No. _____

In the

Supreme Court of the United States

_____

Raul Zapata-Dominguez,

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 this Court should grant review to consider whether a condition of supervision requiring the Petitioner to permit a probation officer to visit him at any time at home or elsewhere is unreasonable under the Fourth Amendment, constitutionally overbroad and vague, statutorily unreasonable, and a greater deprivation of liberty than is reasonably necessary?

II. 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 Raul Zapata-Dominguez, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Raul Zapata-Dominguez 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. Raul Zapata-Dominguez*, 771 Fed. Appx. 549 (5th Cir. May 31, 2019) (unpublished).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 were entered on May 31, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This Petition involves 18 U.S.C. §§ 3583(d)(1) and (2) which provide the following:

> The Court may order, as a further condition of supervised release, to the extent that such condition –
>
> > (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);
> >
> > (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D),

This Petition also 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.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

The Fifth Amendment to the United States Constitution provides in 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 United States Constitution provides in part:

> 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

STATEMENT OF THE CASE

On February 6, 2018, Mr. Zapata-Dominguez was charged by indictment with one count of illegal re-entry after deportation, in violation of 8 U.S.C. § 1326. (ROA.7).[1] The indictment alleged that on or about January 15, 2018, the Appellant Zapata-Dominguez was an alien who was found in the United States of America after having been denied admission, excluded, deported, and removed therefrom, on or about September 4, 2015, and that he had not received the express consent of the Attorney General of the United States and the Secretary of Homeland Security to reapply for admission to the United States. *Id.* There were no allegations of any of the enhancement provisions under the statute that would raise the statutory maximum above 2 years and that allow for a term of supervised release in excess of one year. See 8 U.S.C. § 1326.

Appellant Armando Zapata-Dominguez pleaded guilty to this indictment without a plea agreement (ROA.54-98). The factual resume and the admonishments at the re-arraignment noted that the term of supervised release was up to three years. (ROA.31,82-83). The district court did not advise Zapata-Dominguez that the Felony provision of 8 U.S.C. § 1326(b)(1) stated an essential element of the offense to which he was pleading guilty. (ROA.*passim*).

For sentencing, neither party objected to the Presentence Report (PSR). (ROA.93). The guideline range was 10 to 16 months. (ROA.94). The district court sentenced Mr. Zapata-Dominguez to 16 months, with a three-year term of

[1] For the convenience of the Court and the parties, the Petitioner has cited to the page number of the record on appeal in the court below.

supervised release. (ROA.96). The district court imposed a condition of supervised release which required Mr. Zapata-Dominguez to "permit a probation officer to visit the defendant at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer." (ROA.47).

REASONS FOR GRANTING THIS PETITION

I. This Court should grant review to consider whether a condition of supervision requiring the Petitioner to permit a probation officer to visit him at any time at home or elsewhere is unreasonable under the Fourth Amendment, constitutionally overbroad and vague, statutorily unreasonable, and a greater deprivation of liberty than is reasonably necessary.

The Fourth Amendment guarantees the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. Warrantless searches are unreasonable and violate the Fourth Amendment. See, e.g., *Payton v. New York*, 445 U.S. 573, 576 (1980).

A person on conditional release, such as parole, probation, or supervised release, does have a limited expectation of privacy, but that expectation of privacy is not eliminated. This Court requires at least reasonable suspicion to conduct a search of a probationer's house. *United States v. Knights*, 534 U.S. 112, 121 (2001). In any event, the "Fourth Amendment's touchstone is reasonableness. . . ." *Id*., at 112.

Congress also requires that the conditions of release be reasonable. Other than the mandatory conditions set forth in 18 U.S.C. § 3583(d), any additional condition must be "reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D)" and must involve "no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D). . . ." 18 U.S.C.A. §§ 3583(d)(1) & (2).

Moreover, a district court must explain the reasons for imposing the conditions of release in a particular case. *See, United States v. Salazar*, 743 F.3d 445, 451 (5th Cir. 2014).

The condition in this case was unreasonable. As stated by one court:

> There are two problems with the condition. The first is "or elsewhere." There is no problem with the probation officer and the defendant agreeing to meet outside the defendant's home, but it is unclear why the probation officer should be allowed to pick a location that may be inconvenient for the defendant. Replacing "elsewhere" with "at some other mutually convenient location designated by the probation officer" would solve this problem. Another solution is found in United States v. Armour, 804 F.3d 859, 864, 870 (7th Cir.2015)—"You shall permit a probation officer to visit you at home or any other reasonable location between the hours of 6:00 AM and 11:00 PM, unless investigating a violation or in case of emergency" (emphasis added). Omitting such a qualification (as the judge did in this case) leaves open at least the theoretical possibility that the probation officer could require the defendant to meet him in an inappropriate location, such as a funeral, or in a remote one, say a place many miles away.

United States v. Henry, 813 F.3d 681, 683-84 (7th Cir. 2016).

Moreover, the Seventh Circuit has criticized district courts for imposing these types of conditions without explaining the need for such a condition in a particular case. *See United States v. Kappes*, 782 F.3d 828, 850-51 (7th Cir. 2015); and *United States v. Thompson*, 777 F.3d 368, 373 (7th Cir. 2015).

Although this issue was not raised in the district court, it was raised on direct appeal. The Fifth Circuit Court of Appeals disposed of the issue by simply finding the error was not plain because the issue had not previously been decided. *See United States v. Zapata*, 771 Fed. Appx. 549, 550 (5th Cir. 2019) (unpublished); *citing United States v. Cabello*, 916 F.3d 543, 544 (5th Cir. 2019).

While it is true that the Fifth Circuit has in some cases held that when it has "not previously addressed an issue, we ordinarily do not find plain error." *United States v. Serrano*, 640 F. App'x 328, 330 (5th Cir. 2016) citing *United States v. Evans*,

587 F.3d 667, 671 (5th Cir.2009) (emphasis added), it is simply not true that a court of appeals cannot find plain error in a case of first impression. *See, United States v. Silva-De Hoyos*, 702 F.3d 843, 849 (5th Cir. 2012); *United States v. Leonard*, 157 F.3d 343, 344–46 (5th Cir.1998); *United States v. Aderholt*, 87 F.3d 740, 744 (1996); *United States v. Aguilar*, 668 F. App'x 625, 626 (5th Cir. 2016) ("the fact that a case is one of first impression does not preclude a finding of plain error . . . .").

In fact, the court in *Kappes* found the error of including this condition without an explanation to be plain error requiring reversal. *Kappes*, 782 F.3d 828, 844. In the present case, there was error, it was plain and it did affect Mr. Zapata-Dominguez's substantial rights. Mr. Zapata-Dominguez is now subject to unreasonable requirements that he allow the probation officer to visit him in her home at any time, and anywhere else at any time, regardless of any suspicion. As the court in *Kappes* necessarily found, this error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Again, the Court of Appeals for the Seventh Circuit specifically found that it was plain error to impose the very condition that is at issue in this case. *See United States v. Kappes*, 782 F.3d at 844. Moreover, the Fifth Circuit's position in this regard – that error cannot be plain unless there has been a previous determination that there was error -- is contrary to this Court's precedent. *See Henderson v. United States*, 568 U.S. 1121, 1130 (2013) (For the purposes of determining whether error is plain, "it is enough that an error be plain at the time of appellate consideration.").

Moreover, the fact that a district court must explain the reasons for imposing the conditions of release in a particular case is not new, novel, or of first impression. *See, Salazar*, id. Nor is there anything new or novel in the Fourth Amendment's guarantees of the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," U.S. Const., amend. IV, and the continued application this right to a person on supervised release. See, *Knights*, id. This Court should grant review to determine whether this condition violates the Petitioner's rights under the Fourth Amendment.

Accordingly, this Court should grant review to determine whether the condition of supervised release at issue violates the Fifth Amendment and to resolve a circuit split on the issue.

II. 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 exceeding a one-year term of supervised release 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, which includes 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; and Henderson v. United States*, 568 U.S. at 1130 (For the purposes of determining whether error is plain, "it is enough that an error be plain at the time of appellate consideration."). If this Court were to reverse *Almendarez-Torres*, Petitioner submits that his sentence, which would then exceed the statutory maximum of one-year supervised release, 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 29th day of August, 2019.

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