

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GIOVANNI SANCHEZ-JUAREZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BALLI LAW OFFICE
P.O. Box 1058
Laredo, Texas 78042-1058
Tel: (956) 712-4999
Fax: (956) 724-5830

/s/ Roberto Balli

ROBERTO BALLI
Federal Bar No. 22668
Texas State Bar No. 00795235
Attorney for Defendant-Appellant

QUESTION PRESENTED

Whether *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) was wrongly decided, allowing for the provisions of 8 U.S.C. § 1326(b)(1) and (2) dealing with “felony” and “aggravated felony” to increase the statutory maximum sentence from two years to twenty years, even if the aggravating factors are not pleaded in the indictment nor proven by a jury beyond a reasonable doubt, in violation of Supreme Court precedent *Apprendi v. New Jersey* and the Sixth Amendment of the U.S. Constitution?

LIST OF PARTIES

GIOVANNI SANCHEZ-JUAREZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

The undersigned counsel certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

1. Giovanni Sanchez-Juarez, Defendant-Appellant.
2. Roberto Balli, Counsel for Giovanni Sanchez-Juarez.
3. United States of America, Plaintiff-Appellee.
4. Joseph H. Gay, Counsel for Plaintiff-Appellee.
5. The Honorable Elizabeth Barchas Prelogar, Office of the Solicitor General of the United States.

/s/ Roberto Balli

ROBERTO BALLI

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OPINIONS BELOW

A copy of the Fifth Circuit’s unpublished opinion issued in this case on August 29, 2022, is attached as Appendix A. A copy the District Court’s judgment is attached as Appendix B. The district court did not issue a written opinion.

JURISDICTION

The jurisdiction of this Court to review the Judgment of the Fifth Circuit is invoked in 28 U.S.C. § 1254(1), as an appeal from final judgment of conviction in the United States District Court for the Western District of Texas on December 21, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution 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 defense.”

Title 8 United States Code § 1326 provides:

(a) 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) . . . the Attorney General has expressly consented to such alien’s reapplying for admission; . . . shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) . . . Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection— . . . (2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

STATEMENT OF THE CASE

Giovanny Sanchez-Juarez was charged by indictment with illegal reentry after deportation, in violation of Title 8 U.S.C. § 1326. ROA.14. The indictment contained no language about Mr. Sanchez-Juarez having and convictions for crimes. ROA.14. Mr. Sanchez-Juarez entered guilty plea to the charged offense. ROA.43-73. The Government provided statements during the plea colloquy that Mr. Sanchez-Juarez had been previously deported and reentered and that he had previous felony convictions. ROA.21. The Magistrate Judge took the guilty plea made Mr. Sanchez-Juarez. ROA. 43-73. The District Court accepted the guilty plea made by Mr. Sanchez-Juarez. ROA.27-28.

The District Court subsequently sentenced Mr. Sanchez-Juarez to 37 months of imprisonment and three years of supervised release. ROA.80. Defendant-Appellant, Sanchez-Juarez, timely filed a notice of appeal on December 20, 2021. ROA.29-30. The Fifth Circuit Court of Appeals affirmed the sentence. *United States vs. Sanchez-Juarez*, 2022 WL 3716480.

REASONS FOR GRANTING THE PETITION

- I. *ALMENDAREZ-TORRES V. UNITED STATES*, 523 U.S. 224 (1998), WAS WRONGLY DECIDED, ALLOWING FOR THE PROVISIONS OF 8 U.S.C. § 1326(b)(1) AND (2) DEALING WITH “FELONY” AND “AGGRAVATED FELONY” TO INCREASE THE STATUTORY MAXIMUM SENTENCE FROM TWO YEARS TO TWENTY YEARS, EVEN IF THE AGGRAVATING FACTORS ARE NOT PLEADED IN THE INDICTMENT NOR PROVEN TO A JURY BEYOND A REASONABLE DOUBT, IN VIOLATION OF SUPREME COURT PRECEDENT *APPRENDI V. NEW JERSEY* AND THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION.

A. Review Is Warranted Because The Increase In The Statutory Maximum Sentence Found In Sanchez-Juarez’ Case Was Not Pleaded In The Indictment Nor Proven Beyond A Reasonable Doubt; Therefore, The Statutory Maximum Is Two Years.

The Constitution’s guarantees cannot mean less today that they did the day they were adopted, thus, “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.” *Blakely v. Washington*, 542 U.S. 296, 304 (2004) (quoting 1 Bishop, Criminal Procedure § 87, pp. 55 (2d ed. 1872) (Bishop)). Justice Gorsuch said it clearly, “Only a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty. That promise stands as one of the Constitution’s most vital protection against arbitrary government.” *United States v. Haymond*, 588 U.S. ___, 139 S.Ct. 2369, 2373 (2019).

Mr. Sanchez-Juarez’ indictment is absent of any specific statutory citation to 8 U.S.C. § 1326(b)(1) and (2) and failed to allege that his deportation resulted after a conviction for a felony or an aggravated felony. Yet, the statutory maximum applied to him was increased from two years to twenty years by the sentencing Court using the enhancement provision of 1326. “[T]he Sixth . . . Amendment[] guarantee[s] a jury standing between a defendant and the power of the [Government], and [it] guarantee[s] a jury’s finding of any disputed fact essential to increase the ceiling of a potential sentence.” *See Shepard v. United States*, 544 U.S. 13, 25 (2005) (discussing *Almendarez-Torres* and *Apprendi*).

This Court ruled in *Almendarez-Torres* that “. . . other than the fact of prior conviction, any fact that increases the penalty for a crime beyond prescribed

statutory maximum must be submitted to jury, and proved beyond reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The *Apprendi* Court suggested that *Almendarez-Torres* was incorrectly decided. *Id.* at 489. The Court specifically noted that it is a serious constitutional problem by failing to treat prior convictions as elements that increase a statutory maximum penalty. *Id.* at 499-523; see also *Shepard*, 544 U.S. at 25.

In 1994, Apprendi fired several bullets into a family’s home. Upon his arrest, Apprendi admitted that the criminal act was racially motivated. *Id.* at 466. A state grand jury indicted Apprendi on 23 counts, none of which cited the sentence enhancement of New Jersey’s hate crime statute. *Id.* Yet, Apprendi was still sentenced to an extended term under the state’s hate crime statute. *Id.* Upon granting certiorari, the Court held that the application of the state’s hate crime statute, which authorized an increase in maximum prison sentence based on the *judge’s finding* that the defendant acted with purpose to intimidate the victim, violated due process clause of the Sixth Amendment. *Id.* at 477 (*emphasis added*). The Court reasoned, citing *United States v. Gaudin*, 515 U.S. 506, 510–11 (1995), that trial by jury has been 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.*

Mr. Sanchez-Juarez should have been properly sentenced under the provisions of 8 U.S.C. § 1326(a), to no more than two years of imprisonment and one

year of supervised release rather than under 8 U.S.C. § 1326(b)(1) and (2) because the indictment failed to articulate facts alleging that his prior deportation occurred following a conviction for a felony or aggravated felony. In *Apprendi*, the Court suggested that sentencing enhancements must be alleged so the defendants have adequate notice of said enhancements. The Court praised the common law's determinate sentences because they allowed defendants to predict their sentences from the faces of the indictments.¹ In his concurring opinion, Justice Scalia alluded to notice as an essential part of fairness: The law should “tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of 30 years . . . [to ensure that] the criminal will never get more punishment than he bargained for when he did the crime.” *Id.* at 1140. Similar to *Apprendi*, Mr. Sanchez-Juarez was charged by indictment with illegal reentry in violation of § 1326(a), to which he pled guilty. The charge in Mr. Sanchez-Juarez’ indictment was silent as to the penalty enhancements under subsections (b)(1) and (2) of the aforementioned statute, mirroring the facts in *Apprendi* relating to the hate crime statute penalty enhancement.

Defendants need notice, not only to contest enhancements at sentencing, but to decide whether to plead guilty and on what terms. *Bibas*, *supra* at 1174. This is especially important because the law must guarantee defendants the information they need most and must be fully aware of the “direct consequences” before they

¹ Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancement in a World of Guilty Pleas*, 110 Yale L. J. 1097 (2001).

enter a plea. *Id.* The “direct consequences” should include the maximum penalty to which the defendant is agreeing, including any enhancements. *Id.*

However, the Court held in *Almendarez-Torres* that an “indictment must set forth each element of the crime that it charges, it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime.” 523 U.S. 224, 228 (1998). The Court in *Apprendi* has abandoned this view on the constitutional issue regarding sentence enhancements. However, *Almendarez-Torres* misses the constitutional point. *Bibas*, supra at 1174. Nonetheless, these cases, *Almendarez-Torres* among others, remain the law and it is time to overrule them and to require pre-plea notice of all statutory maxima, including enhancements. *Id.*

Since then, a majority of the Court has now recognized that the decision made in *Almendarez-Torres* was decided incorrectly. *Shepard v. United States*, 544 U.S. 13, 23 (2005). In *Blakely v. Washington*, petitioner pleaded guilty to kidnaping his estranged wife. *Blakely*, 542 U.S. at 296 (2004). Blakely admitted to facts in his plea, which standing alone, supported a maximum sentence of 53 months; however, the judge imposed a 90-month sentence after finding that Blakely had acted with deliberate cruelty, a statutorily enumerated ground for departing from the standard range. *Id.* The Washington Court of Appeals affirmed, rejecting Blakely's argument that the sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence. *Id.* This Court held that because the facts supporting Blakely's

exceptional sentence were neither admitted by Blakely nor found by a jury, the sentence violated his Sixth Amendment right to trial by jury. *Id.* The Court made it clear that, “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*” *Id.* at 303 (emphasis in original). Thus, the “relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum [the judge] may impose *without* any additional facts. *Id.* at 303-304 (emphasis in original). The judge exceeds his authority when the judge imposes a sentence that is not allowed by the jury’s verdict alone because the jury has not found all the facts “which the law makes essential to the punishment.” *Id.* at 304.

Following *Apprendi*, circuits were split regarding whether this rule also applied to facts that increase the mandatory minimum sentence. Prior to *Apprendi*, the Supreme Court had ruled in *Harris v. United States*, 536 U.S. 545 (2002), that the Constitution does not require facts that increase a mandatory minimum sentence to be determined by a jury. The Supreme Court overruled *Harris* in *Alleyne v. United States*, 570 U.S. 99 (2013), holding that “any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.” The Court has examined this also in terms of supervised release revocation sentences. This Court held, in *United States v. Haymond*, that the federal statute governing revocation of supervised release that authorized a new mandatory minimum sentence was unconstitutional because the new mandatory minimum is based on a judge’s fact-

finding by a preponderance of the evidence, thus it was a violation of the Due Process Clause and the right to jury trial as guaranteed in the Sixth Amendment. 588 U.S. ___, 139 S.Ct. 2369 (2019). Some may argue that “jury trials are inconvenient for the government.” However, “like much else in our Constitution, the jury system isn’t designed to promote efficiency but to protect liberty.” *Id.* at 2384.

In the indictment charging Mr. Sanchez-Juarez, the Government failed to cite 8 U.S.C. § 1326(b)(1) and (2) as relevant factors enhancing Sanchez-Juarez’ sentence and failed to allege in that Sanchez-Juarez’ deportation occurred after a conviction for a felony or an aggravated felony as per the above-mentioned subsections of the statute. As such, the Court should hold that the sentencing enhancement in 8 U.S.C. § 1326(b)(1) and (2) is unconstitutional as applied to Mr. Sanchez-Juarez; therefore, the Court should vacate the judgment of the court of appeals with instructions to remand the case to the district court for resentencing.

B. Review Is Warranted Because The Government Did Not Prove To A Jury The Existence Of A Previous Deportation Resulting From A Felony Or An Aggravated Felony Beyond A Reasonable Doubt.

Regardless of whether the statute or the facts were absent in the indictment, functional equivalents of elements must be tried before a jury and proved beyond a reasonable doubt. The term “sentencing factor” appropriately describes a circumstance, which may be either aggravating or mitigating in character, which supports a specific sentence within the range authorized by the jury’s finding that the defendant is guilty of a particular offense. *Apprendi*, 530 U.S. at 494, n.19. On the other hand, when the term “sentence enhancement” is used to describe an

increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an additional element of a greater offense than the one covered by the jury's guilty verdict. *Id.* Indeed, it fits squarely within the usual definition of an “element” of the offense. *See Id.* at 499-501 (Thomas, J., concurring).

This new term, functional equivalent of an element, has been seized upon to explain why these quasi-elements must be submitted to a jury and proven beyond a reasonable doubt, but do not have to be charged in the indictment.² Justice Thomas, in his concurring opinion, undertook an extensive historical review and argued that an element is any fact that provides the basis for a sentence, whether it is imposing or increasing the sentence. *Id.* Once a fact provides the basis for a sentence, it is an element and the U.S. Constitution requires that it be charged in the indictment or information, undergo a probable cause determination, and be submitted to a jury and proven beyond a reasonable doubt. *Id.* This is the most common-sense explanation of the difference between sentencing factors and elements and it should be adopted. *Id.*

In *Ring v. Arizona*, the defendant was convicted of first-degree murder and armed robbery, the jury deadlocked on premeditated murder, but found Ring guilty of felony murder occurring in the course of armed robbery. 536 U.S. 584 (2002). Based solely on the jury's verdict, finding Ring guilty of first-degree felony murder, the maximum punishment was life imprisonment and Ring could not be sentenced to death unless the judge found at least one statutorily enumerated aggravating

² Catherine M. Guastello, *The Tail That Wags The Dog: The Evolution Of Elements, Sentencing Factors, And The Functional Equivalent Of Elements—Why Aggravating Factors Need To Be Charged In The Indictment*, 37 Ariz. St. L.J. 199, 215 (2005).

circumstance as per Arizona law. *Id.* The Court held that “capital defendants, no less than non-capital defendants” are entitled under the Sixth Amendment “to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” *Id.* at 589. The trial judge, sitting alone, cannot determine the presence or absence of the aggravating factors required by Arizona law for the imposition of the death penalty. *Id.* The Court reasoned, citing *Apprendi*, that Arizona's enumerated aggravating factors operate as “the functional equivalent of an element of a greater offense” and the Sixth Amendment requires that they be found by a jury. *Id.* at 597–99 (citing *Apprendi*, 530 U.S. at 494, n. 19).

Justice Thomas, in his concurrence in *Apprendi*, reasons that a sentencing factor supports a specific sentence within the range authorized by a finding of a defendant's guilt to a particular offense. Any increase beyond the statutory maximum is a functional equivalent to an additional element of a greater offense than the one covered by a guilty judgment and fits squarely within the usual definition of an element of the offense. Similarly, in *Ring*, the Court overruled *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty because enumerated aggravating factors operate as “the functional equivalent of an element of a greater offense,” and shall be found by a jury. *See Walton v. Arizona*, 497 U.S. 639, 647–49 (1990).

Sanchez-Juarez' case mirrors *Ring* in that Mr. Sanchez-Juarez was sentenced beyond the maximum authorized statutory sentence, just like Ring. Sanchez-

Juarez' guilty plea to the charged offense of illegal entry after deportation (8 U.S.C. § 1326(a)) carried a statutorily authorized maximum sentence of two years in prison and one year of supervised release. Yet, Mr. Sanchez-Juarez was sentenced beyond the statutory maximum prescribed by offense of conviction, when the District Judge sentenced him to 37 months of imprisonment, a three-year term of supervised release, and a \$100 special assessment, in accordance with 8 U.S.C. § 1326(b)(1) and (2), an offense that Sanchez-Juarez was not convicted of. ROA.35-40. Using the line of reasoning in Justice Thomas' concurrence in *Apprendi*, which was echoed in *Ring*, §§ 1326(b)(1) and (2) are functional equivalents of an element of a greater offense than the one Mr. Sanchez-Juarez was convicted of, § 1326(a). As such, §§ 1326(b)(1) and (2) should be weighed with the usual definition of "element" and shall be tried by jury under the Sixth Amendment.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that his petition for a writ of certiorari be granted.

Date: November 25, 2022.

Respectfully submitted,

BALLI LAW OFFICE
P.O. Box 1058
Laredo, Texas 78042-1058
Tel: (956) 712-4999
Fax: (956) 724-5830

/s/ Roberto Balli

ROBERTO BALLI

Federal Bar No. 22668

Texas State Bar No. 00795235

Attorney for Defendant-Appellant