

No. _____

In the Supreme Court of the United States

Miguel Angel Baez-Castillo,
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

Taylor Wills Edwards "T.W." Brown
Assistant Federal Public Defender
Northern District of Texas
P.O. Box 17743
819 Taylor Street, Room 9A10
Fort Worth, TX 76102
(817) 978-2753
Taylor_W_Brown@fd.org
Texas Bar No. 24087225

QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

Petitioner, Miguel Angel Baez-Castillo, was the Defendant-Appellant before the Court of Appeals. Respondent, the United States of America, was the Plaintiff-Appellee.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING.....	ii
INDEX TO APPENDICES.....	iv
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINION BELOW	1
JURISDICTION.....	1
RELEVANT PROVISIONS	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THIS PETITION	5
I. This Court should revisit <i>Almendarez-Torres</i>	5
a. <i>Almendarez-Torres turned on congressional intent and ignored history</i>	5
b. <i>After Apprendi, the Sixth Amendment's protections turn on historical practices at common law</i>	6
c. <i>This Court should test Almendarez-Torres against the historical record</i>	6
CONCLUSION.....	10

INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit

Appendix B Judgment and Sentence of the United States District Court for the
Northern District of Texas

TABLE OF AUTHORITIES

Constitutional Provisions

U.S. CONST., amend. VI.....	5
-----------------------------	---

Statutes

8 U.S.C. § 1326.....	3
Justices Commitment Act 1743 (17 Geo. 2, c.5).....	8
Counterfeiting Coin Act 1741 (15 Geo. 2, c.28).....	7

Cases

<i>United States v. Haymond</i> , 139 S. Ct. 2369 (2019).....	6
<i>Southern Union Co. v. United States</i> , 567 U.S. 343 (2012)	6-7, 10
<i>Oregon v. Ice</i> , 555 U.S. 160 (2009).....	7, 9
<i>Cunningham v. California</i> , 549 U.S. 270 (2007).....	10
<i>Harris v. United States</i> , 536 U.S. 545 (2002)	9
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	3-4, 6
<i>Jones v. United States</i> , 526 U.S. 227 (1999).....	8
<i>Almendarez-Torres v. United States</i> , 523 U.S. 224 (1998).....	3, 5-6
<i>People v. Youngs</i> , 1 Cai. R. 37 (N.Y. 1803)	9
<i>King v. Ballie</i> , 168 Eng. Rep. 300 (1786).....	8-9
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 Oct. 14, 2020)	8
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 Oct. 14, 2020)	7

PETITION FOR A WRIT OF CERTIORARI

Petitioner Miguel Angel Baez-Castillo 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 opinion is unpublished but can be found in the Federal Appendix at 805 F. App'x 332. In turn, I have attached the Fifth Circuit's opinion as Appendix A, Pet. App. A1-A2, and the district court's judgment as Appendix B, Pet. App. B1-B5.

JURISDICTION

The Court of Appeals issued its panel opinion on May 21, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

This Petition involves a penalty provision found in 8 U.S.C. § 1326:

(b) 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, imprisoned not more than 10 years, or both;

8 U.S.C. § 1326(b)(1). 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. Miguel Angel Baez-Castillo*, Case No. 4:19-CR-58-A, United States District Court for the Northern District of Texas. Judgment and sentence entered on August 24, 2019. (Appendix B).
2. *United States v. Miguel Angel Baez-Castillo*, 805 F. App'x 332 (5th Cir. 2020), Case No. 19-10958, Court of Appeals for the Fifth Circuit. Judgment affirmed on May 21, 2020. (Appendix A).

STATEMENT OF THE CASE

Over Mr. Baez’s objection, the district court imposed a statutorily enhanced term of imprisonment. Mr. Baez, a Mexican citizen, pleaded guilty to illegally reentering the United States following deportation. (ROA.32-33). The statute defining this offense—8 U.S.C. § 1326(a)—sets a two-year term of imprisonment as the default maximum, but Mr. Baez’s presentence report suggested as applicable a ten-year maximum. (ROA.124) (citing 8 U.S.C. § 1326(b)(1)). This alternative applies “in the case of any alien . . . whose removal was subsequent to a conviction for . . . a felony.” 8 U.S.C. § 1326(b)(1). Mr. Baez conceded the prior felony conviction but faulted the government for failing to allege that fact in his indictment. (ROA.129). He argued that the allegation was necessary to support an enhanced sentence but conceded that the issue was foreclosed. (ROA.129) (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 235, 239 (1998)). In light of this concession, the district court overruled the objection and imposed a 60-month term of imprisonment. *See* (ROA.94, 100-01); *see also* Pet. App. B1.

Mr. Baez advanced the same claim on appeal. He criticized the opinion blocking his claim—this Court’s decision in *Almendarez-Torres v. United States*—as out of step with more recent Sixth Amendment authority. *See* Appellant’s Initial Brief at 8-11, *United States v. Miguel Baez-Castillo*, No. 19-10958 (5th Cir. Nov. 26, 2019). In *Apprendi v. New Jersey*, for example, this Court focused on common-law historical practices and held that “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.” 530 U.S. 466, 490 (2000). *Apprendi* nevertheless relied on *Almendarez-Torres* to carve out an exception for prior convictions. *Id.* In his brief on appeal, Mr. Baez argued that this exception was ahistorical and pointed to Founding Era authority to support the claim. Appellant’s Initial Brief, *supra*, at 8-11. He again conceded the claim’s status as foreclosed. *Id.* at 11.

The Fifth Circuit affirmed. It fairly summarized Mr. Baez’s basic claim: “Baez-Castillo contends . . . that the Supreme Court has not considered the historical common law approach to pleading prior convictions since *Almendarez-Torres*, although its Sixth Amendment jurisprudence subsequently evolved to apply the common law practice of defining elements.” Pet. App. A.2. It then recognized the ongoing effect of *Almendarez-Torres*. Pet. App. A2 (“Because Baez-Castillo’s argument is foreclosed, summary affirmance is appropriate.”).

REASONS FOR GRANTING THIS PETITION

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

At the district-court level and on appeal, Mr. Baez argued against the application of a statutorily enhanced sentence 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* 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. Baez'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 simple rule with an important exception: “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 Oct. 14, 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 Oct. 14, 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. 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 approach. 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 Ice*, 555 U.S. at 165 (quoting *Harris v. United States*, 536 U.S. 545, 557 (2002));

Southern Union Co., 567 U.S. at 348 (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 similar 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 October 15, 2020.

/s/ Taylor Wills Edwards “T.W.” Brown
Taylor Wills Edwards “T.W.” Brown
Assistant Federal Public Defender
Northern District of Texas
P.O. Box 17743
819 Taylor Street, Room 9A10
Fort Worth, TX 76102
(817) 978-2753
Taylor_W_Brown@fd.org
Texas Bar No. 24087225

Attorney for Petitioner