

No. 19-7102

In the Supreme Court of the United States

RUBEN MENDEZ, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

**PETITIONER'S REPLY TO THE BRIEF FOR THE
UNITED STATES IN OPPOSITION**

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INTRODUCTION

Petitioner Ruben Mendez argues that the Court should overrule *Almendarez-Torres v. United States*, 523 U.S. 244 (1998). Because of *Almendarez-Torres*, he was subject to an enhanced sentence under 8 U.S.C. § 1326(b) for a prior felony conviction—even though that prior conviction was not included in the indictment or a fact he admitted when pleading guilty. Instead of receiving no more than 24 months’ imprisonment and one year of supervised release, Mendez was sentenced to 84 months’ imprisonment and three years of supervised release. The reasoning of this Court’s decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013), leads to the conclusion that § 1326(b) is unconstitutional because it permits a sentence above the otherwise-applicable statutory maximum based on facts that are neither alleged in the indictment nor found by a jury beyond a reasonable doubt.

The government opposes certiorari. It argues *Almendarez-Torres* is consistent with *Apprendi* and *Alleyne* because recidivism is a traditional basis for increasing an offender’s sentence and does not relate to the commission of the offense. And, requiring a prior conviction to be alleged in the indictment or found by a jury serves

little practical purpose and invites substantial unfairness by introducing a prior conviction into trial. Last, it claims Mendez's case is a poor vehicle for addressing this issue because review would be for plain error.

Mendez replies.

ARGUMENTS AND AUTHORITIES

I. Justices recognize that the reasoning of *Apprendi* and *Alleyne* could apply with equal force to whether a defendant received a felony conviction before illegally reentering.

The government tries to distinguish *Almendarez-Torres* from the *Apprendi* line of cases, primarily by characterizing *Almendarez-Torres* as limited to recidivist offenses. BIO 6–8. The Court itself has drawn that distinction to avoid reconsidering *Almendarez-Torres*. See, e.g., *Alleyne*, 570 U.S. at 111 & n.1 (describing *Almendarez-Torres* as recognizing “a narrow exception to” the “general rule” that “any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime” (cleaned up)); *Apprendi*, 530 U.S. at 489–90 (framing *Almendarez-Torres* narrowly to avoid overruling it).

But the Court itself indicates that it is not committed to that distinction. See, e.g., *Shepard v. United States*, 544 U.S. 13, 26 n.5 (2005) (acknowledging that its holding undermined *Almendarez-Torres*); *Apprendi*, 530 U.S. at 489–90 (finding it “arguable that *Almendarez-Torres* was incorrectly decided”). That is because *Apprendi* is “now firmly rooted” in Sixth Amendment jurisprudence. *Alleyne*, 570 at 121 (Sotomayor, J., concurring). “Any fact that, by law, increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt.” *Id.* at

103. The exception for prior convictions cannot withstand the strength of this jurisprudence, which was cemented after *Almendarez-Torres* was decided. *See Almendarez-Torres*, 523 U.S. at 242 (rejecting claim that recidivism must be an element of the offense by characterizing cases as establishing “the broad proposition that *sometimes* the Constitution does require (though sometimes it does not require) the State to treat a sentencing factor as an element”). Because of this jurisprudential evolution, *Almendarez-Torres* should be reconsidered.

II. By defending an unconstitutional statute, the government trades one unfairness for another.

The government asks the Court to avoid addressing *Almendarez-Torres* out of a concern for fairness—that introducing a prior conviction risks significant prejudice. BIO 8–9. But the continued application of an unconstitutional statute is itself a grave injustice. Numerous defendants, like Mendez, who are convicted under § 1326 are subject to terms of imprisonment in far greater than the 24-month statutory maximum that would otherwise apply.

Courts are equipped to address any unfairness concerns related to the admission of a prior felony conviction. For instance, parties can stipulate to the conviction to minimize prejudice concerns. *See, e.g., Old Chief v. United States*, 519 U.S. 172, 174

(1997). Courts can also sever a § 1326 count from other counts. *See* Fed. R. Crim. P. 14(a). And, while the issue of prejudice at trial will arise, over 99% of defendants facing immigration charges such as illegal reentry plead guilty.¹ Correcting *Almendarez-Torres* will not disrupt prosecutions but will mean that defendants are convicted and sentenced consistent with the Sixth Amendment.

III. Mendez’s case is an appropriate vehicle to address this recurring issue.

The government argues Mendez’s case is a poor vehicle because review would be for plain error. But this Court reviews cases subject to plain error review. *See, e.g., Tapia v. United States*, 564 U.S. 319, 322 (2011) (finding error and “leav[ing] it to the Court of Appeals to consider the effect of Tapia’s failure to object to the sentence when imposed”).

A case with a preserved error will not better present the issue for review. Had Mendez challenged § 1326(b) at the district court level, the result would not have been different. Nor would the court

¹ U.S. Sentencing Comm’n, Interactive Sourcebook, Guilty Pleas and Trials in Each Primary Offense Category (FY 2017), https://isb.ussc.gov/api/repos/USSC:table_xx.xcdf/generatedContent?table_num=Table11. In fiscal year 2017, nine of the 21,119 defendants charged with immigration offenses were found not guilty. Dep’t of Justice, U.S. Attorneys’ Annual Statistical Report: Fiscal Year 2017, at 13 <https://www.justice.gov/usao/page/file/1081801/download> (Table 3B).

have had reason to develop and discuss the issue. This Court's precedent dictated that § 1326(b) is a sentencing factor, not an element. Only this Court can change that error.

Mendez can succeed on plain error review. This Court's ruling that § 1326(b) is unconstitutional would apply to Mendez's active case on remand. *See Henderson v. United States*, 568 U.S. 266, 269 (2013) (finding plain error "as long as the error was plain as of ... the time of appellate review"). The ruling substantially affects his rights because he received a higher sentence under an unconstitutional statute. *See United States v. Knowles*, 29 F.3d 947, 950–51 (5th Cir. 1994). Had the Court already determined § 1326(b) was unconstitutional, Mendez could not have been sentenced to over 24 months' imprisonment. *Cf. United States v. Hornyak*, 805 F.3d 196, 199 (5th Cir. 2015) (finding ACCA sentence based on unconstitutional residual clause affected defendant's substantial rights). And reducing Mendez's sentence by five years, from 84 months to 24 months, is in the interest of justice. *Cf. id.* Mendez, once a rising athlete, lost his dreams due to a debilitating accident that led to an opioid addiction, producing a criminal history that no longer represents who he is—a hardworking son who risked coming to the United States to earn money to support his ailing mother.

Defendants will continue raising this issue until the Court addresses it. *See* BIO 4 n.1 (collecting recent petitions for certiorari). Illegal reentry is the most prosecuted federal felony.² In fiscal year 2018, over 18,000 people were sentenced for illegal reentry.³ With an average sentence of 10 months' imprisonment,⁴ hundreds are sentenced to over 24 months every year. The Federal Public Defender for the Western District of Texas alone represented 162 illegal reentry defendants sentenced to over 24 months' imprisonment in 2019. This Court should address the constitutionality of those sentences and ultimately overturn *Almendarez-Torres*.

² TRAC-Immigration, Immigration Prosecutions for 2019 (Oct. 31, 2019), <https://tracfed.syr.edu/results/9x705dbb47e5a0.html>.

³ U.S. Sentencing Comm'n, Quick Facts: Illegal Reentry Offenses (Fiscal Year 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY18.pdf.

⁴ *Id.*

CONCLUSION

FOR THESE REASONS, the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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