No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 2019

HERMENEGILDO MARGARITO ESPINOZA ESPINOZA,
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 WRIT OF CERTIORARI

AMY R. BLALOCK
Attorney-At-Law
P.O. Box 765
Tyler, TX 75710
Texas Bar Card No. 02438900
Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

1) 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?

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The decision of the Court of Appeals for the Fifth Circuit is reported as United States v. Hermenegildo Margarito Espinoza Espinoza, No. 20-20028 (5th Cir. July 10, 2020)(not published). It is attached to this Petition in the Appendix.

JURISDICTION

The decision by the United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment of conviction and sentence in the Southern District of Texas.

Consequently, Mr. Espinoza files the instant Application for a Writ of Certiorari under the authority of Title 28, U.S.C., § 1254(1).

BASIS OF FEDERAL JURISDICTION

IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in the United States District Court for the Southern District of Texas because Mr. Espinoza was indicted for violations of Federal law by the United States Grand Jury for the Southern District of Texas.

STATUTORY AND RULES PROVISIONS

This Petition involves 8 U.S.C. § 1326, which states:

(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.

8 U.S.C. § 1326.

STATEMENT OF THE CASE

1. Procedural History.

On June 12, 2019, a one-count criminal Indictment was returned by a Grand Jury, in the United States District Court for the Southern District of Texas, Houston Division, charging Hermenegildo Margarito Espinoza Espinoza with illegal re-entry by a previously deported alien after a felony conviction. The indictment alleged that, on April 26, 2017, Mr. Espinoza, an alien who had previously been denied admission, excluded, deported and removed, knowingly and unlawfully was present in the United States having been found at or near Richmond, Texas, without having obtained consent to reapply for admission into the United States from the Attorney General of the United States or the Secretary of the Department of Homeland Security, the successor, pursuant to 6 U.S.C. §§ 202(3), 202(4), and 557, in violation of e 8 U.S.C. §§ 1326(a) and 1326(b). ROA. 25-26.[1]

Mr. Espinoza appeared with counsel for re-arraignment before United States District Judge Vanessa D. Gilmore. On September 9, 2019, Mr. Espinoza entered a plea of guilty to the Indictment. ROA.77. Mr. Espinoza was subsequently sentenced

[1]In the references to the Record on Appeal, references are made according to the pagination assigned by the Clerk of the Court.

to a term of imprisonment of 60 months. ROA.90. The District Court imposed a three-year term of supervised release. ROA.91.

No fine was imposed, but Mr. Espinoza was ordered to pay a $100 special assessment. Thereafter, Mr. Espinoza filed a Notice of Appeal.

On July 10, 2020, a panel of the Fifth Circuit affirmed the Petitioner's conviction in an unpublished decision.

2. Statement of Facts.

Mr. Espinoza is a 52-year old man who was born in Mexico. His childhood was marked by extreme poverty and an alcoholic father. Both of his parents are now deceased, but he has siblings in Mexico and Houston. Mr. Espinoza first illegally entered the United States in May 1985 in Laredo, Texas. After receiving temporary legal status under special agricultural provisions in July 10, 1990, Mr. Espinoza became eligible for permanent resident alien status in July 1992.

Mr. Espinoza's subsequent felony DWI conviction resulted in his order of removal on August 27, 1999, after which he was deported "afoot" on December 7, 1999. On May 20, 2002, Mr. Espinoza was removed, again on foot, at the Laredo, Texas, Port of Entry. Mr. Espinoza was once again encountered by immigration authorities in October 2002, after which he was deported on November 28, 2003. He lived in Cuernavaca, Moreles, Mexico, after his deportations.

Mr. Espinoza resided with Maria Rosa Alvarado-Gomez for approximately 13 years, although that relationship has ended. Mr. Espinoza has five children: Jimena (age 23), Jonathan Edwin (age 21), Juan Alberto (age 19), Ivan (age 16) and Kevin (age 15). All of his children are citizens of the United States and they all reside with their mother in Houston.

On or about on April 26, 2017, Mr. Espinoza allegedly illegally re-entered the United States after having been previously removed and without having obtained consent to reapply for admission. That is the conduct that comprised the charge to which he entered a plea of guilty. ROA.77.

The Presentence Report (PSR) assigned Mr. Espinoza a base offense level of 8 for Count One, pursuant to U.S.S.G. 2L1.1.[2] On April 24, 2008, Mr. Espinoza pled guilty illegal reentry after deportation, a felony offense, under Docket No. 2:08CR00178- 001. This resulted in a 4-level increase to the offense level pursuant to USSG §2L1.2(b)(1)(A). On March 3, 1998, Mr. Espinoza was convicted of driving while intoxicated in the 248th District Court, Harris County, under Cause No. 765737. On November 26, 2003, probation was revoked, and Mr. Espinoza was sentenced to two years imprisonment. Mr. Espinoza was first order deported on

[2]"PSR" refers to the Presentence Investigation Report filed by the United States Probation Department (under seal).

August 27, 1999. Therefore, before Mr. Espinoza was order deported or ordered removed from the United States for the first time, Mr. Espinoza allegedly engaged in criminal conduct resulting in a felony offense for which the sentence imposed was 2 years or more. Therefore, the offense level was increased by 8 levels pursuant to USSG §2L1.2(b)(2)(B).

On April 2, 2018, Mr. Espinoza pled guilty to driving while intoxicated 3rd offense, a felony, in the 268th District Court, Fort Bend County, Texas, Case No.: 17-DCR-077667. He was sentenced to 3 years imprisonment. Therefore, after he was first ordered deported for the first time, he engaged in criminal conduct resulting in a conviction for a felony offense for which the sentence imposed was 2 years or more. An additional 8 levels was added to the offense level, pursuant to USSG §2L1.2(b)(3)(B).

Mr. Espinoza received a three-level reduction for acceptance of responsibility. Based upon a total offense level of 25 and a criminal history category of V, the guideline range for imprisonment is 100 to 120 months. There were no objections made by either party to the PSR.

After announcing its intention to downwardly depart, the District Court sentenced Mr. Espinoza to a 60-month term of imprisonment. ROA.90. The District

Court also sentenced Mr. Espinoza to serve a three-year term of supervised release. ROA.91. After the sentencing hearing, Mr. Espinoza timely filed a notice of appeal.

Mr. Espinoza appealed. His conviction and sentence was affirmed by a Panel of the Fifth Circuit on July 10, 2020. The Panel stated in its decision: "As Espinoza Espinoza concedes, his arguments are foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *See United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *United States v. Rojas-Luna*, 522 F.3d 502, 505-06 (5th Cir. 2008). Thus, summary affirmance is appropriate. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969)." *United States v. Hermenegildo Margarito Espinoza Espinoza*, No. 20-20028, at 2 (5th Cir. July 10, 2020)(not published).

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. This Court should reconsider *Almendarez-Torres v. United States.*

Mr. Espinoza was subjected to an enhanced statutory maximum under 8 U.S.C. §1326(b)(1) because the removal or deportation charged in the indictment followed a prior felony conviction. Mr. Espinoza '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 (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); *United*

States v. Shepard, 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 (Stevens, J., concurring in denial of certiorari); *Rangel-Reyes*, 547 U.S. at 1202-1203 (Thomas, J., dissenting from denial of certiorari); *James v. United States*, 550 U.S. 192, 231-232 (2007) (Thomas, J., dissenting).

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); *see* also 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; *see* also 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 *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. *Id.* at 2160 n.1. 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 may 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"); *id.* at 2160 ("the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted").

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).

This Court, however, 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 believe that the time is ripe 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. The validity of

Almendarez-Torres is accordingly subject to reasonable doubt. If *Almendarez-Torres* is overruled, the result will obviously undermine the use of Mr. Espinoza 's prior conviction to increase his statutory maximum.

Mr. Espinoza's 60-month sentence would exceed the statutory maximum of two years imprisonment. Mr. Espinoza raised this issue in the trial court and on direct appeal, and the issue is therefore preserved for plenary review. If this Court were to reverse *Almendarez- Torres*, Mr. Espinoza contends that his sentence, which would then exceed the statutory maximum, would constitute error and should be vacated.

CONCLUSION

This Petition for Writ of Certiorari should be granted and the decision of the Fifth Circuit should be vacated, and the case should be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

/s/ Amy R. Blalock
AMY R. BLALOCK
Attorney-At-Law
P.O. Box 765
Tyler, TX 75710
(903) 262-7520
amyblalock@outlook.com
Texas Bar Card No. 02438900
Attorney for Petitioner

RELIEF REQUESTED

FOR THESE REASONS, the Petitioner moves this Court to grant a Writ of Certiorari in order to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ Amy R. Blalock
AMY R. BLALOCK
Attorney-At-Law
P.O. Box 765
Tyler, TX 75710
(903) 262-7520
amyblalock@outlook.com
Texas Bar Card No. 02438900
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on the 3rd day of September 2020, I served one (1) copy of the foregoing Petition for Writ of Certiorari on the following individuals by mail (certified mail return receipt requested) by depositing same, enclosed in post paid, properly addressed wrapper, in a Post Office or official depository, under the care and custody of the United States Postal Service, or by other recognized means pursuant to the Rules of the Supreme Court of The United States of America, Rule 29:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Carmen Castillo Mitchell
US Attorney's Office
Southern District of Texas
Houston, Texas

Hermenegildo Margarito Espinoza Espinoza
USM# 03867-095
C.I, North Lake
805 West 32nd Street
Baldwin, MI 49304

/s/ Amy R. Blalock
AMY R. BLALOCK

No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 2019

HERMENEGILDO MARGARITO ESPINOZA ESPINOZA,,

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent.

APPENDIX

OPINION OF THE UNITED STATES COURT

OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
July 10, 2020

Lyle W. Cayce
Clerk

No. 20-20028
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

HERMENEGILDO MARGARITO ESPINOZA ESPINOZA,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CR-437-1

Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

PER CURIAM:[*]

Hermenegildo Margarito Espinoza Espinoza argues that his guilty plea was involuntary because the district court failed to advise him at rearraignment that his prior felony conviction was an essential element of his illegal reentry offense under 8 U.S.C. § 1326(b)(1). He also contends that his sentence under § 1326(b)(1) is unconstitutional because it is based on facts

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

neither alleged in his indictment nor proven to a jury beyond a reasonable doubt.

As Espinoza Espinoza concedes, his arguments are foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *See United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *United States v. Rojas-Luna*, 522 F.3d 502, 505-06 (5th Cir. 2008). Thus, summary affirmance is appropriate. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

Accordingly, the Government's motion for summary affirmance is GRANTED, the Government's alternative motion for an extension of time to file a brief is DENIED, and the judgment of the district court is AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

July 10, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 20-20028 USA v. Hermenegildo Espinoza
USDC No. 4:19-CR-437-1

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

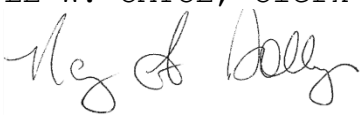
Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk



By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Ms. Lauretta Drake Bahry
Ms. Amy R. Blalock
Ms. Carmen Castillo Mitchell