No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

ERNESTO BETANCOURT-CARRILLO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether all facts – including the fact of a prior conviction – that increase a defendant's statutory maximum must be pleaded in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt?

PARTIES

Ernesto Betancourt-Carrillo is the Petitioner; he was the defendant-appellant below.

The United States of America is the Respondent; it was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ernesto Betancourt-Carrillo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Betancourt-Carrillo,* No. 18-10591, 757 Fed. Appx. 383 (March 13, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appx. A].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on March 13, 2019. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

8 U.S.C. § 1326 provides in part:

> (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 or any prior Act,

shall be fined under title 18, United States Code, 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, United States Code, 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;
(3) who has been excluded from the United States pursuant to section 235(c) [8 USCS § 1225(c)] because the alien was excludable under section 212(a)(3)(B) [8 USCS § 1182(a)(3)(B)] or who has been removed from the United States pursuant to the provisions of title V [8 USCS §§ 1531 et seq.], and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18, United States Code, and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[;] or
(4) who was removed from the United States pursuant to section 241(a)(4)(B) [8 USCS § 1231(a)(4)(B)] who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under title 18, United States Code, imprisoned for not more than 10 years, or both. For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

The Fifth Amendment to the United States Constitution provides:

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.

The Sixth Amendment to the United States Constitution provides:

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.

STATEMENT OF THE CASE

A. Trial Court Proceedings

Petitioner was indicted on one count of illegally re-entering the country, a violation of 8 U.S.C. § 1326(a) and (b)(1)(2)). He pleaded guilty to the charged offense without benefit of plea agreement. Though the indictment contained no mention of any prior conviction, and though he did not admit one in connection with the plea, the district court found that he had, prior to removal, been convicted of an aggravated felony. This elevated the statutory maximum from two years imprisonment to ten years imprisonment. The court imposed 30 months.

B. The Appeal

Petitioner appealed his sentence, arguing, that the district erred in treating his prior convictions as a sentencing factor rather than an element of his offense. The court of appeals affirmed, concluding that the issue had been settled contrary to Petitioner's position *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *See* [Appendix A].

REASONS FOR GRANTING THE WRIT

This Court should decide whether all facts – including the fact of a prior conviction – that increase a defendant's statutory maximum must be pleaded in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt.

Introduction.

Petitioner was subjected to an enhanced statutory maximum under 8 U.S.C. §1326(b) because the removal charged in the indictment followed a felony conviction. Petitioner's sentence thus depends on the judge's ability to find the existence and date of a prior conviction, and to use that date to increase the statutory maximum. This power was affirmed in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that the enhanced maximums of 8 U.S.C.§ 1326 represent sentencing factors rather than elements of an offense, and that they may be constitutionally determined by judges rather than juries. *See Almendarez-Torres*, 523 U.S. at 244.

This Court, however, has repeatedly limited *Almendarez-Torres*. *See Alleyne v. United States*, 133 S.Ct. 2151, 2160 n.1 (2013) (characterizing *Almendarez-Torres* as a narrow exception to the general rule that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt); *Descamps v. United States*, 133 S. Ct. 2276, 2295 (2013)(Thomas, J., concurring) (stating that *Almendarez-Torres* should be overturned); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (stressing that *Almendarez-Torres* represented "a narrow exception" to the prohibition on judicial fact-finding to increase a defendant's sentence); *Shepard v. United States*, 544 U.S. 13 (2005) (Souter, J., controlling plurality opinion) ("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."); *Dretke v. Haley*, 541 U.S. 386, 395-396 (2004) (concluding that the application of *Almendarez-Torres* to the *sequence* of a defendant's prior convictions represented a difficult constitutional question to be avoided if possible); *Nijhawan v. Holder*, 129 S.Ct. 2294, 2302 (2009) (agreeing with the Solicitor General that the loss amount of a prior offense would represent an element of an 8 U.S.C. §1326(b) offense, to the extent that it boosted the defendant's statutory maximum).

Further, any number of opinions, some authored by Justices among the *Almendarez-Torres* majority, have expressed doubt about whether it was correctly decided. *See Apprendi*, 530 U.S. at 490; *Haley*, 541 U.S. at 395-396; *Shepard*, 544 U.S. at 26 & n.5 (Souter, J., controlling plurality opinion); *Shepard*, 544 U.S. at 26-28 (Thomas, J., concurring); *Rangel-Reyes v. United States*, 547 U.S. 1200, 1201(2006)(Stevens, J., concurring in denial of certiorari); *Rangel-Reyes*, 547 U.S. at 1202-03 (Thomas, J., dissenting from denial of certiorari); *James v. United States*, 550 U.S. 192, 231-232 (2007)(Thomas, J., dissenting). And this Court has also repeatedly cited authorities as exemplary of the original meaning of the constitution that do not recognize a distinction between prior convictions and facts about the instant offense. *See Blakely v. Washington*, 542 U.S. 296, 301-302 (2004) (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769),1 J. Bishop, *Criminal Procedure* § 87, p 55 (2d ed. 1872)); *Apprendi*, 530 U.S. at 478-479 (quoting J. Archbold, *Pleading and Evidence in Criminal Cases* 44 (15th ed. 1862) , 4 Blackstone, 369-370).

In *Alleyne*, this 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 proved to a jury beyond a reasonable doubt. 133 S. Ct. at 2162–63. In its opinion, the Court apparently recognized that *Almendarez-Torres*'s holding remains subject to Fifth

and Sixth Amendment attack. *Alleyne* characterized *AlmendarezTorres* as a "narrow exception to the general rule" that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt. *Id.* at 2160 n.1. But because the parties in *Alleyne* did not challenge *Almendarez-Torres*, this Court said that it would "not revisit it for purposes of [its] decision today." *Id*.

The Court's reasoning nevertheless demonstrates that *Almendarez-Torres*'s recidivism exception should be overturned. *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 2159 ("[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 ... include[ing] any fact that annexes a higher degree of punishment") (internal quotation marks and citations omitted); *id.* at 2160 ("the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted") (internal quotation marks and citation omitted). This 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. 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.") *Apprendi* 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 (quoting *Almendarez-Torres*, 523 U.S. at 230). But this Court did not appear committed to that distinction; it 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 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. *Id.* at 2165. Instead, *Apprendi*'s rule "has become even more firmly rooted in the Court's Sixth Amendment jurisprudence." *Id.* Reversal of precedent is warranted when "the reasoning of [that precedent] has been thoroughly undermined by intervening decisions." *Id.* at 2166.

Stare decisis should be not a bar to this Court's decision to overrule *Almendarez-Torres*. As this Court noted in *United States v. Dixon*, 509 U.S. 688, 704-13 (1993), as it overruled the decision rendered only three years before in *Grady v. Corbin*, 495 U.S. 508 (1990):

> . . . Although stare decisis is the "preferred course" in constitutional adjudication, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'"

Dixon, 509 U.S. at 712 (citations omitted). In both *Grady v. Corbin* and *Almendarez-Torres*, the initial opinion was rendered by a sharply divided Court with four dissenters from the five member majority. In both cases the dissent argued that the majority opinion was contrary to the historical understanding of the issue and represented a sharp break with that past.

Likewise, in *Payne v. Tennessee*, 501 U.S. 808, 827-30 (1991), the Court, citing the same principle, overruled its prior decisions in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989). The Court in Payne noted that "*Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions." *Id.* at 828-29.

Almendarez-Torres, like the overruled decisions in *Grady*, *Booth*, and *Gathers*, was decided by the narrowest of margins, over the spirited dissent of Justice Scalia challenging the basic underpinnings of the majority's decision.

Because *Almendarez-Torres* was wrongly decided, this Court should reconsider that decision. If this Court were to do so, it would require this Court to vacate Petitioner's sentence of 30 months imprisonment and to remand for resentencing under 8 U.S.C. § 1326(a), which provides for a statutory maximum sentence of two years imprisonment. This Court has held that Congress unequivocally intended the enhancement provisions of 8 U.S.C. § 1326 to be sentencing factors, not elements. *See Almendarez-Torres*, 523 U.S. at 235. Such a scheme is unconstitutional. In the alternative, should this court determine the statute is constitutional but that the sentencing enhancements must be proven to a jury beyond a reasonable doubt, a remand is still necessary, as the plea was involuntary under these circumstances.

Admittedly, the viability of the *Almendarez-Torres* exception was not raised in district court. Petitioner concedes, therefore, that the instant case may not be the appropriate vehicle to decide the matter. If, however, the Court accepts another Petition raising the claim (of which there are many), it should hold the instant petition, and, if it overturns *Almendarez-Torres*, grant certiorari, vacate the judgment here and remand for reconsideration. *See Lawrence v. Chater*, 516 U.S. 163 (1996).

Conclusion

Petitioner respectfully prays that this Honorable Court grant *certiorari*, and reverse the judgment below, and/or vacate the judgment and remand for reconsideration in light of any relevant forthcoming.

Respectfully submitted June 4, 2019.

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