OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: HUGO ROMAN ALMENDAREZ-TORRES, Petitioner v.

UNITED STATES

CASE NO: 96-6839

PLACE: Washington, D.C.

DATE: Tuesday, October 14, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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HUGO ROMAN ALMENDAREZ-TORRES, :

Petitioner :

v. : No. 96-6839

UNITED STATES :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, October 14, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

PETER M. FLEURY, ESQ., Fort Worth, Texas; on behalf of the Petitioner.

BETH S. BRINKMANN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 96-6839, Hugo Roman Almendarez-Torres v. The United States.

Mr. Fleury.

ORAL ARGUMENT OF PETER M. FLEURY

ON BEHALF OF THE PETITIONER

MR. FLEURY: Mr. Chief Justice and may it please the Court:

Title 8, section 1326(a), provides for a 2-year maximum penalty if these facts are proved: 1) a deportation, and 2) a reentry without a deport -- without permission.

Title 8, 1326(b)(2), on the other hand, sets a punishment of up to 20 years if these facts are proven: 1) a deportation, 2) a reentry without permission, and 3) an aggravated felony conviction which occurred prior to the deportation.

The issue presented is, did Congress intend for 1326(b) to be a sentence provision or a separate offense?

The starting point, of course, is the plain language of the statute. There are three very important factors which plainly indicate that subsection (b) incorporates by reference the conduct described in

subsection (a) rather than setting forth the sentence for a conviction in subsection (a).

The first phrase that helps us is 1326(b). It says -- is in 1326(b) which says, in the case of any alien described in such subsection, and then it says, in that case if the person has a prior aggravated felony, he'll be facing a 20-year maximum.

It specifically does not say, in the case of any alien convicted in such subsection and, as this Court said in the Sedima case, when Congress intended that the defendant had been previously convicted, it said so by using explicitly words like convicted or conviction.

Here we have no such word, so what subsection (b) does is incorporate by reference the conduct set forth in subsection (a), that you have to have a deportation and a reentry without permission.

QUESTION: But you could also say that the person described in subsection (a) shall be fined under title 18 or imprisoned not more than 2 years or both. It's describing that.

MR. FLEURY: That's describing the result of the process, not the person in subsection (a).

QUESTION: But it's in subsection (a), is it not?

MR. FLEURY: That is in subsection (a), but if

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you take that clause that I just read, the person described in subsection (a), and you add to it the clause that precedes it, where it says, notwithstanding subsection (a), which the Government itself concedes as a must, that that means despite subsection (a), which --

QUESTION: Well, doesn't that very clause naturally refer to the -- to your maximum penalty in (a) --

MR. FLEURY: No. What --

QUESTION: Notwithstanding that penalty, here's another penalty if these facts are --

MR. FLEURY: You have to re-add words to the statute to get to that result, which is the opposite --

QUESTION: Well, I don't think so. I mean, I think it's a pretty normal reading, and I think we're -- another factor is that the titles to subsection (b) make reference to penalties, and all the amendments to it refer to penalties. They don't refer to a new separate crime. I don't know why those aren't indicators for us that this really is a sentence enhancement.

MR. FLEURY: First, as to the notwithstanding question, if subsection (b) was to be a penalty or a sentence for subsection (a), it's the opposite word that you would use.

You would say, the penalties in subsection (a)

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are a result of the conviction -- I mean, the penalties in subsection (b) are a result of the conviction in subsection (a), not, notwithstanding or despite the conviction in subjection (a). It's the opposite signal one would give to say that (b) flows from or is a result of (a).

Secondly, as to the word penalty, the word penalty by itself is a very little evidence that what Congress intended was a sentence provision. Penalty is the word signifying the result that will occur, not whether or not how you get there is through a trial of an offense, or at a sentence proceeding. Penalty and sentence proceeding are not synonymous phrases.

Congress, when they enacted in 1952 this very statute, 1326, before the (b) part was even thought of, enacted it in Chapter 8 of the Immigration & Nationality Act entitled, penalties. The House report to that statutory provision referred to the 1326(a) as creating a sanction for certain deported aliens. The word penalties is the way anybody would describe the creation of a new criminal law.

If you wanted to pass a law against jay-walking you would say, I want to make a penalty against jay-walking, and you would describe it as such, just as Congress did when they described the car-jacking statute.

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It was under a subtitle called, enhanced penalties for auto theft, or Federal penalties for armed robberies.

Numerous statutes are found under a heading with penalties. It would be a different thing all together if there was subsection (a), offense, subsection (b), penalty.

In 1988, when Congress passed 1326(b), as the Government points out in their brief, the phrase penalty was not added to the statute. That's just in the codification that you see when you pick up a book. That was not a congress -- the codifiers added that, not Congress, so the word penalty did not become part of the statute at all, much less -- even if it had meaning as a signal as to whether or not it's a sentence provision or an offense.

And third, in the plain language of the statute it would make no sense for the phrase in (b)(1) that you can get up to a 10-year sentence for a felony, and then in parentheses, other than an aggravated felony. How would that make any sense if that's a sentence -- if that's just a sentence proceeding, because it would just be a gradation.

All of the courts below are uniform in looking at a statute and seeing -- if Congress had passed 1326(b) and simply added that language to an already-existing

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1326(a) right at the end, and just said, shall be guilty of a felony and shall suffer a penalty of up to 10 years, or a term of imprisonment of up to 10 years, and if they have an aggravated felony it will be up to 20 years, or if it's just a felony it will be up to 10 years, that would be a signal that there's a sentence provision for the offense in (a).

But making it a separate subsection is deemed by all of the courts that review this as an indicator that it's an offense, especially when it's not section (a) entitled penalties, which it's not.

Then when we --

QUESTION: I'm not following your argument all -- about all of the courts of appeals, because I thought that the Ninth Circuit is the only one interpreting this statute as established in a separate offense.

MR. FLEURY: My point was that in looking at whether or not something is titled penalties, if it's in a separate subdivision, like in section -- 18 U.S.C. section 1091, which says (a), basic offense, (b), penalty for basic offense, then that's a signal that (b) is to be a sentence provision.

But where it's all in one section, courts of appeals have said as to that factor, not the end result

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but as to that factor, that is an indication, if the penalty provision is in the same paragraph as the offense, then it's a sentence for the offense, but if it's separated out into a separate section without a separate title of penalty, then that's an indicator -- it may not be dispositive -- an indicator that it's meant to create a separate offense.

Such as in 2113(d), which is the bank robbery statute, and 2113 sets forth (a) that it's a crime to commit a bank robbery, and you can get up to 20 years. (d), if you use a weapon or assault somebody in the course of committing (a), then it's an extra 5 years, and this Court in the Simpson case assumed that was an element, and even though it was -- it -- just as in this statute incorporated by reference all of the provisions of the previous statute.

QUESTION: Mr. Fleury, would you go back over your argument about the parenthetical other than an aggravated felony? I didn't follow your --

MR. FLEURY: Well, what --

QUESTION: -- argument on that. That doesn't suggest anything to me. What does it suggest to you?

MR. FLEURY: Well, if it was a sentence provision, then it would just say in gradations, (a), if you've got a felony conviction you'll get up to 10 years.

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If it's an aggravated felony you'll get up to 20 years.

But if you put in the word, other than an aggravated felony, it takes care of a due process concern -- I mean, a double jeopardy concern. You could only get convicted under (b)(1) or (b)(2), because a felony could fall under both statutes, but if you add the clause, other than an aggravated felony, then you can only be convicted under (b)(1) and not (b)(2), otherwise there's no sense to having that clause in there.

QUESTION: But you can only be sentenced under (b)(1) or (b)(2) also, under that -- as it now stands, as the Government --

MR. FLEURY: Yes, but there would be no reason to put -- it would -- you could only be -- you can only get up to 10 years if it was a felony and only up to 20 years if it was an aggravated felony, with or without that clause, but it does satisfy double jeopardy concerns if you view these as offenses.

QUESTION: But the clause could -- even if this is a sentencing provision the clause is necessary, is it not?

MR. FLEURY: No, it wouldn't be necessary. If my client has a felony and they don't prove it's an aggravated felony, he could only get up to 10 years, whether --

QUESTION: Well, but the whole point is they want to distinguish between aggravated and nonaggravated felonies for sentencing purposes.

MR. FLEURY: Sure --

QUESTION: So you have to have that parenthetical or something equivalent to it in the -- in (b)(1).

MR. FLEURY: I don't think it would be necessary for sentencing concerns, because again, if it's not an aggravated felony it still -- it's -- if it's an aggravated felony, it would be a felony, and that might raise double jeopardy concerns if these are offenses, which is our view they are, because if it doesn't say other than an aggravated felony, there might -- it might not survive the Blockburger test, so -- but that is not one of our more important points.

More importantly, subsequent enactments indicate clearly that Congress viewed these as creating separate offenses. In -- when they created 1326(d), they referred to -- when they created 1326(d), they made it crystal clear, because they say that you cannot contest the validity of a deportation order under certain -- under (a) or (b)(1).

Well, if you have a trial, and the Government proves the person has been deported and has reentered

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subsequent to that deportation, the deportation order issue will already have been resolved by the time you get to a sentence proceeding. There would be no need for Congress to refer to (d)(1), saying you can't contest a deportation order under (b), when they created 1326(d), because the issue would never arise.

Also, they -- there is no word, deportation order, or order of deportation, in (b)(1) or (b)(2). Therefore, that indicates Congress assumed that (a) was incorporated by reference into (b).

Then they created sections 1326(b)(3) and (b)(4), both of which clearly appeared to be offenses, and they put them in with (b)(1), (b)(2), (b)(3), and (b)(4), all of which are offenses. They didn't separate those out into a separate subsection from (b)(1) and (b)(2).

QUESTION: Mr. Fleury, would you explain to me the consequences of accepting your position in two respects. One is, there was here, if I have it right, no debate about defendant's prior convictions. He conceded that the recitation of his prior conviction was true and correct. So in light of that, that there was nothing to go to the jury on it, he had a prior conviction, he admitted it, what is the consequence of a reversal?

MR. FLEURY: The consequence of a reversal is a 2-year maximum penalty in this case to my client.

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QUESTION: Because it wasn't in the indictment.

MR. FLEURY: Because it wasn't in the indictment.

QUESTION: Now, if it had been in the indictment, and given the certainty of the conviction, I -- the defendant would end up with two offenses which would place the defendant in jeopardy of a three strikes and you're out, closer to the three, so why is it in defendant's interest to have this as a separate offense rather than an enhancement?

MR. FLEURY: I'm not -- I didn't understand the question with regard to he would be convicted of two offenses.

QUESTION: In other words, if you -- you take your case. You say, there are two separate offenses, that merely coming back once you've been thrown out is an offense.

MR. FLEURY: Mm-hmm.

QUESTION: And then a separate offense is coming back after you've committed a felony, been convicted, and then been deported.

MR. FLEURY: Subsection (a) would be a lesser included offense of (b) necessarily. It would not survive the Blockburger test because there's no element in (a) that does not also exist in (b), therefore only one

conviction could be had, but the value is clear, as the amicus brief indicates, to the defendant.

Most of the prosecutions under 1326 are in the Ninth Circuit alone. There's -- 60 percent of the cases under this statute are in the Ninth Circuit alone, which covers more cases than all of the other circuits combined.

QUESTION: But you're telling me that's for sure that you'd end up -- on your view of the case you can only have the one conviction.

MR. FLEURY: Yes.

QUESTION: And you would not be convicted separately of (a) and (b), so you wouldn't have two strikes against you, only one.

MR. FLEURY: Correct. I think it's a clear application of the Blockburger test, and (a) is a subset of (b), and therefore --

QUESTION: Can you tell me if in the plea, the hearings when the judge takes the guilty plea, does the judge in a case with an indictment like this one, which is unclear as to whether it covers both (a) and (b), does the judge routinely ask the defendant about the prior convictions to get that on the record?

MR. FLEURY: I don't know. All I know in this case, the law in our circuit was clear that -- Vasquez-Olvera had already been handed down years before, and it

was the clear rule in our circuit that my client would be exposed to punishment up to 20 years. All the parties acted on that.

I -- we objected at the sentence hearing as we did. We followed the procedure in Vasquez-Olvera.

QUESTION: Was it clear at the time of the plea hearing, or at the time of the sentencing hearing.

MR. FLEURY: As to the law?

QUESTION: As I understand the statement of fact -- pardon? The statement of facts about his prior history was subsequent to the plea of guilty, wasn't it, or am I wrong on that?

MR. FLEURY: There was a -- an inclusion in the factual resume which was -- which is designed to meet the requirements of the Rule 11 factual basis that he had three prior convictions --

QUESTION: I see.

MR. FLEURY: -- some -- those convictions. It wasn't explained, or the court did not do a colloquy as if those were elements. He listed the elements being the 1326(a) elements. He didn't ask if he had a prior aggravated felony conviction. He didn't ask whether he had a felony conviction. He just -- it was just in the resume. The judge didn't even ask about the --

QUESTION: It seems to me that -- the scenario

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that I haven't quite thought through is, supposing you have an indictment like this, a colloquy in which the defendant acknowledges he came in, and so forth and so on, and then subsequently the Government learns that there were the three prior convictions before sentencing, and they go into the judge and say, we've just learned that he qualifies under (b) so we want a 20-year sentence.

That would be permissible, as I understand it, under the Government's view, and they wouldn't have to prove it beyond a reasonable doubt. They'd just --

MR. FLEURY: And they wouldn't have to present it to a grand jury, and I would point out with regard to that, as I said, the Ninth Circuit has the majority of these prosecutions. As the Government itself said in their reply to our cert petition the Government has had no problem complying with the Rule in the Ninth Circuit.

QUESTION: Well, the other circuits, other than the Ninth, have all found it to be a sentencing enhancement provision, haven't they?

MR. FLEURY: Yes, they have.

QUESTION: It's the Ninth is the one circuit that has adopted the view that you espouse here.

MR. FLEURY: That is correct.

QUESTION: And in this case the -- your client acknowledged at the hearing on the plea agreement that he

was subjecting himself to the 10-year penalty and so forth.

MR. FLEURY: Correct. He --

QUESTION: Yes.

MR. FLEURY: That was the settled law in our circuit.

QUESTION: Right.

QUESTION: So what is there left to try?

MR. FLEURY: There -- the question is whether or not --

QUESTION: If he's admitted --

MR. FLEURY: -- this indictment charged him with an offense that exposed him to anything more than 2 years, because if it did not, then the most he could get under this is 2 years, and we're not asking for a retrial, and we've never --

QUESTION: Well --

MR. FLEURY: -- contested the validity of the plea. We're saying he pled guilty.

QUESTION: -- what did the indictment recite?

MR. FLEURY: It recited the elements of 1326(a), that a person was found in the United States, he hadn't had permission to reenter, and he had been deported, and it referred to just 1326 generally, but it did not have any reference to an aggravated felony conviction. The

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plea colloquy didn't have any reference to an aggravated --

QUESTION: But the factual admissions of the other crimes were made before the plea agreement hearing.

MR. FLEURY: We had no plea agreement. It was just a plea, and --

QUESTION: Yes. Before the hearing on the plea, these factual allegations of the prior convictions had been made, and the defendant, your petitioner, had signed it and accepted it as being true.

MR. FLEURY: Right. Right.

QUESTION: So there is no question here that all of this was in the record.

MR. FLEURY: There's no question that he admitted that he had a burglary, that he had prior burglary convictions. He was not told, if you have an aggravated felony conviction your sentence range will turn on that, your sentence -- your statutory sentence maximum will be increased turning on that fact, and he was not asked whether he had an aggravated prior conviction. He was just -- it was just included.

Oftentimes in our district they do include the person's record in the factual resume. The import of that was in no way part of the plea colloquy.

But in any event, the issue is whether or not --

if it's an offense, it doesn't matter, because it has to be --

QUESTION: Well, before we leave the plea colloquy, I'm looking at Rule 11, does -- Rule 11 requires that the judge set forth the range of sentencing, does it not?

MR. FLEURY: Correct.

QUESTION: So that your proposed rule would serve no notice function in --

MR. FLEURY: Oh --

QUESTION: -- in the plea context, or --

MR. FLEURY: My proposed -- I'm sorry.

QUESTION: Or am I incorrect?

MR. FLEURY: The reverse, I think. Under the Government's reading, how would a judge know how -- how would a trial judge know how to give the range of punishment if it's not in the indictment?

QUESTION: Well, if the Rule 11 colloquy's inadequate, then there's an invalid plea.

MR. FLEURY: In this case it's not -- we've never challenged the validity of the plea. The Government's never -- they didn't rely to their detriment on our --

QUESTION: I'm saying that there's no notice problem because if the judge doesn't adequately advise the

defendant --

MR. FLEURY: Oh --

QUESTION: -- in the Rule 11 colloquy, then the plea is --

MR. FLEURY: Correct.

QUESTION: -- must be set aside in any event.

MR. FLEURY: Correct, but as we pointed out in our brief, there is a statute in title 18 in which, depending on the sentence result, you could get up to 6 months, or -- another one is up to 2 years, and the judge wouldn't know until the end of the process whether or not you needed an indictment in the first place or whether or not a jury -- the defendant was entitled to a jury trial until the end of the process, not at the beginning.

QUESTION: Mr. Fleury, you made a constitutional argument in your brief. Are you going to address that at all?

MR. FLEURY: Yes, but I think before we get to the constitutional argument I would say that at the very least, since this raises constitutional arguments, you need a clear statement from Congress that they intended to raise these constitutional arguments or infringe upon the constitutional right to a grand jury indictment and proof of the facts beyond a reasonable doubt.

QUESTION: Can you explain -- why is that? I

understand how it would benefit your client in this case.

Really what (b) does is, it explains to the jury if it's in the indictment that this person, namely the defendant in front of you, not only was deported previously, but he's a very bad guy.

Now, why is it that the defense bar, putting your hat on as a defense attorney, thinks it's better to have that placed in front of the jury before the trial than it is to have it placed before the judge after the trial. It doesn't have to do with the details that he was arrested, deported before, and came back. It has to do with what kind of person this is.

MR. FLEURY: As I understand the Court's question, it's why am I not concerned that inclusion of the prior conviction would prejudice my client in a trial.

QUESTION: Yes, or if not, you have a particular client you're representing very well. I'm interested in the defense in general, the defense bar in general, why -- I want to see why they've taken this position.

MR. FLEURY: As pointed out in the amicus brief, 98.2 percent of these cases end up in a plea of guilty, and in the Ninth Circuit, as the amicus points out, the Government and the courts do not mind the fact that, with the glut of cases that could be prosecuted under this statute, that there's a certain degree of charge

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bargaining, and therefore some prosecutorial discretion over which of the two offenses to charge to dispose of the case, and in many cases, in this particular case it would benefit my client and, of course, it would benefit a number of clients throughout the land, most of the clients.

Secondly, under the Old Chief case, any prejudice to my client would be blunted if that were the issue, and thirdly, if the issue is whether or not this is the same person who's been previously convicted, my client or any client would rather have that issue litigated under the beyond-a-reasonable-doubt standard when 18 additional years turns on a resolution of that fact.

QUESTION: How would any damage to your client be blunted under your understanding of the Old Chief case?

MR. FLEURY: My understanding of the Old Chief is, the jury would not get to hear the conduct that resulted in the conviction, or what the conviction was for. He could just simply stipulate that he has a prior conviction.

QUESTION: And the Government wouldn't be entitled to go to the -- to show the jury what the convictions were for?

MR. FLEURY: Correct, because under Old Chief that would have -- the relevance of that would be

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outweighed by the prejudicial nature of the --

QUESTION: Well, that's very interesting.

QUESTION: May I ask about the Rule 11 point that Justice Kennedy raised? If you had a fact situation in which all that was known was the facts establishing a violation of subsection (a), and there's no sentencing contemplated, I suppose the judge would have a duty of explaining that there is a range of punishment up to 20 years for a violation of subsection (a) in every case, because they wouldn't know -- they would not put -- they could not avoid the possibility that they would prior to sentencing later discover --

MR. FLEURY: Right.

QUESTION: -- a prior sentence, so the routine would be a plea hearing that advised the defendant in all (a) cases that the maximum penalty is 20 years.

MR. FLEURY: That's correct.

QUESTION: But do they do that in the --

MR. FLEURY: Some they do --

QUESTION: I bet they don't.

MR. FLEURY: -- and sometimes not. It depends.

QUESTION: Well, if they fail to, and it later turns out that in fact there is this evidence of prior conviction and so on, they can simply go back and do it again.

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MR. FLEURY: Right. They would have to redo the whole process.

QUESTION: But they could do that. I mean, if it -- it wouldn't --

MR. FLEURY: Yes. It would render the plea invalid. They couldn't give --

QUESTION: Yes.

MR. FLEURY: Yes, in total from the -- and they'd have to start all over, which is not the most judicially economic way to proceed.

QUESTION: Well, it's not, but as you point out, this -- I thought you were indicating earlier this isn't likely to happen very often. I mean, they -- or is it?

MR. FLEURY: Yes, I think it -- it happens --

QUESTION: The Government wakes up at the last moment, suddenly, to this news? Doesn't the Government normally --

MR. FLEURY: I don't know how often it happens. I don't have an empirical study on that. But I know it has happened.

QUESTION: But you said that one of the principal advantages of the position you're taking from the point of view of the defendant is the plea-bargaining with the prosecutor.

MR. FLEURY: Yes.

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QUESTION: The prosecutor says, I'm going to charge only under (a), not (b), so the prosecutor must know at that stage about the conviction, and if I have you right --

MR. FLEURY: Mm-hmm.

QUESTION: -- if the interpretation of the Ninth Circuit is wrong and the other circuits are right, then there is no discretion. The judge can't say, well, there was an aggravated felony but I'm going to --

MR. FLEURY: Right. The charging decision, the prosecution will be left with no charging decision whether or not to proceed under (a) or (b), and so therefore simply charging the elements of the offense in (a), which has a 2-year maximum, could lead to the exposure of up to a 20-year maximum based on facts that nobody knew about at the plea hearing or contemplated when the plea was entered, and a whole new plea hearing will have to have -- to occur under that circumstance.

Another factor that indicated Congress did recognize that they had created an offense is when -- in 1996, when they created a law and told the Sentence Commission that they needed to increase the penalties for the offenses in 1326(b).

Mr. Chief Justice, I'd like to reserve the remainder of my time.

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QUESTION: Very well, Mr. Fleury.

Ms. Brinkmann, we'll hear from you.

ORAL ARGUMENT OF BETH S. BRINKMANN

ON BEHALF OF THE RESPONDENT

MS. BRINKMANN: Mr. Chief Justice, and may it please the Court:

Section 1326, subsection (b)(2), is a sentencing enhancement provision. It does not create a separate criminal offense.

Congress enacted (b)(2) as part of a three-tier penalty scheme for violations of section 1326. The statutory text, structure, and history compelled that conclusion, and that interpretation does not create a constitutional problem.

Subsection (a) of section 1326 sets forth the offense conduct. It also sets forth a base sentence of up to 2 years that shall be imposed on such an offender, but specifies that that provision, that you shall be sentenced to 2 years, is subject to subsection (b).

Subsection (b) then states that notwithstanding subsection (a), longer sentences are authorized in some cases. (b) does not set forth any additional offense conduct.

Specifically, (b)(2) authorizes a sentence up to 20 years for persons with aggravated felony convictions, a

paradigmatic sentencing factor.

The reading of (b)(2) is confirmed by the circumstances surrounding its enactment. As Justice O'Connor pointed out, the provision in the enacting legislation was entitled, criminal penalties. That was not carried over into the codification, but it is part of the legislation that was enacted by Congress.

Moreover, if I could draw the Court's attention to the version of the statute in effect -- it's in the appendix to the Government's brief at 2a. Pages 2a and 3a reflect the changes from the 1952 version to the version which enacted in 1988 that added subsection (b).

Petitioner's counsel discussed at length the fact that subsection (b) applies notwithstanding subsection (a) into the case of any alien described in such subsection. At the time that provision was added, Congress was looking at (a), which stated at that time that an offender shall be guilty of a felony and, upon conviction thereof, be punished, so it was quite natural for Congress to use that language at that time.

As petitioner points out in his brief, later that guilty-of-a-felony provision was dropped out. That was part, as we explain in our brief, part of an effort of Congress going through and changing fine provisions and various provisions of the Immigration Act.

But at the time that (b) was enacted, to refer to an alien that was described in (a), it was clearly an alien who was guilty of a felony and who would be subject to a sentence of 2 years unless (b) applied.

We think that the legislative history also confirms that. As we discuss in our brief, all the references to the subsection (b) that was added were penalty provisions. The sponsors of the bill referred to it that way, the section-by-section analysis that was submitted to the Senate, and the predecessor statute, the sponsors and drafters had discussed at length the fact that this was a three-tier penalty scheme.

QUESTION: May I ask, just to be sure I understand the posture of the case, the case, the hypothetical case that troubles me is one -- unlike this case. I guess the facts were pretty clear -- one in which at the time of the indictment and the plea hearing, all the Government knows is that this particular reentry was made unlawfully, but the Government is not aware of prior convictions, and as I understand the Government's position, if they subsequently discover before sentencing the prior felony the sentence could go up to 20 years.

Now -- and supposing the defendant says, no, that was my brother or somebody else, it's mistaken identity -- and our cases do have some claims of mistaken

identity -- I take it it's your position that the Government must prove that this particular person was the same one by only a preponderance of the evidence.

MS. BRINKMANN: That's correct, Your Honor, and that's what I meant before when I explained that this was the paradigmatic sentencing factor. That is by proof of --

QUESTION: But normally it's a paradigmatic sentencing factor that does not increase the range of punishment beyond the previous maximum, which was true in McMillan, for example. That was within the statutory range.

Here, if you -- well, that's the argument, I guess, whether the maximum for everybody is 20 years, or only for those who find this out later.

MS. BRINKMANN: Well, Your Honor, a couple of responses. As a threshold matter, we would disagree that sentencing enhancements do not often increase the statutory maximum. In fact, they do, and we discussed the early recidivist cases from this Court, where it makes clear that that is not a constitutional problem.

Graham v. West Virginia was the first case in 1912 that talked about the fact that prior convictions used for sentencing enhancements are not an offense. They are a distinctive factor. They can be determined at a

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separate hearing.

And in Oyler v. Boles, an early 1960's case, there were two defendants at issue there. Both of them for their instant offense were subject to much lower than the enhanced sentence.

Mr. Oyler I believe was facing -- he had a second degree murder conviction and he was facing a period of, I think it was --

QUESTION: Wasn't the argument in that case that it was --

MS. BRINKMANN: -- maximum --

QUESTION: -- double jeopardy to do that?

MS. BRINKMANN: No, Your Honor. They also discussed the fact that he had a maximum of 18 years, and his went to a mandatory life. Also, Mr. Crabtree in that case had a maximum of 10 years and it went to life, so we think that that stands for the proposition that the Court has long recognized that the fact that a sentencing consideration enhances the maximum is not a constitutional problem.

I would --

QUESTION: Is -- do you apply that to all situations? I mean, I'm not outraged when you apply it to prior criminal conviction, I guess, but suppose Congress passed a classic malice murder statute and it says, the

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maximum penalty shall be life in prison provided that if the murder is committed with malice aforethought it shall be death.

Now, is that a sentencing enhancement, so you need only a judge determination of by more likely than not of the malice aforethought provision?

MS. BRINKMANN: Your Honor, the question in that case would be, what was the legislative intent?

QUESTION: Okay.

MS. BRINKMANN: And I

QUESTION: They make it very clear. The sentencing shall be increased from life imprisonment to death if there has been malice aforethought.

MS. BRINKMANN: The second factor that Your Honor introduces is the fact of the death penalty, and different procedural protections of this Court --

QUESTION: All right. 10 years to life.

(Laughter.)

QUESTION: this sentence shall be increased from --

MS. BRINKMANN: You're eliminating most of the --

QUESTION: Yes.

MS. BRINKMANN: Yes, we think -- I guess the -- to address that question, I guess I would like to address

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what the Court said in McMillan, suggesting that there is a case over the line where there is some constitutional limit.

QUESTION: I'm sure there is, and I'd like to know your judgment as to what the line is.

MS. BRINKMANN: Well --

QUESTION: McMillan said it was when the tail wags the dog, and the question was whether 20 years is the tail or the dog, as compared to 2 years.

MS. BRINKMANN: Your Honor, I think one thing that McMillan makes clear, that it's not simply the length of the sentence. The example that the Court in McMillan gave was a statute in which the presumption of innocence was undermined because of the elements that were shifted to the sentencing proceeding. There was an old case, I believe, where there was a presumption that the gun had traveled in interstate commerce, and the Court gave that as an example in McMillan of something that would be on the other side of the line.

Also in McMillan, I'd like to point out, the Court cited with -- favorably lower court rulings that had upheld the constitutionality of the old special offender statute. The Third Circuit Davis case the Court cites favorably and discusses it as that's the lower court authority to look to that's citing the cases in discussing

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3575.

3575 also includes the maximum authorized sentence. That statute permitted the sentence to go up to 25 years. In the Davis case, setting aside that sentencing enhancement, he was facing a maximum statutory sentence of 2 years.

QUESTION: May I ask, to follow up on Justice Scalia's -- supposing this statute, instead of reading, whose deportation was subsequent to a conviction for three or more, it simply said, whose deportation was subsequent to the commission of three or more crimes. It would still be a sentence enhancement.

MS. BRINKMANN: We think in light of all of the other factors in this case it would be. Again, I think it's a totality. When the Court is discerning legislative intent here we just believe it's abundantly clear, and I don't think that that factor would make any difference in this particular case.

QUESTION: Are you sure on that one, because there's been no trial or conviction of the previous commission of a felony. I mean, I think what Justice Stevens is driving at is that you then have to have a whole trial as to what the person had done previously. Did he -- three times, did he in fact -- was he a felon or not? Did he murder somebody? You know, try it before the

judge.

MS. BRINKMANN: I may have misunderstood the question. I apologize. I think what I'm trying to say is there may be situations certainly under the Court's recent decisions of Witt, or Watts, where sentencing proceedings include consideration of relevant conduct or acquitted conduct, uncharged conduct. I don't see that that raises a constitutional area.

QUESTION: No, but that doesn't increase the sentence. When you commit the crime you know that if worst comes to worst you'll get 30 years, and within that 30 years the judge is allowed to find on the basis of probabilities that you had committed another crime, and he may increase your sentence up to the maximum of 30 years because of that.

But we're talking here about you commit the crime in good faith, thinking you can get only 30 years, and it turns out that there's a sentencing enhancement that turns it into a 50-year one, and the judge is going to make that determination on his own by -- you know, more likely than not that you committed this earlier crime. You think that's constitutional, raising it from 30 to a 50 maximum?

MS. BRINKMANN: Yes, Your Honor.

QUESTION: Wow.

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MS. BRINKMANN: I think the Court made clear in Oyler it raised it -- it was a check forgery case. Mr. Crabtree was facing a check forgery case, and because he had had three prior convictions under that base sentence he would have been facing 2 to 10 years. It was a mandatory life sentence in that case.

I think also I want to distinguish, Your Honor, between notice of what the penalty is and what the claim is in this case. The claim is in this case there was a constitutional violation because this was not alleged in the indictment and proven beyond a reasonable doubt at trial.

Sentencing enhancements do not need to be included there. That does not mean, however, that it's not clear that Congress intended a person to commit this offense, be criminally sanctioned, and persons who commit this offense with this prior criminal history be subject to the sanctions. That's clear on the face of this statute. The statute gives full notice of that.

Those penalties are not required to included in an indictment. I think what the Court was focused on before helps in that regard, Rule 11. That is the rule that requires that criminal defendants be notified prior to a guilty plea of the maximum sentence.

QUESTION: Suppose the Government thinks that

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there's just a 2-year case before it. It doesn't have the evidence that Justice Stevens referred to of these other convictions, and the district judge says, I want you to know that the maximum penalty is 20 years. Is that a correct Rule 11 advice, or should he say 2 years?

MS. BRINKMANN: Your Honor, I think that in the context of Rule 11 colloquys trial judges often will explain that I can't be certain about your sentence, particularly under the guidelines, and even when they talk about statutory maximum in drug cases they explain enhancement provisions that do increase that maximum --

QUESTION: Of course here --

MS. BRINKMANN: -- although I think it would --

QUESTION: Here he would have to give -- you have to give the minimum as well.

MS. BRINKMANN: Yes.

QUESTION: And here the minimum would be 10 or 20.

MS. BRINKMANN: But the purpose of that is to have a knowing and voluntary plea, Your Honor, and I'd also point out under Rule 11 subsection (h) there's a harmless error analysis. For example, in the advisory committee notes one of the examples they give of harmless error is a guilty plea proceeding in which the trial judge erroneously understates the maximum penalty. If the

penalty imposed in that case did not exceed that, that would be harmless error.

QUESTION: Ms. Brinkmann, isn't --

QUESTION: Do you have any question as to the validity of the Rule 11 hearing before us in this case?

MS. BRINKMANN: No, Your Honor. We was, we point out in our brief that actually at the Rule 11 it said 10 years and in fact under the statute could have been 20 years, but because petitioner's sentence imposed was ultimately below 10 years there's no problem with that.

QUESTION: Ms. Brinkmann, isn't the fact that we've had a fairly serious colloquy here about the problem of when enhancements and enhancing factors become so radically important that they perhaps ought to be treated for constitutional purposes have to be treated as changes of elements rather than merely the addition of sentencing factors a good reason for us in effect to rule against you, because if we rule your way we're going to have to decide and I suppose come up with some standard to say when enough becomes too much, and when we in fact pass into a constitutionally suspect area, and we ought to avoid those kind of rulings if we can.

And I would suppose that if we at least find arguments each way on what Congress intended, that we

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ought to rule against you to keep this constitutional issue out of the case. Isn't that fair?

MS. BRINKMANN: We don't believe the constitutional issue does arise in this case.

QUESTION: Well, it may not arise in this case, but in order to decide this case I suppose we will have to say when it would arise in order to conclude that it doesn't here, so I don't see how we can avoid facing it. They've raised it.

MS. BRINKMANN: Well, Your Honor, the Court did avoid that very question in McMillan, I would point out.

QUESTION: Well, maybe it's time to stop sort of sticking our head in the sand, and it seems to me that the other side has raised this issue, and I don't see how we can avoid it if we go your way.

MS. BRINKMANN: Well, Your Honor, two things. I also think it's been resolved by cases since McMillan. In two death penalty cases this Court has upheld the death penalty sentencing schemes in the State of Florida and Arizona, and in both those schemes the existence of an aggravating factor is the fact that makes -- that increases the maximum sentence to the death penalty in Hildwin and Walton, and in Hildwin the Court specifically said that McMillan does not change that result. It was referring back to its results in Spaziano upholding judge

sentencing --

QUESTION: Well, but in those --

MS. BRINKMANN: -- and judge determination of those factors.

QUESTION: In all of -- yes, but in all of those cases there was, if I understand what your argument is there's a fact that's different from the case here. In all of those cases you were dealing, ab initio, with capital cases in which the capital result was a possibility. It was part of the range to which the defendant was exposed.

The argument here is that the sentencing factor, or that the enhancement factor, as you put it, actually increases the range, so that the death penalty cases, I suppose, would not be authority.

MS. BRINKMANN: Your Honor, I'd have to respectfully disagree. I think it's important to focus on how those sentencing systems worked.

In fact, once you're convicted of the offense -- it's called a capital offense, just like this would be a 1326 offense, but you cannot be sentenced to death in those States unless after that verdict there is then a finding of the existence of an aggravating factor, and that aggravating factor is what then permits the imposition of the death penalty. In the Zant case --

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QUESTION: And did --

QUESTION: All of that has been done to comply with our ruling that you must -- you cannot apply the death penalty automatically and you must allow -- there must be aggravating factors to narrow the class, and that's a consequence of our constitutional ruling, which arguably is satisfied by a judge determination. To reason backwards from that to what the common law requires with respect to conviction or sentencing for felonies is -- doesn't seem to me --

MS. BRINKMANN: Well, it certainly --

QUESTION: Death is different, to quote a --

MS. BRINKMANN: It certainly supports our position, however, Your Honor that there's no constitutional requirement --

QUESTION: Yes, but it's a narrowing in those cases --

QUESTION: Give her a chance.

QUESTION: Yes.

MS. BRINKMANN: There's no constitutional requirement that a factor that is so significant to increasing the maximum sentence needs to be alleged in an indictment or proven at trial. It just does not need to be.

QUESTION: No, but in those cases, as Justice

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Scalia pointed out, there was a narrowing going on. In this case there's an expansion going on.

MS. BRINKMANN: No, Your Honor. This indictment charged petitioner with violation of 1326. When you look at the statute 1326, it is clear that, depending on what your criminal history is, you can get up to 2 years, up to 10 years, up to 20 years. That's clear, just as if you read the death penalty statute, you read 1326 --

QUESTION: Right.

MS. BRINKMANN: -- it's clear what the possible penalties are. That --

QUESTION: There was no indication in the -- I don't have the indictment in front of me --

MS. BRINKMANN: It's in the --

QUESTION: There was no indication in the indictment that it was (a) rather than (b)?

MS. BRINKMANN: No, Your Honor.

QUESTION: You couldn't tell?

MS. BRINKMANN: No. It's in the joint appendix on page 3. It specifically cites section 1326.

I would also point out, regarding earlier questions from the Court, that the factual resume that was signed by petitioner, as Justice O'Connor pointed out, is also in the joint appendix on pages 5 to 7, and in that it lists the three burglary convictions that were used as

enhancement, and --

QUESTION: Well, it's clear that in this particular case there's no problem, but we're concerned about the possible other cases, and you called my attention to Oyler v. Boyles, and I notice the opinion makes this point: the statute expressly provides for a jury trial on the issue of identity if the accused either denies he is the person named in the information or just remains silent, so apparently the court thought that when an identity is in question it might be a matter of some significance.

MS. BRINKMANN: Well, Your Honor, we think that that was simply the statutory provision at issue there, and if there's one thing that we've learned in preparing for this case, there's a wide variety of recidivist statutes both in the Federal and State system, different language, different structures, and I'd have to get back to the Court's opinions in Spaziano and Walton and Hildwin, where the Court made clear that, even in the case of an aggravating factor in a death penalty statute, that's a sentencing provision and it does not need to be determined by a jury. I think Spaziano is dispositive on that point.

QUESTION: But is it the case -- suppose we held against you in this case. What would that do to the drug

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statutes? My impression is the drug statutes are phrased in terms of a crime, possession with intent to distribute, and there follows a very large section called penalties which gives different statutory penalties ranging from a year to life, depending on the amount of the drug.

Now, is it the case that those reviewed by the Department normally are simply sentencing enhancements, or are they viewed as part of the substantive crime?

MS. BRINKMANN: Those are sentencing enhancements, Your Honor. They're set out under 841(b). It's captioned penalties, and there's a whole variety of factors that are sentencing enhancements under that. It's not just the nature and quantity of the drugs involved, but again it's also the prior criminal history of the defendant, and in subsections (b)(1)(B) (C), and (D) those statutory maximum authorized sentences are also increased based on the prior conviction.

(b)(1)(A) it doesn't happen in because the -- without any prior convictions the maximum is life, but under (b)(1)(B) the maximum is 30 years, and if you have a prior conviction it's 40 years, and if you have a prior conviction it's life, so that also is a common feature of 841(b), and the use of prior convictions there.

We also have a --

QUESTION: Ms. Brinkmann, may I -- do I

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understand from your answer to Justice Breyer that it is in fact the Justice Department's practice not to charge amount?

MS. BRINKMANN: I'm sorry.

QUESTION: When they draw up the indictments the Justice Department does not include a charge of the amount of the drugs in the statement of the charge?

MS. BRINKMANN: To the best of my knowledge, Your Honor, that practice has varied over time and over districts.

I believe in some districts they do include, for example, sentence -- citations to sentencing statutes also. It's -- I don't think that there's a uniform rule on that.

I would also point out, though, just -- our concern is not with other statutes in this case, it's with the fact that for 10 years, nearly 10 years, the Government has interpreted this according to what we think the clear intent of Congress is, section 1326, and we -- as we said in our opposition to the petition in this case we don't have difficulty including this in the prosecution in the Ninth Circuit, but we have not proceeded that way.

We do not want to be subject to collateral attacks from defendants who are under conviction from all those other circuits, and we are also put in this ironic

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position of being subject then to these challenges that it will be prejudicial.

We do not believe that the Old Chief scenario would answer all of the challenges we would face, because as the Chief Justice pointed out, that simply sanitizes the prior conviction, if you will. It doesn't eliminate it.

QUESTION: I can't imagine the prejudice argument is very important. Aren't most of these cases, the factual scenario, pretty simple? They pick up the person when he's crossing the border or something, he's found in the United States in violation of (a). Can't involve much of a trial very often.

MS. BRINKMANN: Actually, Your Honor, petitioner was back in the country for years before he was found. He -- and I think this is pretty typical. He was found because he was locked up on other State charges.

QUESTION: Certainly the violation of (b) would be even easier to prove. I mean, there you're not talking with any acts, or something like that. You're simply talking about a judgment of conviction that's introduced from some other court.

MS. BRINKMANN: Exactly, Your Honor, and we would also --

QUESTION: But is it easy when he denies that

he's the same person?

QUESTION: But this guy didn't deny it.

QUESTION: I know. It's -- I'm just -- this is an easy case.

MS. BRINKMANN: It's easy, Your Honor.

QUESTION: But the question is, what does the statute mean for cases that are not so easy?

MS. BRINKMANN: Fingerprints --

QUESTION: They fingerprint him.

MS. BRINKMANN: Identification hearings are very easy. They're often held in district court when there's a transfer to another district for a prosecution. There are all kinds of identity hearings.

QUESTION: But would the Government, if there were an identification problem, call the jury in and ask them to make that determination?

MS. BRINKMANN: No, Your Honor. We believe that that would be a determination by the sentencing judge.

We do also point out concerning the -- that the ease of proof, that the First Circuit, when the First Circuit in the Forbes case was talking about the potential prejudice to defendants, also of introducing a prior conviction, also pointed out the ease of this proof and the fact that Congress has demonstrated a policy of not having prior convictions admitted during criminal trials

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that are irrelevant to that as a matter of course. That was one of the congressional policies that the First Circuit looked to in its holding.

QUESTION: How many of these cases go to trial? Very few, don't they?

MS. BRINKMANN: I think that's right, Your Honor.

QUESTION: And as far as identification is concerned you have usually the mug shots and the fingerprints. What else?

MS. BRINKMANN: I would think identification numbers on their -- the INS has identification procedures, alien numbers, prior cases that that alien was involved with.

I would think oftentimes but not always the prior deportation will have been a direct result of the prior conviction, so that also will be a package of identifying information about this particular defendant, because the conviction of many felonies obviously is grounds for deportation.

If there's nothing further, Your Honor, we submit that the judgment of the court of appeals should be affirmed.

QUESTION: Thank you, Ms. Brinkmann.

Mr. Fleury, you have 4 minutes remaining.

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REBUTTAL ARGUMENT OF PETER M. FLEURY

ON BEHALF OF THE PETITIONER

MR. FLEURY: Mr. Chief Justice, and may it please the Court:

The -- in McMillan and in Patterson there was a clear statement that those legislatures attended the fact at issue there not to be an element, and that was a big part of this outcome of both of those cases.

In this case we have no such clear statement, and in -- both in McMillan and in Patterson the Court looked to the fact that Congress deemed the -- whether or not Congress had deemed the fact -- the facts that the jury did find to be so important to create a liability for the statutory maximum punishment, and since the jury did find all of those facts, the outcome was within the dictates of the Constitution.

Here we have the question left unresolved, and that is whether a fact upon which an additional 18 years, dwarfing the possible consequences to my client other than that resolution of that fact is to be alleged in the indictment and proved beyond a reasonable doubt, and here we do not have what was present in Patterson and in McMillan.

We don't have the type of clear statement from Congress as they did in 21 U.S.C. 841, where they have

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(a), unlawful acts, (b), penalties, and 21 U.S. 851, which sets forth a sentence procedure in order to determine the prior convictions that might be used to increase the statutory maximum sentence under 841, where Congress has said as clearly as they could that the prior convictions in 841(b) will be sentence enhancements for a conviction under (a). That's not present in this case.

The traditional rule is that prior convictions used to increase a statutory maximum must be alleged in the indictment and proved beyond a reasonable doubt. This Court's never said otherwise. In Oyler --

QUESTION: What is the source of your traditional rule?

MR. FLEURY: We -- in a footnote we cited numerous, numerous cases. That was the rule at common law, and that was the rule well into the 20th Century until very recently in statutes like 841 and the like. It hasn't changed. That was the -- as we pointed out in our brief, the uniform rule. As some of the cases say, the precedents for this are too numerous to cite. That was the traditional rule.

In addition to this, this is not a recidivist statute. A recidivist statute is something where it says, well, if you do something and you do it again you'll get extra penalties.

QUESTION: Well, but you don't have to do the same thing again for a recidivist statute.

MR. FLEURY: Oh, correct.

QUESTION: So this is a form of recidivist statute.

MR. FLEURY: But it requires a prior aggravated felony which occurred prior to the deportation, and it has to do with somebody who reenters with the status of a felon, just like 18 U.S.C. 922(g) is concerned with the status of the person. It says, we want to have increased deterrence to keep felons away from weapons, and therefore it's an offense for a felon to have a weapon.

Here, we -- Congress said, we want to have an increased deterrence for felons who don't even belong in this country. Therefore, it's an extra offense, it's a 20-year offense for you to come into this country, and that has to be proved beyond a reasonable doubt and alleged to the jury.

In this case we don't have any -- we have no indication that the constitutional right to have a grand jury to decide whether a 20-year offense should have been filed in this case, it did not occur. That was not presented to the grand jury, and that's the purpose of the grand jury right.

QUESTION: Is it your view that also all these

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things in the drug statute have to be submitted to grand juries -- amounts?

MR. FLEURY: That presents a much more difficult question at least in the drug cases in 21 U.S.C. 841. You do have what was present in Mulaney -- in Patterson and McMillan. You have the clear statement, and so --

QUESTION: Is there a constitutional problem there?

MR. FLEURY: In our -- in my view there is, but again --

QUESTION: So in your view it might be unconstitutional --

MR. FLEURY: Yes.

QUESTION: -- to -- and therefore all the amounts would have to be submitted to grand juries and in the indictment, too.

MR. FLEURY: Yes, that is correct, but again -- and 21 U.S.C. 841 would present that issue clearly because there is a clear statement that that's what Congress intended.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fleury. the case is submitted.

(Whereupon, at 11:59 a.m., the case in the above-entitled matter was submitted.)

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BY Ann Marie Federico

(REPORTER)