

IN THE SUPREME COURT OF THE UNITED STATES

FRANCISCO JAVIER MANZO-RIOS,

PETITIONER,

- vs -

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Court held that in a prosecution for 8 U.S.C. § 1326 the fact of a prior conviction need not be alleged in the indictment because it was a sentencing factor and not an element of the offense. But *Alleyne v. United States*, 133 S. Ct. 2151, 2162 (2013), abandoned the distinction between "sentencing factors" and "elements," and reaffirmed that when "a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." Should the Court finally overrule *Almendarez-Torres*?

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Petitioner, Francisco Javier Manzo-Rios, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 12, 2018.

Opinion Below

The Ninth Circuit, in an unpublished Memorandum, affirmed Petitioner's conviction and sentence. *See* Appendix A.

Jurisdiction

On March 12, 2018, the Ninth Circuit affirmed Petitioner's conviction and sentence. The Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

Fifth Amendment to the United States Constitution:

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....

Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation

Title 8 U.S.C. § 1326.

I.

Statement of Facts

On September 19, 2014, the government obtained a one-count indictment charging Petitioner with attempted reentry of a removed alien, in violation of 8 U.S.C. § 1326. The indictment did not allege a prior conviction. On July 22, 2015, Petitioner entered a conditional guilty plea. On September 21, 2015, the district court found that Petitioner was vulnerable to the enhanced-sentence provision of § 1326(b) and imposed a 96-month sentence. This petition for writ of *certiorari* follows.

II.

Summary of Argument

Petitioner was prosecuted as an alien found in the United States after deportation in violation of 8 U.S.C. § 1326. While § 1326(a) has a maximum penalty of two years, § 1326(b)(2) provides for increased penalties for that conduct of up to 20 years in prison if the defendant was deported after having suffered an aggravated felony conviction. Petitioner's indictment did not allege such a conviction, and no such conviction was proved beyond a reasonable doubt at a trial. Even so, the district court found that Petitioner was subject to the

enhanced penalties, and sentenced Petitioner to terms of imprisonment and supervised release that would not have been available for a violation of § 1326(a) alone.

In *Almendarez-Torres*, the Court construed § 1326(b) to be a penalty provision that is solely the province of the sentencing court. Section 1326(b) did not set out a separate offense and the relevant facts were to be decided by the judge, not the jury. See 523 U.S. at 226.

In *Apprendi v. New Jersey*, however, the Court held that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 530 U.S. 466, 490 (2000) (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)). In reaching this conclusion, the Court acknowledged that its previous decision in *Almendarez-Torres* was at least problematic in that its holding does not seem to comport with the plain constitutional rule. See *Apprendi*, 530 U.S. at 487 (describing *Almendarez-Torres* as "represent[ing] at best an exceptional departure from the historic practice we have described"); see also *id.* at 489 ("it is arguable that *Almendarez-Torres* was incorrectly decided").

In light of *Apprendi* and the Court's subsequent cases, the Court should overrule *Almendarez-Torres* and hold that any fact, even the fact of a prior conviction, that increases the penalty for a crime is an "element" that must be alleged in the indictment, submitted to the jury, and found beyond a reasonable doubt.

III.

Argument

A. *Almendarez-Torres* must be overruled because its "underpinnings" have been "eroded" by subsequent developments of constitutional law.

In *Almendarez-Torres*, the Court evaluated the prior conviction enhancement contained in 8 U.S.C. § 1326(b). The petitioner contended it was error to permit enhancement of his sentence above the two-year maximum permitted by § 1326(a) without alleging the relevant prior conviction in the § 1326 indictment.

Almendarez-Torres rejected that claim:

We conclude that the subsection is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime. Consequently, neither the statute nor the Constitution requires the Government to charge the factor it mentions, an earlier conviction, in the indictment.

523 U.S. at 226-27.

But *Almendarez-Torres*'s analysis was dependent on the Court's prior decision in *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986), which made a distinction between "elements" and "sentencing factors." Specifically, *Almendarez-Torres* held that *McMillan* supports "the conclusion that Congress has the constitutional power to treat the feature before us—prior conviction of an aggravated felony—as a sentencing factor for this particular offense (illegal entry after deportation)." *Almendarez-Torres*, 523 U.S. at 246. Thus, *Almendarez-Torres* rejected the defendant's argument "that this Court should simply adopt a rule that any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement [because] the Constitution, as interpreted in *McMillan* and earlier cases, does not impose that requirement." *Id.* at 247.

Just two years later, however, the Court essentially adopted such a rule and held, "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*, 530 U.S. at 490. Although, *Apprendi* expressly provided a prior-conviction exception to this rule, the doubtful viability of *Almendarez-Torres* was instantly apparent. See *id.* at 489 ("it is arguable that *Almendarez-Torres* was wrongly decided"). Indeed, Justice Thomas, who cast the

fifth and deciding vote in *Almendarez-Torres*, admitted that his vote was erroneous. *Apprendi*, 530 U.S. at 518-20 (Thomas, J., concurring).

The skepticism of *Almendarez-Torres*'s viability has persisted over time. In *Shepard v. United States*, Justice Thomas noted, "*Almendarez-Torres* ... has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided" and recommends that "in an appropriate case, this Court should consider *Almendarez-Torres*'s continuing viability." 544 U.S. 13, 28 (2005) (Thomas, J., concurring in part and concurring in the judgment). *See also Rangel-Reyes v. United States*, 126 S. Ct. 2873, 2874-75 (2006) (Thomas, J., dissent from denial of certiorari) ("There is no good reason to allow such a state of affairs to persist."). And Justice Sotomayor, while on the Second Circuit, twice authored opinions which expressed doubts about its viability (*United States v. Estrada*, 428 F.3d 387, 390-91 (2d Cir. 2005), *United States v. Santiago*, 268 F.3d 151, 155 (2d Cir. 2001)) and joined the majority in a third (*United States v. Gonzalez*, 420 F.3d 111, 128 n.14 (2d Cir. 2005)).

While the Court has yet to revisit *Almendarez-Torres*, the Court's recent decision in *Alleyne* demonstrates that now is the time.¹ In *Alleyne*, the Court granted certiorari to consider whether *Harris v. United States*, 536 U.S. 545 (2002) -- which allowed judicial factfinding of minimum mandatory sentences -- should be overruled. Not only did the Court overrule *Harris*, it also overruled *McMillan*'s distinction between "elements" and "sentencing factors" upon which *Almendarez-Torres* was founded. See *Alleyne*, 133 S. Ct. at 2156-57; *id.* at 2164 (Sotomayor, J., concurring) ("I join the opinion of the Court, which persuasively explains why . . . *McMillan* [was] wrongly decided."); *id.* at 2165 (Sotomayor, J., concurring) (*McMillan*'s "distinction between 'elements' and 'sentencing factors' . . . was undermined by *Apprendi*"); *id.* at 2166 (Sotomayor, J., concurring) ("The Court overrules *McMillan* and *Harris* because the reasoning of those decisions has been thoroughly undermined by intervening decisions.").

Instead of drawing a constitutional distinction between a "sentencing factor" and an "element," *Alleyne* instructs: "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." 133 S. Ct. at 2155. See also *id.* at 2162 ("[T]he essential Sixth

¹ *Alleyne* did not revisit *Almendarez-Torres*, only "[b]ecause the parties d[id] not contest th[e] decision's vitality." *Alleyne*, 133 S. Ct. at 2160 n.1.

Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury."); *id.* at 2162-63 ("The essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt."). In other words, while *Almendarez-Torres* relied upon *McMillan* to hold that the Constitution does not impose a requirement that "any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement," *Almendarez-Torres*, 523 U.S. at 247, *Alleyne* overruled *McMillan* to hold that the Constitution does require that "any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 133 S. Ct. at 2155. Thus, *Almendarez-Torres* should be overruled because, just as with *Harris*, "*stare decisis* does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law." *Alleyne*, 133 S. Ct. at 2165 (Sotomayor, J., concurring) (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)).

Even since *Alleyne*, there has been renewed doubt over *Almendarez-Torres*'s viability. In *Descamps v. United States*, where the Court addressed the approach for determining whether a past conviction increases the sentences of certain defendants under the Armed Career Criminal Act (ACCA), Justice Thomas explained that allowing a judge to make a finding that raises a defendant's sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant "runs afoul of *Apprendi v. New Jersey*." 133 S. Ct. 2276, 2294 (2013) (Thomas, J., concurring in the judgment) (internal citations omitted). Citing his concurrence in *Shepard v. United States*, 554 U.S. 13, 27 (2005), Justice Thomas declared that the "only reason *Descamps*' ACCA enhancement is before us is 'because this Court has not yet reconsidered *Almendarez-Torres v. United States*, which draws an exception to the *Apprendi* line of cases for judicial factfinding that concerns a defendant's prior convictions.'" *Descamps*, 133 S. Ct. at 2295 (citing *Shepard*, 554 U.S. at 27). Though he concurred in the *Descamps* opinion, Justice Thomas clarified that "judicial factfinding increases the statutory maximum in violation of the Sixth Amendment" and that his concurrence in the judgment was only "because today's opinion at least limits the situations in which courts make factual determinations about prior

convictions." *Id.* The time has come for this Court to explicitly reexamine and clarify the viability of *Almendarez-Torres*.

Petitioner's case presents the perfect vehicle to revisit *Almendarez-Torres*. Petitioner unquestionably preserved a Fifth Amendment claim that the indictment failed to allege a prior conviction, and a Sixth Amendment claim that a prior conviction was not proven at trial beyond a reasonable doubt. Nor could it be disputed that the indictment contained no reference to a prior conviction, or that the government produced no evidence of a conviction at trial. And any chance of the issue becoming moot is unlikely: Petitioner will not be released from custody until September 7, 2016, but even then he will begin a term of supervised release of three years, which is two years above the statutory maximum alleged in the indictment and proven at trial. In other words, Petitioner will be serving his illegal sentence until the latter part of 2019.

Moreover, intervention by the Court is necessary because lower courts are instructed to abstain from resolving tension between the Court's decisions. See *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own

decisions.") (citation and quotation omitted). Thus, no other tribunal can take the step necessary to right a pervasive, constitutional distortion affecting at a minimum tens of thousands of criminal cases every year. As such, the Court should grant certiorari to resolve this important federal question. See Sup. Ct. R. 10(c).

IV.

Conclusion

On the basis of the foregoing, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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