No. 04-

IN THE

Supreme Court of the United States

WILTON ANTONIO CERNA-SALGUERO,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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March 17, 2005

QUESTION PRESENTED FOR REVIEW

Whether this Court should overrule *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998).

PARTIES TO THE PROCEEDINGS

All parties to the proceeding are listed in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wilton Antonio Cerna-Salguero respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is not yet published in the *Federal Reporter*, but is available at 2005 WL 486707, and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a-2a. The judgment of the district court is reproduced in pertinent part at Pet. App. 3a-4a, and a transcript of that court's sentencing hearing is reproduced at Pet. App. 5a-13a.

JURISDICTION

The court of appeals entered its judgment on March 3, 2005. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY OR OTHER PROVISIONS INVOLVED

Relevant portions of the Sixth Amendment to the United States Constitution and 8 U.S.C. § 1326 are set forth in the Appendix. Pet. App. 14a-15a.

STATEMENT

This Court should grant certiorari to overrule *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). That decision is fundamentally incompatible with the Sixth Amendment principles expressed in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny, and has been disapproved by a majority of this Court. Its validity was called into question by five members of this Court just two years after it was decided; it simply has not been formally overruled. Now that the limits of *Apprendi* have been tested and its fundamental rationale repeatedly reaffirmed,[1] the time is ripe to revisit the now-anomalous decision in *Almendarez-Torres*. Such review is particularly timely, given the recent reconfirmation by a member of the *Almendarez-Torres* majority that that case was wrongly decided and should be reconsidered. See *Shepard* v. *United States*, __ S. Ct. __, 2005 WL 516494, at *9 (Mar. 7, 2005) (Thomas, J., concurring in part and concurring in the judgment).

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[1] *See United States* v. *Booker*, 125 S. Ct. 738, 748-49, 753 (2005); *Blakely* v. *Washington*, 124 S. Ct. 2531, 2536-37 (2004); *Schriro* v. *Summerlin*, 124 S. Ct. 2519, 2522 (2004); *Ring* v. *Arizona*, 536 U.S. 584, 588-89, 602 (2002); *Harris* v. *United States*, 536 U.S. 545, 562-67 (2002) (plurality).

No matter how clear it is, including to lower-court judges, that *Almendarez-Torres* is inconsistent with this Court's Sixth Amendment jurisprudence, only this Court can overrule *Almendarez-Torres*. *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). And until this Court takes that final step in the process of giving the Sixth Amendment jury right its full effect, defendants like Mr. Cerna-Salguero will continue to receive and be forced to serve unconstitutional sentences. This case provides the proper vehicle for revisiting *Almendarez-Torres*, and the Court should grant review of the issue now.

1. On April 28, 2004, Wilton Antonio Cerna-Salguero was indicted under 8 U.S.C. § 1326(a) as an "illegal alien, without proper consent, being found in the United States following deportation." Pet. App. 18a-19a (Indictment) (capitalization omitted). Section 1326(a) carries a maximum penalty of two years' imprisonment. The indictment did *not*, however, allege that Cerna-Salguero's "removal was subsequent to a conviction for commission of an aggravated felony," a fact that would increase his exposure from two years' imprisonment to a maximum of 20 years. 8 U.S.C. § 1326(b)(2).

Cerna-Salguero subsequently pled guilty to violating § 1326(a). Pet. App. 3a (Judgment). He was sentenced, however, to 57 months imprisonment pursuant to § 1326(b)(2)—nearly three times the two-year maximum permitted by § 1326(a)—on the basis of an alleged prior conviction. *Id.* at 4a (Judgment). Cerna-Salguero repeatedly objected to the imposition of the sentence on this basis. *Id.* at 16a-17a (Letter objection to PSR); *id.* at 8a-9a (Sentencing Transcript). At no point did Cerna-Salguero admit the existence of the prior conviction, nor has the government ever claimed that he did so.

2. On appeal, Cerna-Salguero argued that he "has a Sixth Amendment right to a jury trial for violating and being sentenced pursuant to title 8 § 1326(b)(2)." Appellant's Br. at 1,

United States v. *Cerna-Salguero*, No. 04-3474 (8th Cir. filed Nov. 18, 2004) (capitalization omitted); see also *id.* at 3 (arguing that Cerna-Salguero must "be indicted and given a jury trial under the Sixth Amendment"). He noted that although *Almendarez-Torres* forecloses this argument and never has been overruled, one member of *Almendarez-Torres*' five-Justice majority subsequently wrote that that case was wrongly decided. *Id*. The government responded simply that *Almendarez-Torres* remains binding precedent. Mot. for Summ. Affirmance and to Stay Briefing Schedule at 2, 5-6, *United States* v. *Cerna-Salguero*, No. 04-3474 (8th Cir. filed Dec. 1, 2004).

The Eighth Circuit affirmed in a brief published opinion. Pet. App. 1a-2a. It relied upon cases in which it previously had identified the logical tension between *Apprendi* and *Almendarez-Torres*, see *id.* at 2a (citing *United States* v. *Perez-Perez*, 337 F.3d 990, 997 (8th Cir. 2003)), but it acknowledged that it was bound by *Almendarez-Torres* until this Court acts.

REASONS FOR GRANTING THE PETITION

I. *ALMENDAREZ-TORRES* IS INCOMPATIBLE WITH THIS COURT'S SUBSEQUENT DECISIONS IN *APPRENDI* AND ITS PROGENY.

1. Like the present case, *Almendarez-Torres* concerned the interpretation of 8 U.S.C. § 1326, which prohibits reentry by removed aliens. Section 1326(a) establishes a sentence of up to two years for one who enters (or attempts to enter) the United States after previously having been removed or denied entry. Section 1326(b) provides that, upon proof of various additional factors—such as removal following "conviction for commission of an aggravated felony," *id*. § 1326(b)(2)—a much harsher sentence may be imposed. In *Almendarez-Torres*, a bare majority of the Court concluded that interpreting § 1326(b) as a "sentencing factor" (rather than an "ele-

ment") that need not be indicted or proved to the jury raised no doubts about the statute's constitutionality. 523 U.S. at 239-47. In short, the Court held that the sentence to which a defendant is exposed may constitutionally be increased on the basis of prior convictions that were not alleged in the indictment. *Id.*

Four members of the Court dissented, arguing that such an interpretation of § 1326 would indeed raise a "difficult constitutional issue." *Id.* at 249 (Scalia, J., dissenting). Although the dissenters did not reach this "difficult question"—namely, "whether the Constitution requires a fact which substantially increases the maximum permissible punishment for a crime to be … charged in the indictment, and found beyond a reasonable doubt by a jury," *id.* at 248—they strongly hinted at the proper answer: "[I]t is genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject," *id.* at 251.

Three of the *Almendarez-Torres* dissenters did reach the "difficult question" later that same Term, and concluded that *Almendarez-Torres* "was … a grave constitutional error affecting the most fundamental of rights." *Monge* v. *California*, 524 U.S. 721, 741 (1998) (Scalia, J., dissenting, joined by Souter and Ginsburg, JJ.). The fourth *Almendarez-Torres* dissenter hinted at the same result. *Id.* at 736-37 & nn. 5, 7 (Stevens, J., dissenting).

2. The very next Term, the Court began to reverse course on the interpretation of the Sixth Amendment that formed the basis for *Almendarez-Torres*. In *Jones* v. *United States*, the Court considered whether 18 U.S.C. § 2119, the federal carjacking statute, "define[s] three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict." 526 U.S. 227, 229 (1999). The Court concluded that the statute created three separate

offenses. *Id.* Its analysis rested in large measure upon the conclusion that constitutional doubt would indeed be raised by "judicial factfinding by a preponderance [that] support[s] the application of a provision that increases the potential severity of the penalty for a variant of a given crime." *Id.* at 242-43. Where *Almendarez-Torres* saw no constitutional doubt, *Jones* found such doubt dispositive.

Just one Term after *Jones*, and a mere two Terms after *Almendarez-Torres*, the Court in *Apprendi* v. *New Jersey* addressed the constitutionality of a New Jersey statute that heightened sentences upon a judicial finding that a crime was committed with a racially biased purpose. In striking down the statute, the Court announced the rule that now governs the constitutionality of judicial factfinding: "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." 530 U.S. at 490.

With regard to *Almendarez-Torres*, the Court followed its ordinary practice of not overruling a prior decision unless the prior decision's validity is squarely presented. *Id.* at 490 (declining to revisit *Almendarez-Torres* because the petitioner did "not contest the decision's validity"). But, because *Almendarez-Torres* was logically inconsistent with the rule it was announcing, the Court had to carve out a special exception to *Apprendi* when "the fact of a prior conviction" is at issue. In the course of so doing, however, the Court recognized that *Almendarez-Torres* was on shaky ground. It described *Almendarez-Torres* as "at best an exceptional departure from … historical practice." *Id.* at 487. It further observed that "it 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." *Id.* at 489-90 (footnote omitted). And it even identified reasons that *Almendarez-Torres* was wrongly decided, including some

that had been set forth in the *Almendarez-Torres* dissent. *Id.* at 489 & n.15.

In a concurring opinion, one of the five Justices in the *Almendarez-Torres* majority wrote that *Almendarez-Torres* had been wrongly decided. Justice Thomas determined that "the Constitution requires a broader rule than the Court adopts," *id.* at 499 (Thomas, J., concurring)—*viz.*, "*every* fact that is by law a basis for imposing or increasing punishment" must be indicted and proved to a jury beyond a reasonable doubt, *id.* at 501 (emphasis added). In short, "the fact of a prior conviction is an element under a recidivism statute." *Id.* at 521. Thus, for some five years a majority of this Court has believed that *Almendarez-Torres* was wrongly decided. See *Shepard*, 2005 WL 516494, at *9 (Thomas, J., concurring in part) ("*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.").

3. After *Apprendi*, *Almendarez-Torres* has functioned as "an exception to the *Apprendi* line of cases for judicial fact-finding that concerns a defendant's prior convictions." *Id.*; see, *e.g.*, *United States* v. *Booker*, 125 S. Ct. 738, 748 (2005) (maintaining the *Almendarez-Torres* exception: "'[o]ther than the fact of a prior conviction…'"); *Blakely* v. *Washington*, 124 S. Ct. 2531, 2536 (2004) (same). But nothing in the rule of *Apprendi*—neither its purposes nor the historical practice that undergirds it—admits of a principled exception for the fact of a prior conviction. *Almendarez-Torres* is inconsistent with *Apprendi* and with Sixth Amendment values, and should be overruled.

The Sixth Amendment jury trial right "is meant to ensure [the people's] control in the judiciary," *id.* at 2539, and thereby to forestall "the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases," *Booker*, 125 S. Ct. at 753. This "fundamental reservation of

power in our constitutional structure" means that "the judge's authority to sentence derives wholly from the jury's verdict." *Blakely*, 125 S. Ct. at 2538-39. *Apprendi* recognizes and gives force to this division of power by requiring that the sentence imposed by the judge must fall within the range authorized by the jury. 530 U.S. at 482-83. Judicial determination of *any* fact that increases the punishment to which a defendant is exposed violates this principle. *Blakely*, 125 S. Ct. at 2538; *Ring* v. *Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt").

This principle has equal force when the judge-found fact that increases a defendant's exposure to punishment is the existence of a prior conviction. The fact of prior conviction is logically indistinguishable from any other "fact" within the meaning of *Apprendi*. When a judge finds a fact in order to increase a defendant's exposure to punishment—whether the fact is a prior conviction or a drug quantity—the judge arrogates the power to impose a sentence that is not authorized by the jury. And in so doing, the judge does violence to the structural constraints that the Sixth Amendment requires. See *Almendarez-Torres*, 523 U.S. at 258 (Scalia, J., dissenting) ("there is no rational basis for making recidivism an exception") (emphasis omitted); *Apprendi*, 530 U.S. at 521 (Thomas, J., concurring) ("If a fact is by law the basis for imposing or increasing punishment—for establishing or increasing the prosecution's entitlement—it is an element…. When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute."); cf. *id.* at 489-90 (opinion of the Court) ("it is arguable that … a logical application of our reasoning today should apply if the recidivist issue were confronted").

The recidivism exception of *Almendarez-Torres* is likewise unjustified by historical practice. The principle of *Apprendi* depends upon a long historical tradition. See *id.* at 478-84; *id.* at 501-18 (Thomas, J., concurring). Nothing in that tradition supports a distinction between "the fact of a prior conviction" and all other facts that increase the punishment to which a defendant is exposed. On the contrary, "there [is] a tradition of treating recidivism as an element" that "stretches back to the earliest years of the Republic." *Id.* at 506-07 (Thomas, J., concurring). "Courts treated the fact of a prior conviction just as any other fact that increased the punishment by law." *Id.* at 507; *Almendarez-Torres*, 523 U.S. at 256-57, 261 (Scalia, J., dissenting); see also *Apprendi*, 530 U.S. at 489 & n.15.[2]

In short, *Almendarez-Torres* is supported by neither principle nor practice. This Court should grant certiorari to correct that decision's anomalous interpretation of the Sixth Amendment, which only this Court can correct.

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THIS QUESTION.

Several aspects of this case make it a particularly good vehicle to reconsider *Almendarez-Torres*. *First*, Cerna-Salguero has preserved the argument that the government's failure to indict him under § 1326(b) violated his Sixth Amendment rights and that *Almendarez-Torres* was wrongly decided. See *supra* at 2-4. His diligence in this regard distinguishes this case from innumerable others in which the error is not preserved and review would be limited to plain error.

Second, the conviction below was premised on the same statute that was at issue in *Almendarez-Torres*—namely, 8 U.S.C. § 1326(a), (b). This means that the continued valid-

[2] The recidivism exception also cannot be justified on the theory that indicting and proving prior convictions will prejudice the defendant before the jury. Even were this practical consideration relevant to the constitutional analysis, the defendant can always waive his or her *Apprendi* rights. *Shepard*, 2005 WL 516494, at *8 n.5 (plurality).

ity of *Almendarez-Torres* will be squarely presented, for there can be no attempt to distinguish *Almendarez-Torres* on the basis of a claimed difference in an underlying statute.

This is no idle concern. Several cases in the *Apprendi* line, including *Almendarez-Torres* itself, have required the Court to address the predicate question whether Congress meant the statutory factor at issue to constitute an element of a separate offense. See *Harris* v. *United States*, 536 U.S. 545, 552-56 (2002); *Castillo* v. *United States*, 530 U.S. 120, 123-31 (2000); *Jones*, 526 U.S. at 232-39; *Almendarez-Torres*, 523 U.S. at 229-37. That question is logically antecedent to any analysis of *Apprendi* and *Almendarez-Torres*, for when the statutory provision is an element of a separate offense, then the failure to charge the separate offense renders the conviction invalid. See *United States* v. *Gaudin*, 515 U.S. 506, 509-10 (1995); *e.g.*, *United States* v. *Jackson*, 368 F.3d 59, 67 (2d Cir. 2004). In any such case, *Almendarez-Torres* will not be reached because the case can be resolved on the basis of the predicate statutory interpretation. This issue will lurk in every petition challenging *Almendarez-Torres* that depends on a statute other than § 1326. And, even when a statute is interpreted in a fashion that does permit the Court to reach *Almendarez-Torres*, such a case will be unnecessarily complicated because the Court will be forced to perform an unnecessary statutory analysis.

Here, there is no such barrier to review. Section 1326 was definitively interpreted in *Almendarez-Torres*. (That the constitutional rule of *Almendarez-Torres* is of doubtful validity provides no basis to reinterpret § 1326. See *Harris*, 536 U.S. at 556.[3]) Thus, whereas the continuing vitality of *Almen-*

[3] Conversely, given the now clear constitutional rule of *Apprendi*, the interpretive principle that statutes should be read in a way that preserves their constitutionality may mean that other recidivism statutes that have not been authoritatively construed by this Court may be construed to avoid deciding the continued validity of *Almendarez-Torres*. Under such circumstances, a case (like this one) presenting the same statute at issue in

darez-Torres may not be reached in many cases that purport to present that issue, there can be no question on that score here.

Third, it is of no moment that this case does not stem from a conflict among the courts of appeals, for no such conflict will ever arise. Until this Court overrules *Almendarez-Torres*, the lower courts are bound to follow that decision. *State Oil Co.*, 522 U.S. at 20; *Rodriguez de Quijas*, 490 U.S. at 484. To be sure, the lower courts have recognized the tension between *Almendarez-Torres* and the rule of *Apprendi*. *E.g.*, *United States* v. *Ordaz*, 398 F.3d 236, 241 (3d Cir. 2005). But every single court of appeals has properly recognized that it is bound to apply *Almendarez-Torres*.[4] And in obeying this Court, those courts have—according to five members of this Court—been imposing unconstitutional sentences. See *Shepard*, 2005 WL 2005 WL 516494, at *9 (Thomas, J., concurring in part).

* * * *

Almendarez-Torres was wrongly decided. Called into question from its inception and disapproved by a majority of this Court shortly thereafter, that decision is incompatible with the Sixth Amendment values expressed in *Apprendi*.

Almendarez-Torres is potentially the only vehicle for reviewing the continued validity of that case.

[4] *See United States* v. *Terry*, 240 F.3d 65, 73-74 (1st Cir. 2001); *United States* v. *Latorre Benavides*, 241 F.3d 262, 263-64 (2d Cir. 2001) (per curiam); *United States* v. *Weaver*, 267 F.3d 231, 250-51 (3d Cir. 2001); *United States* v. *Sterling*, 283 F.3d 216, 220 (4th Cir. 2002); *United States* v. *Rodriguez-Montelongo*, 263 F.3d 429, 434-35 (5th Cir. 2001); *United States* v. *Gatewood*, 230 F.3d 186, 192 (6th Cir. 2000); *United States* v. *Skidmore*, 254 F.3d 635, 642 (7th Cir. 2001); *United States* v. *Raya-Ramirez*, 244 F.3d 976, 977 (8th Cir. 2001); *United States* v. *Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2001); *United States* v. *Wilson*, 244 F.3d 1208, 1216-17 (10th Cir. 2001); *United States* v. *Guadamuz-Solis*, 232 F.3d 1363, 1363 (11th Cir. 2000) (per curiam); *United States* v. *Miller*, 395 F.3d 452, 456-57 (D.C. Cir. 2005).

Now is the time to harmonize the dissonance between *Almendarez-Torres* and *Apprendi*. The rule of *Apprendi* has been tested, its boundaries solidified, and its basic premises reaffirmed. With this fundamental work done, the Court should revisit *Almendarez-Torres* and correct that vestige of a rejected line of reasoning. For all these reasons, this is the "appropriate case" in which to "consider *Almendarez-Torres*' continuing viability." *Shepard*, 2005 WL 516494, at *9 (Thomas, J., concurring in part). In the meantime, hundreds, if not thousands, of unconstitutional sentences are being imposed upon defendants like Cerna-Salguero, and no court other than this one has the power to prevent it. The Court should act now and in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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