NO. _____

In the Supreme Court of the United States

JOSE SANTOS PEREZ-GONZALEZ,

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

J. Matthew Wright
Counsel of Record
FEDERAL PUBLIC
DEFENDER'S OFFICE
500 South Taylor Street
Unit 110.
Amarillo, Texas 79101
(806) 324-2370
Matthew_Wright@fd.org

Counsel for Petitioner

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QUESTION PRESENTED

Whether this Court should overrule its decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

DIRECTLY RELATED PROCEEDINGS

United States v. Jose Santos Perez-Gonzalez, No. 4:21-CR-282 (N.D. Tex. Mar. 10, 2022)

United States v. Jose Santos Perez-Gonzalez, No. 22-10266 (5th Cir. Aug. 26, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Jose Santos Perez-Gonzalez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion below was not selected for publication. It can be found at 2022 WL 3709811. The decision is reprinted in the Appendix. The sentencing court did not issue any written opinions.

JURISDICTION

The Fifth Circuit entered its judgment on August 26, 2022. This petition is timely under S. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Fifth and Sixth Amendments to the U.S. Constitution, 8 U.S.C. § 1326, and 18 U.S.C. §§ 3559 and 3583.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.

The Sixth Amendment provides:

> 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 defence.

Title 8, Section 1326, Subsections (a) and (b)(1), of the United States Code provide:

> (a) In general
>
> Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

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 . . .

Title 18, Section 3583(b) provides, in pertinent part:

> (b) Authorized Terms of Supervised Release.—Except as otherwise provided, the authorized terms of supervised release are—
>
> * * * *
>
> (2) for a Class C or Class D felony, not more than three years; and
>
> (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

Section 3559(a) of Title 18 provides, in pertinent part:

> (a) Classification.—An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is—
>
> * * * *
>
> (3) less than twenty-five years but ten or more years, as a Class C felony;
>
> (4) less than ten years but five or more years, as a Class D felony;
>
> (5) less than five years but more than one year, as a Class E felony;

STATEMENT

Petitioner Jose Santos Perez-Gonzalez pleaded guilty to a single-count indictment charging him with illegal reentry after removal. The indictment—reprinted on pages 3a–4a of the Appendix—alleged all

the elements of the "simple" form of the crime, 8 U.S.C. § 1326(a), but did not allege that his May 19, 2020 removal was "subsequent to" a felony conviction. App. 3a; *see* 8 U.S.C. § 1326(b)(1). When he pleaded guilty, he signed a stipulation admitting all the facts alleged in the indictment. App. 6a. He did not admit that he was a convicted felon at the time of his removal. App. 6a.

After the Presentence Investigation Report suggested that the district court should sentence him under 8 U.S.C. § 1326(b)(1), Mr. Perez lodged an objection. 5th Cir. Sealed R. 171–176. He conceded that the issue was foreclosed, and the district court overruled the objection. The court imposed a sentence of 13 months in prison, followed by three years of supervised release. App. 3a.

On appeal, Mr. Perez renewed his argument that the maximum lawful sentence that could be imposed on his indictment and plea was two years in prison and one year of supervised release. App. 1a–2a. The Fifth Circuit summarily affirmed the aggravated conviction and enhanced sentence. App. 2a.

This timely petition follows.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD OVERRULE *ALMENDAREZ-TORRES*.

In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), this Court rejected the petitioner's argument that the existence of a pre-removal aggravated felony conviction was an "element" of an enhanced offense under 8 U.S.C. § 1326(b)(2): "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." *Id.* at 226.

That holding stands as an outlier in this Court's Fifth and Sixth Amendment jurisprudence. Leaving aside the "prior conviction" exception first announced in *Almendarez-Torres*, the Court has more recently clarified that any fact that aggravates the statutory punishment range is, for constitutional purposes, an "element" of an aggravated crime that must be pleaded in the indictment and proven to a jury beyond a reasonable doubt. See, e.g., *Alleyne v. United States*, 570 U.S. 99, 108 (2013).

Thus far, the Court has resisted calls to overrule *Almendarez-Torres*'s "narrow exception" to what the Fifth and Sixth Amendment require for every other kind of fact that aggravates the punishment. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); see also *United States v. Haymond*, 139 S. Ct. 2369, 2377 n.4 (2019) (Gorsuch, J., plurality opinion).

Even so, many current and former Justices have expressed doubt about the continuing vitality of the *Almendarez-Torres* exception. See, e.g., *Descamps v. United States*, 570 U.S. 254, 280 (2013) (Thomas, J., concurring) ("Under the logic of *Apprendi*, a court may not find facts about a prior conviction when such findings increase the statutory maximum."); *Dretke v. Haley*, 541 U.S. 386, 395–396 (2004) (describing the vitality of the exception as a "difficult constitutional question[ ]"); *Rangel-Reyes v. United States*, 547 U.S. 1200, 1200–1201 (2006) (Thomas, J., dissenting from denial of certiorari) ("[I]t has long been clear that a

majority of this Court now rejects that exception."); cf. *United States v. Smith*, 640 F.3d 358, 369 (D.C. Cir. 2011) (Kavanaugh, J.) ("Smith protests that the reasoning of *Almendarez-Torres* is in tension with the reasoning of later sentencing cases from the Supreme Court. . . . Perhaps so."); *United States v. Santiago*, 268 F.3d 151, 155 (2d Cir. 2001) (Sotomayor, J.) ("*Almendarez-Torres* remains good law, at least for now.").

As Justice Sotomayor—joined by Justices Ginsburg and Kagan—explained in her concurring opinion in *Alleyne*, 570 U.S. at 121, stare decisis does not require adherence to decisions where "the reasoning of those decisions has been thoroughly undermined by intervening decisions and because no significant reliance interests are at stake that might justify adhering to their result." The Fifth and Sixth Amendment principles reaffirmed by *Apprendi* are "now firmly rooted in our jurisprudence." *Id.* Those principles cannot logically coexist with the *Almendarez-Torres* exception.

A. This Court has thoroughly undermined most, if not all, of the decisions upon which *Almendarez-Torres* relied for its constitutional holding.

Almendarez-Torres first held, as a matter of statutory interpretation, that Congress *intended* to create mere "sentencing factors," rather than true elements, when it enacted § 1326(b)(1) & (b)(2). 523 U.S. at 229–239. That may well be, but it is irrelevant to the constitutional question resolved by part III of the opinion. *Id.* at 239–247.

The Court then rejected Almendarez's argument "that the Constitution requires Congress to treat recidivism as an element of the offense—irrespective of Congress' contrary intent." *Id.* at 239. The Court then went through a series of reasons for rejecting that argument. Every one of those reasons was subsequently rejected.

1. Almendarez argued that the Constitution set limits on a legislature's ability to classify some punishment-enhancing facts as mere sentencing factors. This Court rejected that claim in light of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). See *Almendarez-Torres*, 523 U.S. at 242–246. This Court subsequently overruled the holding and reasoning of *McMillan* in *Alleyne*, 570 U.S. at 112, and *Apprendi*, 530 U.S. at 490. See *Haymond*, 139 S. Ct. at 2378 (plurality) (recognizing that *Alleyne* overruled *McMillan*).

2. The Court also mused that it would be "anomalous" to require the full "elements" treatment for facts that lead to "a significant increase" in the statutory punishment range "in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty." *Almendarez-Torres*, 523 U.S. at 247 (citing *Walton v. Arizona*, 439 U.S. 639 (1990), *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984)). The Court overruled those decisions in *Ring v. Arizona*, 536 U.S. 584, 609 (2002), and *Hurst v. Florida*, 577 U.S. 92, 102 ("Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*.

The decisions are overruled."). Today, *Almendarez-Torres* is the anomaly.

B. The Court has already recognized that recidivism provisions can give rise to a jury requirement.

In *Nijhawan v. Holder*, 557 U.S. 29 (2009), this Court construed a part of the "aggravated felony" definition in 8 U.S.C. § 1101(a)(43)(M)(i) to require proof that a defendant's prior fraud conviction in fact involved loss exceeding $10,000, even if that loss amount was not an element necessary to the fraud conviction. *Id.* at 40. The Government agreed that, in a later federal prosecution under § 1326(b)(2), the federal jury "would have to find loss amount" associated with the prior conviction "beyond a reasonable doubt." *Id.* Acknowledging that concession, the Court adopted a circumstance-specific interpretation of the loss-amount requirement.

Even if the fact that a defendant was previously convicted of a particular crime is somehow exempted from the Constitutional demands of indictment and verdict that apply to every other fact that aggravates a statutory punishment range, that would not save the so-called recidivism enhancements in § 1326(b)(1) and (b)(2). Those statutory provisions depend on other facts, in addition to the existence of a prior conviction, that surely require the intervention of a grand jury indictment and a trial jury verdict. For example, § 1326(b)(1) requires proof that the felony conviction *preceded* the removal. *See* 8 U.S.C. § 1326(b)(1). That requires consideration of non-elemental real-world

facts about *when* the defendant was convicted and *when* the defendant was removed.

Recently, the Court held that another recidivism-related sentencing law required the factfinder to engage in a "multi-factored" inquiry to determine whether prior convictions could be counted separately. *Wooden v. United States*, 142 S. Ct. 1063, 1071 (2022) (discussing the Armed Career Criminal Act's "different" "occasions" requirement). Respondent has conceded in lower courts throughout the nation that the existence of the three prior convictions must therefore be treated as an element for constitutional purposes. The same logic applies to § 1326(b)(1)—the provision cannot be applied without an indictment and a jury verdict. In this case, the indictment did not assert and Mr. Perez's plea did not admit the facts necessary to trigger (b)(1).

II. THIS CASE IS AN IDEAL VEHICLE TO OVERRULE *ALMENDAREZ-TORRES*.

Without the *Almendarez-Torres* exception, Mr. Perez's three-year term of supervised release would be unlawful. Based only on the facts alleged by the grand jury and admitted during the plea, the district court was authorized to sentence him to up to two years in prison. See 8 U.S.C. § 1326(a). That would be a Class E felony under 18 U.S.C. § 3559(a)(5), and the maximum term of supervised release would be one year. See 18 U.S.C. § 3583(b)(3).

Even so, the *Almendarez-Torres* exception allowed the district court to make additional findings at sentencing that opened the door to a sentence of up to ten years in prison, 8 U.S.C. § 1326(b)(1), which is a

Class C felony punishable by three years of supervised release. 18 U.S.C. § 3559(a)(3) & § 3583(b)(2).

Mr. Perez fully preserved this argument in district court and in the Fifth Circuit. App. 1a–2a.

Finally, Mr. Perez's three-year term of supervised release began on October 3, 2022. This Court will have time to grant him real and effective relief if it overrules *Almendarez-Torres*.

CONCLUSION

This Court should grant the petition and set this case for a decision on the merits.

Respectfully submitted,

J. Matthew Wright
Counsel of Record
FEDERAL PUBLIC
DEFENDER'S OFFICE
500 South Taylor Street
Unit 110.
Amarillo, Texas 79101
(806) 324-2370
Matthew_Wright@fd.org

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