

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL ESPARZA-SALAZAR,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the issue of whether a criminal defendant charged with illegal entry, pursuant to 8 U.S.C. § 1326(b)(1) and (2), is entitled to notice in the indictment of prior convictions that increase the statutory maximum sentence and for the prior conviction to be proven beyond a reasonable doubt as required in Supreme Court precedent *Apprendi v. New Jersey*, and the 6th Amendment to the U.S. Constitution. This Court previously held in *Almendarez-Torres v. United States*, that it was Congress' intent to make increased punishments sentencing factors and not separate criminal offenses under subsection (b)(2) of § 1326. However, two years later in *Apprendi* this Court stated *Almendarez-Torres* was arguably decided incorrectly. Mr. Esparza now asks the Court to revisit the rule in *Almendarez-Torres* and harmonize it with its holding in *Apprendi*.

LIST OF PARTIES

MIGUEL ESPARZA-SALAZAR,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

The undersigned counsel certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

1. Miguel Esparza-Salazar, Petitioner.
2. Roberto Balli, Counsel for Petitioner.
3. United States of America, Respondent.
4. Carmen Castillo Mitchell, Counsel for Respondent.
5. The Honorable Noel J. Francisco, Jr., Office of the Solicitor General of the United States.

/s/

ROBERTO BALLI

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OPINIONS BELOW

A copy of the Fifth Circuit's unpublished opinion issued in this case on March 25, 2019, is attached as Appendix A. A copy the District Court's judgment is attached as Appendix B. The district court did not issue a written opinion.

JURISDICTION

The jurisdiction of this Court to review the Judgment of the Fifth Circuit is invoked in 28 U.S.C. § 1254(1), as an appeal from final judgment of conviction in the United States Court of Appeals for the Fifth Circuit on March 25, 2019. Pursuant to Supreme Court Rule 10(a) review is warranted because this court's holding in *Almendarez-Torres* is in philosophical conflict with other decisions of this Court and involves an important question of federal law as to call for an exercise of this Court's supervisory power.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of 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 defence.

U.S. Const. amend. VI

Title 8 U.S.C. § 1326 provides:

(a) In general Subject to subsection (b) of this section, 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) of this section, 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;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, 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 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. 1 or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title 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, 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.

8 U.S.C. § 1326

STATEMENT OF THE CASE

On September 19, 2017, Miguel Esparza-Salazar was charged by indictment with illegal entry after deportation, in violation of Title 8 U.S.C. § 1326. ROA.14. On October 17, 2017, Mr. Esparza-Salazar pled guilty, without a plea agreement, before a United States Magistrate Judge to the charged offense. ROA.67-117. The Government provided statements that Mr. Esparza-Salazar had been previously deported. ROA.106. The Government also reported that aside from this, Mr. Esparza-Salazar was a native of Mexico and was found in the United States without having applied or receiving permission to be present from the proper authorities. ROA.106-108. However, during the plea colloquy, the district court never addressed any prior convictions that would increase the maximum statutory sentence pursuant to 8 U.S.C. § 1326(b). The magistrate judge accepted the plea made by Mr. Esparza-Salazar. ROA.114.

The district court accepted the plea and sentenced Mr. Esparza-Salazar to 84 months, pursuant to 8 U.S.C. § 1326(b). ROA.120, 122-123. Mr. Esparza-Salazar timely filed his notice of appeal. ROA.47. On appeal, Mr. Esparza-Salazar complained that because indictment did not allege a prior conviction in the indictment, and no evidence was presented of the prior conviction during the plea, Mr. Esparza-Salazar was subject to a maximum sentence of 2 years pursuant to 8 U.S.C. § 1326(a) and the sentencing court erred in 8 U.S.C. § 1326(b)(1), which allows for a maximum sentence of 10 years.

The Fifth Circuit Court of Appeals affirmed the district court holding the issue was precluded pursuant to *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *United States v. Esparza-Salazar*, 762 F. App'x 176 (5th Cir. 2019).

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS THE ISSUE OF WHETHER A CRIMINAL DEFENDANT CHARGED WITH ILLEGAL ENTRY, PURSUANT TO 8 U.S.C. § 1326(B)(1) AND (2), IS ENTITLED TO NOTICE IN THE INDICTMENT OF PRIOR CONVICTIONS THAT INCREASE THE STATUTORY MAXIMUM SENTENCE AND FOR THE PRIOR CONVICTION TO BE PROVEN BEYOND A REASONABLE DOUBT AS REQUIRED IN SUPREME COURT PRECEDENT *APPRENDI V. NEW JERSEY*, AND THE 6TH AMENDMENT TO THE U.S. CONSTITUTION. THIS COURT PREVIOUSLY HELD IN *ALMENDAREZ-TORRES V. UNITED STATES*, THAT IT WAS CONGRESS' INTENT TO MAKE INCREASED PUNISHMENTS SENTENCING FACTORS AND NOT SEPARATE CRIMINAL OFFENSE UNDER SUBSECTION (B)(2) OF § 1326. HOWEVER, TWO YEARS LATER IN *APPRENDI* THIS COURT STATED *ALMENDAREZ-TORRES* WAS ARGUABLY DECIDED INCORRECTLY. MR. ESPARZA NOW ASKS THE COURT TO REVISIT THE RULE IN *ALMENDAREZ-TORRES* AND HARMONIZE IT WITH ITS HOLDING IN *APPRENDI*.

A. Review Is Warranted Because this Court's Holding in *Almendarez-Torres* is in Philosophical Conflict With Other Decisions of this Court and Involves an Important Question of Federal Law as to Call for an Exercise of this Court's Supervisory Power.

Mr. Esparza-Salazar's indictment does not allege that his deportation resulted after conviction of a felony 8 U.S.C. § 1326(b)(1) and (2). Yet, the statutory maximum applied to him was increased from two years to ten years by the sentencing Court using the enhancement provision of § 1326(b)(1). The sentencing court's increase of the statutory maximum can be understood in light of *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998). In a close five-to-four opinion, this Court held that it was Congress' intention to put in place a sentencing factor and not as a separate criminal offense under subsection (b)(2) of § 1326. *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998). The Court's

conclusion was that this type of treatment was not considered unconstitutional. *Id.* at 247.

However, in a decision made two years later, the same Court held that “other than . . . 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,” otherwise the 6th Amendment Constitutional right to a trial by jury is violated. U.S. CONST. amend. VI; *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). It was suggested by the same Court that *Almendarez-Torres* was arguably decided incorrectly, and that the reasoning applied in *Apprendi* should be applied to the recidivist issue. *Id.* at 489-490. The Court ultimately decided to not revisit the issue and instead treated the case as a “narrow exception to the general rule.” *Id.* at 490.

Since *Apprendi*, a majority of the Court has now recognized that the decision made in *Almendarez-Torres* was decided incorrectly. *Shepard v. United States*, 125 S. Ct. 1254, 1264 (2005). Therefore, there is a need for reconsideration of the constitutional holding in *Almendarez-Torres*. Mr. Esparza-Salazar asserts that the felony and aggravated felony provisions listed under Title 8 U.S.C. § 1326(b)(1) and (2) are unconstitutional.

By allowing any unconstitutional acts to result from the non-element treatment of the provisions listed under 8 U.S.C. § 1326(b)(1) and (2), no remedy is available by holding them as essential elements of the offense. The shift in this Court’s view since *Apprendi*, leads to the conclusion that these provisions are

unconstitutional. It is well known that the courts are not capable of rewriting statutes to correct items that are unconstitutional. *Hill v. Wallace*, 259 U.S. 44, 70-71 (1922). Therefore, the portions of § 1326(b)(1) and (2), that raise the statutory maximum sentence for prior convictions should be stricken as unconstitutional.

In the event that 8 U.S.C. § 1326(b)(1) and (2) are not found unconstitutional on their face, their application as enhancements to Mr. Esparza-Salazar's case is also unconstitutional. Mr. Esparza-Salazar notes that the indictment failed to allege that his deportation resulted after a conviction for an aggravated felony. Furthermore, the government never proved to the jury the existence of a prior deportation for an aggravated felony. Thus, even if § 1326(b)(1) and (2) are not found unconstitutional on their face, they are still unconstitutional as applied to Mr. Esparza-Salazar.

In applying the principles mentioned above, this would call for Esparza-Salazar's conviction to be reduced to the lesser offense found in 8 U.S.C. § 1326(a) and reformation of the judgment. Reforming the judgment would allow for the judgment to reflect the conviction under the single provision of 8 U.S.C. § 1326(a).

B. Relief Sought

The Court should grant this Writ and order briefing to decide, in light of the Supreme Court's ruling in *Apprendi v. New Jersey*, whether this Court should overrule its decision in *Almendarez-Torres v. United States*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that his petition for a writ of certiorari be granted so that the Court can consider whether the time has come to overrule its decision in *Almendarez-Torres v. United States*.

Date: June 23, 2019.

Respectfully submitted,

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PROOF OF SERVICE

I, Roberto Balli, a member of the Bar appointed under the Criminal Justice Act, do swear and declare that on this 23rd day of June, 2019, and pursuant to Rule 29.5, served the preceding Petition for Writ of Certiorari on counsel for the Respondent by enclosing a copy of these documents in an envelope for delivery by private third party commercial carrier for delivery within 3 calendar days and addressed to:

The Honorable Noel J. Francisco
Office of the Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001

I declare under the penalty of perjury that the foregoing is true and correct.

/s/

ROBERTO BALLI