

No. 22-7224

IN THE SUPREME COURT OF THE UNITED STATES

TRINIDAD WALTER ENCARNACION-PASCUAL, 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

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 22-7224

TRINIDAD WALTER ENCARNACION-PASCUAL, 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

Petitioner contends (Pet. 4-10) 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. 4-9) that Almendarez-Torres was wrongly decided is incorrect.³ In addition, as Justice Stevens recognized, "there is no special justification for

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); Berrun-Torres v. United States, No. 22-6983 (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); Ordonez-Mendoza v. United States, No. 22-7183 (filed Mar. 29, 2023); Ajualip-Pablo v. United States, No. 22-7179 (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);; 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); Morquecho-Sanchez v. United States, No. 22-7420 (filed Apr. 27, 2023); Marquez-Calzadilla v. United States, No. 22-7423 (filed Apr. 27, 2023); Chairez-Avila v. United States, No. 22-7479 (filed May 4, 2023); Manriquez-Gutierrez v. United States, No. 22-7636 (filed May 23, 2023); Nevarez-Zamudio v. United States, No. 22-7647 (filed May 24, 2023); Gallegos-Hernandez v. United States, No. 22-7653 (filed May 24, 2023).

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

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).

Finally, this case, like Dominguez-Morales, would be a poor vehicle for reconsidering Almendarez-Torres even if the Court were inclined to do so. Petitioner acknowledges that he did not raise his constitutional objection to his recidivist enhancement in the district court. Pet. 2; see C.A. ROA 103-104, 121. 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

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

JUNE 2023

⁴ The government waives any further response to the petition for a writ of certiorari unless the Court requests otherwise.