

No. 22-6983

IN THE SUPREME COURT OF THE UNITED STATES

BERNARDINO BERRUN-TORRES, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 3-8) that this Court should overrule Almendarez-Torres v. United States, 523 U.S. 224 (1998). In Almendarez-Torres, this Court held, in the context of a constitutional claim arising from a prosecution under 8 U.S.C. 1326, that a defendant's prior conviction may be found by the sentencing court, rather than charged in the indictment and found by the jury as an element of the offense. 523 U.S. at 239-247. The Court has repeatedly and recently denied numerous petitions for writs of certiorari asking this Court to revisit Almendarez-

Torres, including earlier this Term.¹ The same result is warranted here.²

¹ See, e.g., Olivo-Duron v. United States, 143 S. Ct. 1010 (2023) (No. 22-6716); Villalobos-Franco v. United States, 143 S. Ct. 1010 (2023) (No. 22-6708); Francisco-Francisco v. United States, 143 S. Ct. 846 (2023) (No. 22-6637); Valencia-Sandoval v. United States, 143 S. Ct. 842 (2023) (No. 22-6603); Cardenas-Ramirez v. United States, 143 S. Ct. 817 (2023) (No. 22-6372); Esquivel-Ontiveros v. United States, 143 S. Ct. 809 (2023) (No. 22-6317); Mora-Mendez v. United States, 143 S. Ct. 807 (2023) (No. 22-6309); Mendoza-Espinoza v. United States, 143 S. Ct. 808 (2023) (No. 22-6308); Canales v. United States, 143 S. Ct. 756 (2023) (No. 22-6302); Castro-Salazar v. United States, 143 S. Ct. 755 (2023) (No. 22-6300); Munguia-Portales v. United States, 143 S. Ct. 639 (2023) (No. 22-6247); Sanchez-Juarez v. United States, 143 S. Ct. 620 (2023) (No. 22-6228); Moncada-Aguirre v. United States, 143 S. Ct. 620 (2023) (No. 22-6220); Brito-Brito v. United States, 143 S. Ct. 620 (2023) (No. 22-6218); Perez-Gonzalez v. United States, 143 S. Ct. 632 (2023) (No. 22-6168); Rodriguez-Juarez v. United States, 143 S. Ct. 627 (2023) (No. 22-6125); Cante-Dondiego v. United States, 143 S. Ct. 603 (2023) (No. 22-6043); Ramirez-Juan v. United States, 143 S. Ct. 505 (2022) (No. 22-5950); Ramirez-Ortiz v. United States, 143 S. Ct. 504 (2022) (No. 22-5949); Nieto-Uribe v. United States, 143 S. Ct. 506 (2022) (No. 22-5981); Benitez-Marquez v. United States, 143 S. Ct. 507 (2022) (No. 22-5977); Chavira-Montanez v. United States, 143 S. Ct. 501 (2022) (No. 22-5869); Gonzalez-Ramirez v. United States, 143 S. Ct. 469 (2022) (No. 22-5912); Perez-Barrios v. United States, 143 S. Ct. 413 (2022) (No. 22-5810); Granados-Ortez v. United States, 143 S. Ct. 392 (2022) (No. 22-5740); Sanchez-Lugo v. United States, 143 S. Ct. 365 (2022) (No. 22-5603); Amparano-Torres v. United States, 143 S. Ct. 358 (2022) (No. 22-5606); Venzor-Ortega v. United States, 143 S. Ct. 343 (2022) (No. 22-5597); Cruz v. United States, 143 S. Ct. 343 (2022) (No. 22-5598); Mickel v. United States, 143 S. Ct. 341 (2022) (No. 22-5575); Barajas-Salvador v. United States, 143 S. Ct. 339 (2022) (No. 22-5551); Portillo-Rodriguez v. United States, 143 S. Ct. 336 (2022) (No. 22-5511); Gonzalez-Ruiz v. United States, 143 S. Ct. 332 (2022) (No. 22-5459); Lujan-Madrid v. United States, 143 S. Ct. 328 (2022) (No. 22-5445); Molina-Rodriguez v. United States, 143 S. Ct. 324 (2022) (No. 22-5389); Islas-Macias v. United States, 143 S. Ct. 324 (2022) (No. 22-5387); Salazar-Munoz v. United States, 143 S. Ct. 321 (2022) (No. 22-5353); Pacheco-Apodaca v. United States, 143 S. Ct. 319 (2022) (No. 22-5349).

For the reasons set forth more fully in the government's brief in opposition in Dominguez-Morales v. United States (No. 22-6475) (May 8, 2023), petitioner's contention (Pet. 4-7) that Almendarez-Torres was wrongly decided is incorrect.³ In addition, as Justice Stevens recognized, "there is no special justification for overruling" that decision. Rangel-Reyes v. United States, 547 U.S. 1200, 1201 (2006) (Stevens, J., respecting the denial of the petitions for writs of certiorari).

² Several other pending petitions for writs of certiorari raise the same question. See Dominguez-Morales v. United States, No. 22-6475 (filed Jan. 3, 2023); Narvaez-Gomez v. United States, No. 22-6730 (filed Feb. 6, 2023); Conde-Herrera v. United States, No. 22-6823 (filed Feb. 16, 2023); Martin-Andres v. United States, No. 22-6826 (filed Feb. 16, 2023); Dominguez v. United States, No. 22-6873 (filed Feb. 23, 2023); Hernandez-Correa v. United States, No. 22-6897 (filed Feb. 27, 2023); Bernal-Ceto v. United States, No. 22-6986 (filed Mar. 7, 2023); Arroyo-Ramon v. United States, No. 22-6998 (filed Mar. 9, 2023); Onate-Herrera v. United States, No. 22-7016 (filed Mar. 13, 2023); Garcia-Archaga v. United States, No. 22-7025 (filed Mar. 13, 2023); Ortiz-Castillo v. United States, No. 22-7114 (filed Mar. 23, 2023); Ajualip-Pablo v. United States, No. 22-7179 (filed Mar. 29, 2023); Ordonez-Mendoza v. United States, No. 22-7183 (filed Mar. 29, 2023); Valdivia-Gonzalez v. United States, No. 22-7205 (filed Mar. 31, 2023); Martinez-Saucedo v. United States, No. 22-7207 (filed Mar. 31, 2023); Macias-Torres v. United States, No. 22-7209 (filed Mar. 31, 2023); Tomas-Antonio v. United States, No. 22-7218 (filed Apr. 3, 2023); Juarez-Medellin v. United States, No. 22-7220 (filed Apr. 3, 2023); Encarnacion-Pascual v. United States, No. 22-7224 (filed Apr. 3, 2023); Cejudo-Mancinas v. United States, No. 22-7259 (filed Apr. 10, 2023); Escobedo-Duenas v. United States, No. 22-7260 (filed Apr. 10, 2023); Tovar-Zamarripa v. United States, No. 22-7287 (filed Apr. 12, 2023); Perez-Mendoza v. United States, No. 22-7316 (filed Apr. 17, 2023); Salazar-Hernandez v. United States, No. 22-7319 (filed Apr. 17, 2023); Mora-Rodriguez v. United States, No. 22-7377 (filed Apr. 24, 2023).

³ We have served petitioner with a copy of the government's brief in opposition in Dominguez-Morales.

Finally, this case, like Dominguez-Morales, would be a poor vehicle for reconsidering Almendarez-Torres even if the Court were inclined to do so. Even if petitioner were correct in his claim of error in the indictment, such error would not require reversal. See Washington v. Recuenco, 548 U.S. 212, 218-222 (2006) (recognizing that Apprendi error can be harmless); United States v. Cotton, 535 U.S. 625, 632-633 (2002) (recognizing that Apprendi error does not require reversal on plain-error review where the evidence was overwhelming). Petitioner's objection at sentencing came too late to preserve the issue because the factual resume accompanying his plea, as well as his plea colloquy, established that the conduct that he was admitting exposed him to a statutory-maximum punishment of 20 years of imprisonment, if the judge found the relevant type of prior conviction at sentencing. See C.A. ROA 37, 87-88. Accordingly, his claim would be reviewed only for plain error. See Fed. R. Crim. P. 52(b). And petitioner, who does not dispute that he has a prior qualifying conviction under Section 1326(b)(2), cannot demonstrate that the courts below plainly erred in adhering to this Court's precedent or that any error affected his substantial rights.⁴

⁴ Even if the objection were deemed preserved, the lack of dispute regarding petitioner's prior qualifying conviction would render any error harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.⁵

Respectfully submitted.

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⁵ The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.