No. 19-5865

IN THE SUPREME COURT OF THE UNITED STATES

PABLO SUASTE BALDERAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether plain-error relief is warranted on petitioner's claim that this Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), should be overruled.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Suaste Balderas-Lopez, No. 18-cr-271 (June 28, 2018)

United States Court of Appeals (5th Cir.):

United States v. Suaste Balderas, No. 18-11285 (June 7, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-5865

PABLO SUASTE BALDERAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 772 Fed. Appx. 88.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2019. The petition for a writ of certiorari was filed on September 5, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of unlawful reentry after removal, in violation of 8 U.S.C. 1326(a) and (b)(2). Pet. App. B1. He was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. Id. at B2-B3. The court of appeals modified the judgment to reflect conviction under 8 U.S.C. 1326(a) and (b)(1), and affirmed. Pet. App. A2.

1. Petitioner is a citizen and national of Mexico. Presentence Investigation Report (PSR) ¶ 8. He was removed from the United States in 1999, 2002, and 2003. PSR ¶¶ 8-10.

Petitioner reentered the United States and, in August 2006, he was arrested in Denton County, Texas, for the manufacture/delivery of a controlled substance (more than 4 grams and less than 200 grams), in violation of Texas law. PSR ¶¶ 11, 38. Petitioner subsequently pleaded guilty to that crime and was sentenced to five years of imprisonment. Ibid. In February 2007, petitioner was released from prison on parole. Ibid. He was removed to Mexico in September 2008. Ibid.

At some point thereafter, petitioner reentered the United States. See PSR ¶ 12. On October 4, 2015, he was arrested in The Colony, Texas, for theft of property. PSR ¶ 40. Petitioner pleaded nolo contendre to that offense and was sentenced to 12

months of probation. Ibid. Petitioner's probation was later revoked, and he received 75 days of imprisonment. Ibid.

In April 2018, a grand jury indicted petitioner on one count of unlawful reentry after removal, in violation of 8 U.S.C. 1326(a) and (b)(2). Indictment 1-2. Petitioner pleaded guilty to the charge without a plea agreement. PSR ¶ 5.

2. Section 1326(a) generally makes it unlawful for an alien to reenter the United States after having been removed unless he obtains the prior consent of the Attorney General (or the Secretary of Homeland Security, see 6 U.S.C. 202(3)-(4) (2012 & Supp. V 2017); 6 U.S.C. 557). The default maximum punishment for that offense is a term of imprisonment of two years, followed by one year of supervised release. 8 U.S.C. 1326(a); 18 U.S.C. 3559(a)(5), 3583(b)(3). If, however, the alien's removal followed a conviction for a "felony," then the maximum term of imprisonment is ten years, and the maximum term of supervised release is three years. 8 U.S.C. 1326(b)(1); see 18 U.S.C. 3559(a)(3), 3583(b)(2). And if the alien's removal followed a conviction for an "aggravated felony," then the maximum term of imprisonment is 20 years, and the maximum term of supervised release is three years. 8 U.S.C. 1326(b)(2); see 18 U.S.C. 3559(a)(3), 3583(b)(2). As relevant here, an "'aggravated felony'" is defined to include "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. 1101(a)(43)(B).

The Probation Office determined that petitioner's Texas controlled-substance conviction qualified as a conviction for an aggravated felony and that petitioner was therefore subject to the penalty provisions in Section 1326(b)(2). PSR ¶¶ 2, 67. The Probation Office calculated an advisory Sentencing Guidelines range of 57 to 71 months of imprisonment and one to three years of supervised release. PSR ¶¶ 68, 71. Petitioner did not object to the Probation Office's report. See Pet. 9.

The district court sentenced petitioner to 63 months of imprisonment, to be followed by three years of supervised release. Pet. App. B2-B3.

3. The court of appeals affirmed. Pet. App. A1-A2. Petitioner argued for the first time on appeal that because the indictment did not specifically allege that he had a prior aggravated-felony conviction, he was subject only to sentencing under 8 U.S.C. 1326(a), which provides a maximum sentence of two years of imprisonment and one year of supervised release. Pet. C.A. Br. 7. Petitioner acknowledged, however, that his argument was subject only to plain-error review, id. at 6, and that it was foreclosed by this Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), Pet. C.A. Br. 7. In Almendarez-Torres, this Court held in the context of a similar constitutional claim arising from a Section 1326 prosecution that a defendant's prior conviction may be found by the sentencing court by a preponderance of the evidence as a sentencing factor, rather than

charged in the indictment and found by the jury beyond a reasonable doubt as an element of the offense. See 523 U.S. at 239-247. The court of appeals here determined that Almendarez-Torres barred petitioner's claim. Pet. App. A1-A2.

The court of appeals next considered petitioner's argument, also raised for the first time on appeal, that his Texas controlled-substance conviction is a felony, but not an aggravated felony, and that the judgment therefore erroneously reflected that he had been subject to sentencing under Section 1326(b)(2), rather than Section 1326(b)(1). Pet. App. A2. Citing circuit precedent concluding that the Texas statute "is indivisible and includes mere offers to sell," the court agreed with petitioner that his prior Texas offense was not an aggravated felony. Ibid. The court therefore determined that the judgment should be modified to reflect sentencing under Section 1326(b)(1) rather than Section 1326(b)(2). Ibid. The court then affirmed the judgment as modified. Ibid.

ARGUMENT

Petitioner contends (Pet. 5-9) that this Court should overrule Almendarez-Torres v. United States, 523 U.S. 224 (1998). The Court has repeatedly and recently denied numerous petitions

for writs of certiorari raising that issue.[1] The same result is warranted here.[2]

1. More than two decades ago, this Court held in Almendarez-Torres that, under Section 1326(b), a defendant's prior conviction is a sentencing factor rather than an element of an enhanced unlawful-reentry defense. 523 U.S. at 228-239. The Court further held that the statute, as so construed, does not violate the Constitution. Id. at 239-247.

---

[1] See, e.g., Rios-Garza v. United States, 140 S. Ct. 278 (2019) (No. 19-5455); Collazo-Gonzalez v. United States, 140 S. Ct. 273 (2019) (No. 19-5358); Phillips v. United States, 140 S. Ct. 270 (2019) (No. 19-5150); Esparza-Salazar v. United States, 140 S. Ct. 264 (2019) (No. 19-5279); Capistran v. United States, 140 S. Ct. 237 (2019) (No. 18-9502); Riojas-Ordaz v. United States, 140 S. Ct. 120 (2019) (No. 18-9616); Dolmo-Alvarez v. United States, 140 S. Ct. 74 (2019) (No. 18-9321); Betancourt-Carrillo v. United States, 140 S. Ct. 59 (2019) (No. 18-9573); Boles v. United States, 139 S. Ct. 2659 (2019) (No. 18-9006); Miranda-Manuel v. United States, 139 S. Ct. 2656 (2019) (No. 18-8964); Aguilera-Alvarez v. United States, 139 S. Ct. 2654 (2019) (No. 18-8913); Herrera v. United States, 139 S. Ct. 2628 (2019) (No. 18-8900).

[2] Several other pending petitions for writs of certiorari raise the same question. See Castro-Lopez v. United States, No. 19-5829 (filed Sept. 3, 2019); Enriquez-Hernandez v. United States, No. 19-5869 (filed Sept. 3, 2019); Gonzalez-Terrazas v. United States, No. 19-5875 (filed Sept. 3, 2019); Castaneda-Torres v. United States, No. 19-5907 (filed Sept. 6, 2019); Arias-de Jesus, No. 19-6015 (filed Sept. 16, 2019); Herrera-Segovia v. United States, No. 19-6094 (filed Sept. 25, 2019); Espino Ramirez v. United States, No. 19-6199 (filed Oct. 7, 2019); Pineda-Castellanos v. United States, No. 19-6290 (filed Oct. 15, 2019); Dominguez-Villalobos v. United States, No. 19-6500 (filed Oct. 31, 2019); Martinez-Mendoza v. United States, No. 19-6582 (filed Nov. 7, 2019); Ortega-Limones v. United States, No. 19-6773 (filed Nov. 25, 2019); Conde-Herrera v. United States, No. 19-6795 (filed Nov. 26, 2019); Castanon-Renteria v. United States, No. 19-6796 (filed Nov. 26, 2019).

In keeping with Almendarez-Torres, this Court held in Apprendi v. New Jersey, 530 U.S. 466 (2000), that the Sixth Amendment requires any fact "'[o]ther than the fact of a prior conviction'" to be submitted to a jury and proved beyond a reasonable doubt (or admitted by the defendant) when it increases the penalty for a crime above the otherwise-prescribed statutory maximum. Id. at 490. The Court has since repeatedly affirmed that the Sixth Amendment rule announced in Apprendi applies only to penalty-enhancing facts "[o]ther than the fact of a prior conviction." Ibid.; see United States v. Haymond, 139 S. Ct. 2369, 2377 n.3 (2019) (plurality opinion); Mathis v. United States, 136 S. Ct. 2243, 2252 (2016); Descamps v. United States, 570 U.S. 254, 269 (2013); Alleyne v. United States, 570 U.S. 99, 111 n.1 (2013); Southern Union Co. v. United States, 567 U.S. 343, 358-360 (2012); Carachuri-Rosendo v. Holder, 560 U.S. 563, 567 n.3 (2010); James v. United States, 550 U.S. 192, 214 n.8 (2007); Cunningham v. California, 549 U.S. 270, 274-275 (2007); United States v. Booker, 543 U.S. 220, 244 (2005); Blakely v. Washington, 542 U.S. 296, 301-302 (2004).

2. Petitioner contends (Pet. 8) that Almendarez-Torres is inconsistent with this Court's Apprendi line of decisions. That is incorrect. As the Court observed in Almendarez-Torres, recidivism "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."

523 U.S. at 243; see id. at 230 (describing recidivism to be "as typical a sentencing factor as one might imagine"). "Consistent with this tradition, the Court said long ago that a State need not allege a defendant's prior conviction in the indictment or information that alleges the elements of an underlying crime, even though the conviction was 'necessary to bring the case within the statute.'" Id. at 243 (quoting Graham v. West Virginia, 224 U.S. 616, 624 (1912)) (emphasis omitted). "That conclusion followed, the Court said, from 'the distinct nature of the issue,' and the fact that recidivism 'does not relate to the commission of the offense, but goes to the punishment only.'" Id. at 243-244 (quoting Graham, 224 U.S. at 629) (emphasis omitted).

"The Court has not deviated from this view." Almendarez-Torres, 523 U.S. at 244 (citing Oyler v. Boles, 368 U.S. 448, 452 (1962), and Parke v. Raley, 506 U.S. 20, 27 (1992)). Indeed, Apprendi itself recognized "a vast difference" between "accepting the validity of a prior judgment * * * entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt," and allowing a judge rather than a jury to find in the first instance facts that "'relate to the commission of the offense' itself." 530 U.S. at 496 (quoting Almendarez-Torres, 523 U.S. at 244); see, e.g., Jones v. United States, 526 U.S. 227, 249 (1999) (explaining that because a prior conviction "must itself

have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees," it is "unlike virtually any other consideration used to enlarge the possible penalty for an offense").

A rule requiring that prior convictions, relevant only to sentencing, be alleged in the indictment or found by a jury would also be "difficult to reconcile" with the Court's "precedent holding that the sentencing-related circumstances of recidivism are not part of the definition of the offense for double jeopardy purposes." Almendarez-Torres, 523 U.S. at 247 (citing Graham, 224 U.S. at 623-624). And such a rule would serve little practical purpose. A defendant's prior conviction is "almost never contested," id. at 235, and a defendant who has previously undergone the criminal process that resulted in the conviction cannot plausibly claim to be surprised by the conviction's existence or its use to enhance his sentence for a later crime, cf. United States v. Resendiz-Ponce, 549 U.S. 102, 108 (2007) (describing the notice functions served by indictment).

The rule that petitioner advocates also could invite substantial "unfairness." Almendarez-Torres, 523 U.S. at 234. "As this Court has long recognized, the introduction of evidence of a defendant's prior crimes risks significant prejudice." Id. at 235; see, e.g., Old Chief v. United States, 519 U.S. 172, 185 (1997) ("[T]here can be no question that evidence of the name or

nature of the prior offense generally carries a risk of unfair prejudice to the defendant."); Spencer v. Texas, 385 U.S. 554, 560 (1967) (observing that evidence of prior crimes "is generally recognized to have potentiality for prejudice"); cf. Spencer, 385 U.S. at 563-565 (holding that the Due Process Clause does not require bifurcated proceeding when jury resolves recidivist sentencing issues).

Petitioner errs in contending (Pet. 8) that this Court's decision in Alleyne, in particular, "seriously undercuts the view * * * that recidivism is different from other sentencing facts." This Court held in Alleyne that "any fact that increase[d] the mandatory minimum is an 'element' that must be submitted to the jury." 570 U.S. at 103. But as petitioner recognizes (Pet. 7), the Court in Alleyne also made clear that it was not "revisit[ing]" Almendarez-Torres. Alleyene, 570 U.S. at 111 n.1. And since Alleyne, the Court has denied numerous petitions for writs of certiorari asking the Court to overrule Almendarez-Torres. See p. 6 n.1, supra.

3. In any event, as Justice Stevens recognized, even if Almendarez-Torres was wrongly decided, "there is no special justification for overruling" it. Rangel-Reyes v. United States, 547 U.S. 1200, 1201 (2006) (Stevens, J., respecting the denial of the petitions for writs of certiorari). Almendarez-Torres's rule, which applies only to "the narrow issues of fact concerning a

defendant's prior conviction history, * * * will seldom create any significant risk of prejudice to the accused." Ibid. Indeed, here, petitioner does not suggest (Pet. 5-9) that the government would have been unable to prove beyond a reasonable doubt his prior Texas controlled-substance conviction. In these circumstances, "[t]he doctrine of stare decisis provides a sufficient basis for the denial of certiorari." Rangel-Reyes v. United States, 547 U.S. at 1201-1202 (Stevens, J., respecting the denial of the petitions for writs of certiorari).

4. Finally, even if the question presented otherwise warranted this Court's review, this case would be a poor vehicle for addressing it. As petitioner acknowledges (Pet. 9), because he did not preserve his argument in district court, review would be for plain error. See Fed. R. Crim. P. 52(b). On plain-error review, petitioner bears the burden to establish (1) error that (2) was "clear or obvious," (3) "affected the defendant's substantial rights," and (4) "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904-1905 (2018) (citations omitted); see Puckett v. United States, 556 U.S. 129, 135 (2009). "Meeting all four prongs is difficult, 'as it should be.'" Puckett, 556 U.S. at 135 (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004)).

In light of this Court's adherence to Almendarez-Torres in subsequent decisions, see pp. 6-7, supra, petitioner cannot demonstrate that the lower courts' adherence to that decision was error, much less "clear or obvious" error, Rosales-Mireles, 138 S. Ct. at 1904 (citation omitted). To satisfy the second prong of plain-error review, a defendant must show that an error was so obvious under the law as it existed at the time of the relevant district court or appellate proceedings that the courts "were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." United States v. Frady, 456 U.S. 152, 163 (1982). And the uncontested existence and nature of petitioner's prior conviction would independently preclude a showing of prejudice under the third prong or the sort of injustice necessary to satisfy the fourth prong. The courts below did not plainly err in following this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

JANUARY 2020