No. 19-6094

In the

Supreme Court of the United States

Andres Herrera-Segovia,

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

REPLY TO BRIEF IN OPPOSITION

Christopher Curtis
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
819 Taylor Street, Room 9A10
Fort Worth, TX 76102
(817) 978-2753
Chris_Curtis@fd.org

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 Andres Herrera-Segovia, 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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REASONS FOR GRANTING THIS PETITION

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

The rule of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), deprives criminal defendants of three rights of "surpassing importance," *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), indictment, jury trial and proof beyond a reasonable doubt. It is contrary to the understanding of the constitution at founding, as the sources embraced by *Alleyne v. United States*, 570 U.S. 99 (2013), *Blakely v. Washington*, 542 U.S. 296, 301-302 (2004), and *Apprendi,* attest. *See Alleyne*, 570 U.S. at 109 (noting that in historical sources a "'crime' … consist[ed] of every fact which 'is in law essential to the punishment sought to be inflicted…'") (citing 1 J. Bishop*, New Criminal Procedure* § 84, p. 49 (4th ed. 1895) for the proposition that crime was defined as "that wrongful aggregation [of elements] out of which the punishment proceeds"); id. (citing J. Archbold, Pleading and Evidence in Criminal Cases 128 (5th Am. ed. 1846) for the proposition that a crime was defined "to include any fact that 'annexes a higher degree of punishment'").

Almendarez-Torres has been undermined both by open questioning of its validity in this Court, and by decisions that interpret the prior opinion so narrowly as to call for a different result in *Almendarez-Torres.* As such, it would be a strong candidate for a second look even if it did not resolve a constitutional issue against the recognition of individual rights. But as the "[t]he force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional

protections," *Alleyne* 570 U.S. at 116, n.5, the case for review is all the more compelling

Herrera-Segovia was subjected to an enhanced statutory maximum under 8 U.S.C. §1326(b) because the removal charged in the indictment followed a prior 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.

Herrera-Segovia filed a petition for certiorari urging this Court to reconsider its decision in *Almendarez-Torrez*. Upon directive of this Court, the government has filed a Brief in Opposition to Herrera-Segovia's petition on December 26, 2019.

***Almendarez-Torrez* was wrongly decided**

A number of opinions, some authored by Justices among the *Almendarez-Torres* majority, have expressed doubt about whether the case was correctly decided. *See Descamps v. United States*, 133 S. Ct. 2276, 2295 (Thomas, J., concurring) (noting the judicial fact finding that *Almendarez-Torres* allows for violates the Sixth Amendment); *Apprendi*, 530 U.S. at 489 ([I]t is arguable that *Almendarez-Torres* was incorrectly decided and that a logical application of our reasoning today should apply if the recidivist issue were revisited"); *Dretke v. Haley*, 541 U.S. 386, 395-396 (2004)

(noting that the validity of *Almendarez-Torres* is a difficult constitutional question); *Shepard v. United States*, 544 U.S. 13, at 26 & n.5 (2005) (Souter, J., controlling plurality opinion) (discussing the possible extension of *Apprendi* to prior convictions); *Shepard*, 544 U.S. at 26-28 (Thomas, J., concurring) (calling again for the reconsideration of *Almendarez-Torres*) ; *Rangel-Reyes v. United States*, 547 U.S. 1200, 1201 (Stevens, J., concurring in denial of certiorari) (stating again that *Almendarez-Torres* was wrongly decided); *Rangel-Reyes*, 547 U.S. at 1202-1203 (Thomas, J., dissenting from denial of certiorari) ("Moreover it has long been clear that a majority of this Court now rejects that exception."); *James v. United States*, 550 U.S. 192, 231-232 (2007) (Thomas, J., dissenting) (Stating the belief that 18 U.S.C. § 924(e) unconstitutionally allows for sentencing enhancements based upon judge made findings).

Those doubts are valid. The decision contravenes the original meaning of the Fifth and Sixth Amendments. The authorities cited by this Court 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)) ("The 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous sufferage of 12 of his equals and neighbors.'"); *Apprendi*, 530 U.S. at 478-479 (quoting J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862) , 4 Blackstone 369-370) ("[T]he court must pronounce that judgement, which the law

hath annexed to the crime."). Moreover, sentencing enhancements based upon prior convictions proven to a jury beyond a reasonable doubt existed under state law long before *Almendarez-Torres*. *See Moore v. State*, 227 S.W. 2d 219, 221 (Court of Criminal Appeals of Texas, February 22, 1950) ("The court was without authority to add to the jury verdict a finding that the appellant had been three times convicted of a felony, even though the indictment had alleged three prior convictions.").

The argument that *Almendarez-Torres* was wrongly decided is compelling. This Court should grant certiorari to reconsider that decision.

The statute in question, 8 U.S.C. § 1326(b) requires more of a factual determination than the mere fact of a prior conviction.

Almendarez-Torres, whether correctly or incorrectly decided, has consistently been recognized as a limited exception holding that the mere fact of prior conviction does not have to be presented to the grand jury and proven to a jury beyond a reasonable doubt. *See Almendarez-Torres*, 523 U.S. at 244; *and Alleyne v. United States*, 570 U.S. at 111, 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).

This Court has repeatedly recognized that this exception is limited very narrowly to only the fact of prior convictions. *See Apprendi*, 530 U.S. at 490 (stressing that *Almendarez-Torres* represented "a narrow exception" to the prohibition on judicial fact-finding to increase a defendant's sentence); *Shepard*, 544 U.S. at 25-26 (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."); *Haley*, 541 U.S. at 395-396 (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).

However, the sentencing enhancement provisions of 8 U.S.C. § 1326(b)(1) and (b)(2) require more than proof of the mere fact of prior conviction. First, both provisions require that the prior conviction precede the removal from the United States. Accordingly, both enhancement provisions raise a fact issue: whether the removal or deportation preceded the felony or aggravated felony prior conviction.

Moreover, section 1326(1) requires that the prior conviction be for a felony conviction. A "felony" is usually defined as on offense that carries a punishment of more than one year imprisonment. *See* 18 U.S.C. § 3559. Section 1326(b)(2) requires that the prior conviction be for an "aggravated felony". The term "aggravated felony" as defined in 8 U.S.C. § 1101 (43) contains at a minimum more than 50 offenses that could qualify as "aggravated felonies." *See* 8 U.S.C. §§ 1101(43)(A)-(U).

Accordingly, 8 U.S.C. §§ 1326(b) and (b)(2) require litigation that exceeds the simple fact of a prior conviction. Members of this Court have recognized that the question of whether the sequence of prior convictions falls within the limited

exception of *Almendarez-Torres*, as well as the validity of *Almendarez-Torres* itself, present "difficult constitutional questions." *Haley*, 541 U.S. at 395-96.

Even under the flawed logic of *Almendarez-Torres*, the sentencing enhancements set forth in 8 U.S.C. § 1326(b) require more fact finding than the mere fact of a prior conviction. The narrow exception carved out by *Almendarez-Torres* for sentencing enhancements based upon the judge found facts of a mere fact of a prior conviction should not have been applied to the sentencing enhancements set forth in 8 U.S.C. § 1326(b). Indeed, the narrow construction given to *Almendarez-Torres's* prior conviction exception by subsequent precedent of this Court would likely produce a different result in *Almendarez-Torres* itself. This irreconcilable tension between *Almendarez-Torres* and its progeny calls for guidance from this Court.

The concerns stated by the government about fairness and potential prejudice to the defendant are not realistic dangers.

On page 8 of the Brief in Opposition, the government argues "The rule the petitioner advocates could invite substantial "unfairness." (Brief in Opposition , p. 8). This simply has not occurred in jurisdictions where the jury decides the issue of punishment and must take into account prior convictions. Several states provide for a simple bifurcated proceeding where the jury only decides the issue of punishment after determining the issue of guilt/innocence. See Texas Code of Criminal Procedure, Art. 37.07; Arkansas Code, § 16-97-101; Missouri Rev. Stat § 510.263; Virginia Code of Criminal Procedure § 19.2-295.1. Nothing requires presentation of prior convictions to the jury before considering the punishment.

Moreover, this Court has long recognized that such prejudice can be alleviated through the use of a trial stipulation. *See Old Chief v. United States*, 519 U.S. 172, 179-180 (1997). The practical problems asserted by the government are hardly insurmountable. They are, in any case, not sufficient reason to disregard the Constitution, nor to leave in place constitutional error.

Plain error review does not prohibit the court from granting review in Petitioner's case.

As has been pointed out in the petition for certiorari and the government's brief in opposition, the Petitioner did not raise this issue in the trial court. Rather, the issue was raised for the first time on direct appeal. Accordingly, the Petitioners claim of error must be reviewed by the plain error standard of review. *See United States v. Olano*, 507 U.S. 725, 732 (1993)

If this Court were to reconsider *Almendarez-Torres*, and decide the issue favorably to the Petitioner, then Petitioner's sentence of 36 months imprisonment would exceed the statutory maximum by 12 months. Also, his three-year term of supervised release would exceed the statutory maximum term of one year. A sentence that exceeds the statutory maximum is an illegal sentence, and necessarily constitutes plain error. *See United States v. Vera*, 542 F.3d 457, 459 (5th Cir. 2008).

In determining whether error is plain, "it is enough that the error be plain at the time of appellate consideration." *Henderson v. United States*, 568 U.S. 266, 274 (2013) quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997) ("We agree with petitioner on this point, and hold that in a case such as this – where the law at the

time of trial was settled and clearly contrary to the law at the time of the appeal – it is enough that an error be 'plain' at the time of appellate consideration.").

Should this Court overrule *Almendarez-Torres* and remand this case to the court below, that court is likely to find that the Petitioner suffered substantial prejudice by receiving a sentence in excess of the statutory maximum and that there was an effect on the fairness, integrity and public reputation of the judicial proceedings. *See United States v. Rojas-Luna*, 522 F.3d 502, 507 (5th Cir. 2008) ("Given that Rojas-Luna received a sentence of seventy-three months in prison when, absent constitutional error, his sentence would have been a maximum of two years, we have little difficulty in concluding that Rojas-Luna's substantial rights were affect (sic).").

In the context of a sentencing enhancement based upon a prior removal, the court in *Rojas-Lunas* also recognized that the fourth prong of plain error was satisfied because there had been not jury trial where the facts of the prior removal had been presented to the evidence, distinguishing *Untied States v. Cotton*, 555 U.S.. 625, 627-29 (2002). *See Rojas-Lunas* at 507. That analysis is equally applicable to the facts of Herrera-Segovia's case.

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 9th day of January 2020.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Christopher A. Curtis
Christopher Curtis
Assistant Federal Public Defender
Federal Public Defender's Office
819 Taylor Street, Room 9A10
Fort Worth, Texas 76102
Telephone: (978) 767-2746
E-mail: Chris_Curtis@fd.org

Attorney for Petitioner