No. 19-8561

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

REPLY TO BRIEF IN OPPOSITION

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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. 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. 19-5410 and Burris v. United States, S. Ct. No. 19-6186.

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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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.

Petitioner was sentenced to 70 months imprisonment. He was subjected to the enhanced statutory maximum under 8 U.S.C. §1326(b)(1) because the removal charged in the indictment followed a prior felony conviction. Petitioner's sentence of 70 months imprisonment 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.

Corona-Perez filed a petition for certiorari urging this Court to reconsider its decision in *Almendarez-Torres*. The government has filed a Brief in Opposition to Corona-Perez's petition on August 21, 2020.

***Almendarez-Torres* 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 *Almendarez-Torres* 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 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 suffrage 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.").

Collecting post-*Almendarez-Torres* authority that recognizes its holding, the government treats the prior conviction exception as an uncontroversial proposition in this Court. See Brief in Opposition at p. 7. However, as the above sources illustrate, while *Almendarez-Torres's* bare holding is recognized as current law, the scope of the prior conviction exception has been so thoroughly constricted as to raise questions about whether it would even apply to 8 U.S.C. § 1326. Further, the theoretical underpinnings of the case have been steadily refuted by every case to discuss the historical foundations of the jury trial requirement.

Most recently, this Court's decision in *United States v. Haymond*, ___U.S.__, 139 S.Ct. 2369 (2019), has recognized that bright-line, categorical exclusions from the rule of *Apprendi* may give way when a holistic assessment of a factual finding suggests similarity to a traditional element. Before *Haymond*, every federal court of appeals in the country exempted the findings that led to revocation of supervised release from the rule of *Apprendi*. See Government's Petition for Certiorari in *United States v. Haymond*, No. 17-1672, 2018 WL 3032900, at *29-30 (Filed June 15, 2018)

("Every court of appeals to have addressed the question has concluded that the Sixth Amendment right under the Jury Trial Clause and the related due process right to factual findings beyond a reasonable doubt do not apply to revocations of supervised release and subsequent orders of reimprisonment.") (collecting cases). Yet the *Haymond* court found that the findings supporting revocation – and a mandatory minimum -- under 18 U.S.C. 3583(k) must be proven to a jury rather than found by a judge. *See Haymond*, 139 S. Ct. at 2385. Subsection (k) provides for a mandatory term of five years when persons convicted of registerable sex offenses commit certain sex offenses on supervised release. *See* 18 U.S.C. 3583(k).

In *Haymond*, four members of the Court applied *Apprendi* in a straightforward way, observing that supervised release and subsequent imprisonment represent punishment for the initial offense, and that revocations under Subsection(k) therefore added time to the defendant's minimum and maximum punishment *See Haymond*, 139 S.Ct. at 2379 (Gorsuch, J.)(plurality op). Justice Breyer, however, recognized the traditional authority for judges to revoke parole and probation by a preponderance of the evidence. *See id*. at 2385-2386 (Breyer, J., concurring). His concurring opinion extended that authority to supervised release revocation, but nonetheless concluded that the findings underlying Subsection (k) are "less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach." *Id.* at 2386. This conclusion flowed not merely from the finding's impact on the sentencing range, but on a global assessment of its similarity to traditional elements: the fact that such findings related to a discrete federal offense, that they

triggered mandatory imprisonment, and that they carried such a significant mandatory minimum. *See id.*

Accordingly, it will no longer do to say that some facts are simply exempt from jury trials, whatever impact they may have on their sentence, and however closely they may resemble traditional elements. And a global assessment of the prior conviction finding under 1326(b) may very well suggest that it functions as a disguised element. The finding raises a maximum sentence of two years to one of ten years, a radical 500% increase ordinarily reserved for elements of an aggravated offense.

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

The statute in question, 18 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(b)(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)(1) 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 18 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 18 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.

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 Petitioner's 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 70 months imprisonment

would exceed the statutory maximum term of 24 months imprisonment. 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 that was in excess of the statutory maximum term of imprisonment and three times the maximum term of supervised release. The court below is likely to find that the error affected 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 not been a jury trial where the facts of the prior removal had been

presented in the evidence at trial, 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 Corona-Perez's case.

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. 19-5410 and *Burris v. United States*, S. Ct. No. 19-6186.

In response to the government's opposition to a request for a hold in this case, the petition for certiorari in *Burris* is still currently pending. *See Burris v. United States*, No. 19-6186. Moreover, oral argument has been set in *Bordon* for November 4, 2020. *See Borden v. United States*, No. 19-5410. A decision in either or both of these cases would affect the continued validity of *United States v. Santiesteban-Hernandez*, 469 F.3d 376 (5th Cir. 2006), and ultimately whether a Texas robbery qualifies as a crime of violence for the purposes of U.S.S.G. §2L1.2. Specifically, if the Court in *Burris* finds that a robbery committed recklessly cannot qualify as a "violent felony" for the purposes of 18 U.S.C. § 924(e), then that brings to question whether the Texas Robbery statute falls within the generic definition of robbery, which allows for the commission of a robbery with a reckless *mens res*. Likewise, in *Bordon* this court is also considering whether reckless conduct can qualify as a "violent felony" for the purposes of 924(e). Moreover, if the Court in Burris were to address an alternative definition of "violent felony" (such as addressing the elements clause), a decision could further open Santiesteban-Hernandez up for reconsideration. The argument that a

Texas robbery does not qualify as a crime of violence under section 2L1.2 has been preserve by the Petitioner in the trial court and the court of appeals.

Additionally, the district court's statement that he would have imposed the same sentence should not prevent a remand to the court of appeals for re-consideration in light of a decision in *Bordon* or *Burris*. *See United States v. Redmond*, 965 F.3d 416, 418 (5th Cir. 2020) ("it is not enough for the district court to say the same sentence would have been imposed but for the error.") quoting *United States v. Tanksley*, 848 F.3d 347, 353 (5th Cir. 2017); *see also United States v. Martinez-Romero*, 817 F. 3d 917, 925 (5th Cir. 2016) (Finding no harmless error where district court stated three times that even if the 16-level enhancement was incorrect it would have imposed the same sentence). If the outcome of *Burris* or *Bordon* called into question the validity of *Santiesteban-Hernandez*, the Court should remand this case for the court of appeals to re-consider its decision in light of the change in the law. At that point, the court of appeals would have to consider whether the district court's inoculation statement, and the record as a whole, shows that the district court would have imposed the same sentence for the same reasons, a consideration the court of appeals has not yet made. *See United States v. Redmond*, 965 F.3d at 422.

Corona-Perez continues to urge this Court to hold this Petition pending the outcome in *Borden* and *Burris* because a decision in either of those cases could 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.

Respectfully submitted this 4th day of September, 2020.

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