

No. 22-7287

IN THE SUPREME COURT OF THE UNITED STATES

RODOLFO TOVAR-ZAMARRIPA, 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

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Petitioner contends (Pet. 11-29) 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 this Term.¹ The same result is warranted here.²

¹ See, e.g., Bernal-Ceto v. United States, 2023 WL 3937653 (June 12, 2023) (No. 22-6986); Berrun-Torres v. United States, 2023 WL 3937646 (June 12, 2023) (No. 22-6983); Narvaez-Gomez v. United States, 2023 WL 3937643 (June 12, 2023) (No. 22-6730); Dominguez-Morales v. United States, 2023 WL 3937641 (June 12, 2023) (No. 22-6475); 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);

For the reasons set forth more fully in the government's brief in opposition in Dominguez-Morales v. United States (No. 22-6475) (cert. denied June 12, 2023), petitioner's contention (Pet. 11-28) that Almendarez-Torres was wrongly decided is incorrect.³ In

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).

² Several other pending petitions for writs of certiorari raise the same question. See 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); 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); Ordones-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); 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); 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.

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).

Finally, this case 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 10 years of imprisonment. See C.A. ROA 35-36, 93-94, 101. 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)(1), 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.

ELIZABETH B. PRELOGAR
Solicitor General

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