

No. _____

In the

Supreme Court of the United States

ANTONIO SERRANO-PEREZ,
PETITIONER,
v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The default penalty range for illegal reentry in violation of 8 U.S.C. § 1326(a) is a sentence of “not more than 2 years” in prison. Petitioner was sentenced to 10 years in prison, based on the sentencing court’s determination that he was previously removed from the United States “subsequent to conviction for commission of . . . a felony.” § 1326(b)(1). Under this Court’s decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the existence of the prior conviction was not an “element” of the aggravated form of the offense found in § 1326(b).

The question presented is whether this Court should overrule *Almendarez-Torres*.

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

RELATED PROCEEDINGS

United States v. Serrano-Perez, No. 4:19-CR-77 (N.D. Tex.)

United States v. Serrano-Perez, No. 19-11179 (5th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Antonio Serrano-Perez asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 1a–2a) was not selected for publication in the Federal Reporter. It can be found at 830 F. App'x 457.

JURISDICTION

The Fifth Circuit entered judgment on December 4, 2020. On March 19, 2020, this Court extended the deadline to file petitions for certiorari in all cases to 150 days from the date of the order denying rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Fifth and Sixth Amendments to the U.S. Constitution and 8 U.S.C. § 1326.

The Fifth Amendment 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, 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

The Sixth Amendment 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.

Title 8, Section 1326, Subsections (a) and (b), of the United States Code provide:

(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 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), 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, 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.

STATEMENT

Federal authorities indicted Petitioner Anthony Serrano-Perez for illegally reentering the United States without permission in violation of 8 U.S.C. § 1326. Pet. App. 3a. The indictment alleged all the elements of the “simple” form of that offense:

On or about March 11, 2019, in the Fort Worth Division of the Northern District of Texas, defendant Antonio Serrano-Perez, an alien, was found in the United States having previously been deported and removed from the United States on or about June 5, 2014, and the defendant had not received the consent of the Attorney General of the United States or the Secretary of the Department of Homeland Security, to reapply for admission to the United States.

Pet. App. 3a. The indictment included a citation to 8 U.S.C. § 1326(b)(1), but the grand jury made no allegations about any prior convictions. Pet. App. 3a.

Mr. Serrano pleaded guilty to this indictment, without admitting any prior convictions. Pet. App. 1a. The district court imposed a sentence of ten years in prison. Pet. App. 1a. On appeal, Mr. Serrano argued that the existence of a prior felony conviction was an essential element of the aggravated offense defined in § 1326(b)(1),

and that he therefore pleaded guilty only to the “simple” form of the offense defined in § 1326(a). That would make the statutory maximum punishment two years in prison, and would make his ten-year sentence unlawful. The Fifth Circuit held that this argument was foreclosed by *Almendarez-Torres*. Pet. App. 2a. This timely petition follows.

REASONS TO GRANT THE PETITION

I. THE COURT SHOULD GRANT THE PETITION AND OVERRULE *ALMENDAREZ-TORRES*.

In *Almendarez-Torres*, this Court rejected the petitioner’s argument that a pre-removal aggravated felony conviction was an “element” of the enhanced offense 8 U.S.C. § 1326(b)(2). 523 U.S. at 239. That holding stands as an outlier in this Court’s Fifth and Sixth Amendment jurisprudence. Leaving aside the “prior conviction” exception first announced in *Almendarez-Torres*, the Court has more recently clarified that any fact that aggravates the statutory punishment range must be pleaded in the indictment and proven to a jury beyond a reasonable doubt. *See, e.g., Alleyne v. United States*, 570 U.S. 99, 108 (2013).

Thus far, the Court has persisted in recognizing *Almendarez-Torres*’s “narrow exception” to what the Fifth and Sixth Amendment require for every other kind of fact that aggravates the punishment. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Even so, many current and former Justices have expressed doubt about the continuing vitality of the *Almendarez-Torres* exception. *See, e.g., Descamps v. United States*, 570 U.S. 254, 280 (2013) (Thomas, J., concurring) (“Under the logic of *Apprendi*, a court may not find facts about a prior conviction when such findings

increase the statutory maximum.”); *Dretke v. Haley*, 541 U.S. 386, 395–396 (2004) (describing the vitality of the exception as a “difficult constitutional question[]”); *Rangel-Reyes v. United States*, 547 U.S. 1200, 1200–1201 (2006) (Thomas, J., dissenting from denial of certiorari) (“[I]t has long been clear that a majority of this Court now rejects that exception.”); cf. *United States v. Smith*, 640 F.3d 358, 369 (D.C. Cir. 2011) (Kavanaugh, J.) (“Smith protests that the reasoning of *Almendarez-Torres* is in tension with the reasoning of later sentencing cases from the Supreme Court. . . . Perhaps so.”); *United States v. Santiago*, 268 F.3d 151, 155 (2d Cir. 2001) (Sotomayor, J.) (“*Almendarez-Torres* remains good law, at least for now.”).

As Justice Sotomayor—joined by Justices Ginsburg and Kagan—explained in her concurring opinion in *Alleyne*, 570 U.S. at 121, stare decisis does not require adherence to decisions where “the reasoning of those decisions has been thoroughly undermined by intervening decisions and because no significant reliance interests are at stake that might justify adhering to their result.” The Fifth and Sixth Amendment principles reestablished by *Apprendi* are “now firmly rooted in our jurisprudence.” *Id.* Those principles cannot logically coexist with the *Almendarez-Torres* exception.

II. OVERRULING *ALMENDAREZ-TORRES* WOULD OVERTURN THE DECISION BELOW.

The Fifth Circuit was bound by *Almendarez-Torres* to reject Mr. Serrano’s argument. Without that decision, his sentence would plainly be unlawful. The grand jury did not allege anything about prior convictions. Pet. App. 3a. And Mr. Serrano admitted only those facts charged in the indictment at the time he pleaded guilty.

The only offense lawfully charged by indictment was 8 U.S.C. § 1326(a), which carries a maximum lawful sentence of two years.

CONCLUSION

Petitioner asks that this Court grant the petition and set the case for a decision on the merits.

Respectfully submitted,

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