No. _____

IN THE
Supreme Court of the United States

NESTOR VASQUEZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

1. In *Holbrook v. Flynn*, 475 U.S. 560, 570-72 (1986), the Court held that the mere presence of guards at a trial was not so inherently prejudicial that the respondent was denied his constitutional right to a fair trial. In so holding, the Court explained that guards should be strategically placed throughout the courtroom to avoid adhering prejudice to a defendant, but that more defendant-specific security would be inherently prejudicial. *Id*. at 569. During Petitioner's trial, despite his non-violent past, and without an individualized determination that excess security was necessary, a U.S. Marshal remained seated next to Petitioner while he testified and physically escorted him from the witness stand to counsel table in the presence of the jury. The court of appeals summarily affirmed and found this practice was not inherently prejudicial. Did the Ninth Circuit contravene *Flynn*?

2. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), this Court held that, even when the fact of a prior conviction increases the defendant's statutory-maximum penalty, it is not an element that must be proven to a jury beyond a reasonable doubt. Should the Court overrule *Almendarez-Torres*?

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The unpublished memorandum disposition of the U.S. Court of Appeals for the Ninth Circuit is reproduced in the appendix. *See* Pet. App. 1a-4a.

JURISDICTION

The court of appeals entered judgment on December 17, 2018. Pet. App. 1a-4a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Background.

On July 30, 2016, Petitioner was arrested as he was coming into the United States at a port of entry. He was arrested and subsequently charged with violation of 8 U.S.C. § 1326, attempted reentry of a removed alien.

Petitioner proceeded to trial. Petitioner's defense was that he did not have the specific intent to enter the United States free from official restraint. A defendant does not have the specific intent to enter the United States free from official restraint, and is thus not guilty of attempted illegal re-entry, if the individual comes to the United States to seek protection from border patrol rather than for the purpose of trying to make it free in the United States. *See, e.g., United States v. Argueta-Rosales,* 819 F.3d 1149, 1151 (9th Cir. 2016). The government claimed, however, that Petitioner actually came to the port of entry in an attempt to sneak into the United States. Below, the trial evidence is summarized.

A. Government's case.

Border Patrol Agent Fudge testified about arresting Petitioner after seeing him jogging north on the southbound lanes at the port of entry. According to Agent Fudge, Petitioner stopped when Agent Fudge asked him to stop and then Petitioner told Agent Fudge that he was being chased. Agent Fudge admitted that he did not ask Petitioner any questions about who was chasing him. Agent Fudge confirmed that Petitioner never tried to run back into Mexico after seeing border patrol, and they were a few feet only from Mexico.

Border Patrol Agent Luna also testified about his post-arrest interview with Petitioner. The post-arrest interview—which occurred after Petitioner waived his *Miranda* rights—was approximately five minutes long. During the interview, Petitioner explained that he had been chased to the port of entry. Other than this exchange, Agent Luna focused the interview on questions such as where Petitioner was born and of what country he is a citizen.

B. The defense case.

Petitioner testified in his own defense. Prior to his testifying, and with objection from defense counsel, the U.S. Marshals informed defense counsel they would not allow Petitioner to walk by himself from counsel table to the witness stand and from the witness stand. Instead, they would escort him to the stand, remain seated within feet of him while he testified, and escort him back to defense counsel table. When the district court asked for clarification, the U.S. Marshal confirmed that a Marshal would be "right behind" Petitioner as he walked from the witness stand:

Court: You confirm no one's going to touch him, he's just going to casually walk?

U.S. Marshal: But my fellow deputy will be right behind him.

Defense counsel objected to this procedure and pointed out that this could lead a juror make inferences regarding the district court's view on guilt and dangerousness based on the presence and proximity of the Marshal:

Defense Counsel: But, Your Honor, I think that makes it really obvious he's in custody. He might as well be in the jumpsuit at this point.

Court: No, that's not true. I mean, so what if the jury knows he's in custody or suspects that. The problem with the jumpsuit . . . is that it's associated with being guilty of something, not necessarily just being in custody, but being guilty of something.

Defense Counsel: But so is having a marshal follow someone. It's associated also with potentially being dangerous.

Court: I'm not going to take the time to send the jury out to go through the nicety of having the defendant walk 20 feet without somebody walking casually behind him who's not putting any arms on him. The objection is overruled.

Defense Counsel: I would object on due process and Sixth Amendment and Eighth Amendment.

Court: All the grounds are overruled.

While the jury was on a break, Petitioner was escorted by the marshals to the witness stand. He sat in the witness box while the jury returned to the courtroom from break. A marshal sat next to him the entire time the jury filed back into the courtroom. The marshal remained seated within view of the jury and just feet from Petitioner the entire time he testified.

Petitioner testified that he had been chased the day of his arrest and came to the port of entry to get help from U.S. law enforcement. Petitioner's testimony, if believed by the jury, would have established that he did not have the specific intent to enter the United States free from official restraint. After he finished testifying, while the jury was considering his testimony and credibility, the marshal stood up when Petitioner stood up. The marshal then physically escorted him across the courtroom back to counsel table, indicating to the jury that Petitioner could not even walk twenty feet across the courtroom without law enforcement escort.

C. The verdict and sentencing.

Ultimately, the jury returned a guilty verdict.

At the sentencing hearing, the district court implicitly found that Petitioner had suffered a prior aggravated felony conviction, thereby increasing the statutory-maximum penalty from two years to twenty years. *See* 8 U.S.C. § 1326(b). Petitioner subsequently received a sentence of 54 months' imprisonment, followed by three years supervised release.

II. The appeal.

On appeal, Petitioner argued that the district court reversibly erred by allowing an excessive showing of defendant-specific security without considering what would be necessary to protect the presumption of Petitioner's innocence. Additionally, Petitioner contended that his statutory-maximum penalty should not have been more than two years.

The court of appeals affirmed. *See* Pet. App. 1a-4a. According to the court,

"[n]either security measure employed here was inherently prejudicial, and there was no evidence showing actual prejudice." *Id.* at 2a. However, the court did find that similar facts may be prejudicial in other circumstances. *See id.* at 2a n.1. The court did not address the statutory-maximum issue in its written opinion.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This Court ought to either grant this petition or summarily reverse the lower court. The Ninth Circuit disregarded and contravened binding precedent from this Court in *Holbrook v. Flynn*, 475 U.S. 560 (1986). Alternatively, this Court should grant review and overrule this Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), where this Court held that a defendant's statutory-maximum penalty could increase after a district court, rather than a jury, found the fact of a prior conviction.

I. Because the U.S. Marshals employed defendant-specific security that went beyond generalized courtroom security, Petitioner meets the "inherently prejudicial" test established in *Flynn*.

"The general rule . . . is that a defendant has a right to be tried in an atmosphere free of partiality created by the use of excessive guards except where special circumstances, which in the discretion of the trial judge, dictate added security precautions." *Kennedy v. Cardwell*, 487 F.2d 101, 108 (6th Cir. 1973). One reason underlying this right is that guards seated around or next to the defendant during a jury trial are likely to create the impression in the minds of the jury that the defendant is dangerous or untrustworthy. *Id.*

Because the number and location of guards could "lead the jurors to believe that the defendant is a violent person disposed to commit the crimes of the type alleged," *People v. Duran*, 16 Cal.3d 282, 291 n.8 (1976), the presence of guards should be subtle. As this Court has explained:

> The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence. While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. *If they are placed at some distance from the accused*, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.

Flynn, 475 U.S. at 469 (emphasis added). Thus, the Court distinguished between defendant-specific security measures—measures such as shackling and wearing prison garb—that would allow the jury to infer the defendant was dangerous with generalized courtroom security, security that applied to the whole courtroom.[1] The

[1] For example, when lawyers, law enforcement, jurors, and members of the public go through security when entering a courthouse, there is no risk that a juror will make an inference that the security says something specific about the defendant being tried. *See Hayes v. Ayers,* 632 F.3d 500, 521 (9th Cir. 2011). Notably, in *Hayes,* before employing additional security, "[t]he court consulted with court security personnel and investigators from the district attorney's office, who voiced concerns about the security of witnesses who had been threatened and about the possibility that Hayes might escape," before allowing additional security in the courtroom. *Id*.

Flynn Court found there is nothing inherently prejudicial when a trial court allows security officers to remain in a courtroom and sit in one place; but under certain circumstances, the presence of guards would create inherent prejudice to a defendant. 475 U.S. at 569-70. "To be sure, it is possible that the sight of a security force within the courtroom might under certain conditions 'create the impression in the minds of the jury that the defendant is dangerous or untrustworthy.'" *Id.* at 569 (citing *Kennedy*, 487 F.2d at 108). Because of this, greater security precautions should be employed only when warranted. "Since guards can be strategically placed in the courtroom when more security is needed and can be hidden in plain clothes, the jury never needs to be aware of the added protection so that no prejudice would adhere to the defendant." *Kennedy*, 487 F.2d at 108-09.

But far from creating a rule for all possible uses of security personnel, the *Flynn* Court held that a "case-by-case approach" should be employed when determining whether a particular security measure is inherently prejudicial. This case-by-case analysis hinges on whether an "unacceptable risk is presented of impermissible factors coming into play," *id.* at 570, which includes the prejudicial effect of security measures that "suggest particular official concern or alarm." *Id.* at 569.

Moreover, the seating of a U.S. Marshal next to the defendant while he testifies undermines the decorum of the courtroom.

> The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment.

> And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve.

Deck v. Missouri, 544 U.S. 622, 631 (2005). Because of this, a district court must make a specific determination of necessity of defendant-specific security during trial on a case-by-case basis. *Id*. at 633. Absent a showing of greater security need, guards must be deployed strategically and subtly to avoid undermining the defendant's presumption of innocence.

In this case, a U.S. Marshal sat with Petitioner while he testified, as constant a reminder of his custodial status as prison garb. The U.S. Marshal served as a "human shackle" and suggested to the jury the "need to separate the defendant from the community at large." *Flynn*, 475 U.S. at 569. The district court did not consider the necessity of the heightened, defendant-specific security measure. Instead, it considered whether it would be time consuming to have a less restrictive security measure stating, "I'm not going to take the time to send the jury out to go through the nicety of having the defendant walk 20 feet without somebody walking casually behind him without putting arms on him. The objection is overruled." Later, after the jury began its deliberation and the injury to Petitioner's presumption of innocence had occurred, the district court commented on the physical escort again, stating that it "didn't think it was any big deal" and that it didn't "think anybody paid any particular attention to it." But the district court also confirmed the Marshal was just 10 feet from Petitioner as he testified and as he walked across the courtroom from the witness stand to counsel table. The district court provided supposition that the

marshal policy may be to position themselves between the defendant and the jury, but that information was not before the court when it made its decision. The source of that speculation was never revealed. Although the district court considered timeliness, and later opined about impact, the district court never considered the need for this security measure, much less did it make any finding of need.

Nothing in Petitioner's criminal record, largely dated theft offenses, necessitated this added measure of security. In fact, the district court noted at sentencing, "And I'm mindful of the fact the fact that the state crimes are older and that they were the product of juvenile misbehavior." Additionally, Petitioner had made several court appearances in his case without any violent outbursts or attempts of escape, and he had never before even been charged with a violent crime. Moreover, the U.S. Marshals proffered no reason why it was necessary in this case, and the court asked for none. There was no consideration of security and what, if any, other measures could have been taken to protect Petitioner from the prejudice of having a U.S. Marshal physically sit or stand within feet from him as he exercised his Constitutional right to testify.

Under *Flynn*, the Ninth Circuit should have reversed because this sort of defendant-specific falls squarely in the "inherently prejudicial" category. 475 U.S. at 569. However, the court of appeals below summarily disagreed, simply stating ""[n]either security measure employed here was inherently prejudicial, and there was no evidence showing actual prejudice." *See* Pet. App. 2a. But in so finding, the Ninth Circuit disregarded *Flynn*, which requires a district court to consider the necessity of

such a heightened, defendant-specific security measure. Although the district court here considered timeliness, and later opined about impact, the district court never considered the need for this security measure, much less did it make any finding of need. Thus, the district court erred and the Ninth Circuit should have thus reversed.

II. This Court should overrule *Almendarez-Torrez* in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In *Almendarez-Torres*, the Court evaluated the prior-conviction enhancement contained in 8 U.S.C. § 1326(b). The petitioner contended it was error to permit enhancement of his sentence above the two-year maximum permitted by § 1326(a) without alleging the relevant prior conviction in the § 1326 indictment. *Almendarez-Torres* rejected that claim:

> We conclude that the subsection is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime. Consequently, neither the statute nor the Constitution requires the Government to charge the factor it mentions, an earlier conviction, in the indictment.

523 U.S. at 226-27.

But *Almendarez-Torres*'s analysis was dependent on the Court's prior decision in *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986), which made a distinction between "elements" and "sentencing factors." Specifically, *Almendarez-Torres* held that *McMillan* supports "the conclusion that Congress has the constitutional power to treat the feature before us—prior conviction of an aggravated felony—as a sentencing factor for this particular offense (illegal entry after deportation)." *Almendarez-Torres*, 523 U.S. at 246. Thus, *Almendarez-Torres* rejected the defendant's argument "that this Court should simply adopt a rule that any significant

increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement [because] the Constitution, as interpreted in *McMillan* and earlier cases, does not impose that requirement." *Id.* at 247.

Just two years later, however, the Court essentially adopted such a rule and held, "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*, 530 U.S. at 490. Although *Apprendi* expressly provided a prior-conviction exception to this rule, the doubtful viability of *Almendarez-Torres* was instantly apparent. *See id.* at 489 ("[I]t is arguable that *Almendarez-Torres* was wrongly decided."). Indeed, Justice Thomas, who cast the fifth and deciding vote in *Almendarez-Torres*, admitted that his vote was erroneous. *Apprendi*, 530 U.S. at 518-20 (Thomas, J., concurring).

The skepticism of *Almendarez-Torres*'s viability has persisted over time. In *Shepard v. United States*, Justice Thomas noted, "*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," recommending that "in an appropriate case, this Court should consider *Almendarez-Torres*'s continuing viability." 544 U.S. 13, 28 (2005) (Thomas, J., concurring in part and concurring in the judgment). *See also Rangel-Reyes v. United States*, 126 S. Ct. 2873, 2874-75 (2006) (Thomas, J., dissent from denial of certiorari) ("There is no good reason to allow such a state of affairs to persist."). And Justice Sotomayor, while on the Second Circuit, twice authored opinions that expressed doubts about its viability

(*United States v. Estrada*, 428 F.3d 387, 390-91 (2d Cir. 2005); *United States v. Santiago*, 268 F.3d 151, 155 (2d Cir. 2001)) and joined the majority in a third (*United States v. Gonzalez*, 420 F.3d 111, 128 n.14 (2d Cir. 2005)).

While the Court has yet to revisit *Almendarez-Torres*, the Court's decision in *Alleyne v. United States* demonstrates that now is the time. 133 S. Ct. 2151 (2013). In *Alleyne*, the Court granted certiorari to consider whether *Harris v. United States*, 536 U.S. 545 (2002)—which allowed judicial fact-finding of minimum mandatory sentences—should be overruled. Not only did the Court overrule *Harris*, it also overruled *McMillan*'s distinction between "elements" and "sentencing factors" upon which *Almendarez-Torres* was founded. *See Alleyne*, 133 S. Ct. at 2156-57; *id.* at 2164 (Sotomayor, J., concurring) ("I join the opinion of the Court, which persuasively explains why . . . *McMillan* [was] wrongly decided."); *id.* at 2165 (Sotomayor, J., concurring) (*McMillan*'s "distinction between 'elements' and 'sentencing factors' . . . was undermined by *Apprendi*"); *id.* at 2166 (Sotomayor, J., concurring) ("The Court overrules *McMillan* and *Harris* because the reasoning of those decisions has been thoroughly undermined by intervening decisions.").

Instead of drawing a constitutional distinction between a "sentencing factor" and an "element," *Alleyne* instructs: "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." 133 S. Ct. at 2155. *See also id.* at 2162 ("[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily

forms a constituent part of a new offense and must be submitted to the jury."); *id.* at 2162-63 ("The essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt."). In other words, while *Almendarez-Torres* relied upon *McMillan* to hold that the Constitution does not impose a requirement that "any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement," *Almendarez-Torres*, 523 U.S. at 247, *Alleyne* overruled *McMillan* to hold that the Constitution does require that "any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*,133 S. Ct. at 2155. Thus, *Almendarez-Torres* must be overruled because, just as with *Harris*, "stare decisis does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law." *Alleyne*, 133 S. Ct. at 2165 (Sotomayor, J., concurring) (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)).

Petitioner's case presents an ideal vehicle to revisit *Almendarez-Torres*. The issue is squarely presented: Petitioner's statutory maximum was increased from two to twenty years based on the district court's finding that Petitioner had previously been convicted of an aggravated felony, although no evidence was presented at trial or in the indictment of the prior conviction. *See* 8 U.S.C. § 1326(b). He then received a 54-month sentence, a sentence that was possible only because the statutory-maximum penalty increased from two years.

Moreover, intervention by the Court is necessary because lower courts are instructed to abstain from resolving tension between the Court's decisions. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We reaffirm that 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 Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (citation and quotation omitted)). Thus, no other tribunal can take the step necessary to right a pervasive, constitutional distortion affecting thousands of criminal cases every year. As such, the Court should grant certiorari to resolve this important federal question.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, this Court should summarily reverse the court of appeals.

Respectfully submitted,

Dated: March 15, 2019

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