

No. _____

IN THE
Supreme Court of the United States

PEDRO FERNANDEZ-DE CAMPA
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), should be overruled.

**PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS
DIRECTLY RELATED TO THIS CASE**

United States District Court (M.D. Fla.):

United States v. Pedro Fernandez-de Campa, No. 3:19-cr-38-J-34GBT (July 1, 2019)

United States Court of Appeals (11th Cir.):

United States v. Pedro Fernandez-de Campa, No. 19-12673 (April 16, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Pedro Fernandez-de Campa respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND JUDGMENT BELOW

The Eleventh Circuit's opinion, 801 F. App'x 743 (11th Cir. 2020), is provided in the petition appendix at A (Pet. App.). The district court's judgment is provided at Pet. App. B.

JURISDICTION

The Eleventh Circuit issued its opinion on April 16, 2020. Pet. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) by the timely filing of this petition within 150 days of the date of the opinion. *See Order Regarding Filing Deadlines* (Mar. 19, 2020) (extending deadlines due to COVID-19).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides, in relevant 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, 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 deprived of life, liberty, or property, without due process of law

The Sixth Amendment to the U.S. 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.

Section 1326 of Title 8, United States Code, provides in pertinent 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 . . .

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), 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 . . .

STATEMENT OF THE CASE

Petitioner Fernandez-de Campa entered a guilty plea to the offense of being an alien found in the United States following his removal, in violation of 8 U.S.C. § 1326. The statutory maximum for this offense is ordinarily two years in prison. 8 U.S.C. § 1326(a). The district court increased the statutory penalties to 20 years in prison based on an implicit finding that Mr. Fernandez-de Campa's removal was subsequent to a conviction for an aggravated felony, and the court sentenced Mr. Fernandez-de Campa to thirty months in prison. Pet. App. B; 8 U.S.C. § 1326(b)(2).

The Eleventh Circuit affirmed based on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Pet. App. A. In *Almendarez-Torres*, this Court rejected in a § 1326 prosecution that the Constitution requires a defendant's prior conviction to be charged in an indictment and proven to

jury beyond a reasonable doubt as an element of the offense. 523 U.S. at 239-47. This case presents the important and recurring question whether *Almendarez-Torres* should be overruled.

Procedural History

The grand jury indicted Mr. Fernandez-de Campa on one count of being an alien who had been found unlawfully in the United States after having been previously removed, in violation of 8 U.S.C. § 1326. Doc. 12. The indictment alleged that Mr. Fernandez-de Campa had been previously deported and removed on or about March 6, 1984, and on or about September 8, 2010. *Id.* The indictment did not allege any prior convictions by Mr. Fernandez-de Campa, and it did not cite 8 U.S.C. § 1326(b).

When Mr. Fernandez-de Campa pled guilty, the court advised him that the offense has four elements:

First, he was an alien at the time stated in the indictment;
second, he had been deported or removed from the United States;
third, afterward he was found to be voluntarily back in the United States; and,
fourth, he did not have the consent of the Attorney General or the Secretary of Homeland Security for the United States to apply for admission or to re-enter the United States.

Doc. 38 at 24-25. Mr. Fernandez-de Campa admitted facts supporting these elements. *Id.* at 30-32. In pleading guilty, Mr. Fernandez-de Campa did not admit the facts required by § 1326(b)(2) to increase his statutory penalties—i.e., whether his “removal was subsequent to a conviction for commission of an aggravated felony.” *See id.*

The district court sentenced Mr. Fernandez-de Campa to thirty months in prison. Pet. App. B. As such, the district court increased Mr. Fernandez-de Campa’s statutory maximum penalty beyond the two-year maximum set forth in § 1326(a), though the indictment did not charge

and Mr. Fernandez-de Campa did not admit in pleading guilty that his removal was subsequent to a conviction for an aggravated felony. 8 U.S.C. § 1326(b)(2); *see also* Doc. 28 at 18 (¶88); Doc. 32 at 1; Doc. 39 at 6-7.

The Eleventh Circuit affirmed Mr. Fernandez-de Campa’s thirty-month sentence. Pet. App. A. The court of appeals rejected Mr. Fernandez-de Campa’s constitutional challenge because “*Almendarez-Torres* remains the law until overruled by the Supreme Court, which it declined to do in *Alleyne v. United States*, 570 U.S. 99 (2013). *Id.* at 111 n.1.” Pet. App. A at 3.¹ The court of appeals also rejected his challenge to the procedural reasonableness of his sentence based on an insufficient explanation of reasons under 18 U.S.C. §3553(c). Pet. App. A at 2-3.

REASONS FOR GRANTING THE WRIT

In *Almendarez-Torres*, this Court read 8 U.S.C. § 1326(a) as defining the offense and § 1326(b) as a penalty provision that merely sets forth sentencing factors. 523 U.S. at 226, 229-35. The Court rejected that the Constitution requires the fact of a prior conviction, required by § 1326(b), be considered an element of the offense that must be charged in an indictment and proven to a jury beyond a reasonable doubt. *Id.* at 239-47. Mr. Fernandez-de Campa respectfully requests this Court’s review to resolve whether *Almendarez-Torres* should be overruled.²

¹ Because the courts below were bound by this Court’s decision in *Almendarez-Torres*, Mr. Fernandez-de Campa could not prevail below under any standard of review. That Mr. Fernandez-de Campa did not preserve a constitutional objection at sentencing therefore made no difference to the Eleventh Circuit’s decision. *See* Pet. App. A at 3.

² Multiple petitions for certiorari raising this same issue are pending before this Court. *See, e.g., Corona-Perez v. United States*, No. 19-8561 (docketed May 29, 2020). Following an initial conference on the petition in *Corona-Perez*, this Court requested the government’s response,

This Court's precedent since *Almendarez-Torres* has made clear that the Constitution ordinarily requires the facts that increase a defendant's statutory minimum or mandatory penalties to be charged in an indictment and proven to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 102, 111 & n.1 (2013); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). This Court has excepted the fact of a prior conviction from this constitutional rule. *See Almendarez-Torres*, 523 U.S. at 239-47. Members of this Court, however, have expressed doubt about the validity of *Almendarez-Torres*. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466, 489-90 (2000) ("[I]t is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested") (footnote omitted); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1253-54 (2018) (Thomas, J., dissenting) ("The exception recognized in *Almendarez-Torres* for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered. . . . In my view, if the Government wants to enhance a defendant's sentence based on his prior convictions, it must put those convictions in the indictment and prove them to a jury beyond a reasonable doubt.") (citations omitted).

which was filed August 21, 2020. *Id.* The case has been distributed again for conference on September 29, 2020. *Id.*

Since the docketing of *Corona-Perez*, this Court has distributed at least twelve additional cases raising the same issue for conference on September 29, 2020. *See Chavez v. United States*, No. 19-8617 (docketed June 2, 2020); *Barrios-Alvarado v. United States*, No. 19-8655 (docketed June 11, 2020); *Job v. United States*, No. 19-8788 (docketed June 23, 2020); *Vasquez-Soto v. United States*, No. 19-8791 (docketed June 23, 2020); *Nunez-Lopez v. United States*, No. 19-8815 (docketed June 25, 2020); *Navarro v. United States*, No. 19-8825 (docketed June 26, 2020); *Campos-Lagunas v. United States*, No. 19-8928 (docketed July 8, 2020); *Arredondo-Moreno v. United States*, No. 20-5152 (docketed July 23, 2020); *Gonzalez-Gatica v. United States*, No. 20-5161 (docketed July 27, 2020); *Estrada-Eugenio v. United States*, 20-5376 (docketed August 17, 2020); *Morales-Mercado v. United States*, No. 20-5428 (docketed August 20, 2020); *Milla-Rodriguez v. United States*, No. 20-5470 (docketed August 24, 2020). At least one additional petition has been filed and remains pending. *See Galindo-Caballero v. United States*, No. 20-5543 (docketed September 1, 2020, and response due October 1, 2020).

Section 1326(b) increases the maximum penalty when additional facts are met – i.e., a defendant “whose removal was subsequent to” certain prior convictions specified in (b)(1) or (b)(2). A recent decision of this Court supports that § 1326(a) and (b), together, define the elements of the offense. *See Rehaif v. United States*, 139 S. Ct. 2191, 2194-96 (2019) (reading the penalty provision of 18 U.S.C. § 924(a)(2) together with 18 U.S.C. § 922(g) to define the offense). In addition, § 1326(b) requires more than the mere fact of a prior conviction; it has a temporal requirement for the prior conviction. Section 1326(b) requires that the prior conviction precede the removal from the United States, which is a fact apart from the existence of a prior conviction. 8 U.S.C. § 1326(b)(1), (2).

Mr. Fernandez-de Campa accordingly maintains that the additional facts required by § 1326(b) constitute elements of the offense. *See Alleyne*, 570 U.S. at 104, 111-16 (concluding that additional fact—brandishing—that raised the mandatory-minimum penalty in 18 U.S.C. § 924(c)(1)(A)(ii) must be charged in an indictment and proven to a jury beyond a reasonable doubt); *see also Almendarez-Torres*, 523 U.S. at 249, 264-68 (Scalia, Stevens, Souter, Ginsburg, JJ., dissenting) (addressing interpretation of § 1326(b)). Mr. Fernandez-de Campa submits that this interpretation is consistent with the original meanings of the Fifth and Sixth Amendments. *See Alleyne*, 570 U.S. at 109; *Apprendi*, 530 U.S. at 478-79.

This case is an excellent vehicle for this Court to revisit the viability of *Almendarez-Torres*. No grand jury determined the additional facts of a prior conviction that predated Mr. Fernandez-de Campa’s removal. And the district court increased the statutory maximum prison term above two years (§ 1326(a)) based on its own determination of the additional fact that Mr. Fernandez-de Campa’s removal was subsequent to a conviction for an aggravated felony. No jury made this determination, and Mr. Fernandez-de Campa did not admit to this additional fact when he entered

his guilty plea. The district court nonetheless sentenced Mr. Fernandez-de Campa to thirty months in prison, providing nearly no reason for selecting thirty months as a sentence. Mr. Fernandez-de Campa’s case thus squarely presents the question of whether his sentence is permissible under the Fifth and Sixth Amendments, given that his sentence exceeds the two-year maximum sentence permitted by § 1326(a), and no prior convictions were alleged in the indictment. *See Apprendi*, 530 U.S. at 474.

The question presented in this case is important and recurring. The Sentencing Commission reported in 2015 that almost 74% of illegal reentry offenders faced an increased statutory maximum of 10 or 20 years based on their predicate convictions.³ Moreover, illegal reentry cases comprise a large percentage of all federal criminal cases—26% of all federal criminal cases reported to the Sentencing Commission for fiscal year 2013.⁴ The number of illegal reentry cases has increased since that report.⁵

³ See U.S. Sentencing Commission, *Illegal Reentry Offenses*, at 9 (Apr. 2015) (analyzing fiscal year 2013), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf (last visited Sept. 14, 2020).

⁴ *Id.* at 1, 8.

⁵ See Sentencing Commission, *Quick Facts: Illegal Reentry Offenses* (Fiscal Year 2019), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY19.pdf (last visited Sept. 14, 2020).

CONCLUSION

Whether the additional facts required by § 1326(b) are elements of the offense that must be charged in an indictment and proven to a jury beyond a reasonable doubt presents a recurring issue deserving of further review. Accordingly, Mr. Fernandez-de Campa asks this Court to grant this petition to resolve whether *Almendarez-Torres* should be overruled.

Respectfully submitted,

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