

No. _____

In the
Supreme Court of the United States

Jesus Julian Corona-Perez,

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?
- II. Whether a prior conviction for a Texas robbery qualifies as a “crime of violence for the purposes of U.S.S.G. §2L1.2?”

PARTIES TO THE PROCEEDING

Petitioner is Jesus Julian Corona-Perez, 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 Jesus Julian Corona-Perez 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 Julian Corona-Perez*, 788 Fed. Appx. 965 (5th Cir. December 27, 2019) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on December 27, 2019. The 90-day deadline for filing a petition for writ of certiorari provided for in Supreme Court Rule 13 has been extended to 150 days from the date of the lower court judgment by order of this Court on March 19, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

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.

This petition also involves the Texas offense of robbery, Texas

Penal Code, Sec. 29.02 which provides the following:

Sec. 29.02. ROBBERY.

(a) A person commits an offense if, in the course of committing theft as defined in Chapter [31](#) and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

(b) An offense under this section is a felony of the second degree.

LIST OF PROCEEDINGS BELOW

1. *United States v. Jesus Corona-Perez*, 3:17-CR-00392-B-1, United States District Court for the Northern District of Texas. Judgment and sentence entered on July 12, 2018. (Appendix B).

2. *United States v. Jesus Corona-Perez*, 788 Fed. Appx. 965 (5th Cir. December 27, 2019), CA No. 18-10933, Court of Appeals for the Fifth Circuit. Judgment affirmed on December 27, 2019. (Appendix A)

STATEMENT OF THE CASE

On July 25, 2019, Jesus Julian Corona-Perez (Corona-Perez) 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 September 16, 2016, Corona-Perez was an alien who was found in the United States of America after having been deported, and removed therefrom on or about February 26, 2010, 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, other than a citation to 1326(b)(1) in the caption of the indictment. (ROA.7).

On October 19, 2017, Appellant Corona-Perez pleaded guilty to this indictment without a plea agreement (ROA.40-41,84). 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, or not more than 20 years if the defendant was removed or deported after a conviction for an aggravated felony. (ROA.36-37,80-81). The district court did not advise that the Felony provision of 8 U.S.C. § 1326(b) stated an essential element of the offense to which Corona-Perez was pleading guilty. (ROA.36-37,80-81).

¹ For the benefit of the Court and the Parties, the Petitioner has cited to the page number of the record below.

After sentencing, a presentence report (PSR) was prepared. The probation officer found that the base offense level, pursuant to U.S.S.G. §2L1.2 was 8. (ROA.120). The offense level was enhanced by 16 levels pursuant to U.S.S.G. §2L1.2(b)(1)(A)(ii) for being deported or removed subsequent to being convicted of a felony crime of violence (Robbery). (ROA.120). After a three-level reduction for acceptance of responsibility, the total offense level was 21. (ROA.120).

Corona-Perez had 13 criminal history points, and was a Criminal History Category VI. (ROA.130). His advisory imprisonment range was 77-96 months. (ROA.136). Corona-Perez filed written objections to the PSR. (ROA.156-162). He objected to the 16-level increase to his offense level on the grounds that his prior robbery conviction should not have been treated as a “crime of violence” for the purposes of the enhancement. (ROA.157).

In an addendum to the PSR, the probation officer rejected Corona-Perez’s objections. (ROA.164-166). The defendant filed an amended objection, reasserting his argument that his prior robbery conviction did not qualify as a “crime of violence,” specifically arguing that a Robbery offense under Texas Penal Code Section 29.02 is not a “crime of violence” because it can be committed recklessly and because the offense can be accomplished without violent or forceful contact. (ROA.191).

In a second addendum to the PSR, the probation officer amended his guideline calculations. The officer found that the 2016 Sentencing Guidelines should have been applied because they resulted in a lower offense level than application of the 2015 version of the Guidelines. *See* (ROA.223-224). The probation officer found that under

the 2016 version of the Guidelines, Corona-Perez's Total Offense Level was 19 (as opposed to 21 under the 2015 version), and his advisory imprisonment range was lowered to 63-78 months. (ROA.225).

As applied by the PSR, under the 2015 version of the Guidelines, the defendant would have received a 16-level enhancement for his prior robbery conviction, which qualified as a "crime of violence". However, if Corona-Perez prevailed on his argument that his robbery conviction was not a "crime of violence," then the 2015 version of the Guidelines would have been more beneficial to him – resulting in a Total Offense Level of 13 and an imprisonment range of 33-41 months. *See* (ROA.224).

At the sentencing hearing, Corona-Perez's attorney persisted in his argument that the prior robbery conviction was not a crime of violence, and under the 2015 version of the Guidelines, his Total Offense Level should have been a level 13 with an advisory imprisonment range of 33-41 months. (ROA.101). Again, the basis of his argument was that a Texas robbery does not qualify as a "crime of violence." *See* (ROA.101-104). The district court overrule the objection. (ROA.107). The district court sentenced Corona-Perez to a term of imprisonment of 70 months and a \$100 mandatory special assessment, with no term of supervised release and no fine. (ROA.110-111). The district court stated it would have imposed a 70 month sentence regardless of its rulings on the objections to the PSR. (ROA.107,110-111).

On appeal, Corona-Perez raised two issues, first that the conviction for a Texas robbery did not qualify as a crime of violence; and second that the statutory maximum term of imprisonment was two years. The Court of Appeals affirmed the

judgement and sentence finding that the first issue was foreclosed by *United States v. Burris*, 920 F.3d 942 (5th Cir. 2019) and finding the second issue was foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *See United States v. Corona-Perez*, 788 Fed. Appx. 965 (5th Cir. Dec. 27, 2020).

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 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 70-month sentence would exceed the statutory maximum of two years imprisonment.

This issue was not raised by Corona-Perez in the trial court. Because this issue was not raised in the district court, it must be reviewed for plain error. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 368-69 (5th Cir. 2009). The lower court may reverse Corona-Perez’s sentence if it finds that (1) the district court erred, (2) its error was plain, and (3) the error affected Corona-Perez’s substantial rights. *See United States v. Mares*, 402 F.3d 511, 520 (5th Cir. 2005) (citing *United States v. Cotton*, 535 U.S. 625, 631 (2002)). If these conditions are met, the court has discretion to reverse Corona-Perez’s sentence if it also finds that the error “seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.* (quoting *Cotton*, 535 U.S. at 631). If this Court were to reverse its holding in *Almendarez-Torres*, the error would be clear and plain and would affect Corona-Perez’s substantial

rights because his 70 month term of imprisonment would exceed the statutory maximum sentence.

II. This Court should grant review to determine whether a Texas robbery qualifies as a “crime of violence” under U.S.S.G. §2L1.2 and, in the alternative, should hold this petition pending the outcome in *United States v. Bordon*, S. Ct. No. 19-510 and *Burris v. United States*, No. 19-6186.

Corona-Perez argued in the trial court and in the Fifth Circuit that the district court erred by treating his prior conviction for a Texas robbery as a crime of violence. Corona-Perez’s offense was completed in September 2016. There was a disagreement at the trial court level as to which version of the Guidelines should apply in this case, the 2015 version or the 2016 version.

The Guidelines provide that the court should apply the version in effect at the time of a defendant’s sentencing unless that version violates the *ex post facto* clause of the United States Constitution. *See* U.S.S.G. §1B1.11. In this case, the offense was completed in September 2016. The 2016 version of the Guidelines went into effect on November 1, 2016. Corona-Perez was sentence on July 13, 2017. The issue in this case revolves around the argument that a Texas robbery offense does not qualify as a “crime of violence” for the purposes of U.S.S.G. §2L1.2. If a Texas robbery does not qualify as a “crime of violence” then the 2015 Guidelines are more favorable to Mr. Corona-Perez, and application of the 2016 version would violated the *ex post facto* clause. *See Peugh v. United States*, 113 S. Ct. 2072, 2084 (2013) (a retrospective

increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation.”)

The Petitioner raised the argument that a Texas robbery conviction does not qualify as a “crime of violence” in the trial court and in the Court of Appeals. The Fifth Circuit held that the argument was foreclosed by *United States v. Burris*, 920 F.3d 942 (5th Cir. 2019). *See United States v. Corona-Perez*, 788 Fed. Appx. at 965. In *Burris*, this Fifth Circuit had held, “Finally, we conclude that § 29.02(a)(2), robbery by threat, also has as an element the attempted or threatened use of physical force.” *Id.*

A petition for certiorari has been filed in *Burris* and is currently pending before this Court. *See Burris v. United States*, No. 19-6186. Moreover, this Court has recently granted certiorari and ordered briefing on the issue of whether an offense that allows for a conviction based upon a *mens res* of recklessness can qualify as a “crime of violence” for the purposes of 18 U.S.C. § 924(e) in *Borden v. United States*, No. 19-5410 (March 2, 2020 order). This Court should hold this Petition pending the outcome in *Borden* and *Burris* because a decision in either of those cases will likely be dispositive of the issue of whether a Texas robbery conviction can qualify as a “crime of violence” under U.S.S.G. §2L1.2. If the petitioners were to prevail in either *Borden* or *Burris* than it would be appropriate for this Court to grant certiorari, vacate the sentence and remand for reconsideration in light of such an opinion (GVR). *See Lawrence v. Chater*, 516 U.S. 163, 166 (1996).

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, and in the alternative, hold this case pending a decision in *Burris v. United States*, No. 19-6186 and *Borden v. United States*, No. 19-5410.

Respectfully submitted this 26th day of May, 2020.

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