

No. _____

In the Supreme Court of the United States

October Term, 2017

DAVID MARTINEZ-GONZALEZ, *PETITIONER*,

v.

UNITED STATES OF AMERICA

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

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the 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).
2. Whether a prior conviction must be alleged in the indictment before a defendant is subjected to enhanced punishment under 8 U.S.C. § 1326(b).

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FIFTH CIRCUIT**

Petitioner David Martinez-Gonzalez 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 March 16, 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

QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW.....	1
JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.....	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
FEDERAL STATUTE INVOLVED.....	1
STATEMENT	2
REASONS FOR GRANTING THE WRIT	5
The Court Should Grant Certiorari to Consider Whether to Overrule <i>Almendarez-Torres v. United States</i> , 523 U.S. 224 (1998).	5
CONCLUSION.....	12
APPENDIX A <i>United States v. Martinez-Gonzalez</i> , No. 17-50253, unpub. op. (5th Cir. Mar. 16, 2018)	
APPENDIX B Indictment, <i>United States v. Martinez-Gonzalez</i> , 16-CR-1029-ILL July 20, 2016	
APPENDIX C 8 U.S.C. § 1326	

TABLE OF AUTHORITIES

Cases

<i>Agostini v. Felton</i> , 521 U.S. 203 (1997)	10
<i>Alleyne v. United States</i> , 133 S. Ct. 2151 (2013)	<i>passim</i>
<i>Almendarez-Torres v. United States</i> , 523 U.S. 244 (1998)	<i>passim</i>
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	<i>passim</i>
<i>Cunningham v. California</i> , 549 U.S. 270 (2007)	9
<i>Descamps v. United States</i> , 133 S. Ct. 2276 (2013)	6
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)	11
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016)	6
<i>Rangel-Reyes v. United States</i> , 547 U.S. 1200 (2006)	10, 11
<i>Seminole Tribe v. Florida</i> , 517 U.S. 44 (1996)	10
<i>Shepard v. United States</i> , 544 U.S. 13 (2005)	9
<i>State Oil Co. v. Khan</i> , 522 U.S. 3 (1997)	11
<i>United States v. Pineda-Arrellano</i> , 492 F.3d 624 (5th Cir. 2007)	6

Constitutional Provisions

Fifth Amendment, United States Constitution	1
Sixth Amendment, United States Constitution	1, 7, 9

Statutes

8 U.S.C. § 1326.....	1, 2, 3
8 U.S.C. § 1326(a)	2, 3, 5
8 U.S.C. § 1326(b)	i, 3, 5, 6
8 U.S.C. § 1326(b)(2)	3
28 U.S.C. § 1254(1)	1

United States Sentencing Guideline

U.S.S.G. §2L1.2(b)(1)(C)	3
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Rules

Supreme Court Rule 13.1	1
-------------------------------	---

Other Authorities

1 J. Bishop, CRIMINAL PROCEDURE § 81 (2d ed. 1872)	8
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OPINION BELOW

The unpublished opinion of the United States Court of Appeals, *United States v. Martinez-Gonzalez*, No. 17-50253 (5th Cir. Mar. 16, 2018), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Court of Appeals entered judgment in Petitioner’s case on March 16, 2018. This petition is filed within 90 days after entry of 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

David Martinez-Gonzalez, a Mexican citizen, came to the United States illegally and was convicted of various offenses, two of which were felonies. On July 8, 2015, after serving his sentence for felony illegal reentry, he was removed from the United States. On June 24, 2016, Border Patrol agents found Martinez near Carizo Springs, in the Western District of Texas. He had not obtained the consent of the Attorney General or the Secretary of Homeland Security to reapply for admission to the United States.

Martinez was indicted for illegally reentering the United States after having been removed, in violation of 8 U.S.C. § 1326. Under § 1326(a), the maximum penalty for illegal reentry is two years' imprisonment. Under § 1326(b), the maximum increases to 10 years if the defendant was removed from the United States after having been convicted of a felony, and to 20 years if he was removed after having been convicted of an aggravated felony. 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. Martinez's indictment cited § 1326(b), but, in accord with *Al-*

mendarez-Torres, it did not allege a prior conviction. App. B. Martinez pleaded guilty as charged. The factual basis for his guilty plea admitted only the elements of § 1326(a); he did not admit to having a prior conviction that would trigger the enhanced penalties in § 1326(b).

After Martinez pleaded guilty, a probation officer prepared a presentence report recommending a Guidelines range of 30 to 37 months' imprisonment. The report's Guidelines calculations included an eight-level enhancement, under §2L1.2(b)(1)(C), for Martinez's prior injury-to-a-child conviction being an aggravated felony. Although the indictment did not allege, and Martinez did not admit in the factual basis for his guilty plea, that he had been removed from the United States after that convictions, the presentence report stated that that statutory maximum penalty was 20 years' imprisonment and three years' supervised release, under 8 U.S.C. § 1326(b)(2), because his prior injury-to-a-child conviction qualified as an aggravated felony.

Martinez objected to any sentence imposed under § 1326(b). The district court overruled that objection and sentenced him to 27 months' imprisonment and three years' supervised release.

Martinez 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 this Court's 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. App. A at 2.

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 Martinez 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. 530 U.S. 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.

Relying on *Apprendi*, and later indications from the Court and individual justices that *Almendarez-Torres* should be reversed, defendants like Martinez preserved for possible review the contention that their reentry sentences exceeded the punishment permitted by statute and should be reversed. The Court did not grant certiorari on this issue and, in 2007, a panel of the court of appeals for the Fifth Circuit opined, in dictum, that a challenge to *Almendarez-Torres* is “foreclosed from further debate.” *United States v. Pineda-Arrellano*, 492 F.3d 624, 625 (5th Cir. 2007).

However, since that time, the Court has 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 Mathis v. United States*, 136 S. Ct. 2243, 2258–59 (2016) (stating that *Almendarez-Torres* should be overturned) (citing *Descamps v. United States*, 570 U.S. 254, 281 (2013)).

(Thomas, J., concurring) (same)); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1253–54 (2018) (Thomas, J., concurring) (same). 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 114–16. 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 our decision today.” *Id.*

The Court’s reasoning in *Alleyne*, however, strengthens any future challenge brought against *Almendarez-Torres*’s recidivism exception. *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 109; *see also id.* (“[i]f a fact was by law essential to the penalty, it was an element of the offense.”); *id.* (historically, crimes were defined as “the whole of the wrong to which the law affixes punishment ... including 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, 114–15. 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.”) *Apprendi* later 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 quotation marks and citation omitted). But the Court has since 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 the 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). 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 235–36. Even if the Court were ultimately to reaffirm *Almendarez-Torres*, review is warranted. As shown above, a majority 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 Martinez 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 Martinez 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) (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)). *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 the 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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DATED: June 12, 2018.

APPENDIX A

United States v. Martinez-Gonzalez,

No. 17-50253, unpub. op. (5th Cir. Mar. 16, 2018)

715 Fed.Appx. 407 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee

v.

David MARTINEZ-GONZALEZ,

Defendant-Appellant

United States of America, Plaintiff-Appellee

v.

David Martinez, Defendant-Appellant

No.

17

-

50253

Summary Calendar

Cons. w/ No. 17-50300

Filed March 16, 2018

Appeals from the United States District Court for the Western District of Texas, USDC No. 2:16-CR-979-1, USDC No. 2:16-CR-1029-1

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Laura G. Greenberg, Assistant Federal Public Defender, Maureen Scott Franco, Federal Public Defender, Federal

Public Defender's, Office Western District of Texas, San Antonio, TX, for Defendant-Appellant

Before JOLLY, OWEN, and HAYNES, Circuit Judges.

Opinion

PER CURIAM: *

David Martinez-Gonzalez appeals the 27-month within-guidelines sentence and three-year term of supervised release imposed following his guilty plea conviction for illegal reentry, in violation of 8 U.S.C. § 1326(a), (b)(2), and the 13-month sentence imposed following the revocation of his supervised release for another illegal reentry offense. He argues that his new illegal reentry sentence violates due process because it exceeds the statutory maximum sentence allowed by § 1326(a). Specifically, he argues that a prior conviction that enhances a sentence under § 1326(b) must be alleged in the indictment and proved to a jury. He correctly concedes that his argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). See *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *United States v. Pineda-Arrellano*, 492 F.3d 624, 625-26 (5th Cir. 2007). However, he seeks to preserve the issue for possible Supreme Court review.

The Government has moved for summary affirmance or, alternatively, an extension of time to file a brief. Because Martinez-Gonzalez's argument is foreclosed, 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, and the judgments are AFFIRMED. The Government's alternative motion for an extension of time to file a brief is DENIED.

All Citations

715 Fed.Appx. 407 (Mem)

Footnotes

- * 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.

APPENDIX B

Indictment,
United States v. Martinez-Gonzalez,
16-CR-1029-ILL
July 20, 2016

FILED

DEC 10 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY MS DEPUTY CLERK

UNITED STATES OF AMERICA,

Plaintiff,

V.

DAVID MARTINEZ-GONZALEZ,

Defendant

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*
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*
*
*

CRIMINAL NO.

W13CR288

INDICTMENT

[VIO: 8 U.S.C. 1326(a) and (b)(2) – Illegal
Re-Entry Into the United States]

THE GRAND JURY CHARGES:

On or about December 3, 2013, in the Western District of Texas, Defendant,

DAVID MARTINEZ-GONZALEZ,

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 October 22, 2008, which followed him having been convicted of an aggravated felony, to-wit: *Injury to Child/Elderly/Disable With Intent to Cause Bodily Injury*, in the 19th Judicial District Court of McLennan County, Texas, in Cause Number 2007-1949-C, on or about December 17, 2007, and that the Defendant had not received the consent of the Attorney General of the United States or his successor, the Secretary for Homeland Security, to reapply for admission to the United States, in violation of Title 8, United States Code, Sections 1326(a) and (b)(2), and Title 6, United States Code, Sections 202(3), 202(4) and 557.

A TRUE BILL:

SEALED DOCUMENT PURSUANT
TO E-GOVERNMENT ACT OF 2002

FOREPERSON

ROBERT PITMAN
United States Attorney

By: GREGORY S. GLOFF
Assistant United States Attorney

17-50253.7

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 \(1300\)](#)

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. 115-173. Also includes P.L. 115-176 to 115-178. Title 26 current through 115-182.

End of Document

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