No. 19-6773

IN THE SUPREME COURT OF THE UNITED STATES

EDGAR ORTEGA-LIMONES, 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

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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. Ortega-Limones, No. 18-cr-135 (Nov. 20, 2018)

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

United States v. Ortega-Limones, No. 18-11548 (Aug. 27, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is reprinted at 776 Fed. Appx. 222.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2019. The petition for a writ of certiorari was filed on November 25, 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)(1). Pet. App. B1. He was sentenced to 60 months of imprisonment, to be followed by three years of supervised release. Id. at B2. The court of appeals affirmed. Id. at A1-A3.

1. Petitioner is a citizen and national of Mexico. Presentence Investigation Report (PSR) ¶ 9. He was removed from the United States four times between 2008 and 2014. PSR ¶¶ 11, 13-15. Two of those removals followed convictions for unlawful reentry after removal. PSR ¶¶ 11, 15.

At some point following petitioner's 2014 removal, he reentered the United States. See PSR ¶ 16. On June 18, 2017, petitioner was arrested by Arlington, Texas police for unlawful possession of a firearm. Ibid. Petitioner was convicted of that offense in state court and was sentenced to two years of imprisonment. Ibid.

A federal grand jury charged petitioner with unlawful reentry after removal, in violation of 8 U.S.C. 1326(a) and (b)(1). 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), 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).

The Probation Office found that petitioner's prior criminal history included at least one felony and that petitioner was therefore subject to the penalty provisions in Section 1326(b)(1). PSR ¶¶ 25, 39. The Probation Office calculated an advisory Sentencing Guidelines range of 30 to 37 months of imprisonment and one to three years of supervised release. PSR ¶¶ 67, 70. Petitioner did not object to the Probation Office's report, whose findings and calculations the district court adopted. Pet. 4; Sent. Tr. 2-3.

The district court sentenced petitioner to 60 months of imprisonment, to be followed by three years of supervised release. Pet. App. B2. In varying upward from the advisory Sentencing Guidelines range, the court explained that petitioner's prior sentences for unlawful reentry had "not deterred him," and that "while in this country illegally," petitioner had "violated the

criminal statutes including pointing a gun and threatening to kill his wife." Sent. Tr. 6.

3. The court of appeals summarily affirmed in an unpublished, per curiam opinion. Pet. App. A1-A3. As relevant here, petitioner argued for the first time on appeal that 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, because the sentencing judge, rather than a jury, had found that petitioner had a prior felony conviction. Pet. C.A. Br. 20-24. He further argued that his guilty plea was invalid because the district court did not advise him that his prior felony conviction was an essential element of his unlawful-reentry offense. Ibid.

Petitioner acknowledged, however, that his arguments were subject only to plain-error review, and that they were foreclosed by this Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998). Pet. C.A. Br. 19-20. 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 accordingly determined that Almendarez-Torres barred petitioner's claims. Pet. App. A3.

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]

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[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); Suaste Balderas v. United States, No. 19-5865 (filed Sept. 5, 2019); Castaneda-Torres v. United States, No. 19-5907 (filed Sept. 6, 2019); Arias-De Jesus v. United States, 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); Conde-Herrera v. United States, No. 19-6795 (filed Nov. 26, 2019); Castanon-Renteria v. United States, No. 19-6796 (filed Nov. 26, 2019); Mendez v. United States, No. 19-7102 (filed Dec. 18, 2019); Cortez-Rogel v. United States, No. 19-7088 (filed Dec. 23, 2019); Pacheco-Astrudillo v. United States, No. 19-7104 (filed Dec. 23, 2019).

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.

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. 6-8) 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) (emphases 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 this Court to overrule Almendarez-Torres. See p. 5 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 convictions. In these circumstances, "[t]he doctrine of stare decisis provides a sufficient basis for the denial of certiorari." Rangel-Reyes, 547 U.S. at 1201-1202.

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. 5-7, 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 convictions 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.

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JANUARY 2020