No.

IN THE

SUPREME COURT OF THE UNITED STATES

ISREAL PEREZ-JIMENEZ,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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Question Presented for Review

I. Whether all facts – including the fact of a prior conviction – that increase a defendant's statutory maximum must be pleaded in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt?

II. Whether this Court should hold this petition for certiorari pending a decision in *Sessions v. Dimaya*, No. 15-1498, argued January 17, 2017.

Parties

Israel Perez-Jimenez is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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Petition for a Writ of Certiorari

Petitioner, Israel Perez-Jimenez, 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The unpublished order of summary affirmance of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Perez-Jimenez*, No. 16-10135 (5th Cir. December 21, 2016), and is provided in the Appendix to the Petition. [Appx. A]. No petitions for rehearing were filed.

Jurisdictional Statement

The judgment and order of the United States Court of Appeals for the Fifth Circuit were filed on December 21, 2016. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutes and Constitutional Provision Involved

8 U.S.C. § 1326 provides in part:

> (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 or any prior Act,
>
> shall be fined under title 18, United States Code, 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, United States Code, imprisoned not more than 10 years, or both;
> (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;

(3) who has been excluded from the United States pursuant to section 235(c) [8 USCS § 1225(c)] because the alien was excludable under section 212(a)(3)(B) [8 USCS § 1182(a)(3)(B)] or who has been removed from the United States pursuant to the provisions of title V [8 USCS §§ 1531 et seq.], and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18, United States Code, and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[;] or

(4) who was removed from the United States pursuant to section 241(a)(4)(B) [8 USCS § 1231(a)(4)(B)] who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under title 18, United States Code, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

The Fifth Amendment to the United States Constitution provides:

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

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; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

Rights of the accused.

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.

Statement of the Case

A. Facts and Proceedings Below

On July 9, 2014, Israel Perez-Jimenez (Perez), was charged in a one-count indictment with illegal re-entry after deportation, a violation of 8 U.S.C. §§ 1326(a) and (b)(2). (ROA.11). On January 15, 2015, Perez pleaded guilty to the indictment without plea agreement. (ROA.5,97-114).

The Probation Department prepared a presentence report (PSR) using the November 1, 2014, edition of the United States Sentencing Guidelines. (ROA.224). Applying U.S.S.G. §2L1.2, the probation officer calculated the base offense level to be a level 8 and then assessed a 8-level enhancement as follows:

> 19. **Specific Offense Characteristics**: The defendant was last removed from the United States on October 31, 2011, after convictions for Burglary of a Building, in the 197th Judicial District Court of Cameron County, Case No. 99-CR-960, and Illegal Reentry Into the United States After Deportation, in the U.S. District Court, Western District of Texas, Del Rio Division, Case No. DR-09-CR-1143, which are aggravated felony convictions, under 8 U.S.C. §1101(a)(43)(G) & (O). Pursuant to USSG §2L1.2(b)(1)(C), if the defendant was previously deported after a conviction for an aggravated felony, increase by 8 levels.

(ROA.224).

This enhancement resulted in a total guideline offense level 16. Applying a three-level reduction to it for timely acceptance of responsibility (for pleading guilty), Perez's total offense level was a level 13. (ROA.224). This, combined with his attributed 10 criminal history points–scoring a Criminal History Category V–yielded an advisory imprisonment range of 30-37 months. (ROA.233, 229).

Perez objected to the PSR, arguing, among other things, that the prior conviction for illegal reentry was not an aggravated felony. (ROA.253). The probation officer's PSR Addendum rejected this objection and re-asserted that the prior conviction for

illegal reentry was an aggravated felony offence, and said that, regardless, the burglary of a building offense was an aggravated felony. (ROA.261-262).

Both in a *pro se* pleading and in a brief filed by his attorney, Perez objected that none of his prior felonies, burglary of a building, burglary of a vehicle and illegal re-entry did not qualify as "aggravated felonies" for the purposes of U.S.S.G. §2L1.2. (ROA.57-59,236.315-322).

The district court ultimately found that the Texas burglary of a vehicle and burglary of a building statute are "crimes of violence" under 18 U.S.C. § 16(b) and Section 1101(a)(43)(F). (ROA.189-193). The district court sentenced Mr. Perez to a 30-month sentence, the bottom of the advisory guideline range, no fine and no supervised release. (ROA.208-211).

B. The Appeal

Petitioner appealed his sentence, arguing, first, that the residual clause under Section 16(b) was unconstitutionally vague pursuant to this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015)(Foreclosed by *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016). Second, Petitioner argued that the district court's sentence exceeded the statutory maximum authorized by 8 U.S.C. § 1326(a). (Foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The court of appeals affirmed his sentence in an unpublished opinion. *See* [Appendix A].

REASONS FOR GRANTING THE PETITION

I. Whether all facts – including the fact of a prior conviction – that increase a defendant's statutory maximum must be pleaded in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt?

Petitioner was subjected to an enhanced statutory maximum under 8 U.S.C. §1326(b) because the removal charged in the indictment followed a prior felony or aggravated felony conviction. Petitioner's sentence thus depends on a judge's–and not a jury's–fact-finding authority to determine the existence and date of a prior conviction,

and to use that date to increase the statutory maximum. This authority was affirmed in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that the enhanced maximums of 8 U.S.C.§ 1326 represent sentencing factors rather than elements of an offense, and that they may be constitutionally determined by judges rather than juries. *See Almendarez-Torres*, 523 U.S. at 244.

But this Court itself has suggested that *Almendarez-Torres* is on judicial life-support and that that support is failing. The Court has repeatedly limited *Almendarez-Torres*. *See Alleyne v. United States*, 133 S.Ct. 2151, 2160 n.1 (2013) (characterizing *Almendarez-Torres* as a narrow exception to the general rule that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt); *Descamps v. United States*, 133 S. Ct. 2276, 2295 (2013)(Thomas, J., concurring) (stating that *Almendarez-Torres* should be overturned); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (stressing that *Almendarez-Torres* represented "a narrow exception" to the prohibition on judicial fact-finding to increase a defendant's sentence); *Shepard v. United States*, 544 U.S. 13 (2005) (Souter, J., controlling plurality opinion)("While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute."); *Dretke v. Haley*, 541 U.S. 386, 395-396 (2004) (concluding that the application of *Almendarez-Torres* to the *sequence* of a defendant's prior convictions represented a difficult constitutional question to be avoided if possible); *Nijhawan v. Holder*, 129 S.Ct. 2294, 2302 (2009) (agreeing with the Solicitor General that the loss amount of a prior offense would represent an element of an 8 U.S.C. §1326(b) offense, to the extent that it boosted the defendant's statutory maximum).

Further, any number of opinions, some authored by Justices who numbered among the *Almendarez-Torres* majority, have expressed doubt about whether that case was correctly decided. *See Apprendi*, 530 U.S. at 490; *Haley*, 541 U.S. at 395-396; *Shepard*, 544 U.S. at 26 & n.5 (Souter, J., controlling plurality opinion); *Shepard*, 544 U.S. at 26-28 (Thomas, J., concurring); *Rangel-Reyes v. United States*, 547 U.S. 1200, 1201 (2006)(Stevens, J., concurring in denial of certiorari); *Rangel-Reyes*, 547 U.S. at 1202-1203 (Thomas, J., dissenting from denial of certiorari); *James v. United States*, 550 U.S. 192, 231-232 (2007)(Thomas, J., dissenting).

And this Court has also repeatedly cited authorities as exemplary of the original meaning of the constitution that do not recognize a distinction between prior convictions and facts about the instant offense. *See Blakely v. Washington*, 542 U.S. 296, 301-302 (2004)(quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769),1 J. Bishop, Criminal Procedure § 87, p 55 (2d ed. 1872)); *Apprendi*, 530 U.S. at 478-479 (quoting J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862) , 4 Blackstone 369-370).

In *Alleyne*, this Court applied *Apprendi*'s rule to mandatory minimum sentences, holding that any fact that produces a higher sentencing range—not just a sentence above the mandatory maximum—must be proved to a jury beyond a reasonable doubt. 133 S. Ct. at 2162–63. In its opinion, the Court apparently recognized that *Almendarez-Torres*'s holding remains subject to Fifth and Sixth Amendment attack. *Alleyne* characterized *AlmendarezTorres* as a "narrow exception to the general rule" that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt. *Id.* at 2160 n.1. But because the parties in *Alleyne* did not challenge *Almendarez-Torres*, this Court said that it would "not revisit it for purposes of [its] decision today." *Id.*

The Court's reasoning in *Alleyne* nevertheless demonstrates that *Almendarez-Torres*'s recidivism exception may be not be long in the offing. *Alleyne* traced the treatment of the relationship between crime and punishment, beginning in the Eighteenth Century, repeatedly noting how "[the] linkage of facts with particular sentence ranges . . . reflects the intimate connection between crime and punishment." *Id.* at 2159 ("[i]f a fact was by law essential to the penalty, it was an element of the offense"); *see id.* (historically, crimes were defined as "the whole of the wrong to which the law affixes [ ] punishment … include[ing] any fact that annexes a higher degree of punishment") (internal quotation marks and citations omitted); *id.* at 2160 ("the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted") (internal quotation marks and citation omitted). This Court concluded that, because "the whole of the" crime and its punishment cannot be separated, the elements of a crime must include any facts that increase the penalty. The Court recognized no limitations or exceptions to this principle.

Alleyne's emphasis that the elements of a crime include the "whole" of the facts for which a defendant is punished seriously undercuts the view, expressed in *Almendarez-Torres*, that recidivism is different from other sentencing facts. *See Almendarez-Torres*, 523 U.S. at 243–44; *see also Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") *Apprendi* tried to explain this difference by pointing out that, unlike other facts, recidivism "'does not relate to the commission of the offense' itself[.]" 530 U.S. at 496 (quoting *Almendarez-Torres*, 523 U.S. at 230).

But this Court did not appear committed to that distinction; it acknowledged that *Almendarez-Torres* might have been "incorrectly decided." *Id.* at 489; *see also Shepard v. United States*, 544 U.S. 13, 26 n.5 (2005) (acknowledging that Court's

holding in that case undermined *Almendarez-Torres*); *Cunningham v. California*, 549 U.S. 270, 291 n.14 (2007) (rejecting invitation to distinguish between "facts concerning the offense, where *Apprendi* would apply, and facts [like recidivism] concerning the offender, where it would not," because "*Apprendi* itself … leaves no room for the bifurcated approach").

Indeed, three concurring justices in *Alleyne* provide additional reason to believe that the time is ripe to revisit *Almendarez-Torres*. *See Alleyne*, 133 S. Ct. at 2164 (Sotomayor, Ginsburg, Kagan, J.J., concurring). Those justices noted that the viability of the Sixth Amendment principle set forth in *Apprendi* was initially subject to some doubt, and some justices believed the Court "might retreat" from it. *Id.* at 2165. Instead, *Apprendi*'s rule "has become even more firmly rooted in the Court's Sixth Amendment jurisprudence." *Id*. Reversal of precedent is warranted when "the reasoning of [that precedent] has been thoroughly undermined by intervening decisions." *Id.* at 2166.

The validity of *Almendarez-Torres* is accordingly subject to reasonable doubt. If *Almendarez-Torres* is overruled in another case, the result will obviously undermine the use of Petitioner's prior conviction to increase his statutory maximum. Indeed, any *limitation* on the scope of this decision in another case will undercut the decision below. Petitioner's sentence depends on the district court's ability to find not merely that he was previously convicted, but that the date of his prior conviction preceded the deportation admitted by the plea of guilty. *See* 8 U.S.C. §1326(b)(requiring that the defendant's prior felony conviction precede his removal).

Now, to be sure, this issue was not raised in the trial court below. Any error must therefore meet the requirements of Federal Rule of Criminal Procedure 52(b) to merit relief. Unpreserved error may be reversed only where it is plain, where the defendant's substantial rights have been affected, and where the error affects the

fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993). But the plain-ness of error is determined at the time of appeal, not at the time of trial proceedings. *See Henderson v. United States*, __ U.S. __, 133 S.Ct. 1121, 1124-1125 (2013).

And this Court has recently emphasized that an effect on substantial rights will ordinarily follow from proof of a Guideline error. *See Molina-Martinez v. United States*, 136 S. Ct. At 1345. Nothing in the record defeats that presumption here. In this case, the issue was raised before the appeals court below. If this Court were to determine that the Constitution limits Perez's statutory range of imprisonment to not more than two years, then clearly such constitutional error substantially prejudiced Perez as evidenced by his 30 month sentence.

II. This Court should hold this petition for certiorari pending its decision in *Sessions v. Dimaya*, No. 15-1498, argued on January 17, 2017.

At sentencing, the district court found that the Texas burglary of a vehicle and burglary of a building statute are "crimes of violence" under 18 U.S.C. § 16(b) and Section 1101(a)(43)(F). (ROA.189-193). On direct appeal, Perez raised the argument that 18 U.S.C. § 16(b)–as implicated by the residual clause found in the definition of crime of violence–was unconstitutionally vague in light of this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Perez's argument was foreclosed at the Fifth Circuit by that court's decision in *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016). But a petition for certiorari from that case is pending before this Court.

On January 17, 2017, this precise issue was argued to this Court in *Sessions v. Dimaya*, No. 15-1498, a case out of the Ninth Circuit. That case still awaits this

Court's adjudication. Perez asks this Court to hold its evaluation of his petition for pending *Dimaya*, because that decision will, in part, directly affect Perez's petition.

CONCLUSION

Petitioner respectfully aks this Court to grant *certiorari* and to reverse the judgment below, and/or to vacate the judgment and remand for reconsideration in light of any relevant forthcoming authority.

Respectfully submitted this 21st day of March, 2017.

____
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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Israel Perez-Jimenez, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), in the United States District Court for the Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 21st day of March, 2017.

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PROOF OF SERVICE

I, Christopher Curtis, do certify that on this date, March 21, 2017, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served. I have served the Supreme Court of the United States via Federal Express, Overnight. The Solicitor General, Assistant United States Attorney Wes Hendrix, and the Petitioner were each served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

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