No. _____

In the Supreme Court of the United States

October Term, 2018

ELISEO GUEVARA-GUEVARA, *PETITIONER*,

V.

UNITED STATES OF AMERICA

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

MAUREEN SCOTT FRANCO
Federal Public Defender

KRISTIN M. KIMMELMAN
Assistant Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206-1205
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether a prior conviction must be alleged in the indictment before a defendant is subjected to enhanced punishment under 8 U.S.C. § 1326(b), thereby overturning *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), and *Alleyne v. United States*, 570 U.S. 99 (2013).

No. _____

In the Supreme Court of the United States

October Term, 2018

ELISEO GUEVARA-GUEVARA, *PETITIONER*,

V.

UNITED STATES OF AMERICA

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

Petitioner Eliseo Guevara-Guevara 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 July 2, 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rule

United States Sentencing Guidelines

Other Authority

OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Guevara-Guevara*, No. 17-50738, unpub. op. (5th Cir. July 2, 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 July 2, 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).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law[.]"

The Sixth Amendment to the U.S. Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury[.]"

FEDERAL STATUTE INVOLVED

The text of Title 8 U.S.C. § 1326 is reproduced in Appendix C.

STATEMENT

Eliseo Guevara-Guevara is a 48-year-old Mexican citizen who was charged with illegal reentry in an indictment that did not allege a prior felony or aggravated felony conviction. (ROA.14.) Such an offense has a two-year statutory maximum of imprisonment and one-year statutory maximum of supervised release. 8 U.S.C. § 1326(a); *see* 18 U.S.C. §§ 3559(a)(5), 3583(b)(3). Guevara, however, received a sentence of 48 months' imprisonment and three years' supervised release. (ROA.55–56.)

Guevara was raised in Veracruz, Mexico, by impoverished but loving parents, who are now deceased. (ROA.243.) He came to the United States unlawfully in 1997 and has since resided in Dallas, Texas, except for periodic removals to Mexico. (ROA.243.) His immediate family lives in the United States, including five siblings and one daughter who is 25 years old, has a tumor, and resides in Houston, Texas. (ROA.243.)

In his 20's and early 30's, Guevara sustained several criminal convictions including a 1994 Texas conviction for burglary of a vehicle and a 1995 Texas conviction for burglary of a habitation. (ROA.236–38.) He received illegal-reentry convictions in 2009 and in 2013. (ROA.239–41.) He was last removed to Mexico on April 22, 2016. (ROA.240.)

On July 13, 2016, Guevara was apprehended by U.S. Border Patrol agents near Eagle Pass, Texas. (ROA.233.) He was indicted for illegal reentry after removal, in violation of § 1326(a). (ROA.14.) The indictment also referenced "8 U.S.C. § 1326(a) and (b)(1)/(2)" but did not include any allegation of a prior conviction. (ROA.14.) He pleaded guilty as charged. (ROA.51–52, ROA.101.)

A probation officer prepared a presentence report using the 2015 edition of the Guidelines Manual.[1] (ROA.197.) The officer applied an eight-level enhancement to the base offense level of eight because Guevara had been deported after being convicted for an aggravated felony. (ROA.197); *see* U.S.S.G. §2L1.2(b)(1)(C) (2015). Although the prior conviction was not alleged in the indictment, the officer increased the statutory maximum punishment from two years to 20 years' imprisonment. (ROA.245); *see* 8 U.S.C. § 1326(a) & (b)(2).

At the sentencing hearing, Guevara objected under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to the statutory maximum of 20 years' imprisonment. (ROA.178.) The district court denied the objection. (ROA.178.)

---

[1] The probation officer determined the 2015 Guidelines Manual, which was in effect at the time of the offense, was more favorable than the edition in effect at the time of sentencing. (ROA.197); *see* U.S.S.G. §1B1.11(a).

The advisory Guidelines range was 30 to 37 months' imprisonment. (ROA.180, ROA.245, ROA.248.) The district court sentenced Guevara to 48 months' imprisonment and three years' supervised release. (ROA.55–56.)

Guevara appealed, arguing that, because the prior conviction was not alleged in the indictment, it could not subject him to enhanced penalties. Counsel acknowledged that the argument was foreclosed by this Court's precedent, but said that recent decisions from the Court suggested the precedent may be reconsidered. The court of appeals, finding itself bound by *Almendarez-Torres*, affirmed the sentence. App. A at 2.

REASONS FOR GRANTING THE WRIT

The Court Should Grant Certiorari to Overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

The district court determined that Guevara was subject to a sentence enhancement under 8 U.S.C. § 1326(b), which increases the maximum penalty if the removal occurred after certain convictions. Guevara's indictment, however, did not allege the requisite prior conviction. Instead, it tracked the language of 8 U.S.C. § 1326(a), which has a maximum term of two years' imprisonment and one year of supervised release. The court sentenced Guevara to over twice that: four years' imprisonment and three years' supervised release. (ROA.55–56.)

The district court's decision was in accordance with *Almendarez-Torres v. United States*, in which this Court held that § 1326(b)'s enhanced penalty is a sentencing factor, not a separate, aggravated offense. 523 U.S. 224, 235 (1998). This 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.

The Court has questioned, however, the continued validity of *Almendarez-Torres*. Just two years after *Almendarez-Torres* was decided, the Court 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. 530 U.S. 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.

The Court has continued to question *Almendarez-Torres*'s reasoning and suggest the Court would be willing to revisit its holding. *See Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013); *see also Mathis v. United States,* 136 S. Ct. 2243, 2258–59 (2016) (stating that *Almendarez-Torres* should be overturned) (citing *Descamps v. United States*, 570 U.S. 254, 281 (2013) (Thomas, J., concurring) (same)). These opinions highlight that *Almendarez-Torres* 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 mandatory 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 114–16. In its opinion, the Court apparently recognized that *Almendarez-Torres* remained 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 it would not revisit it at that time. *Id.*

The Court's reasoning in *Alleyne*, however, reveals that *Almendarez-Torres*'s recidivism exception is constitutionally flawed. *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; *see also id.* ("If a fact was by law essential to the penalty, it was an element of the offense."); *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") (internal citations omitted); *id.* at 111 ("the indictment

must contain an allegation of every fact which is legally essential to the punishment to be inflicted") (quoting 1 J. Bishop, CRIMINAL PROCEDURE § 81 at 51 (2d ed. 1872)). The Court 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. *Id.* at 109, 114–15. 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. *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."). *Apprendi* later tried to explain this difference by pointing out that, unlike other facts, recidivism "does not relate to the commission of the offense itself[.]" 530 U.S. at 496 (internal quotation marks and citation omitted). 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 the 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 this Court should revisit *Almendarez-Torres*. *See Alleyne*, 570 U.S. at 118 (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. *Id.* at 120. 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. Indeed, 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 235–36.

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 (2006) (Thomas, J., dissenting from denial of certiorari).

Only this Court can resolve the question of *Almendarez-Torres*'s validity. *Rangel-Reyes*, 547 U.S. at 1200 (Thomas, J., dissenting) (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)). *Almendarez-Torres* is a decision of the 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 the 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.

Guevara argues his imprisonment exceeds the statutory maximum because *Apprendi*, its progeny, and, most recently, *Alleyne*, undermine *Almendarez-Torres*. The indictment stated only the elements of the § 1326(a) offense; it did not include any allegation of a prior conviction. He preserved for further review the argument

that his maximum punishment was limited to two years' imprisonment. Guevara's four-year sentence of imprisonment, therefore, violated due process.

CONCLUSION

FOR THESE REASONS, this Court should grant certiorari in this case.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
Tel.: (210) 472-6700
Fax: (210) 472-4454

s/ Kristin M. Kimmelman
KRISTIN M. KIMMELMAN
Assistant Federal Public Defender

Attorney for Defendant-Appellant

DATED: September 27, 2018