No. _____

In the Supreme Court of the United States

_____

Edgardo Navarro,

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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QUESTION PRESENTED

I. Can a sentencing court, consistent with the Sixth Amendment's Notice Clause, impose a statutorily enhanced sentence based on the fact of a prior conviction never alleged in the indictment?

PARTIES TO THE PROCEEDING

Petitioner, Edgardo Navarro, was the Defendant-Appellant before the Court of Appeals. Respondent, the United States of America, was the Plaintiff-Appellee.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Edgardo Navarro seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Fifth Circuit's unpublished opinion can be located in the Federal Appendix at *United States v. Navarro*, 790 F. App'x 644 (5th Cir. 2020). The opinion is attached as Appendix A. The district court's judgment is attached as Appendix B.

JURISDICTION

The Court of Appeals issued its panel opinion on January 22, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

This Petition involves the penalty provision in 8 U.S.C. § 1326(b)(2):

> (b) Notwithstanding subsection (a), in the case of any alien described in such subsection—
>
> . . .
>
> (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*;

8 U.S.C. § 1326(b)(2). This petition also involves the Notice Clause of the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . *to be informed of the nature and cause of the accusation*.

U.S. CONST., amend. VI.

LIST OF PROCEEDINGS BELOW

1. *United States v. Edgardo Navarro*, Case No. 4:18-CR-00279-O, United States District Court for the Northern District of Texas. Judgment and sentence entered on April 23, 2019. (Appendix B).

2. *United States v. Edgardo Navarro*, 790 F. App'x 644 (5th Cir. 2020), Case No. 19-10471, Court of Appeals for the Fifth Circuit. Judgment affirmed on January 22, 2020. (Appendix A)

STATEMENT OF THE CASE

The United States recently charged Mr. Navarro with committing a federal crime. A grand jury in the Northern District of Texas returned an indictment alleging illegal reentry after deportation. (ROA.6) (citing 8 U.S.C. § 1326(a)). The indictment alleged specifically that Mr. Navarro was an alien, had been deported in 2012, and was found in the United States in 2018. (ROA.6). According to the indictment, Mr. Navarro had also failed to apply for lawful readmission. (ROA.6). The indictment did not allege any prior convictions. *See* (ROA.6).

Mr. Navarro pleaded guilty. To support the plea, he filed a factual resume. (ROA.25-26). The resume separated the underlying offense into four elements, and Mr. Navarro then stipulated to a series of facts corresponding to each. (ROA.26). The resume, like the indictment, described no prior convictions. *See* (ROA.26).

At sentencing, Mr. Navarro raised a foreclosed objection concerning the maximum term of imprisonment. The charged offense sets the default maximum at two years. 8 U.S.C. § 1326(a). A separate subsection sets a higher maximum if the defendant's "removal was subsequent to" certain criminal convictions. 8 U.S.C. § 1326(b)(1)-(2). Mr. Navarro's presentence report applied one of those enhanced sentencing provisions and set the maximum term of imprisonment at 20 years. (ROA.126) (citing 8 U.S.C. § 1326(b)(2)). Mr. Navarro objected. (ROA.130). He faulted the indictment as constitutionally insufficient and argued that the two-year maximum applied in the absence of a prior-conviction allegation. (ROA.130). He conceded, however, that this Court's opinion in *Almendarez-Torres v. United States*

foreclosed the issue in the government's favor. (ROA.131) (citing 523 U.S. 224, 239 (1998)).

The district court imposed a 27-month term of imprisonment. (ROA.41). All parties agreed that Mr. Navarro's sole objection was foreclosed. (ROA.132-33). The district court accepted this fact and overruled the objection without comment. (ROA.109).

Mr. Navarro raised the same issue on appeal, but again, *Almendarez-Torres* precluded relief. He argued "that the enhancement of his sentence pursuant to 8 U.S.C. § 1326(b)(2) is unconstitutional because the fact of a prior conviction must be charged and proved to a jury beyond a reasonable doubt." *United States v. Navarro*, 790 F. App'x 644, 645 (5th Cir. 2020). The Court of Appeals responded by first accounting for this Court's authority: "The Supreme Court held in *Almendarez-Torres* that for purposes of a statutory sentencing enhancement, a prior conviction is not a fact that must be alleged in an indictment." *Id*. (citing 523 U.S. at 239-47). From there, the Court of Appeals recognized the issue as foreclosed and granted summary affirmance. *Id*.

REASONS FOR GRANTING THIS PETITION

I. This Court should revisit *Almendarez-Torres*.

At the district-court level and on appeal, Mr. Navarro argued against the application of a higher statutory sentencing range based on the fact of a prior conviction. He faulted the government for failing to allege the prior conviction in his indictment, but *Almendarez-Torres* resolved the dispute in the government's favor. *Almendarez-Torres*, however, is ahistorical and out of line with this Court's more recent Sixth Amendment authority. The Court should revisit that opinion.

a. Almendarez-Torres *turned on congressional intent and ignored history.*

Almendarez-Torres v. United States foreclosed Mr. Navarro's sole objection at sentencing and only argument on appeal. There, the defendant challenged the sufficiency of an indictment that failed to allege a prior conviction. 523 U.S. 224, 225 (1998). "In all criminal prosecutions," the Sixth Amendment states, "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. CONST., amend. VI. An indictment satisfies this standard if it "directly, and without ambiguity, disclose[s] all the elements essential to the commission of the offense charged." *Burton v. United States*, 202 U.S. 344, 372 (1906). In *Almendarez-Torres*, the prior conviction affected the statutory maximum, and the defendant argued that it was thereby an element of the offense. 523 U.S. at 225. This Court rejected the argument and instead classified the prior conviction as a "sentencing factor." *Id*. at 235. For support, the Court looked to

congressional intent, rather than historical practice. *See id*. at 228 ("We therefore look to the statute before us and ask what Congress intended.").

b. After Apprendi*, the Sixth Amendment's protections turn on historical practices at common law.*

In *Apprendi v. New Jersey*, this Court jettisoned the *Almendarez-Torres* analysis but preserved its holding. "Any possible distinction between an 'element' of a felony offense and a 'sentencing factor,'" the Court explained, "was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U.S. 466, 478 (2000). In light of this historical guidance, the Court adopted a simpler rule: "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 the jury, and proved beyond a reasonable doubt." *Id*. at 490. The Court rooted the general rule in common-law historical practices, *see id*. at 477-83, but relied on *Almendarez-Torres* to support the prior-conviction exception, *see id*. at 487.

c. This Court should test Almendarez-Torres *against the historical record.*

The prior-conviction exception is persistent and puzzling. The Court continues to recognize its validity, *see, e.g.*, *United States v. Haymond*, 139 S. Ct. 2369, 2377 n.3 (2019), but has never subjected the exception to historical analysis. In contrast, this Court has repeatedly looked to common-law practices to tease out the Sixth Amendment's precise meaning in other contexts. *See, e.g.*, *Southern*

Union Co. v. United States, 567 U.S. 343, 353 (2012) (quoting *Oregon v. Ice*, 555 U.S. 160, 170 (2009)).

Can *Almendarez-Torres* hold up to history? Eighteenth-century English trial records provide good reason to think not. Consider, for example, cases involving "common utterers" of counterfeit money. A 1741 statute made it a crime to "utter, or tender in payment, any false or counterfeit money, knowing the same to be false or counterfeit, to any person or persons," and upon conviction, a first-time offender would "suffer six months imprisonment." *See* Counterfeiting Coin Act 1741 (15 Geo. 2 c.28, s.2). The statute singled out recidivist offenders—in that context, "common utterers"—for additional punishment: "if the same person shall afterwards be convicted a second time," that defendant "shall, for such second offence, suffer two years imprisonment." 15 Geo. 2 c.28, s.2. The trial record from a 1751 prosecution suggests that all parties believed the prior conviction to be an element of the offense charged. That year, a London jury acquitted a woman named Elizabeth Strong after the prosecutor failed to produce a "true copy" of the record to establish the "former conviction" alleged in her indictment. Trial of Elizabeth Strong, (Oct. 16, 1751), Old Bailey Proceedings Online, https://www.oldbaileyonline.org/browse.jsp?id=t17511016-48-defend352&div=t17511016-48#highlight (last visited June 17, 2020). She had been "indicted for being a common utterer of false money," and the allegations included the earlier conviction. *Id*. The prosecutor, however, could not sufficiently prove *that* allegation, and the case fell apart. *Id*. In 1788, a man named Samuel Dring

went to trial on the same charge, and the record establishes similar procedural safeguards. Trial of Samuel Dring, (Sept. 10, 1788), Old Bailey Proceedings Online, https://www.oldbaileyonline.org/browse.jsp?id=t17880910-129-defend1003&div=t17880910-129#highlight (last visited June 17, 2020). Again, the indictment alleged the prior judgment, and this time, the prosecutor admitted "a copy of the prisoner's former conviction" into evidence. *Id*. The prosecutor also called a witness to identify Mr. Dring and establish his identity with regard to the former judgment. *Id*. The parties once more treated the prior conviction as an element, which was formally "charged in the indictment" and "submitted to a jury" for resolution. *See Jones v. United States*, 526 U.S. 227, 232 (1999).

English appellate authorities provide additional support for this historical practice. In *King v. Ballie*, for example, the defendant appealed his conviction after preserving an argument against the sufficiency of the indictment's allegations. 168 Eng. Rep. 300, 301-02 (1786). The 1785 indictment alleged his status as an "incorrigible rogue," a fact that necessarily required the existence of a prior conviction. Justices Commitment Act 1743 (17 Geo. 2, c.5, s.4). In turn, "any person committed as an incorrigible rogue," risked higher punishment upon a subsequent escape or new offense committed "in like manner." 17 Geo. 2, c.5, s.4. In Mr. Ballie's case, the indictment specifically alleged his status as an "incorrigible rogue" and supported the fact by laying out a series of prior convictions. 168 Eng. Rep. at 300-01. The indictment also alleged that Mr. Ballie had "offend[ed] again in like manner" following his most recent escape. *Id*. After conviction at trial, the

defendant attacked the sufficiency of the indictment on appeal and argued that the indictment's allegations did not track the precise language of the sentencing provision in play. *Id.* The judges reviewing the case disagreed. *Id.* Each of the facts necessary to support the recidivist enhancement were "disclosed in the indictment." *Id.* "No technical terms or words of art [were] made necessary to the description of *this offence*," and the facts alleged and proved at trial allowed the appellate judges to infer Mr. Ballie's qualification for an enhanced sentence. *Id.* His challenge to the indictment thus failed. *Id.*

The earliest American authority suggests the same procedure. In *People v. Youngs*, the Supreme Court of New York reviewed an enhanced sentence based on the fact of a prior conviction. 1 Cai. R. 37, 37 (N.Y. 1803). The prosecution had not alleged that fact in the original charge but instead advanced it as a "counterplea" following conviction for the new offense. *Id.* at 37-38. This procedure relieved the prosecution of its burden to prove the prior conviction as part of its case in chief. *Id.* at 38. The defendant objected, *id.* at 39, and the Supreme Court of New York sustained the objection on appeal, *id.* at 40-41. "[T]he method heretofore adopted has been to make the first offence a charge in the indictment for the second," it explained. *Id.*

The Court should account for these historical practices by revisiting *Almendarez-Torres*. In a variety of other contexts, this Court has looked to the common law to determine whether a disputed fact constitutes an element. *See Oregon v. Ice*, 555 U.S. 160, 165 (2009) (quoting *Harris v. United States*, 536 U.S.

545, 557 (2002)); *Southern Union Company v. United States*, 567 U.S. 343, 348 (2012) (quoting *Cunningham v. California*, 549 U.S. 270, 281 (2007)). So far, the Court has shielded *Almendarez-Torres* from historical analysis, but its reticence makes no sense in light of the persistent turn to history in other Sixth Amendment cases. The Sixth Amendment's protections either depend on common-law practices or they do not, but until this Court tests *Almendarez-Torres* against the historical record, the answer remains unclear.

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 June 19, 2020.

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