No. _____

In the Supreme Court of the United States

October Term, 2018

ROQUE ARIAS-DE JESUS, *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

JUDY FULMER MADEWELL
Chief of Appeals
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 this Court should consider the continuing validity of *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

ROQUE ARIAS-DE JESUS, Petitioner,

v.

UNITED STATES OF AMERICA

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

Petitioner Roque Arias-De Jesus 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 June 20, 2019.

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

Other Authority

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Court of Appeals entered the judgment in Petitioner's case on June 20, 2019. This petition is filed within 90 days after entry of the judgment. *See* SUP. CT. R. 13.1. This 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

Roque Arias-De Jesus was removed from the United States in 2016. In 2017, he was found in the Western District of Texas. He

had not received permission from the Attorney General or the Secretary of Homeland Security to reapply for admission. He was charged with illegally reentering the country, under 8 U.S.C. § 1326.

Under § 1326(b), certain prior convictions increase the maximum sentence for a reentry offense from two years to 10 or 20 years. Arias-De Jesus had a qualifying prior conviction. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), this Court held that the enhancement-qualifying conviction under § 1326(b) is a sentencing factor, not an element of a separate offense. In accordance with *Almendarez-Torres*, no prior felony was alleged in Arias-De Jesus's indictment. Appendix B. Arias-De Jesus pleaded guilty to the charge in his indictment. The district court imposed a sentence of 54 months' imprisonment.

Arias-De Jesus appealed, arguing that 1326(b) was unconstitutional because its enhanced penalties were sentencing factors that increase the maximum imprisonment term. Counsel acknowledged that the argument was foreclosed by Supreme Court 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. Appendix A.

REASONS FOR GRANTING THE WRIT

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

Title 8 U.S.C. § 1326(a) punishes illegal reentry after removal with a maximum term of two years' imprisonment and one year of supervised release. Section 1326(b) increases the maximum imprisonment term to 10 or 20 years if the removal occurred after certain convictions. In *Almendarez-Torres v. United States*, this Court construed § 1326(b)'s enhanced penalty as a sentencing factor, rather than as an element of 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.

However, the continued validity of *Almendarez-Torres* is questionable. Just two years after it was decided, the Court appeared to 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. *Id.* 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*. *Apprendi*, 530 U.S. at 490. Instead, the Court framed its holding to avoid expressly overruling the earlier case. *Id.* at 489.

Thirteen years later, this Court again questioned *Almendarez-Torres*'s reasoning and suggested the Court would be willing to revisit its holding. *See Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013); *see also Descamps v. United States*, 570 U.S. 254, 281 (2013) (Thomas, J., concurring) (stating that *Almendarez-Torres* should be overturned). These opinions reveal concern 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 115–16. 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 for purposes of [its] decision today." *Id.*

The Court's reasoning in *Alleyne*, however, strengthens any future challenge brought against *Almendarez-Torres*'s recidivism exception. The Court 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 108–10 ("[i]f a fact was by law essential to the penalty, it was an element of the offense"); *see id.* at 109 (historically, crimes were defined as "the whole of the wrong to which the law affixes punishment . . . includ[ing] 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 109–10. 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.") The *Apprendi* Court 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 citations omitted). But even the *Apprendi* Court 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 believe that this Court should and will 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.

The growing view among members of the Court that *Almendarez-Torres* was wrongly decided is good reason to clarify whether *Almendarez-Torres* is still the law. 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) (same). 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 236. Even if the Court were ultimately to reaffirm *Almendarez-Torres*, review is warranted. As shown above, a significant number of the Justices have stated that *Almendarez-*

Torres is wrong as a matter of constitutional law. 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).

If *Apprendi*, its progeny, and, more recently, *Alleyne*, undermine *Almendarez-Torres*, as Arias-De Jesus argues, his imprisonment exceeds the statutory maximum. The question of *Almendarez-Torres*'s validity can be resolved only in this forum. *Rangel-Reyes*, 547 U.S. at 1200 (Thomas, J., dissenting). *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 this 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.

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/ Judy Fulmer Madewell
JUDY FULMER MADEWELL
Chief of Appeals

Counsel of Record for Petitioner

DATED: September 16, 2019.