No. _____

IN THE

Supreme Court of the United States

ABEL GUILLERMO GODOY,

Applicant/Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Court held that in a prosecution for 8 U.S.C. § 1326, the fact of a prior conviction need not be alleged in the indictment because it was a sentencing factor and not an element of the offense. But *Alleyne v. United States*, 570 U.S. 99, 114–15 (2013), abandoned the distinction between "sentencing factors" and "elements," and *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019), reaffirmed that "a jury must find beyond a reasonable doubt every fact which the law makes essential to [a] punishment that a judge might later seek to impose." Should the Court finally overrule *Almendarez- Torres*?

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PETITION FOR A WRIT OF CERTIORARI

Abel Guillermo Godoy petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

JUDGMENT BELOW

The judgment for which review is sought is *United States v. Godoy*, 837 Fed. Appx. 526 (9th Cir. Feb. 23, 2021). (Appendix ("App.") at 1-4.)

JURISDICTION

The Ninth Circuit issued its decision on February 23, 2021. Pursuant to this Court's order dated March 19, 2020 concerning the Covid-19 pandemic, the deadline to file this petition was 150 days from the date of the lower court's judgment, or July 23, 2021. This petition, accordingly, is being timely filed. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .; nor be deprived of life, liberty, or property, without due process of law . . . .

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

8 U.S.C. § 1326(b)(2)

Notwithstanding subsection (a), in the case of any alien described in such subsection . . . 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.

STATEMENT OF THE CASE

Petitioner Abel Guillermo Godoy was charged with one count of violating 8 U.S.C. § 1326(a) and (b). (App. 11-12.) After a two-day trial, the jury rejected his duress defense and found him guilty. (ER 25.)[1] He was sentenced to five years of imprisonment pursuant to § 1326(b)(2), which increases the statutory maximum sentence for defendants who have a prior aggravated felony conviction. (App. 6, 8; ER 3, 5.)

On appeal, Godoy argued that a Sixth Amendment violation occurred when the district court increased the applicable statutory maximum based upon a judicial—rather than jury—determination concerning Godoy's prior aggravated felony conviction. The Ninth Circuit rejected this claim, explaining that "*Almendarez-Torres* remains a 'narrow exception' to the general rule in *Apprendi* and its progeny." (App. 4.) Accordingly, the

[1] "ER" stands for the "Excerpts of Record" that were submitted alongside the opening brief before the Ninth Circuit.

court concluded, "Because *Almendarez-Torres* has not been expressly overruled by the Supreme Court, the decision forecloses Godoy's claim." (*Id.*)

REASONS FOR GRANTING THE WRIT

A. The underpinnings of *Almendarez-Torres* have been deeply eroded by this Court's subsequent Sixth Amendment jurisprudence.

In *Almendarez-Torres*, the Court evaluated the prior conviction enhancement contained in 8 U.S.C. § 1326(b). The petitioner there contended it was error to permit enhancement of his sentence above the two-year maximum permitted by § 1326(a) without alleging the relevant prior conviction in the § 1326 indictment. *Almendarez-Torres* rejected that claim:

> We conclude that the subsection is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime. Consequently, neither the statute nor the Constitution requires the Government to charge the factor it mentions, an earlier conviction, in the indictment.

523 U.S. at 226-27.

But *Almendarez-Torres*'s analysis was dependent on the Court's prior decision in *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986), which made a distinction between "elements" and "sentencing factors." Specifically, *Almendarez-Torres* held that *McMillan* supports "the conclusion that Congress has the constitutional power to treat the feature before us—prior conviction of an aggravated felony—as a sentencing factor for this particular offense (illegal entry after deportation)." *Almendarez-Torres*, 523 U.S. at 246. *Almendarez-Torres* thus rejected the defendant's argument "that this Court should simply adopt a rule that any significant increase in a statutory maximum sentence would trigger a

constitutional 'elements' requirement [because] the Constitution, as interpreted in McMillan and earlier cases, does not impose that requirement." *Id.* at 247.

Just two years later, however, the Court essentially adopted such a rule, when it 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." *Apprendi*, 530 U.S. at 490. Although *Apprendi* expressly provided a prior conviction exception to this rule, the doubtful viability of *Almendarez-Torres* was instantly apparent. "It is arguable," the Court observed, "that *Almendarez-Torres* was wrongly decided." *Id.* at 489. Indeed, Justice Thomas, who had cast the fifth and deciding vote in *Almendarez-Torres*, admitted in his *Apprendi* concurrence that his previous vote was erroneous. *Apprendi*, 530 U.S. at 518-20 (Thomas, J., concurring). But despite the Court's misgivings about *Almendarez-Torres*'s congruence with the rule announced in Apprendi, the Court did note one feature—apart from the dubious element/sentencing factor distinction—that might distinguish *Almendarez-Torres* from the mine run of cases: Unlike most facts that increase mandatory minimum or maximum sentences, the recidivism provision at issue in Almendarez-Torres did "'not relate to the commission of the offense' itself." *Apprendi*, 530 U.S. at 496 (quoting *Almendarez-Torres*, 523 U.S. at 230).

The skepticism of *Almendarez-Torres*'s viability has persisted over time. In *Shepard v. United States*, Justice Thomas noted, "*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided" and recommended that "in an

appropriate case, this Court should consider *Almendarez-Torres*'s continuing viability." 544 U.S. 13, 28 (2005) (Thomas, J., concurring in part and concurring in the judgment); *see also Rangel-Reyes v. United States*, 126 S. Ct. 2873, 2875 (2006) (Thomas, J., dissent from denial of certiorari) ("There is no good reason to allow such a state of affairs to persist."). And Justice Sotomayor, while on the Second Circuit, twice authored opinions expressing doubts about its viability, *see United States v. Estrada*, 428 F.3d 387, 390-91 (2d Cir. 2005); *United States v. Santiago*, 268 F.3d 151, 155 (2d Cir. 2001), and joined the majority in a third, *see United States v. Gonzalez*, 420 F.3d 111, 128 n.14 (2d Cir. 2005).

Finally, in *Alleyne*, the Court abandoned once and for all the distinction between "elements" and "sentencing factors" on which *Almendarez-Torres* was predicated.[2] In *Alleyne*, the Court granted certiorari to consider whether *Harris v. United States*, 536 U.S. 545 (2002)—which allowed judicial factfinding of minimum mandatory sentences—should be overruled. Not only did the Court overrule *Harris*, but it also overruled *McMillan*'s distinction between "elements" and "sentencing factors." *See Alleyne*, 570 U.S. at 118; *id.* at 2164 (Sotomayor, J., concurring) ("I join the opinion of the Court, which persuasively explains why . . . *McMillan* [was] wrongly decided."); *id.* at 119 (Sotomayor, J., concurring) (*McMillan*'s "distinction between 'elements' and 'sentencing factors' . . . was undermined by *Apprendi*"); *id.* at 121 (Sotomayor, J., concurring) ("The Court overrules *McMillan* and *Harris* because the reasoning of those decisions has been thoroughly undermined by intervening decisions.").

[2] *Alleyne* did not revisit *Almendarez-Torres* "[b]ecause the parties d[id] not contest th[e] decision's vitality." *Alleyne*, 570 U.S. at 111 n.1.

Instead of drawing a constitutional distinction between a "sentencing factor" and an "element," *Alleyne* instructs as follows: "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." 133 S. Ct. at 2155; *see also id.* at 2162 ("[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury."); *id.* at 2162-63 ("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. It must, therefore, be submitted to the jury and found beyond a reasonable doubt.").

In other words, while *Almendarez-Torres* relied upon *McMillan* to hold that the Constitution does not impose a requirement that "any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement," *Almendarez-Torres*, 523 U.S. at 247, *Alleyne* overruled *McMillan* to hold that the Constitution *does require* that "any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 570 U.S. at 103.

By the time this Court decided *United States v. Haymond*, 139 S. Ct. 2369 (2019), then, *Almendarez-Torres* had become an anomalous, unexplained "exception" to the clear rule that governs in nearly every other context. In *Haymond*, the Court confronted the question whether a defendant accused of a supervised release violation with a mandatory

minimum five-year sentence has a right to a jury trial. 139 S. Ct. at 2378. Justice Gorsuch's plurality opinion answered that question by marching through the Sixth Amendment's history, from its inception to *Alleyne*.

The plurality explained that "juries in our constitutional order exercise supervisory authority over the judicial function by limiting the judge's power to punish." *Haymond*, 139 S. Ct. at 2376. Accordingly, "a jury must find beyond a reasonable doubt every fact which the law makes essential to [a] punishment that a judge might later seek to impose." *Id.* (internal quotation marks omitted). The plurality found these principles reflected in *Apprendi*'s holding that the jury right extends to "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." *Id.* Justice Gorsuch paused to note *Apprendi*'s early rejection of the notion that the State could evade the rule by framing the penalty-increasing fact as a "sentencing enhancement." *Id.* The plurality then reviewed in brief the litany of cases applying the *Apprendi* principle to "strike down [laws] that fail to respect the jury's supervisory function." *Id.* at 2377. Finally, the plurality ended its history on *Alleyne*, explaining that the case had corrected the "anom[olous]" result in *McMillan* by bringing the Court's approach to mandatory minimums into the doctrinal fold. *Id.*

"By now," the Court concluded, "the lesson for our case is clear." *Id.* at 2378. Applying the principles that stretched from the Sixth Amendment's inception to *Alleyne*, the Court held that the Sixth Amendment jury right did extend to the facts resulting in the mandatory minimum sentence provided for in 18 U.S.C. § 3583(k). *Id.* Justice Breyer, concurring, agreed. *See id.* at 2386 (Breyer, J. concurring) (in concluding that *Alleyne*'s

rule applied, explaining that peculiar features of § 3583(k) "more closely resemble[d] the punishment of new criminal offenses" than would an ordinary supervised release provision).

Notably, *Almendarez-Torres* had no place in the Court's recitation of Sixth Amendment doctrinal history. The plurality mentioned the case only once, in a footnote placed in between descriptions of *Apprendi* and *Alleyne*. "The Court has recognized two narrow exceptions to *Apprendi*'s general rule," the footnote reads. "Prosecutors need not prove to a jury the fact of a defendant's prior conviction, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), or facts that affect whether a defendant with multiple sentences serves them concurrently or consecutively, *Oregon v. Ice*, 555 U.S. 160 (2009)." *Haymond*, 139 S. Ct. at 2377 n.3. The plurality did not provide an explanation for the exceptions and instead merely noted that "neither" were "implicated" in the case. *Id.*

Though *Haymond* did not present an opportunity to revisit *Almendarez-Torres*, its result was inconsistent with one of the Court's last surviving explanations for the *Almendarez-Torres* exception. As noted above, the Court in *Apprendi* distinguished the result in *Almendarez-Torres* by observing that the facts raising the statutory maximum under § 1326(b) do "'not relate to the commission of the offense' itself." *Apprendi*, 530 U.S. at 496 (quoting *Almendarez-Torres*, 523 U.S. at 230). But as Justice Alito pointed out in dissent in *Haymond*, the same might be said of the facts that result in a mandatory minimum under § 3583(k): The facts at issue in *Haymond* had "virtually nothing to do with the child-pornography offense that led to respondent's conviction, incarceration, and

supervised release." 139 S. Ct. at 2398-99 (Alito, J., dissenting). In light of *Haymond*, then, one of the last surviving explanations for *Almendarez-Torres*'s anomalous result is no longer viable.

Haymond makes abundantly clear that *Almendarez-Torres*'s reasoning is fatally inconsistent with the Court's present Sixth Amendment jurisprudence. Mr. Godoy's case, which squarely presents the issue decided in *Almendarez-Torres*, provides this Court the opportunity to address this inconsistency and overrule *Almendarez-Torres* at last.

B. Whether *Almendarez-Torres* should be overruled is an issue of exceptional importance.

Whether *Almendarez-Torres* remains good law is an issue that affects thousands of criminal defendants each year, and its impact on the sentences imposed on those defendants is substantial. This Court should grant the petition for a writ of certiorari to resolve this important, frequently occurring issue.

According to the United States Sentencing Commission, the government brought over 23,500 illegal reentry cases in Fiscal Year 2020. See United States Sentencing Commission, Quick Facts: Illegal Reentry Offenses, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY20.pdf. In more than 5,500 cases, the defendant's sentence was enhanced under the Guidelines for a prior illegal reentry felony, and in more than 4,000 cases, the defendant's sentence was enhanced under the Guidelines for having either a non-illegal-reentry felony or three misdemeanor drug crimes or crimes of violence. *Id.* The government could charge any of those defendants under § 1326(b)(1), multiplying the

person's statutory maximum sentence by five times, from 2 years to 10. *See* 8 U.S.C. § 1326(a), (b)(1). Any defendant accused of sustaining an aggravated felony prior to removal could instead be charged under § 1326(b)(2), multiplying their statutory maximum by ten times, from 2 years to 20. *See* 8 U.S.C. § 1326(a), (b)(2). Thus, just in the last year and just with regard to § 1326(b), *Almendarez-Torres* likely governed thousands of defendants' jury trial rights on a important matter that greatly increased sentencing exposure by 8 or 18 years.

But *Almendarez-Torres*'s effects do not end with § 1326(b). To name just a few additional applications, it governs the Sixth Amendment rights of persons charged under 18 U.S.C. § 3559(c), which directs the court to impose a mandatory sentence of life imprisonment, *see United States v. Harris*, 741 F.3d 1245, 1248 (11th Cir. 2014); the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), which sets a 15-year mandatory minimum sentence, *see United States v. McDowell*, 745 F.3d 115, 123 (4th Cir. 2014); and 21 U.S.C. § 841(b)(1)(C), which adds 10 years to the defendant's statutory maximum, *United States v. Ordaz*, 398 F.3d 236, 238 (3d Cir. 2005).

As a result of these large-scale impacts, defendants across the circuits have repeatedly asked the courts of appeals to examine whether and why *Almendarez-Torres*'s result obtains under current Sixth Amendment law. At this point, every circuit court of appeals has confronted the question whether *Almendarez-Torres* has been implicitly overruled.[3] Most have acknowledged that there is reason to question whether and how

[3] *See, e.g.*, *United States v. Rodriguez*, 759 F.3d 113, 122 (1st Cir. 2014); *McDowell*, 745 F.3d at 124; *Harris*, 741 F.3d at 1250; *United States v. Smith*, 640 F.3d 358, 369 (D.C.

Almendarez-Torres withstood *Apprendi* and its progeny. *See, e.g.*, *McDowell*, 745 F.3d at 124 ("[R]ecent characterizations of the Sixth Amendment are difficult, if not impossible, to reconcile with *Almendarez–Torres*[ ] . . . .").[4] All—including the Ninth Circuit in Mr. Godoy's case—have held that they were not at liberty to reexamine the issue. *See, e.g.*, *United States v. Godoy*, 837 Fed. Appx. 526, 526 (9th Cir. Feb. 23, 2021) (explaining that "[b]ecause *Almendarez-Torres* has not been expressly overruled by the Supreme Court, the decision forecloses Godoy's claim" and noting "that the Supreme Court has prohibited lower courts from holding that the higher court overruled its own precedent by

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Cir. 2011); *United States v. Mack*, 729 F.3d 594, 609 (6th Cir. 2013); *United States v. Martinez-Rodriguez*, 472 F.3d 1087, 1093 (9th Cir. 2007); *United States v. Browning*, 436 F.3d 780, 782 (7th Cir. 2006); *Estrada*, 428 F.3d at 391; *Ordaz*, 398 F.3d at 240–41; *United States v. Torres-Alvarado*, 416 F.3d 808, 810 (8th Cir. 2005); *United States v. Moore*, 401 F.3d 1220, 1224 (10th Cir. 2005); *United States v. Rodriguez-Montelongo*, 263 F.3d 429, 434 (5th Cir. 2001).

[4] *See also Harris*, 741 F.3d at 1250 ("We recognize that there is some tension between *Almendarez–Torres* on the one hand and *Alleyne* and *Apprendi* on the other."); *Mack*, 729 F.3d at 609 ("*Almendarez–Torres* may stand on shifting sands . . . ."); *Martinez-Rodriguez*, 472 F.3d at 1093 ("*Apprendi* may cast doubt on the continuing viability of *Almendarez–Torres* . . . ."); *Browning*, 436 F.3d at 782 ("*Almendarez-Torres* is vulnerable to being overruled . . . because of *United States v. Booker*, 543, U.S. 220 (2005)."); *Estrada*, 428 F.3d at 391 ("[W]e acknowledge a tension between the spirit of *Booker*—that all facts that fix mandatorily a defendant's sentence should be found by a jury or admitted by the defendant—and the Supreme Court's decision in *Almendarez-Torres*."); *Torres-Alvarado*, 416 F.3d at 810 ("[I]t is unclear whether *Almendarez–Torres* and its felony exception will remain good law . . . ."); *Ordaz*, 398 F.3d at 241 ("We do not gainsay that there is a tension between the spirit of *Blakely* and *Booker* that all facts that increase the sentence should be found by a jury and the Court's decision in *Almendarez-Torres*."); *Rodriguez-Montelongo*, 263 F.3d at 434 ("*Apprendi* cast doubt on the continued validity of *Almendarez-Torres* . . . .").

implication"); *Browning*, 436 F.3d at 782 ("[W]e are not authorized to disregard the Court's decisions even when it is apparent that they are doomed.").

In other words, thousands of defendants in every circuit are serving years or decades in prison as a direct result of the holding in *Almendarez-Torres*, which flatly conflicts with this Court's recent Sixth Circuit jurisprudence. And yet the circuit courts of appeal have concluded that they are powerless to address or resolve the conflict. There is nowhere left for these defendants to turn but to this Court.

C. Mr. Godoy's case squarely presents the question of whether *Almendarez-Torres* remains good law.

Mr. Godoy's case squarely presents the question whether and why *Almendarez-Torres* remains good law. Mr. Godoy did not admit to any prior convictions, and the government did not present any evidence of prior convictions at trial. Despite this, the district court sentenced him under § 1326(b) to a prison term well above the 2-year statutory maximum from § 1326(a). Thus, Mr. Godoy's case presents the very same question considered in *Almendarez-Torres*.

The Court could reach a definitive answer to this question even if it applies plain error review. If the Court adheres to the result in *Almendarez-Torres*, then it will hold either that there was no error or that any error was harmless. But if the Court finds in Mr. Godoy's favor, it will almost certainly do so on the ground that post-*Almendarez-Torres* precedent squarely rejected that case's reasoning—a plain, i.e., "clear" or "obvious," ground for reversal. *United States v. Olano*, 507 U.S. 725, 734 (1993). And prejudicial

sentencing errors affect the fairness and integrity of judicial proceedings. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1909 (2018).

Finally, an error in applying *Almendarez-Torres* here would affect Mr. Godoy's substantial rights. Mr. Godoy was sentenced over the statutory maximum set in § 1326(a), even though the government did not allege any specific prior convictions in the indictment or offer any evidence of them at trial or at sentencing. Accordingly, but for *Almendarez-Torres*, Mr. Godoy would have received a lesser sentence. Thus, Mr. Godoy's case provides an appropriate vehicle for reconsidering *Almendarez-Torres* even if this Court applies plain error review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DATED: July 21, 2021

By: 

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APPENDIX

NOT FOR PUBLICATION

FILED

FEB 23 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ABEL GUILLERMO GODOY, AKA Abel Guillermo Godoy, Defendant-Appellant.	No. 19-50376 D.C. No. 3:19-cr-01170-JLS-1 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Janis L. Sammartino, District Judge, Presiding

Submitted February 2, 2021**
Pasadena, California

Before: GOULD, LEE, and VANDYKE, Circuit Judges.

Defendant-Appellant Abel Guillermo Godoy, a citizen of Mexico, appeals from his conviction of being a removed alien found in the United States, in violation of 8 U.S.C. § 1326(a) and (b). Before sentencing, a probation officer

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

authored a Presentence Investigation Report ("PSR") that listed Godoy's prior felony convictions, the dates of those convictions, and the specific statutes Godoy violated. Because Godoy had a prior aggravated felony conviction, the PSR applied the applicable enhancement and calculated a 20-year statutory maximum. *See* 8 U.S.C. § 1326(b)(2). Godoy did not contest the factual accuracy of the PSR in any way. At sentencing, the district court relied on the PSR's calculated guidelines range of 57 to 71 months—with which the defense agreed—and sentenced Godoy to 60-months imprisonment and 3 years of supervised release. Because Godoy did not object to the PSR or the district court's reliance on the PSR, we review Godoy's sentencing claims for plain error. *United States v. Jimenez*, 258 F.3d 1120, 1124 (9th Cir. 2001). We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), and we affirm.

1. Godoy challenges the district court's sentence on two grounds. First, Godoy contends that because neither the PSR nor the district court specified which of Godoy's felonies is an aggravated felony, the government did not prove the factual basis of the 8 U.S.C. § 1326(b)(2) sentencing enhancement. We disagree. Godoy was convicted of violating 8 U.S.C. § 1326(a), a statute carrying a maximum sentence of 2 years. But the statutory maximum is raised to 20 years if the defendant's removal was "subsequent to" an aggravated felony. 8 U.S.C. § 1326(b)(2). The district court did not err because clear and convincing evidence

demonstrates the factual basis for the sentencing enhancement—that Godoy was convicted of a qualifying offense, in this case an aggravated felony, prior to his 2015 removal. *See United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1049–50 (9th Cir. 2003). Here, the Government alleged in the indictment that Godoy was removed after April 18, 2015, and the jury expressly found that date of removal beyond a reasonable doubt. *See United States v. Salazar-Lopez*, 506 F.3d 748, 752 (9th Cir. 2007). To establish the factual basis underlying a prior conviction, "evidence additional to an uncontroverted PSR is not necessary if the PSR specifies the statutory section of conviction." *United States v. Romero-Rendon*, 220 F.3d 1159, 1164–65 (9th Cir. 2000). Here, the uncontroverted PSR clearly shows Godoy's prior conviction for possession of cocaine base for sale and listed the specific statute under which Godoy was charged, Cal. Health & Safety Code § 11351.5. Because this offense qualifies as a drug trafficking offense, it is properly considered to be an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). *See United States v. Morales–Perez*, 467 F.3d 1219, 1223 (9th Cir. 2006).

2. Godoy next contends that under the Sixth Amendment, his prior convictions must be alleged in the indictment and be found by a jury beyond a reasonable doubt. We disagree. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Supreme Court held that the fact of a prior conviction which is used to enhance a statutory maximum is a mere "sentencing factor" and not an

element of the offense. *Id.* at 230–31. In 2000, the Court held that under the Sixth Amendment, "any fact (*other than prior conviction*) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (emphasis added) (citation omitted). *Almendarez-Torres* remains a "narrow exception" to the general rule in *Apprendi* and its progeny. *Id.* at 490; *see also Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013). Because *Almendarez-Torres* has not been expressly overruled by the Supreme Court, the decision forecloses Godoy's claim. Godoy responds by urging us to conclude that *Almendarez-Torres* was overruled by implication in *United States v. Haymond*, 139 S. Ct. 2369 (2019). We decline to decide that question, noting that the Supreme Court has prohibited lower courts from holding that the higher court overruled its own precedent by implication. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation omitted).[1]

AFFIRMED.

[1] Godoy also cites *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc), for the proposition that lower courts are bound by a higher court's "mode of analysis," and that if the higher court "undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable," lower courts are "bound by the intervening higher authority." *Id.* Godoy's reliance on *Miller* is misplaced, however, because *Miller* refers to Supreme Court or Ninth Circuit en banc decisions that undercut "prior *circuit* precedent." 335 F.3d at 900 (emphasis added).

AO 245B (CASD Rev. 1/19) Judgment in a Criminal Case

FILED
DEC 20 2019
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA
V.
ABEL GUILLERMO GODOY (1)
aka Abel Guillermo Godoy

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:19-CR-01170-JLS

Robert A. Garcia
Defendant's Attorney

USM Number 36320-048

☐ –

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☒ was found guilty on count(s) 1 of the Indictment
after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offense(s):

Title and Section / Nature of Offense	**Count**
8:1326 - Removed Alien Found In The United States	1

The defendant is sentenced as provided in pages 2 through 5 of this judgment.
The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ is dismissed on the motion of the United States.

☒ Assessment : $100.00 imposed

☐ JVTA Assessment*: $

*Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

☒ Fine waived ☐ Forfeiture pursuant to order filed , included herein.

IT IS ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material change in the defendant's economic circumstances.

December 13, 2019
Date of Imposition of Sentence

HON. JANIS L. SAMMARTINO
UNITED STATES DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
60 months

☒ Sentence imposed pursuant to Title 8 USC Section 1326(b).
The court makes the following recommendations to the Bureau of Prisons:
☒ 1. Incarceration at FCI Lompoc to accommodate family visits

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant must surrender to the United States Marshal for this district:
- ☐ at _____ A.M. on _____
- ☐ as notified by the United States Marshal.

☐ The defendant must surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ on or before
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant will be on supervised release for a term of:
3 years

MANDATORY CONDITIONS

1. The defendant must not commit another federal, state or local crime.
2. The defendant must not unlawfully possess a controlled substance.
3. The defendant must not illegally possess a controlled substance. The defendant must refrain from any unlawful use of a controlled substance. The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as determined by the court. Testing requirements will not exceed submission of more than 4 drug tests per month during the term of supervision, unless otherwise ordered by the court.
   ☐The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (check if applicable)
4. ☐The defendant must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5. ☒The defendant must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
6. ☐The defendant must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where the defendant resides, works, is a student, or was convicted of a qualifying offense. (check if applicable)
7. ☐The defendant must participate in an approved program for domestic violence. (check if applicable)

The defendant must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of the defendant's supervised release, the defendant must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for the defendant's behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in the defendant's conduct and condition.

1. The defendant must report to the probation office in the federal judicial district where they are authorized to reside within 72 hours of their release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed.

3. The defendant must not knowingly leave the federal judicial district where the defendant is authorized to reside without first getting permission from the court or the probation officer.

4. The defendant must answer truthfully the questions asked by their probation officer.

5. The defendant must live at a place approved by the probation officer. If the defendant plans to change where they live or anything about their living arrangements (such as the people living with the defendant), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. The defendant must allow the probation officer to visit them at any time at their home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of their supervision that he or she observes in plain view.

7. The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment the defendant must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about their work (such as their position or their job responsibilities), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. The defendant must not communicate or interact with someone they know is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, they must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If the defendant is arrested or questioned by a law enforcement officer, the defendant must notify the probation officer within 72 hours.

10. The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. The defendant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant must comply with that instruction. The probation officer may contact the person and confirm that the defendant notified the person about the risk.

13. The defendant must follow the instructions of the probation officer related to the conditions of supervision.

SPECIAL CONDITIONS OF SUPERVISION

1. If deported, excluded or allowed to voluntarily return to country of origin, not reenter the United States illegally and report to the probation officer within 24 hours of any reentry into the United States; supervision waived upon deportation, exclusion, or voluntary departure

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FILED
19 APR -3 PM 2:58
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY MMB DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

January 2019 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. ABEL GUILLERMO GODOY, aka Cleodaoldo Reyes-Godoy, Defendant.	Case No. 19 CR 1170 JLS I N D I C T M E N T Title 8, U.S.C., Sec. 1326(a) and (b) - Removed Alien Found in the United States

The grand jury charges:

On or about March 9, 2019, within the Southern District of California, defendant ABEL GUILLERMO GODOY, aka Cleodaoldo Reyes-Godoy, an alien, who previously had been excluded, deported and removed from the United States, was found in the United States, without the Attorney General of the United States and his/her designated successor, the Secretary of the Department of Homeland Security (Title 6, United States Code, Sections 202(3) and (4), and 557), having expressly consented to the defendant's reapplication for admission into the United States; in violation of Title 8, United States Code, Section 1326(a) and (b).

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APW:cms:San Diego:4/2/19

It is further alleged that defendant ABEL GUILLERMO GODOY, aka Cleodaoldo Reyes-Godoy, was removed from the United States subsequent to April 18, 2015.

DATED: April 3, 2019.

A TRUE BILL:

Foreperson

ROBERT S. BREWER, JR.
United States Attorney

By: _____
ALICIA P. WILLIAMS
Assistant U.S. Attorney