**No. 18-_____**

**In the Supreme Court of the United States**

---

JOEL DARNELL PATTON,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*,

---

MOTION FOR LEAVE TO PROCEED
*IN FORMA PAUPERIS*

---

Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), Petitioner requests leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), both in the United States District Court for the Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted on January 10, 2019.

J. MATTHEW WRIGHT
*Counsel of Record*

Federal Public Defender's Office
Northern District of Texas
500 South Taylor Street, Suite 110
Amarillo, Texas 79101
(806) 324-2370
matthew_wright@fd.org

**No. 16-_____**

In the

# Supreme Court of the United States

AMILCAR LINARES-MAZARIEGO,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*,

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

J. MATTHEW WRIGHT
*COUNSEL OF RECORD*
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
500 SOUTH TAYLOR STREET, SUITE 110
AMARILLO, TEXAS 79101
(806) 324-2370
matthew_wright@fd.org

## QUESTIONS PRESENTED

1

Is 18 U.S.C. § 16(b) unconstitutionally vague?

2

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

## PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Amilcar Linarez-Mazariego was Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the case below.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### CONSTITUTIONAL PROVISIONS



### STATUTES

**GUIDELINES**

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Amilcar Linarez-Mazariego seeks a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The Fifth Circuit's opinion in *United States v. Amilcar Linarez-Mazariego*, No. 15-11187, 2017 WL 699158 (5th Cir. Feb. 21, 2017), is reprinted at pages 1a–2a of the Appendix. The district court entered no written opinion, but the appendix contains an excerpt from the sentencing transcript in which the district court orally ruled on both issues. Pet. App. 8a–10a.

## JURISDICTION

The Fifth Circuit issued its written judgment on February 21, 2017. Pet. App. 3a. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves interpretation and application of the Fifth and Sixth Amendments to the U.S. Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;

> to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const., amends. V–VI.

This case also involves the criminal code's general definition of "crime of violence" found at 18 U.S.C. § 16:

> The term "crime of violence" means--
>
> **(a)** an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> **(b)** any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

This statutory definition is incorporated into the Immigration and National Act's definition of "aggravated felony":

> **(43)** The term "aggravated felony" means . . . **(F)** a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year . . .

8 U.S.C.A. § 1101(a)(43)(F). That definition, in turn, is incorporated into the penalty for aggravated illegal reentry after deportation:

> (a) **In general**
>
> Subject to subsection (b), any alien who--
>
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he

> was not required to obtain such advance consent under this chapter or any prior Act,
>
> shall be fined under Title 18, or imprisoned not more than 2 years, or both.
>
> (b) **Criminal penalties for reentry of certain removed aliens**
>
> Notwithstanding subsection (a), in the case of any alien described in such subsection--
>
> (1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;
>
> (2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

8 U.S.C. § 1326(a),(b)(1)–(2). The statutory "aggravated felony" definition was also incorporated into an earlier version of the U.S. Sentencing Guidelines. Petitioner was sentenced under the November 1, 2014 version of Guidelines 2L1.2, which provided (in pertinent part):

> (a) Base Offense Level: 8
>
> (b) Specific Offense Characteristic
>
> (1) Apply the Greatest: If the defendant was deported, or unlawfully remained in the United States, after . . . (C) a conviction for an aggravated felony, increase by 8 levels . . .

U.S.S.G. § 2L1.2(a),(b)(1)(C) (Nov. 1., 2014 ed.).

## STATEMENT OF THE CASE

Petitioner pleaded guilty to illegal reentry after removal in violation of 8 U.S.C. § 1326(a). The district court concluded, over Petitioner's objections, that he had been removed after conviction for a "felony," and more specifically, a "crime of violence" that was an "aggravated felony." Pet. App. 4a–10a. The effect of this ruling was dramatic: with the statutory enhancement, Petitioner's maximum possible prison sentence was 20 years and his maximum term of supervised release is 3 years. *See* 8 U.S.C. § 1326(b)(1); *see also* 18 U.S.C. § 3583(b)(2) (establishing a maximum of three years of supervised release for defendants convicted of class C felony).

Petitioner argued that his Texas vehicle-burglary convictions were not aggravated felonies. He acknowledged that the Fifth Circuit held the offense was categorically violent for purposes of 18 U.S.C. § 16(b) in *Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000), but argued that § 16(b) was unconstitutionally vague under the reasoning of *Johnson v. United States*, 135 S. Ct. 2551 (2015). He specifically relied upon the Ninth Circuit's decision in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *pet. for cert. granted*, 137 S. Ct. 31 (2016). Alternatively, he argued that the "fact" that he was previously convicted of those offenses was an element of the aggravated offense that must be charged in the indictment and either proven to a jury beyond a reasonable doubt or admitted by the defendant. The district court overruled both objections. Pet. App. 4a, 8a–10a. Petitioner lodged a timely notice of appeal.

On August 5, 2016, while the direct appeal was pending, the Fifth Circuit issued its en banc decision in *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016). That case held (contrary to every other circuit that has directly addressed

the issue) that 18 U.S.C. § 16(b) is not unconstitutionally vague. Petitioner then filed a letter brief, acknowledging that both of his claims were foreclosed by circuit law and subject to summary affirmance. The Fifth Circuit agreed that both issues were foreclosed in its opinion below. Pet. App. 1a–2a. This timely petition follows

## REASONS FOR GRANTING THE PETITION

### I. THIS COURT SHOULD GRANT THE PETITION BECAUSE 18 U.S.C. § 16(B) IS UNCONSTITUTIONALLY VAGUE.

Every circuit to consider the issue—other than the Fifth Circuit—has held that 18 U.S.C. § 16(b) is unconstitutionally vague. *See Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th Cir. 2016) ("Having carefully considered these principles and precedents, we agree with the Sixth, Seventh, and Ninth Circuits that 18 U.S.C. § 16(b) is not meaningfully distinguishable from the ACCA's residual clause and that, as a result, § 16(b), and by extension 8 U.S.C. § 1101(a)(43)(F), must be deemed unconstitutionally vague in light of *Johnson*.").

This Court granted certiorari in *Dimaya* and will presumably decide whether it is unconstitutionally vague in that case. If, for some reason, that question remains open at the time this petition is considered, then Petitioner asks the Court to grant the petition and hold that § 16(b) is unconstitutionally vague for the same reasons *Johnson* struck down the nearly identical provision in the Armed Career Criminal Act.

### II. ALTERNATIVELY, THIS COURT SHOULD GRANT THE PETITION AND OVERRULE *ALMENDAREZ-TORRES*

"Any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Alleyne v. United States*, 133 S. Ct.

2151, 2160 (2013) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10 (2000)). In *Almendarez–Torres*, this Court "recognized a narrow exception to this general rule for the fact of a prior conviction." *Alleyne*, 133 S. Ct. at 2160 n.1. But subsequent decisions of this Court have cast *Almendarez-Torres* in serious doubt, and that decision now stands as an outlier in the Fifth and Sixth Amendment jurisprudence. *See*, e.g., *Shepard v. United States*, 544 U.S. 13, 27–28 (2005) (Thomas, J., concurring in part) ("*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.")

Relying only on the facts alleged by a grand jury in the indictment and admitted by Petitioner in his plea, he faced a maximum sentence of two years in prison and one year of supervised release. *See* 18 U.S.C. § 1326(a). Relying on its own findings, which were based on a preponderance of the evidence, the district court instead imposed a sentence of 41 months in prison, with the possibility of additional time on revocation, extension, or reimposition of supervised release that would not be available absent those findings. This violates the logic of *Apprendi* and *Alleyne*.

## CONCLUSION

For all the foregoing reasons, the Petition for a writ of certiorari should be granted. Petitioner asks that this Court either reverse the Fifth Circuit outright or set the case for oral argument.

Respectfully submitted,

J. MATTHEW WRIGHT
*COUNSEL OF RECORD*
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
500 SOUTH TAYLOR STREET, SUITE 110
AMARILLO, TEXAS 79101
(806) 324-2370
matthew_wright@fd.org

May 22, 2017