the meantime, defense counsel should not be called unethical—and certainly not be subjected to sanctions—for raising the issue in the lower courts as a prerequisite to raising it in a certiorari petition that asks the Court to overrule *Almendarez-Torres*.

Supreme Court Justices should be aware that the *Anders* ethical dilemma is exacerbated by such dicta and perpetual dissents, at least when the Court does not resolve the issue and instead allows it to become stagnant in the lower courts. This is not to say individual Justices should not express their disagreement with what they view as patently erroneous rulings by the majority, although they should seek to avoid "stubbornly . . . persist[ing] in [their] views on a particular issue after the contrary had become part of the tissue of the law."[286] In Justice Thomas's case,[287] he cannot be faulted because, as of 2005, a majority of the Court seemed amenable to overruling *Almendarez-Torres* and since that time has not done anything to

283. *See supra* Part II.A (discussing *Almendarez-Torres* and subsequent opinions calling it into doubt).

284. *Cf.* Toolson v. N.Y. Yankees, 346 U.S. 356, 357 (1953) (per curiam) (reaffirming an earlier decision after decades of challenges to its continuing validity "[w]ithout re-examination of the underlying issues" and, instead, simply on the basis of stare decisis).

285. *Cf.* Richardson v. United States, 468 U.S. 317, 326 n.6 (1984) (declaring the double jeopardy issue addressed by the Court in that case—and resolved against the defendant—would be deemed frivolous in any future case). Notwithstanding the Fifth Circuit's interpretation of footnote 8 in *James v. United States*, 127 S. Ct. 1586, 1600 n.8 (2007), *see* United States v. Pineda-Arrellano, 492 F.3d 624, 625–26 (5th Cir. 2007), the Supreme Court in *James* did not close the door on the issue of whether one day it will reconsider *Almendarez-Torres*. *See supra* notes 183–89189 and accompanying text (scrutinizing the Supreme Court's decision in *James*).

286. Radovich v. NFL, 352 U.S. 445, 455 (1957) (Frankfurter, J., dissenting).

287. *See* Rangel-Reyes v. United States, 547 U.S. 1200, 1202 (2006) (Thomas, J., dissenting) (urging the court to overrule *Almendarez-Torres*); *see also James*, 127 S. Ct. at 1610 (Thomas, J., dissenting) (same).

make *Almendarez-Torres* part of the "tissue of the law."[288] In view of the mixed signals it has sent out since *Apprendi*, the full Court, as opposed to a single Justice,[289] has the responsibility to resolve, once and for all, whether the Court will reconsider *Almendarez-Torres*. Until then, assuming it ever happens, defense counsel will continue to face the ethical dilemma and taxpayers will continue to pay the costs.

Finally, it is recommended that the advisory committees responsible for drafting the model ethics rules and the Restatement of the Law Governing Lawyers revise the ethical canons specifically to address the untoward ethical situation discussed in this Article. In particular, the canons should provide that an attorney acts ethically when she raises an issue foreclosed by the binding precedent of a superior appellate court—including, but not limited to, the Supreme Court of the United States—solely in order to preserve for a future appeal a good faith argument that such precedent should be overruled. Although the model rules and Restatement currently opine a "good faith argument for an extension, modification or reversal of existing law" is not an unethical, frivolous argument,[290] such a general statement provides insufficient guidance for both courts and the attorneys facing the ethical dilemma described above—as evidenced by recent cases implicitly threatening to impose sanctions on attorneys who continue to preserve the *Almendarez-Torres* issue in the lower courts. Both appointed and retained criminal defense attorneys should be assured that, so long as there is some objective basis to contend binding precedent should be overruled and the superior court in question has not explicitly shut the door to reconsideration of a particular issue, counsel will act ethically by simply preserving the issue for a future appeal.

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288. *See Radovich*, 352 U.S. at 455 (Frankfurter, J., dissenting).

289. *See Rangel-Reyes*, 547 U.S. at 1201 (Stevens, J., respecting the denial of certiorari) ("While I continue to believe that *Almendarez-Torres* . . . was wrongly decided, that is not a sufficient reason for revisiting the issue.").

290. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2007); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(2) (1980).