

No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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DAVID FEHR HARDER,  
*Petitioner*

v.

UNITED STATES OF AMERICA,  
*Respondent*

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

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PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

- I. Whether all facts – including the fact of a prior conviction – that increase a defendant's statutory maximum must be pleaded in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt?

PARTIES

David Fehr Harder is the Petitioner; he was the defendant-appellant below.

The United States of America is the Respondent; it was the plaintiff-appellee below.

## TABLE OF CONTENTS

Question Presented .....	ii
Parties.....	iii
Table of Contents.....	iv
Index to Appendices.....	v
Table of Authorities .....	vi
Opinions Below.....	1
Jurisdictional Statement.....	1
Constitutional and Statutory Provisions Involved .....	1
Statement of the Case .....	4
Reasons for Granting the Writ.....	5
This Court should use this case to answer the reoccurring, important question whether all facts – including the fact of a prior conviction – that increase a defendant’s statutory maximum must be pleaded in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt? .....	5
Conclusion .....	9

INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas

## TABLE OF AUTHORITIES

### Cases

<i>Alleyne v. United States</i> , 133 S. Ct. 2151 (2013) .....	5, 6, 7, 8
<i>Almendarez-Torres v. United States</i> , 523 U.S. 224 (1998) .....	<i>passim</i>
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000) .....	<i>passim</i>
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004) .....	6
<i>Cunningham v. California</i> , 549 U.S. 270 (2007) .....	8
<i>Descamps v. United States</i> , 133 S. Ct. 2276 (2013) .....	5
<i>Dretke v. Haley</i> , 541 U.S. 386 (2004) .....	6
<i>James v. United States</i> , 550 U.S. 192 (2007) .....	6
<i>Nijhawan v. Holder</i> , 129 S. Ct. 2294 (2009) .....	6
<i>Rangel-Reyes v. United States</i> , 547 U.S. 1200 (2006) .....	6
<i>Shepard v. United States</i> , 544 U.S. 13 (2005) .....	5, 6, 8

### Statutes

8 U.S.C. § 1326 .....	1, 5
8 U.S.C. § 1326(a) .....	4
8 U.S.C. § 1326(b) .....	5, 6, 9
28 U.S.C. § 1254(1) .....	1

### Rules

Sup. Ct. R 13.1 .....	1
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### Miscellaneous

4 W. Blackstone, <i>Commentaries on the Laws of England</i> 343 (1769) .....	6
1 J. Bishop, <i>Criminal Procedure</i> § 87, p 55 (2d ed. 1872) .....	6
J. Archbold, <i>Pleading and Evidence in Criminal Cases</i> 44 (15th ed. 1862) .....	6

### United States Constitution

U.S. Const. amend. V .....	2
U.S. Const. amend. VI .....	3

## PETITION FOR A WRIT OF CERTIORARI

Petitioner David Fehr Harder respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

### OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. David Fehr Harder*, No. 18-10140, 745 Fed. Appx. 222 (5<sup>th</sup> Cir. December 12, 2018)(unpublished), and is provided in the Appendix to the Petition. [Appx. A].

### JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on December 12, 2018. See SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

### CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

8 U.S.C. § 1326 provides in part:

- (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 or any prior Act,

shall be fined under title 18, United States Code, 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, United States Code, 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 235(c) [8 USCS § 1225(c)] because the alien was excludable under section 212(a)(3)(B) [8 USCS § 1182(a)(3)(B)] or who has been removed from the United States pursuant to the provisions of title V [8 USCS §§ 1531 et seq.], 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, United States Code, and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.]; or

(4) who was removed from the United States pursuant to section 241(a)(4)(B) [8 USCS § 1231(a)(4)(B)] 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, United States Code, 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.

The Fifth Amendment to the United States Constitution provides:

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; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution 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 defense.

### STATEMENT OF THE CASE

The government indicted David Fehr Harder, Petitioner, on one count of Illegal Reentry after Removal from the United States, but did not specify that he would be subject to the enhanced penalty for re-entry following a felony conviction. Rather, the indictment stated that he had violated 8 U.S.C. 1326(a), which specifies a two year maximum penalty. He entered a guilty plea. Upon finding that Petitioner had in fact been convicted of a felony or aggravated felony before his last removal, the district court imposed a sentence of 37 months.

Petitioner appealed, arguing the district court had wrongly determined his statutory maximum at twenty years rather than ten. The court of appeals summarily affirmed.

## REASONS FOR GRANTING THE WRIT

This Court should use this case to answer the reoccurring, important question whether all facts – including the fact of a prior conviction – that increase a defendant's statutory maximum must be pleaded in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt?

### *Introduction.*

Petitioner was subjected to an enhanced statutory maximum under 8 U.S.C. §1326(b) because the removal charged in the indictment followed an aggravated felony conviction. Petitioner's sentence thus depends on the judge's ability to find the existence and date of a prior conviction, and to use that date to increase the statutory maximum. This power was affirmed in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that the enhanced maximums of 8 U.S.C. § 1326 represent sentencing factors rather than elements of an offense, and that they may be constitutionally determined by judges rather than juries. See *Almendarez-Torres*, 523 U.S. at 244.

This Court, however, has repeatedly limited *Almendarez-Torres*. See *Alleyne v. United States*, 133 S.Ct. 2151, 2160 n.1 (2013) (characterizing *Almendarez-Torres* as a narrow exception to the general rule that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt); *Descamps v. United States*, 133 S. Ct. 2276, 2295 (2013) (Thomas, J., concurring) (stating that *Almendarez-Torres* should be overturned); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (stressing that *Almendarez-Torres* represented “a narrow exception” to the prohibition on judicial fact-finding to increase a defendant's sentence); *Shepard v. United States*, 544 U.S. 13 (2005) (Souter, J., controlling plurality opinion) (“While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior

judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute."); *Dretke v. Haley*, 541 U.S. 386, 395-396 (2004) (concluding that the application of *Almendarez-Torres* to the sequence of a defendant's prior convictions represented a difficult constitutional question to be avoided if possible); *Nijhawan v. Holder*, 129 S.Ct. 2294, 2302 (2009) (agreeing with the Solicitor General that the loss amount of a prior offense would represent an element of an 8 U.S.C. §1326(b) offense, to the extent that it boosted the defendant's statutory maximum).

Further, any number of opinions, some authored by Justices among the *Almendarez-Torres* majority, have expressed doubt about whether it was correctly decided. See *Apprendi*, 530 U.S. at 490; *Haley*, 541 U.S. at 395-396; *Shepard*, 544 U.S. at 26 & n.5 (Souter, J., controlling plurality opinion); *Shepard*, 544 U.S. at 26-28 (Thomas, J., concurring); *Rangel-Reyes v. United States*, 547 U.S. 1200, 1201(2006)(Stevens, J., concurring in denial of certiorari); *Rangel-Reyes*, 547 U.S. at 1202-03 (Thomas, J., dissenting from denial of certiorari); *James v. United States*, 550 U.S. 192, 231-232 (2007)(Thomas, J., dissenting). And this Court has also repeatedly cited authorities as exemplary of the original meaning of the constitution that do not recognize a distinction between prior convictions and facts about the instant offense. See *Blakely v. Washington*, 542 U.S. 296, 301-302 (2004) (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769), 1 J. Bishop, *Criminal Procedure* § 87, p 55 (2d ed. 1872)); *Apprendi*, 530 U.S. at 478-479 (quoting J. Archbold, *Pleading and Evidence in Criminal Cases* 44 (15th ed. 1862), 4 Blackstone, 369-370).

In *Alleyne*, this 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 proved to a jury beyond a reasonable doubt. 133 S. Ct. at 2162-63. In its

opinion, the Court apparently recognized that *Almendarez-Torres*'s holding remains subject to Fifth and Sixth Amendment attack. *Alleyne* characterized *Almendarez-Torres* as a "narrow exception to the general rule" that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt. *Id.* at 2160 n.1. But because the parties in *Alleyne* did not challenge *Almendarez-Torres*, this Court said that it would "not revisit it for purposes of [its] decision today." *Id.*

The Court's reasoning nevertheless demonstrates that *Almendarez-Torres*'s recidivism exception should be overturned. *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 2159 ("[i]f a fact was by law essential to the penalty, it was an element of the offense"); *see id.* (historically, crimes were defined as "the whole of the wrong to which the law affixes [ ] punishment ... include[ing] any fact that annexes a higher degree of punishment") (internal quotation marks and citations omitted); *id.* at 2160 ("the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted") (internal quotation marks and citation omitted). This 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. 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. *See 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* 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 (quoting *Almendarez-Torres*, 523 U.S. at 230). But this Court did not appear committed to that distinction; it 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 the time is ripe to revisit *Almendarez-Torres*. *See Alleyne*, 133 S. Ct. at 2164 (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 2165. Instead, *Apprendi*'s rule "has become even more firmly rooted in the Court's Sixth Amendment jurisprudence." *Id.* Reversal of precedent is warranted when "the reasoning of [that precedent] has been thoroughly undermined by intervening decisions." *Id.* at 2166.

The validity of *Almendarez-Torres* is accordingly subject to reasonable doubt. If *Almendarez-Torres* is overruled in another case, the result will obviously undermine the use of Petitioner's prior conviction to increase his statutory maximum. Indeed, any *limitation* on the scope of this decision in another case will undercut the decision below. Petitioner's sentence depends on the district court's ability to find not merely that he was previously convicted, but that the date of his prior

conviction preceded the deportation admitted by the plea of guilty. *See* 8 U.S.C. §1326(b) (requiring that the defendant's prior felony conviction precede his removal).

If this Court were to determine that the Constitution limits Petitioner's statutory range of imprisonment to not more than two years, then clearly such constitutional error substantially prejudiced Petitioner as evidenced by his 37 months sentence.

### **Conclusion**

Petitioner respectfully prays that this Honorable Court grant *certiorari*, and reverse the judgment below, and/or vacate the judgment and remand for reconsideration in light of any relevant forthcoming.

Respectfully submitted this 11th day of March, 2019.

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