

No. 18-_____

In The Supreme Court Of The United States

KENNETH WHIGHAM, JR.,
Petitioner,

v.

UNITED STATES,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The First Circuit

Petition For A Writ Of Certiorari

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QUESTION PRESENTED FOR REVIEW

Whether this Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), which held that the allegation of a prior conviction need not be submitted to a jury and proved beyond a reasonable doubt, should be overruled?

LIST OF PARTIES

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INTRODUCTION

At sentencing, the district court found that Kenneth Whigham, Jr. ("Whigham") had previously been convicted of offenses qualifying him as a career offender. Although this Court approved judicial fact-finding of prior convictions in Almendarez-Torres v. United States, 523 U.S. 224 (1998), individual justices and subsequent decisions have called into question whether such judicial fact-finding comports with the Sixth Amendment. Since this case involves a preserved objection to a practice whose constitutionality is in grave doubt, this Court should grant Whigham's petition to consider whether Almendarez-Torres should be overruled.

OPINIONS BELOW

The Appendix consists of the judgment of the United States Court of Appeals for the First Circuit.

JURISDICTION

The United States Court of Appeals for the First Circuit affirmed the judgment of the district court on December 11, 2018. On or about March 11, 2019, this Court granted the petitioner an extension of 60 days in which to file this petition. The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

18 U.S.C. § 922(g)(1) provides as follows:

It shall be unlawful for any person ... who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, an firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

CONSTITUTIONAL PROVISIONS INVOLVED

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

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 as follows:

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. PROCEDURAL HISTORY

On April 17, 2013, Whigham was charged in a one-count indictment with being a felon in possession of a firearm and ammunition (18 U.S.C. § 922(g)(1)). Whigham filed a motion to suppress evidence, and a hearing on the motion was held on March 21, 2014. The district court denied the motion on April 2, 2014.

On July 15, 2014, a superseding indictment charged Whigham with two counts. The first count, as before, charged Whigham with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). The second count charged Whigham with possession with intent to distribute cocaine base under 21 U.S.C. § 841(a)(1). That same day, the government filed an information under 21 U.S.C. § 851 to establish a prior conviction as to the defendant. The information charged Whigham with possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) & 924(e)(1).

Chief Judge Patti B. Saris presided over Whigham's jury trial in October 2014. On the third day of trial, the jury returned a guilty verdict on both counts.

At a sentencing hearing held on January 28, 2015, Judge Saris sentenced Whigham to a term of incarceration of 17 years. Whigham filed a timely notice of appeal. On appeal, he raised two arguments:

- THE COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE MASSACHUSETTS OFFENSE OF ASSAULT AND BATTERY BY MEANS OF A DANGEROUS WEAPON IS A VIOLENT FELONY UNDER THE ACCA; and
- A SENTENCE MAY NOT BE ENHANCED ON THE BASIS OF PRIOR CONVICTIONS NEITHER ADMITTED NOR PROVED BEYOND A REASONABLE DOUBT, AND THE PRIOR CONVICTION EXCEPTION RECOGNIZED IN ALMENDAREZ-TORRES V. UNITED STATES, 523 U.S. 224 (1998) IS CONSTITUTIONALLY DOUBTFUL.

Following this Court's decision in United States v. Johnson, 135 S. Ct. 2551 (2015), the United States assented to Whigham's motion to vacate the sentence and to summarily rule on the remaining issue. This Court granted Whigham's motion in part, vacating the sentence and remanding the case for resentencing. It declined, however, "to address at this time the other sentencing challenge included in appellant's brief, without prejudice to appellant's reassertion of the claim as part of an appeal taken after entry of a new or amended judgment, should such an appeal be taken."

Judge Saris presided over a resentencing hearing on December 20, 2017. Judge Saris sentenced Whigham to a term

of incarceration of 12 years. She also imposed 6 years of supervised release.

The amended judgment entered on December 27, 2017. Whigham filed a timely notice of appeal on January 3, 2018.

On December 11, 2018, the United States Court of Appeals for the First Circuit summarily affirmed the judgment of the district court. A petition for rehearing was not filed.

B. FACTS

*The Offense*¹

The charges in the indictment and superseding indictment arose out of a February 28, 2013, traffic stop in which police observed Whigham erratically operating his car by twice driving into and out of a traffic lane closed for construction in Boston's O'Neill Tunnel. Whigham appeared to be under the influence of alcohol. As a result of the stop, police retrieved a handgun with an obliterated serial number from under the passenger seat. They also retrieved 3 grams of individually packaged cocaine base and \$666 from Whigham's left front pants pocket.

¹ The following summary of the offense conduct derives from the presentence investigation report.

C. BASIS FOR FEDERAL JURISDICTION IN THE COURT BELOW

The United States District Court for the District of Massachusetts had subject-matter jurisdiction over this case pursuant to 18 U.S.C. § 3231 because the indictment charged the petitioner with violations of laws of the United States. The United States Court of Appeals for the First Circuit had jurisdiction over the case pursuant to 28 U.S.C. § 1291 because Whigham appealed from the final judgment of conviction of the district court.

REASONS FOR GRANTING THE WRIT

A SENTENCE MAY NOT BE ENHANCED ON THE BASIS OF PRIOR CONVICTIONS NEITHER ADMITTED NOR PROVED BEYOND A REASONABLE DOUBT, AND THE PRIOR CONVICTION EXCEPTION RECOGNIZED IN ALMENDAREZ-TORRES V. UNITED STATES, 523 U.S. 224 (1998) SHOULD BE OVERRULED.

At resentencing, Whigham was assigned an offense level of 34 rather than 32 in light of his classification as a career offender. See U.S.S.G. § 4B1.1(b) (2) (career offender's total offense level is 34 if the offense carries a maximum sentence of 25 years or more); 21 U.S.C § 841(b) (1) (C) (maximum sentence for second or subsequent offense is 30 years).² He objected on the ground that "the

²The PSR also calculated the offense level for the firearm conviction as 34 under U.S.S.G. §§ 4B1.4(b) (2) and 4B1.4(b) (3)(A), because it classified Whigham as a career offender, and it counted the firearm and ammunition as possessed in connection with a controlled substance offense.

prior conviction under 21 U.S.C. § 851 should have been submitted to the jury and proven beyond a reasonable doubt, in spite of the contrary holdings in Almendarez-Torres v. United States, 523 U.S. 224 (1998) and Apprendi v. New Jersey, 530 U.S. 466 (2000).” Judge Saris overruled his objection. Since Judge Saris engaged in judicial fact-finding in violation of Whigham’s right to a jury trial, the resulting Guidelines Sentencing Range of 262-to-327 months was erroneous. See Descamps v. United States, 133 S. Ct. 2276, 2294 (2013) (Thomas, J., dissenting) (“Regardless of the framework adopted, judicial factfinding increases the statutory maximum in violation of the Sixth Amendment.”).

Current law supports Judge Saris’s judicial fact-finding. In Almendarez-Torres v. United States, supra, the defendant admitted his prior convictions in his plea colloquy but argued that the Fifth Amendment required that they be charged in the indictment. In a five-to-four decision, the Court relied on a distinction between elements of offenses and sentencing factors to hold that a prior conviction raising the maximum sentence need not be pleaded in the indictment. Id. at 226-27, 246-47. The dissent, written by Justice Scalia, would have construed the penalty provision as an element in order to avoid the

"genuinely doubtful" question whether the Constitution permits an increase in the maximum punishment based on a fact, whether designated as an element or a sentencing factor, that has not been charged in an indictment and proved to a jury beyond a reasonable doubt. Id. at 251-60.³

In a case decided two years later, this Court noted the holding in Almendarez-Torres and declined to revisit it. See Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, the Court held that "[o]ther 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." Id. at 490. The Court reserved judgment on the validity of Almendarez-Torres, since a prior conviction enhancement was not at issue in Apprendi. It noted, however, that Almendarez-Torres "represents at best an exceptional departure from the historic practice [of requiring pleading and proof of factors increasing statutory maximums]." Id. at 484, 487. The Court further emphasized that no question regarding jury trial or standard of proof arose in Almendarez-Torres, and explicitly stated that it may have

³ Justice Thomas later renounced his swing vote in Almendarez-Torres. Apprendi, 530 U.S. at 520-21 (Thomas, J., concurring).

been incorrectly decided and should be narrowly applied. Id. at 488-89.

In a series of subsequent decisions, this Court has repeatedly called into question the constitutional underpinnings and soundness of Almendarez-Torres. See, e.g., Ring v. Arizona, 536 U.S. 584, 605, 609 (2002) (abandoning any distinction for constitutional purposes between elements and sentencing factors); Dretke v. Haley, 541 U.S. 386, 395-96 (2004) (acknowledging that the continuing viability of Almendarez-Torres represents a "difficult constitutional question[]" that should be "avoided if possible"); Blakely v. Washington, 542 U.S. 296 (2004) (explicitly rejecting the distinction between elements and sentencing factors; observing that "facts essential to punishment" must be charged in an indictment and proved to a jury beyond a reasonable doubt).

In Shepard v. United States, 544 U.S. 13 (2005), the Court strongly indicated that Almendarez-Torres is ripe for overturning. While Shepard did not challenge Almendarez-Torres or the prior conviction exception, parts of the opinion make clear that five of the then-sitting Justices would overturn that decision and eliminate the exception.

In section III of the opinion, Justice Souter, writing for a four-justice plurality, explained that judicial fact-

finding about a disputed prior conviction "raises the concern underlying Jones v. United States, 526 U.S. 227, 243 n.6 (1999) and Apprendi: the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence." Id. at 25. The dissent in turn observed that the Court's decision "may portend the extension of Apprendi . . . to proof of prior convictions." Id. at 25.

For his part, Justice Thomas would have found the Armed Career Criminal Act unconstitutional as applied to Shepard because it required an increase in the sentence based on facts (prior convictions) not admitted by the defendant or proven to a jury. Shepard, 544 U.S. at 27-28 (Thomas, J. concurring). He stated that Almendarez-Torres:

has been eroded by the Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that Almendarez-Torres was wrongly decided. The parties do not request it here, but in an appropriate case, this Court should consider Almendarez-Torres' continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of Almendarez-Torres, despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.

Id. at 27-28 (internal citations omitted).

The prior convictions relied upon to increase the sentencing ranges faced by Whigham are elements that must be included in an indictment and either admitted by the defendant or found by a jury beyond a reasonable doubt. Since the district court's classification of Whigham as a career offender amounted to unconstitutional judicial fact-finding, this Court should take the opportunity to overrule Almendarez-Torres.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Date: April 2, 2019