No. 19-6906

IN THE SUPREME COURT OF THE UNITED STATES

DATANYA DAMON ALEXANDER, 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

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QUESTIONS PRESENTED

1. Whether a state drug offense must categorically match the elements of a generic analogue offense in order to qualify as a "serious drug offense" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(A)(ii).

2. Whether 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. Alexander, No. 17-cr-437 (Sept. 20, 2018)

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

United States v. Alexander, No. 18-11239 (Sept. 9, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 776 Fed. Appx. 860.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2019. The petition for a writ of certiorari was filed on December 9, 2019 (Monday). 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 two counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. B1. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Id. at B2-B3. The court of appeals affirmed. Id. at A1-A2.

1. On April 17, 2016, in response to a suspicious-persons call, Dallas police officers stopped petitioner's car. Presentence Investigation Report (PSR) ¶ 9. As officers approached the car, they detected a strong marijuana odor. PSR ¶ 10. Officers ordered the occupants -- petitioner and his passenger, Bryan Davis -- to exit the car. Ibid. They then searched the car and found a loaded .40-caliber pistol in a back-seat compartment. Ibid. Petitioner admitted that the firearm belonged to him. Ibid. Officers transported petitioner to the county jail, where they discovered a small plastic bag of marijuana in his boxer shorts. PSR ¶ 11. Petitioner was subsequently released from custody with state charges pending. Ibid.

On December 31, 2016, police officers again stopped a car driven by petitioner. PSR ¶ 12. Both petitioner and his passenger (Larome Simon) were placed under arrest for outstanding warrants. Ibid. During the arrest, petitioner admitted that he had marijuana on his person and handed the officers a plastic bag containing 6.8

grams of marijuana. Ibid. Officers then searched the car and located a 9-millimeter pistol and two rifles. PSR ¶ 13.

A federal grand jury charged petitioner with two counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). PSR ¶¶ 2-3. Petitioner pleaded guilty. PSR ¶¶ 6-7.

2. The default term of imprisonment for a felon-in-possession offense is zero to 120 months. See 18 U.S.C. 924(a)(2). The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). The ACCA defines a "serious drug offense" as either

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. 924(e)(2)(A).

The Probation Office reported that petitioner had three prior convictions under Texas law for delivery of cocaine. Addendum to PSR ¶¶ 51-52a. It determined that those convictions qualified as "serious drug offense[s]" and accordingly recommended that

petitioner be sentenced under the ACCA. Id. ¶ 32. The Probation Office calculated petitioner's advisory Guidelines range to be 180 to 210 months. Id. ¶ 116.

Petitioner objected to the Probation Office's determination that his prior Texas convictions for delivery of cocaine qualify as "serious drug offense[s]" under the ACCA. See C.A. ROA 291-292. Specifically, petitioner argued that the Texas drug statutes, Tex. Health & Safety Code. Ann. §§ 481.002(8) and 481.112 (West Supp. 2003), prohibit "possessing a drug with the intent to offer it for sale" -- conduct that, according to petitioner, does not "involve" "'manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance'" under 18 U.S.C. 924(e)(2)(A)(ii). C.A. ROA 291-292 (citation omitted). Petitioner acknowledged, however, that his argument was foreclosed by Fifth Circuit precedent. See id. at 291.

Petitioner additionally argued that the Sixth Amendment required the government to allege his prior convictions in the indictment and prove their existence to a jury beyond a reasonable doubt. C.A. ROA 289-291. Petitioner acknowledged that this argument was foreclosed by this Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998). C.A. ROA 290.

3. The district court overruled petitioner's objections. C.A. ROA 99, 102. Citing United States v. Vickers, 540 F.3d 356 (5th Cir.), cert. denied, 555 U.S. 1088 (2008), the court found that petitioner's prior Texas drug convictions qualified as

"serious drug offenses" under the ACCA. C.A. ROA 102. In Vickers, the Fifth Circuit determined that "a Texas conviction for offering to sell a controlled substance is one 'involving' distribution of a controlled substance under the ACCA." 540 F.3d at 365. The district court similarly observed that existing precedent foreclosed petitioner's Sixth Amendment objection. C.A. ROA 99. The court sentenced petitioner to 180 months of imprisonment. Id. at 115.

The court of appeals affirmed in an unpublished per curiam decision, agreeing that petitioner's claims were foreclosed by circuit precedent and Almendarez-Torres. Pet. App. A2.

ARGUMENT

1. Petitioner contends (Pet. 5-8) that the court of appeals erred in determining that his prior Texas convictions for delivery of cocaine qualify as "serious drug offense[s]" under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii). Specifically, petitioner asserts (Pet. 7) that the Texas drug statutes, Tex. Health & Safety Code Ann. §§ 481.002(8) and 481.112 (West Supp. 2003), prohibit "a mere offer to sell" a controlled substance -- conduct that, according to petitioner, does not "involv[e]" "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," 18 U.S.C. 924(e)(2)(A)(ii). This Court has granted review in Shular v. United States, No. 18-6662 (argued Jan. 21, 2020), to decide whether a state drug offense must categorically match the elements of a "generic" analogue to qualify as a "serious

drug offense" under Section 924(e)(2)(A)(ii). As petitioner observes (Pet. 8), the proper disposition of the petition for a writ of certiorari may be affected by this Court's resolution of Shular. The petition in this case should therefore be held pending the decision in Shular and then disposed of as appropriate in light of that decision.

2. Petitioner additionally contends (Pet. 9) that this Court should overrule Almendarez-Torres v. United States, 523 U.S. 224 (1998). He does not, however, seek plenary review on that issue, but instead requests (Pet. 9) only that the Court hold this petition if it grants review of that issue in another case. The Court has repeatedly and recently denied numerous petitions for writs of certiorari raising that issue. See, e.g., Herrera-Segovia v. United States, No. 19-6094 (Jan. 27, 2020); Rios-Garza v. United States, 140 S. Ct. 278 (2019) (No. 19-5455); Collazo-Gonzalez v. United States, 140 S. Ct. 273 (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). The same result is warranted here.*

a. More than two decades ago, this Court held in Almendarez-Torres that, under 8 U.S.C. 1326(b), a defendant's prior conviction is a sentencing factor rather than an element of an enhanced unlawful-reentry offense. 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

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* 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); 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); 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).

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).

b. Petitioner errs in characterizing (Pet. 9) Almendarez-Torres as a "constitutional aberration." 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).

c. 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. 3) that the government would have been unable to prove beyond a reasonable doubt the fact of his prior Texas drug convictions. 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).

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in Shular v. United States, No. 18-6662 (argued Jan. 21, 2020), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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FEBRUARY 2020