No. ________________

In the Supreme Court of the United States

October Term, 2017

QUIRINO PEREZ-MARTINEZ, Petitioner,

V.

UNITED STATES OF AMERICA

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

Petitioner Quirino Perez-Martinez 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 January 3, 2018.

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

Statutes

Rules

Other Authority

Constitutional Provisions

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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is attached to this petition as Appendix A.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 January 3, 2018. 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

Quirino Perez-Martinez, a Mexican citizen, was removed from the United States in 2015. The next year, 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 to 10 years. Perez 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 Perez's indictment. Appendix B. Perez pleaded guilty to the charge in his indictment, but he objected to any sentence imposed under § 1326(b). The district court overruled that objection and imposed a sentence of 46 months' imprisonment.

Perez appealed, arguing that, because the prior conviction was not alleged in the indictment, it could not subject him to enhanced penalties. 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. The district court determined, however, that Perez was subject to enhancement under § 1326(b), which increases the maximum penalty if the removal occurred after certain convictions. The district court's decision accorded with this Court's decision in *Almendarez-Torres v. United States*, which held that § 1326(b)'s enhanced penalty is a sentencing factor, not 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 re-visit 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 this 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, most recently, *Alleyne*, undermine *Almendarez-Torres*, as Perez argues, his imprisonment exceeds the statutory maximum. The indictment stated only the elements of the § 1326(a) offense; it did not include any allegation of a prior conviction. Because Perez was charged only with the § 1326(a) offense, he preserved for further review the argument that his maximum punishment was limited to two years' imprisonment.

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.

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/s/ JUDY FULMER MADEWELL
JUDY FULMER MADEWELL
Assistant Federal Public Defender

Attorney for Defendant-Appellant

DATED: March 29, 2018.

Appendix A

United States v. Perez-Martinez,

No. 17-50198

Unpub. op. (5th Cir. Jan. 3, 2018)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-50198
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
January 3, 2018
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff−Appellee,

versus

QUIRINO PEREZ-MARTINEZ,

Defendant−Appellant.

Appeal from the United States District Court
for the Western District of Texas
No. 2:16-CR-305-1

Before HIGGINBOTHAM, JONES, and SMITH, Circuit Judges.

PER CURIAM:*

Quirino Perez-Martinez appeals the sentence for his conviction of illegal

* 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.

reentry. *See* 8 U.S.C. § 1326(a), (b). He maintains that the sentence violates due process because it was enhanced based on a conviction not alleged in the indictment, but he correctly concedes that his position is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27, 235, 247 (1998). Accordingly, the government's motion for summary affirmance is GRANTED, its alternative motion for an extension of time to file its brief is DENIED, and the judgment is AFFIRMED.

Appendix B

Indictment,

United States v. Perez-Martinez,

DR-16-CR-0305

March 9, 2016

FILED

2016 MR -9 AM 11:00

WESTERN DISTRICT OF TEXAS
U.S. CLERK'S OFFICE

BY: DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA v. QUIRINO PEREZ-MARTINEZ	§ § § § § § § § §	Cause No.: **INDICTMENT** [Vio: 8 U.S.C. § 1326(a) & (b)(1)/(2): Illegal Re-entry into the United States.] **DR16CR0305**

THE GRAND JURY CHARGES:

COUNT ONE
[8 U.S.C. § 1326(a) & (b)(1)/(2)]

That on or about February 14, 2016, in the Western District of Texas, Defendant,

QUIRINO PEREZ-MARTINEZ,

an alien, attempted to enter, entered, and was found in the United States having previously been denied admission, excluded, deported and removed from the United States on or about November 4, 2015, and that the Defendant had not received the consent of the Attorney General of the United States and the Secretary of the Department of Homeland Security, to reapply for admission to the United States, in violation of Title 8, United States Code, Section 1326(a) and (b)(1)/(2).

A TRUE BILL.

FOREPERSON

RICHARD L. DURBIN, JR.
United States Attorney

By:______________________
GORAN KRNAICH
Assistant United States Attorney

Appendix C

8. U.S.C. § 1326

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part VIII. General Penalty Provisions

8 U.S.C.A. § 1326

§ 1326. Reentry of removed aliens

Effective: September 30, 1996
Currentness

(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.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2)[2] of this title who 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 incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 8, § 276, 66 Stat. 229; Pub.L. 100-690, Title VII, § 7345(a), Nov. 18, 1988, 102 Stat. 4471; Pub.L. 101-649, Title V, § 543(b)(3), Nov. 29, 1990, 104 Stat. 5059; Pub.L. 103-322, Title XIII, § 130001(b), Sept. 13, 1994, 108 Stat. 2023; Pub.L. 104-132, Title IV, §§ 401(c), 438(b), 441(a), Apr. 24, 1996, 110 Stat. 1267, 1276, 1279; Pub.L. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), Sept. 30, 1996, 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629.)

Notes of Decisions (1298)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. Section 1252 of this title, was amended by Pub.L. 104-208, Div. C, Title III, § 306(a)(2), Sept. 30, 1996, 110 Stat. 3009-607, and as so amended, does not contain a subsec. (h); for provisions similar to those formerly contained in section 1252(h)(2) of this title, see 8 U.S.C.A. § 1231(a)(4).

8 U.S.C.A. § 1326, 8 USCA § 1326

Current through P.L. 115-72. Title 26 current through 115-73.

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