No. _____________

In the

Supreme Court of the United States

Edgar Ortega-Limones,

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 Edgar Ortega-Limones, 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

INDEX TO APPENDICES

Table of Authorities

Cases

Statutes

Miscellaneous

PETITION FOR A WRIT OF CERTIORARI

Petitioner Edgar Ortega-Limones 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. Ortega-Limones*, 776 Fed. Appx. 222 (5th Cir. August 27, 2019) (unpublished).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 August 27, 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.

LIST OF PROCEEDINGS BELOW

1. *United States v. Edgar Ortega-Limones*, 4:18-CR-00135-O-1, United States District Court for the Northern District of Texas. Judgement and sentence entered on November 21, 2018. (Appendix B).

2. *United States v. Edgar Ortega-Limones*, 776 Fed. Appx.222 (5th Cir. August 27, 2019), CA No. 18-11548, Court of Appeals for the Fifth Circuit. Judgment affirmed on August 27, 2019. (Appendix A)

STATEMENT OF THE CASE

On June 20, 2018, Edgar Ortega-Limones (Ortega-Limones) was charged by indictment with illegal re-entry after deportation, in violation of 8 U.S.C. § 1326(a). (ROA.7-8).[1] The indictment alleged that on or about June 18, 2017, Ortega-Limones 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 June 30, 2014, 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. (ROA.7). There were no allegations of any of the enhancement provisions under the statute that would raise the statutory maximum above 2 years or allow for a term of supervised release in excess of one year. (ROA.7) 8 U.S.C. 1326(b).

Appellant Ortega-Limones pleaded guilty to this indictment without a plea agreement (ROA.87-88). The factual resume and the admonishments at the re-arraignment noted that the statutory maximum was 10 years and the term of supervised release was up to three years. (ROA.43,92). The district court did not advise Ortega-Limones 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.43,92).

[1] For the convenience of the Court and the parties, Petitioner is citing to the page number of the record on appeal below.

For sentencing, neither party objected to the Presentence Report (PSR). (ROA.102). The total offense level was 15 with a criminal history category IV, resulting in an advisory guideline imprisonment range of 30-to-37 months. (ROA.102-103). The PSR identified no factors that would warrant an upward variance. (ROA.125).

Counsel for Mr. Ortega-Limones argued for mitigation. He filed a motion for downward variance in which he argued that Ortega-Limones had come to the United States when he was 16 years old to live with his brother and work in construction. He argued in the motion that Ortega-Limones now had a family of five that he was unable to support because of his current incarceration. See (ROA.56). At sentencing, counsel argued for a below Guideline sentence, pointing out the same arguments in his motion for downward variance and pointing out that this case was a fairly typical illegal re-entry case. (ROA.103). The district court imposed a sentence of 60 months imprisonment and a three—year term of supervised release. (ROA.104-106). Ortega-Limones' attorney objected to the upward variant sentence. (ROA.107-108).

On Appeal, Ortega-Limones argued, *inter ali*a, that his sentence should have been limited to not more than two years imprisonment and not more than one year supervised release. The court of appeals held that Ortega-Limones's argument that his sentencing range should have been limited to two years imprisonment and a one-year term of supervised release was foreclosed by *Almendarez-Torres*. (Appendix A)

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)(1) because the removal or deportation 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.

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. Petitioner's 60-month sentence and three--year term of supervised release would exceed the statutory maximum of two years imprisonment and one year supervised release. 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*, Petitioner submits that his sentence, which would then exceed the statutory maximum, would constitute plain error. Moreover, 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. 1121, 1130 (2013).

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 25th day of November, 2019.

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