No. _____

In the Supreme Court of the United States

October Term, 2017

VICTOR ARMANDO CRUZ-COLOCHO, *PETITIONER*,

v.

UNITED STATES OF AMERICA

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

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Court consider the continuing validity of *Almendarez-Torres v. United States*, 523 U.S. 244 (1998), in light of the reasoning of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)?

2. Must a prior conviction be alleged in the indictment before a defendant is subjected to enhanced punishment under 8 U.S.C. § 1326(b)?

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Petitioner Victor Armando Cruz-Colocho asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on March 29, 2018.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Cruz-Colocho*, No. 17-50298, unpub. op. (5th Cir. March 29, 2018), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on March 29, 2018. This petition is filed within 90 days after entry of judgment. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

RELEVANT GUIDELINES PROVISION

Guideline §2L1.2 is attached to this petition as Appendix B.

STATEMENT

Petitioner Victor Armando Cruz-Colocho pleaded guilty to illegally reentering the United States after having been removed, in violation of 8 U.S.C. § 1326. The district court exercised jurisdiction under 18 U.S.C. § 3231.

Cruz, a 37-year-old El Salvadoran citizen, was brought to the United States when he was two years old, by his mother. He and his mother fled the violence in El Salvador, where both his father and stepfather were murdered. They relocated to Houston, Texas, where Cruz lived for approximately 25 years. Unfortunately, Cruz

also got into trouble with the law. He prior convictions for aggravated assault, robbery, and possession of cocaine with the intent to deliver. After serving nine years in prison, Cruz was removed to El Salvador in 2015.

On January 2, 2016, he was found in the Western District of Texas. He had not received permission from the Attorney General or the Secretary of Homeland Security to re-apply for admission. Cruz was indicted for illegal reentry after removal, in violation of § 1326(a).

The probation officer prepared a presentence report recommending an advisory Guidelines range of 57 to 71 months' imprisonment, based on the total offense level of 21 and the criminal history category of IV.

Cruz filed written objections, asserting that, because the aggravated felony conviction was not alleged in the indictment, it could not subject him to the 20-year enhanced penalties and that his potential sentence was limited to 24 months' imprisonment and one year of supervised release, under § 1326(a). Counsel acknowledged that the argument was foreclosed by precedent, but wished to preserve it for possible further review.

Cruz was sentenced on March 27, 2017, at which time the 2016 version of the Sentencing Guidelines were in effect. The district

court applied the 2016 guideline and found a total offense level under §2L1.2 of 15. The court agreed that the total offense level combined with the criminal history category IV to yield a Guidelines range of 30 to 37 months' imprisonment.

Through counsel, Cruz renewed his "*Apprendi*" objection. The district court denied the objection and indicated that it was considering a "possible sentence above" the 30- to 37-month range.

The Government, citing the old Guidelines range of 57- to 71-months and Cruz's "history of criminality," asked for an upward variance.

Cruz's counsel asked for a sentence within the 30- to 37- month range. Counsel also explained that Cruz was brought here from a young age, that he is now married and has a child and step children, and that he obtained his GED and is fluent in English. Counsel further explained that Cruz re-turned to the United States to be reunited with his mother, wife, and children, but he now understands the severity of the punishment for illegally reentering and plans to relocate to Mexico, where his wife has family, and where he can be with his wife and children.

The district court found that the guidelines were not adequate. The court sentenced Cruz to 60 months' imprisonment and three years' supervised release.

Cruz appealed. appealed. He argued that, under the reasoning of this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013), 8 U.S.C. § 1326(b) is unconstitutional, insofar as it permits a sentence above the otherwise-applicable statutory maximum based on facts that are neither alleged in the indictment nor found by a jury beyond a reasonable doubt. He acknowledged that the argument was foreclosed by *Almendarez-Torres*, but noted that recent decisions from this Court suggested that *Almendarez-Torres* may be re-considered. The court of appeals, finding itself bound by *Almendarez-Torres*, affirmed Cruz's sentence. App. A at 2.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER TO OVERRULE *ALMENDAREZ-TORRES V. UNITED STATES*, 523 U.S. 224 (1998).

Title 8 U.S.C. § 1326(a) punishes illegal reentry after removal with a maximum term of two years' imprisonment and one year's supervised release. The district court determined, however, that Cruz was subject to enhancement under § 1326(b), which increases the maximum penalty if the removal occurred after a conviction for a felony or an aggravated felony. The court's decision accorded with this Court's decision in *Almendarez-Torres v. United States*, which held that § 1326(b)'s enhanced penalty is a sentencing factor, not a separate, aggravated offense. 523 U.S. 224, 235 (1998). The Court further ruled that this construction of § 1326(b) did not violate due process; a prior conviction need not be treated as an element of the offense, even if it increases the statutory maximum penalty. *Id.* at 239–47.

However, the continued validity of *Almendarez-Torres* is questionable. Just two years after it was decided, the Court appeared to cast doubt on it. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Court announced that facts that increase the maximum sentence must be proved to the jury beyond a reasonable doubt. *Id.* at 490. The Court acknowledged that this general principle conflicted with the specific holding in *Almendarez-*

Torres that a prior conviction need not be treated as an element under § 1326(b). The Court found it "arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply" to prior convictions as well. *Id.* at 489. But because *Apprendi* did not involve a prior conviction, the Court considered it unnecessary to revisit *Almendarez-Torres*. *Id.* at 490. Instead, the Court framed its holding to avoid expressly overruling the earlier case. *Id.* at 489.

Relying on *Apprendi*, and later indications from the Court and individual justices that *Almendarez-Torres* should be reversed, defendants like Cruz preserved for possible review the contention that their reentry sentences exceeded the punishment permitted by statute and should be reversed. The Court did not grant certiorari on this issue and, in 2007, a panel of the Fifth Circuit opined, in dictum, that a challenge to *Almendarez-Torres* is "foreclosed from further debate." *United States v. Pineda-Arrellano*, 492 F.3d 624, 625 (5th Cir. 2007).

Since then, this Court has again questioned *Almendarez-Torres*'s reasoning and suggested that the Court would be willing to revisit its holding. *See Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1253 (2018) (Thomas, J., dissenting) (opining that *Almendarez-Torres*

should be reconsidered) *Mathis v. United States*, 136 S. Ct. 2243, 2258–59 (2016) (Thomas, J., concurring) (same); *Descamps v. United States*, 570 U.S. 254, 280–81 (2013) (Thomas, J., concurring) (same). These opinions reveal concern that the opinion is constitutionally flawed.

In *Alleyne*, the Court applied *Apprendi*'s rule to mandatory minimum sentences, holding that any fact that produces a higher sentencing range—not just a sentence above the statutory maximum—must be pleaded in the indictment and either admitted by the defendant or proved to a jury beyond a reasonable doubt. *Alleyne*, 570 U.S. at 115–16. In the opinion, the Court apparently recognized that *Almendarez-Torres* remains subject to Sixth Amendment attack. The Court characterized that decision as a "narrow exception to the general rule" that all facts that increase punishment must be alleged and proved beyond a reasonable doubt. *Id.* at 111 n.1. But because the parties in that case did not challenge *Almendarez-Torres*, the Court said that it would "not revisit it for purposes of our decision today." *Id.*

Nonetheless, the Court's reasoning in *Alleyne* strengthens the challenge to *Almendarez-Torres*'s recognition of a recidivism exception. *Alleyne* traced the treatment of the relationship between

crime and punishment, beginning in the Eighteenth Century, repeatedly noting how "[the] linkage of facts with particular sentence ranges … reflects the intimate connection between crime and punishment." *Id.* at 109 ("[i]f a fact was by law essential to the penalty, it was an element of the offense"); *see id.* (historically, crimes were defined as "the whole of the wrong to which the law affixes punishment … including any fact that annexes a higher degree of punishment"); *id.* at 111 ("the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted"). *Alleyne* concluded that, because "the whole of the" crime and its punishment cannot be separated, the elements of a crime must include any facts that increase the penalty. The Court recognized no limitations or exceptions to this principle.

Alleyne's emphasis that the elements of a crime include the "whole" of the facts for which a defendant is punished seriously undercuts the view, expressed in *Almendarez-Torres*, that recidivism is different from other sentencing facts. *See Almendarez-Torres*, 523 U.S. at 243–44; *see also Apprendi*, 530 U.S. at 490 ("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.") The *Apprendi* Court later tried to explain this difference

by pointing out that, unlike other facts, recidivism "does not relate to the commission of the offense itself." *Apprendi*, 530 U.S. at 496. But the Court has since acknowledged that *Almendarez-Torres* might have been "incorrectly decided." *Id.* at 489; *see also Shepard v. United States*, 544 U.S. 13, 26 n.5 (2005) (acknowledging that Court's holding in that case undermined *Almendarez-Torres*); *Cunningham v. California*, 549 U.S. 270, 291 n.14 (2007) (rejecting invitation to distinguish between "facts concerning the offense, where *Apprendi* would apply, and facts [like recidivism] concerning the offender, where it would not," because "*Apprendi* itself … leaves no room for the bifurcated approach").

Three concurring justices in *Alleyne* provide additional reason to believe that the Court is willing to revisit *Almendarez-Torres*. *See Alleyne*, 133 S. Ct. at 2164 (Sotomayor, Ginsburg, Kagan, J.J., concurring). Those justices noted that the viability of the Sixth Amendment principle set forth in *Apprendi* was initially subject to some doubt, and some justices believed the Court "might retreat" from it. *Alleyne*, 570 U.S. at 118–22. Instead, *Apprendi*'s rule "has become even more firmly rooted in the Court's Sixth Amendment jurisprudence." *Id.* Reversal of even recent precedent is warranted when "the reasoning of [that precedent] has been thoroughly undermined by intervening decisions." *Id.* at 121; *see also Dimaya*,

138 S. Ct. at 1253 ("The exception recognized in *Almendarez-Torres* for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered.") (Thomas, J., dissenting); *Mathis*, 136 S. Ct. at 2259 ("I continue to believe that the exception in *Apprendi* was wrong, and I have urged that *Almendarez-Torres* be reconsidered.") (Thomas, J., concurring).

The growing view among members of this Court that *Almendarez-Torres* was wrongly decided is good reason to clarify whether *Almendarez-Torres* is still the law. Stare decisis "is at its weakest" when the Court interprets the Constitution. *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996). When "there has been a significant change in, or subsequent development of, our constitutional law," stare decisis "does not prevent …overruling a previous decision." *Agostini*, 521 U.S. at 236. Even if the Court were ultimately to reaffirm *Almendarez-Torres*, review is warranted. While lower court judges—as well as prosecutors, defense counsel, and criminal defendants—are forced to rely on the decision, they must speculate as to the ultimate validity of the Court's holding. "There is no good reason to allow such a state of affairs to persist." *Rangel-Reyes v. United*

States, 547 U.S. 1200, 1201 (2006) (Thomas, J., dissenting from denial of certiorari).

The question of *Almendarez-Torres*'s validity can be resolved only in this forum. *Rangel-Reyes*, 547 U.S at 1201 (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)). *Almendarez-Torres* is a decision of this country's highest court on a question of constitutional dimension; no other court, and no other branch of government, can decide if it is wrong. Regarding the Constitution, it is ultimately this Court's responsibility "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Court should grant certiorari to say whether *Almendarez-Torres* is still the law.

CONCLUSION

FOR THESE REASONS, Cruz asks that this Honorable Court grant a writ of certiorari, vacate the opinion of the court of appeals, and remand the case for further review.

Respectfully submitted.

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