No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OSCAR PENA TRUJILLO,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held in *Southern Union Co. v. United States*, 567 U.S. 343 (2012), that the rule from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), requiring all facts necessary to increase the maximum sentence to be proven beyond a reasonable doubt to a jury applied to other forms of punishment in addition to imprisonment. In an unrelated line of cases, this Court has held that the primary purpose of sex offender registration is regulatory, and, for that reason, subsequent statutory changes that require persons to register as a sex offender for earlier convictions do not violate the *Ex Post Facto* Clause. Despite the fact that the two lines of cases serve different ends, many state courts, including the Arizona Supreme Court, conflate the two.

The question presented is:

Does the Sixth Amendment right to jury trial, recognized by this Court in *Apprendi* and *Southern Union*, require submitting to the jury questions of fact that mandate sex offender registration?

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PETITION FOR WRIT OF CERTIORARI

Oscar Pena Trujillo respectfully petitions for a writ of certiorari to review the Arizona Supreme Court's opinion dated May 4, 2020, which held that trial judges may engage in fact-finding that exposes a defendant to mandatory sex offender registration, without regard for the right to a jury trial.

Under this Court's Sixth Amendment jurisprudence, any fact other than a prior conviction "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 v. New Jersey*, 530 U.S. 466, 490 (2000). This decision created a "bright-line rule" prohibiting judges from imposing punishment beyond "the maximum sentence [he or she] may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (emphasis in original). The rule prohibiting judicial fact-finding extends to any fact that increases the mandatory minimum as well as maximum penalty. *Alleyne v. United States*, 570 U.S. 99, 103 (2013); *United States v. Haymond*, 588 U.S. __, 139 S. Ct. 2369, 2378 (2019). Since this Court has been unable to find a "principled basis" for

distinguishing criminal fines from punishments such as imprisonment or death, the rule has likewise been applied in the context of criminal fines. *Southern Union Co. v. United States*, 567 U.S. 343, 349 (2012).

Notwithstanding Petitioner's assertion of his Sixth Amendment rights, the trial court made its own finding that the sexual abuse victim was under age 18. Without proof of that fact, Petitioner was not required to register as a sex offender; but because of that fact finding by the court, he is now subject to mandatory lifetime sex offender registration. In a decision that directly contravened this Court's holdings in *Apprendi*, *Blakely*, *Southern Union*, *Alleyne*, and *Haymond*, as well as basic principles of constitutional law, the Arizona Supreme Court upheld the judge-made finding based on an unrelated line of cases holding that the *Ex Post Facto* Clause of the United States Constitution, *see* U.S. Const. art. I, § 10, permits subsequent legislation to require persons previously convicted of certain offenses to register—a fact not at issue in this case.

This case presents the Court with an ideal opportunity to answer a question that has remained unanswered since *Apprendi* was decided: Whether the protections provided by the Sixth Amendment apply to sex offender registration.

OPINIONS BELOW

The Arizona Court of Appeals' opinion dated September 17, 2018, is reported at 430 P.3d 379 (Ariz. Ct. App. 2018). Exhibit 1. The Arizona Supreme Court's opinion dated May 4, 2020, is reported at 462 P.3d 550 (Ariz. 2020). Exhibit 2. The Arizona Supreme Court's order denying a motion for reconsideration dated May 20, 2020, is not reported. Exhibit 3.

STATEMENT OF JURISDICTION

The Arizona Court of Appeals, Division Two, entered its judgment on September 17, 2018. Exhibit 1. The Arizona Supreme Court entered its judgment on May 4, 2020, and denied reconsideration of that judgment on May 22, 2020. Exhibits 2, 3. The issues raised herein were raised before the Arizona courts as issues of federal constitutional law. Exhibits 1, 2. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . .

Section One of the Fourteenth Amendment to the United States

Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

M.A.C. testified that he arrived in the United States from Honduras in April 2015, when he was fifteen years old. M.A.C. testified that he had his birth certificate but no other identification papers. Federal agents took him to an immigration office in Texas and then, after three days, to Southwest Key in Tucson, an immigration detention facility where children were housed until they are united with their relatives in the United States. A social worker at Southwest Key told M.A.C. he could leave to be with his father once his father completed the paperwork, and explained that he could get a U-Visa if he was a victim of mistreatment or abuse. When he learned about the U-Visa, he had not been a victim of anything. He claimed that he did not think that he needed a U-Visa to stay in the United States since he was going to be living with his father.

Oscar Trujillo worked in the facility where M.A.C. was housed.

M.A.C. testified that he woke up on April 11, 2015, and Trujillo came into his room four times that morning. Hallway video showed someone entering only three times. Trujillo admitted going into M.A.C.'s room three times to give him hair gel and toothpaste (as he did for many residents that day because they were understaffed), but he denied any physical contact with M.A.C.

According to M.A.C., the first time Trujillo came in for two minutes and tickled him. The second time, Trujillo came in for three minutes, tickled him under the blankets and over his clothing, and put his hand on M.A.C.'s penis over his underwear. In less than a minute, according to M.A.C., Trujillo came in again, lifted M.A.C.'s shorts and tried to touch his penis, but M.A.C. told him to stop. The surveillance videos showed that Trujillo was in the room for only 20-30 seconds at a time.

After testimony and during settling of jury instructions, Trujillo requested an interrogatory concerning the victim's age. The State argued, and the trial court agreed, that the age of the victim is not an element of the offense of sexual abuse, and therefore the jury did not need to determine the victim's age. The jury was not instructed to determine M.A.C.'s age and the verdict forms did not include an interrogatory

regarding his age.

Under Arizona law, the elements of the crime were the same whether M.A.C. was an adult or a minor, so long as he was at least fifteen years of age.[1] The fact of M.A.C.'s age affected the question whether Trujillo would be required to register as a sex offender. If M.A.C. was a minor, then Trujillo would be required to register, but if he was eighteen years or older, then the sentencing judge would have discretion on the issue of registration.[2]

At sentencing, the trial court ordered Trujillo to register, but it suspended that order pending further briefing and argument, at which time the court issued a written ruling affirming the registration requirement. It determined that cases discussing the application of the

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[1] Ariz. Rev. Stat. § 13-1404(A) states, "A person commits sexual abuse by intentionally or knowingly engaging in any sexual contact with any person who is fifteen or more years of age without consent of that person…" § 13-1404(C) increases the punishment if the victim is under fifteen years of age.

[2] Ariz. Rev. Stat. § 13-3821(A)(3) requires conviction for a conviction for "[s]exual abuse pursuant to section 13-1404 if the victim is under eighteen years of age." § 13-3821(C) states: "Notwithstanding subsection A of this section, the judge who sentences a defendant for any violation of chapter 14 or 35.1 of this title … may require the person who committed the offense to register pursuant to this section."

Ex Post Facto Clause, U.S. Const. art. I, § 10, to sex offender registration controlled the outcome, as opposed to cases that discuss the right to a jury trial.

The Arizona Court of Appeals affirmed Trujillo's conviction and sentence, including the imposition of sex offender registration. *State v. Trujillo (Trujillo I)*, 430 P.3d 379 (Ariz. Ct. App. 2018). It acknowledged that in *Fushek v. State*, 183 P.3d 536 (Ariz. 2008), the Arizona Supreme Court held that sex offender registration under Arizona's statutes constitutes a "penalty" that requires a jury trial on the question of a sentencing allegation of sexual motivation because that fact makes a defendant eligible for registration. However, like the trial court, the Arizona Court of Appeals instead relied on *State v. Noble*, 829 P.2d 1217 (Ariz. 1992), which held that registration is not a "penalty" for purposes of determining whether a statute amended after a person's conviction is an *ex post facto* law, and thus it rejected Trujillo's argument that *Apprendi* and *Alleyne* required a jury trial on the fact that made registration mandatory. *Trujillo I*, 430 P.3d at 385-86.

The Arizona Supreme Court granted discretionary review and similarly affirmed the trial court. *State v. Trujillo (Trujillo II)*, 462 P.3d

550 (Ariz. 2020). Like the lower courts, it found *Noble* controlling, and it conducted a thorough *ex post facto* analysis as dictated by *Smith v. Doe*, 538 U.S. 84, 97 (2003). *Trujillo II*, 462 P.3d at 557. In dissent, Justice Bolick explained that the majority "err[ed] by failing to apply the framework the United States Supreme Court and this Court have consistently applied to the right to jury trial and instead choosing to apply one that pertains to other contexts, particularly ex post facto laws." *Id.* at 566 (Bolick, J., dissenting).

REASONS FOR GRANTING THE WRIT

This case presents the Court with an ideal opportunity to answer a question that has heretofore evaded review: Whether sex offender registration is a criminal penalty that is entitled to Sixth Amendment protections.

I. Courts Have Struggled With the Issue Whether Facts Requiring Sex Offender Registration Must Be Tried to a Jury Under *Apprendi*.

"The right to jury trial in criminal cases [is] fundamental to our system of justice." *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968). The jury is, after all, "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric

judge," and is meant to act as "further protection against arbitrary action." *Id.* at 156. This Court held in *Apprendi* that any fact other than a prior conviction "that increases the penalty for a crime beyond the prescribed maximum must be submitted to a jury and proved beyond a reasonable doubt." 530 U.S. at 490. In reaching its conclusion, the Court advised that the constitutional protection afforded by the right to trial by jury is "of surpassing importance." *Id.* at 476. The foundation for that right "extends down centuries into the common law," when the right was "understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors.'" *Id.* at 477 (emphasis in original, citations omitted).

Thus, in subsequent decisions, the Court has held that *Apprendi* created a bright-line rule prohibiting a judge from imposing punishment beyond the "maximum sentence [he or she] may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303 (emphasis in original). Therefore, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose

after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04 (emphasis in original). The rule has recently been extended to require a jury finding as to any fact that also increases the mandatory minimum that can be imposed. *Alleyne*, 570 U.S. at 103.

Although the *Apprendi* rule has not yet been extended to cover sex offender registration explicitly, the Court recently extended the rule to prohibit judicial fact-finding in the context of criminal fines, explaining that there was no "principled basis" for distinguishing criminal fines from punishments such as imprisonment or death. *Southern Union*, 567 U.S. at 349. Thus, even if *Blakely* left the issue in doubt, *Southern Union* seems to put to rest any question as to whether criminal penalties can be carved out from the protections of the Sixth Amendment.

In *Southern Union*, this Court was confronted with the issue of whether a jury was required to find the amount of a fine to be imposed under the Resource Conservation and Recovery Act of 1976, which provided for "a fine of not more than $50,000 for each day of violation" of the statute. 567 U.S. at 346-47. This Court explained that

> we have never distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial

> factfinding that increases maximum criminal "sentence[s]," "penalties," or "punishment[s]" – terms that each undeniably embrace fines.

Id. at 350. This Court held that the Sixth Amendment reserved for the jury the determination of facts underlying criminal fines. *Id.* at 350, 360. This Court further acknowledged that fines imposed under other statutes, much like restitution, are calculated by reference to "the amount of … the victim's loss." *Id.* at 349-50. It made clear that "in all such cases," the facts required to determine the amount of the penalty must be found by a jury in order "to implement *Apprendi*'s 'animating principle.'" *Id.* at 350.

Like the issue of criminal fines in *Southern Union*, the issue of sex offender registration in this case stands at the confluence of two separate lines of cases concerning the right to a jury trial. One springs from *Apprendi*. The other springs from *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541 (1989), which provides for jury trial for "serious" crimes as determined by the "severity of the maximum penalty." Just as the Court in *Southern Union* found no principled means of distinguishing criminal fines from imprisonment, there is no principled way to distinguish sex offender registration from imprisonment.

Furthermore, because *Southern Union* has now unified the *Apprendi* and *Blanton* lines of cases, *Alleyne* is now just as much a *Blanton* case as it is an *Apprendi* case. *Alleyne* requires a jury to determine any factor requiring the imposition of a mandatory minimum sentence within the sentencing range because that fact constrains the trial court's discretion, essentially creating a different offense. "The essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime." 570 U.S. at 115-16.

As Justice Bolick noted in dissent in *Trujillo II*, "there can be no doubt that the penalties imposed by the legislature make clear it considers sexual abuse a serious crime." 430 P.3d at 566 (Bolick, J., dissenting). Whereas the prohibition on *ex post facto* laws "is a limitation on legislative power" and "prohibits imposition of retroactive criminal punishments," "the right to jury trial is a fundamental constitutional right that applies in all criminal prosecutions" and it "dictates the rules by which a defendant's guilt or innocence is determined." *Id.* Thus, whether the majority was right or wrong in its "extensive *Smith/Noble* inquiry … is simply beside the point." *Id.* "[T]he proper inquiry for

determining a jury trial right is not whether the penalties are regulatory or punitive, an inquiry the majority engages in at great but irrelevant length, but whether they demonstrate that the underlying crime is serious." *Id*. at 567.

Notably, in its recent precedent in *Fushek*, the Arizona Supreme Court recognized that "The issue before us is not whether sex offender registration is criminal punishment for ex post facto purposes, but rather whether it is a statutory consequence reflecting a legislative determination that Fushek's alleged offenses are 'serious.'" 183 P.3d at 541. The majority in *Trujillo II* used the first clause of this quoted language from *Fushek* and omitted the second clause, giving the false impression that *Fushek* does not address the question whether proof of facts that would permit ordering sex offender registration must be found by a jury—even though that was the only question raised in *Fushek*. *Trujillo II*, 462 P.3d at 563.

Having incorrectly dismissed *Fushek* as not controlling, *Trujillo II* instead relied on cases from other jurisdictions that similarly misapply *Apprendi*, *Blanton*, and *Southern Union*. *Trujillo II*, 462 P.3d at 554. The most egregious example is *Young v. State*, 806 A.2d 233 (Md. 2002), in

which the court denied a jury trial on sex offender registration by relying heavily on this Court's then-recent opinion in *Harris v. United States*, 536 U.S. 545 (2002), which held that *Apprendi* did not extend to facts that increased the mandatory minimum sentence without extending the sentence beyond the statutory maximum. *Young*, 806 A.2d at 251. Once this Court explicitly overruled *Harris* in *Alleyne*, 570 U.S. at 107, however, *Young*'s application of *Apprendi* was undermined and reliance on it as extrajurisdictional authority is dubious at best.

Other cases cited in *Trujillo II* similarly included flawed reasoning. For example, in *People v. Mosley*, 344 P.3d 788 (Cal. 2015), the majority incorrectly relied on *Oregon v. Ice*, 555 U.S. 160 (2009), and entirely misinterpreted *Southern Union*. In *State v. Hachmeister*, 395 P.3d 833, 840 (Kan. 2017), the court held that "lifetime sex offender registration is not punishment" because of prior cases that hold that under ex post facto considerations, the purpose of sex offender registration is not punitive—reasoning that Justice Bolick effectively eviscerated in his *Trujillo II* dissent. *Wiggins v. State*, 702 S.E.2d 865 , 868 (Ga. 2010), provides only a conclusory statement that *Apprendi* does not apply in such situations, while recognizing that the jury necessarily found the facts needed to

allow registration by virtue of conviction for the charge—a fact not present in Trujillo's case. *People v. Golba*, 729 N.W.2d 916 (Mich. App. 2007), was a split decision from an intermediate appellate court that restricts the application of *Apprendi* to cases involving incarceration—which is unsurprising since *Golba* predated *Southern Union* by five years.

It is thus apparent that courts of last resort have failed to address the applicability of *Southern Union* to the issue of sex offender registration. This Court's review is necessary to explain that *Apprendi* applies to any "penalty" that is "serious," and that cases such as *Smith* that analyze retroactivity are inapplicable to the *Apprendi* inquiry.

II. This Case Provides an Ideal Vehicle for Deciding the Issue.

Trujillo's case presents this question cleanly. There is no dispute that the factual finding that was necessary to expose Trujillo to mandatory sex offender registration was found by the trial judge.[3]

[3] The trial court could have ordered Trujillo to register as a discretionary act based on the crime for which Trujillo was convicted. The trial court's lengthy written ruling analyzed the law for judicial fact-finding and explicitly invoked the section of law pertaining to mandatory registration, thereby implying that it would not have ordered registration

The Arizona Court of Appeals erroneously suggested that any *Apprendi* error in this case was harmless, and it provided the following rationale to support that statement:

> M.A.C. testified that he was eighteen years old at the time of trial and fifteen years old when this incident occurred. Indeed, he explained that it happened the day before his sixteenth birthday. Trujillo did not challenge this testimony. *See State v. Prince*, 206 Ariz. 24, ¶ 13, 75 P.3d 114, 118 (2003) (where evidence of age aggravator uncontroverted, error in not having jury make finding harmless). The state therefore presented overwhelming evidence that M.A.C. was under eighteen years of age at the time of the offense. *See Ring*, 204 Ariz. 534, ¶ 86, 65 P.3d at 942 (where jury failed to make finding, error harmless where overwhelming evidence establishes victim's age).
>
> When discussing voir dire, Trujillo agreed the trial court could inform the potential jurors that "[M.A.C.] was 16 years old" and that he "entered the United States as an unaccompanied minor." And although M.A.C.'s age became an issue as part of Trujillo's *Apprendi* argument after M.A.C. had testified, Trujillo did not then provide an affidavit or make an offer of proof that M.A.C.'s age was different than what he had testified to.

Trujillo I, 430 P.3d at 386-87 & n.6. The court misapplied the facts and law of harmless error.

The court's characterization of the record is factually misleading

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but for the finding that M.A.C. was a minor. The State of Arizona has never argued to the contrary, and both the Arizona Court of Appeals and Arizona Supreme Court assumed this fact.

because it ignores that defense counsel had no reason to challenge M.A.C.'s age so long as it was not being submitted to the jury as a fact it was required to find. Defense counsel did challenge M.A.C.'s credibility generally, particularly through his acquisition of a U-Visa. Had M.A.C.'s age been something subject to a jury finding, counsel would have challenged it. Although the conviction shows that the jury believed M.A.C. about the act, the jury must have seen that he lacked credibility on the length of time Trujillo was in his room because M.A.C.'s testimony contradicted the surveillance video. Juries are not required, or expected, to believe a witness entirely or not at all, rather, they may pick and choose which statements to believe. Second, relying on statements made by the trial judge during jury selection ignores that the purpose of such statements is only to give the venire panel some background on the case. Obviously the defense would be aware that the State intended to present evidence from M.A.C. of his age, and letting the venire hear that might help counsel identify potential jurors who should be excused as unsuitable to hear the case. The jury was appropriately instructed: "You determine facts only from the evidence produced in court…. The evidence which you are to consider consists of testimony of witnesses and

exhibits…. What the lawyers say is not evidence…" Had the jury been asked, it could have assessed M.A.C.'s physical appearance and determined whether he looked his declared age or not.

The lower court also misapplied the law of harmless error. This Court explained the reason for placing the burden upon the party causing or benefitting from the error:

> An error … which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless. Certainly error … casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment."

Chapman v. California, 386 U.S. 18, 23-24 (1967) (citing *Fahy v. Connecticut*, 375 U.S. 85 (1963)). In spite of this clear rule, the lower court interpreted the trial record as if sitting as a three-person jury, instead of holding the State to its burden.

Because the constitutional violation in this case is so plain and clearly based on erroneous reasoning, it is an ideal vehicle for explaining *Apprendi*'s application to all criminal penalties.

CONCLUSION

For these reasons, Petitioner respectfully requests that this Court accept review of the opinion of the Arizona Supreme Court.

Respectfully submitted,

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