

No. _____

In the
Supreme Court of the United States

Jesus Rios-Garza,

Petitioner,

v.

United States of America,

Respondent.

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

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 TO THE PROCEEDING

Petitioner is Jesus Rios-Garza, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
INDEX TO APPENDICES	iv
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTORY AND RULES PROVISIONS	1
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THIS PETITION.....	5
I. This Court should decide whether all facts that affect the statutory maximum must be pleaded in the indictment and proven to a jury beyond a reasonable doubt	5
CONCLUSION.....	10

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, 7, 8
<i>Almendarez-Torres v. United States</i> , 523 U.S. 224 (1998)	5, 6, 7, 8, 9
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	5, 6, 7, 8, 9
<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
<i>United States v. Mondragon-Santiago</i> , 564 F. 3d 361 (5th Cir. 2009)	9
<i>United States v. Rios-Garza</i> , 769 F. Appx 186 (5th Cir. May 7, 2019)	1

Statutes

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

Miscellaneous

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

United States Sentencing Guidelines

USSG § 2L1.2	3
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jesus Rios-Garza seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Jesus Rios-Garza*, 769 Fed. Appx. 186 (5th Cir. May 7, 2019) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit was entered on May 7, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This Petition involves 8 U.S.C. § 1326, which states:

(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.

8 U.S.C. § 1326.

STATEMENT OF THE CASE

On February 14, 2018, Jesus Rios-Garza (Rios-Garza) was indicted for one count of illegal re-entry after deportation, in violation of 8 U.S.C. § 1326(a). (ROA.16).¹ On March 14, 2018, Rios-Garza entered a guilty plea pursuant to a written plea agreement (ROA.59-66,89,105). Rios-Garza, in a written factual resume, stipulated to facts ostensibly establishing the elements of the offense. (ROA.60-61).

Rios-Garza was warned in his plea agreement and at the guilty plea hearing that he was facing a possible term of imprisonment of not more than ten years, not more than a \$250,000 fine, a term of supervised release of three years, and a \$100 special assessment. (ROA.92,106).

After the guilty plea, the probation officer prepared a pre-sentence investigation report (PSR). In the PSR, applying the provisions of U.S.S.G. 2L1.2, the probation officer found that Rios-Garza's base offense level was 8. The PSR recommended a 10-level increase for deportation after a conviction for a felony offense for which the sentence imposed was five years or more. With a three-level reduction for acceptance of responsibility, Rios-Garza's total offense level was a 15. (ROA.117-118). The probation officer determined that Rios-Garza had a criminal history score of 4, resulting in a criminal history category III. (ROA.118-119). With a total offense level 15 and a criminal history category II, Rios-Garza had an advisory Guideline imprisonment range of 24-30 months. (ROA.123). Neither party objected to the PSR. Both parties adopted the PSR. (ROA.129-131). Rios-Garza did not object to a sentence

¹ For the convenience of the Court and the parties, Petitioner has included citations to the page number of the record on appeal.

above 24 months or above a one-year term of supervised release based on the argument raised on direct or appeal or in this petition.

At the sentencing hearing, the district court adopted the findings and conclusions in the PSR. (ROA.100). The district court then sentenced Rios-Garza to 40 months imprisonment, a three year term of supervised release, a \$100 mandatory special assessment, no fine and no restitution. (ROA.101)

Petitioner appealed and raised for review the foreclosed argument that a sentence in excess of two years imprisonment or in excess of one year supervised release violated his constitutional rights to indictment, jury trial, and proof beyond a reasonable doubt. The court of appeals affirmed in an unpublished opinion.

REASONS FOR GRANTING THIS PETITION

I. This Court should reconsider *Almendarez-Torres v. United States*.

Petitioner was subjected to an enhanced statutory maximum under 8 U.S.C. §1326(b) because the removal charged in the indictment followed a prior 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 (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); *United States v. Shepard*, 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 (Stevens, J., concurring in denial of certiorari); *Rangel-Reyes*, 547 U.S. at 1202-1203 (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 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 may 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, the result will obviously undermine the use of Petitioner’s prior conviction to increase his statutory maximum. His sentence of 40 months imprisonment and a three-year term of supervised release would exceed the statutory maximum. The petitioner did not raise this issue in the trial court, therefore, it must be reviewed for plain error. *See United States v. Mondragon-Santiago*, 564 F.3d 361 (5th Cir. 2009). A sentence above the statutory maximum would result in plain error. *See id.* If this Court were to reverse *Almendarez-Torres*, He submits that his sentence, which would then exceed the statutory maximum, would constitute plain error.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 5th day of August, 2019.

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