No. 10-

IN THE

SUPREME COURT OF THE UNITED STATES

Estevan Ayala-Segoviano — PETITIONER
(Your Name)

VS.

United States of America — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

[x] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

6th Circuit - pursuant to 18 U.S.C. § 3006A (Criminal Justice Act);

U.S. District Court, Middle District of Tennessee at Nashville - same

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

(Signature)

No. 10-

IN THE

Supreme Court of the United States

ESTEVAN AYALA-SEGOVIANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 6, 2010

QUESTION PRESENTED

If a noncitizen illegally reenters after a proper deportation, then he has violated 8 U.S.C. § 1326(a); this determination carries a two-year maximum prison sentence and the defendant has a right to a jury.

If the defendant is found guilty of illegal reentry then a subsequent determination may be made: if the defendant has a prior conviction for a violent crime, then the defendant receives a sentence enhancement under 8 U.S.C. § 1326(b)(2); this determination increases his two-year maximum prison sentence to 20 years but the defendant has no right to a jury.

Whether 8 U.S.C. § 1326(b)(2) violates the Sixth Amendment by bifurcating the reentry "element" from the prior conviction "sentence enhancement"?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. Esteban Ayala-Segoviano is not a corporation.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reprinted at 2010 U.S. App. LEXIS 7174 (6th Cir. 2010) and is reproduced in the Appendix to this petition ("Pet. App.") at page 1a. The District Court for the Middle District of Tennessee did not issue a written opinion.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment reads, in part, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

8 U.S.C. § 1326(a) reads, in part, "any alien who–(1) has been … deported …, and thereafter (2) enters …, or is at any time found in, the United States [without the Attorney General's consent or the legal equivalent] shall be fined under title 18, or imprisoned not more than 2 years, or both."

8 U.S.C. § 1326(b)(2) reads, in part, "[for defendants found guilty of violating 1326(a) and] whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both."

STATEMENT OF THE CASE

Over the last ten years, this Court has reformed the roles of Congress and judge in setting sentences for criminals. A series of cases, beginning with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), limited the judicial determination of sentencing factors that could push a criminal defendant above the statutory maximum set by Congress. The lone exception is that a judge may determine whether a defendant has a prior conviction. *Almendarez-Torres* v. *United States,* 523 U.S. 224 (1998).

Mr. Ayala-Segoviano was born in Mexico. For most of his life, he lived near Nashville, Tennessee. He admitted coming to the United States illegally and returning illegally. In 1999, he was properly deported. Pet. App. 23a.

Mr. Ayala-Segoviano was charged with illegal reentry under 8 U.S.C. §§ 1326(a) and 1326(b)(2). Pet. App. 1a. He pleaded guilty to illegal reentry and made no admissions of prior criminal convictions. At the sentencing hearing, again, he made no admissions. Based on a pre-sentence report (PSR) prepared by a probation officer the judge determined that Mr. Ayala-Segoviano was convicted of involuntary manslaughter in 1996. Pet. App. 2a. Mr. Ayala-Segoviano objected to the offering of the evidence and the district court's determinations. Pet. App. 23a. The judge recognized that the defendant's objection was a "reasonable objection to make in light of the fact that this area could get revisited and it preserves the rights of the defendant in the event it be revisited." Pet. App. 8a.

The court determined that Mr. Ayala-Segoviano had a prior qualifying felony conviction, which increased the statutory maximum sentence from two

years to twenty years, and also allowed the application of a 16-level Guideline enhancement. Pet App. 3a. The district court ultimately sentenced him to 70 months, far above the statutory maximum for his underlying offense. Mr. Ayala-Segoviano objected to the sentencing but his objection was overruled. Pet. App. 19a. He later appealed to the circuit court. Pet. App. 3a.

Relying on this Court's decision in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), the United States Circuit Court of Appeals for the Sixth Circuit affirmed the district court's sentence, implicitly affirming that Mr. Ayala-Segoviano had previously been convicted of a violent crime. Pet. App. 5a. The Sixth Circuit affirmed the lower court's decision, reasoning that this Court has "effectively foreclosed Defendant's argument." Pet. App. 6a.

REASONS FOR GRANTING THE PETITION

I. DOUBT OVER THE VALIDITY OF *ALMENDAREZ-TORRES* IS LEADING LOWER COURTS INTO ERROR AND ONLY THIS COURT CAN RESOLVE THE ISSUE.

Lower courts have a seemingly simple duty to this Court: follow the precedents set by this Court. Even where a decision "appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). But following *Almendarez-Torres* is no simple task.

Justices Stevens and Thomas both criticized the case two years later in *Apprendi* v. *New Jersey*. 530 U.S. 466 (2000). But Justice Stevens stopped short of overruling *Almendarez-Torres* in his majority opinion,

"[e]ven though it is arguable that *Almendarez-Torres* was incorrectly decided …." *Apprendi*, 530 U.S. at 489. Then, five years later, Justice Thomas urged others to undo what the Court had done, "[*Almendarez-Torres*] has been eroded by this court's subsequent Sixth Amendment jurisprudence and a majority of the Court now recognizes that [it] was wrongly decided." *Shepard* v. *United States*, 544 U.S. 13, 27 (2005) (Thomas, J., concurring).

Not surprisingly, criminal defendants have picked up on the doubts expressed by the Justices and filed appeals based on the possibility of this Court overturning its decision. From 1998 to 2008, 5,200 appeals were filed against judgments which rely on *Almendarez-Torres*. Brent E. Newton, Almendarez-Torres *and the* Anders *Ethical Dilemma*, 45 Hous. L. Rev. 747, 784 n.192 (2008).

And, also, unsurprisingly, courts have become frustrated by the exception that *Almendarez-Torres* carves out of the *Apprendi* rule. The Fifth Circuit has become so frustrated that it explicitly eliminated *Almendarez-Torres* as a legitimate basis for appeal. In *United States* v. *Pineda-Arrellano*, 492 F.3d 624 (5th Cir. 2007), *cert. denied*, 552 U.S. 1103 (2008), the Fifth Circuit admitted that *Almendarez-Torres* "doesn't fit with the logic of *Apprendi*," *id.* at 626, but flatly stated that "this issue no longer serves as a legitimate basis for appeal," *id.* at 625. Such a categorical elimination of a grounds for appeal is beyond the power of a circuit court: criminal appeals are a matter of right, not discretion. *See Coppedge* v. *United States*, 369 U.S. 438, 441-42 (1962). The *Pineda-Arrellano* Court relied on a footnote in *James* v. *United States*, 550 U.S. 192, 214 n.8 (2007), asserting flatly that *Almendarez-Torres* was generally binding. *Pineda-Arrellano*, 492 F.3d at 625.

But such an assertion in a case where the question was not squarely presented cannot reasonably be interpreted to *completely foreclose* a ground of appeal. *Pineda-Arrellano*, 492 F.3d at 627-28 (Dennis, J., concurring). An argument is "frivolous" only when "[none] of the legal points [are] arguable on their merits." *Anders* v. *California*, 386 U.S. 738, 744 (1967). Cf. 28 U.S.C. § 2254(d)(2) (allowing for the correction of an error with a writ of habeas corpus only when the "decision [ ] was contrary to … clearly established Federal law, as determined by the Supreme Court"). Nevertheless, the Fifth Circuit warned appellants and their counsel not to damage their credibility with this court by asserting non-debatable arguments." *Pineda-Arrellano*, 492 F.3d at 626. The Fifth Circuit has affirmatively been led into error by the ambiguity of *Almendarez-Torres*, and this Court should act to prevent further recurrences.

II. RELEVANT FACTUAL DIFFERENCES REQUIRE REEXAMINATION OF THE APPLICATION OF *ALMENDAREZ-TORRES*.

The pivotal fact in *Almendarez-Torres* that permitted it to be decided as written was that the defendant did not contest the finding: he admitted the prior conviction, and the Court explicitly avoided dealing with issues that might have arisen had he not done so. *Almendarez-Torres*, 523 U.S. at 247-48. Few further procedural safeguards need to be considered when a competent, voluntary admission is in the record. Nevertheless, a case where a defendant admitted his prior conviction has set the precedent even for defendants who object, setting aside necessary procedural safeguards. In light of the changes in immigration enforcement and increases in the number of offenders, the procedural safeguards

that may have been sufficient may appear inadequate for a significant number of criminal defendants. *Almendarez-Torres* is applied to cases involving materially different facts, such as Mr. Ayala-Segoviano's case. This Court must intervene to ensure that its precedent is not applied to inapposite cases.

In the context of immigration law and § 1326, the procedural protections that guarantee the viability of an admission like Almendarez-Torres's are not always observed. Justice Stevens opined that the application of *Almendarez-Torres* "will seldom create any significant risk of prejudice to the accused," *Rangel-Reyes* v. *United States*, 547 U.S. 1200, 1201 (2006) (Stevens, J., commenting on the denial of certiorari). This comment overlooks the significant procedural disadvantages that aliens face in removal and reentry proceedings, especially to contest factual determinations. Immigration Judges have repeatedly been taken to task for applying "primitive psychology" to factual determinations made in administrative proceedings. *See Kadia* v. *Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007) (Posner, J.), citing John H. Wigmore, *A Students' Textbook of the Law of Evidence* 181 (1935). The Seventh Circuit has specifically catalogued a series of failures in immigration proceedings that revolve mostly around factual determinations. *Iao* v. *Gonzales*, 400 F.3d 530, 533-35 (7th Cir. 2005) (Posner, J.). Immigration officials are notorious for demanding factual corroboration under unreasonable circumstances. *See Dawoud* v. *Gonzales*, 424 F.3d 608, 612-13 (7th Cir. 2005) (Wood, J.). The procedural safeguards that might protect an ordinary criminal defendant are weak to nonexistent in the immigration context, yet *Almendarez-Torres* makes no differentiation.

Moreover, more people are affected by this rule than it seems to assume. In 1995, the year that Mr. Almendarez-Torres was arrested, the courts only sentenced 2,032 persons for illegal reentry violations, 5.3% of all sentences issued. U.S. Sentencing Comm'n, 1991-1996 Datafiles, MONFY 91-96. By 2009, that number ballooned to 17,309, constituting 21.8% of all federal sentences in the United States. U.S. Sentencing Comm'n, 2009 Datafile. USSCFY09. The agency in charge of enforcing these laws has made clear that it will continue on this path, or even increase the number of arrests if it can. "The heightened focus on re-entry prosecutions is part of the Department of Homeland Security's multi-year plan to secure America's borders and reduce illegal migration. That strategy seeks to gain operational control of both the northern and southern borders, while re-engineering the detention and removal system to ensure that illegal aliens are removed from the country quickly and efficiently." U.S. Immigration and Customs Enforcement, News Release, "Violent Illegal Alien Sentenced to 7 Years for Re-entering the United States," (June 24, 2008). Nevertheless, the circuit courts feel constrained to apply *Almendarez-Torres* as a blanket rule, stifling all appeals in the area without even inquiring into the merits or different factual situations of each challenge.

III. AS APPLIED, *ALMENDAREZ-TORRES* CREATES A "TAIL WAGS DOG" EFFECT ON ILLEGAL REENTRY SENTENCES.

The incoherence produced by *Almendarez-Torres* would likely be unconstitutional were it to occur in a different context. As applied to Mr. Ayala-Segoviano specifically, the 16-level enhancement "tail" wags the "dog" of his 8-level sentence. *Cf. McMillan* v. *Pennsylvania*, 477 U.S. 79, 88 (1986) ("The statute

gives no impression of having been tailored to permit the [enhancement] to be a tail which wags the dog of the substantive offense."). The double standard can be more clearly seen if one focuses on the sentencing laws as applied in the immigration context, rather than focusing on the idea of recidivism generally.

The functional reality of § 1326(b)(3) is that very long enhancements arise from very short base sentences, a classic instance of "the tail wagging the dog." For example, speaking about the function of § 1326(b)(1) versus § 1326(b)(2), an Assistant Federal Attorney admitted: "Aliens who have no criminal history are usually not prosecuted and are simply returned to their country of origin. However, aliens who are found to be in the country illegally and to have serious prior criminal convictions are prosecuted." Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 Ariz. St. L.J. 517, 531-32 (2006). If authorities are releasing illegal reentrants with no criminal history, but prosecuting only the ones who can receive a prior-conviction enhancement, then the base offense has become meaningless, merely a stalking-horse for the enhancement. *Cf. United States* v. *O'Brien*, ___ U.S. ___, 130 S. Ct. 2169, 2177 (2010) (noting that "a drastic, sixfold increase" because of an enhancement "strongly suggests a separate substantive crime"). *Almendarez-Torres* has turned the previous-conviction enhancement into a "tail" that wags the "dog" of the substantive offense—or at worst, "a separate substantive crime" of which a defendant can be convicted without trial.

The realities of the application of the illegal reentry statute show that it is a two-year, nearly strict-

liability statute often used either for a quick conviction or as leverage for other purposes. The potential for abuse seems ripe. *Almendarez-Torres* prevents lower courts from acting to prevent such abuses.

IV. THIS CASE IS THE PROPER VEHICLE TO DIRECTLY CONFRONT *ALMENDAREZ-TORRES*.

Mr. Ayala-Segoviano's injury is clear and mootness will not be an issue. Mr. Ayala has been injured: his sentence for illegal reentry was enhanced by sixteen levels under the Sentencing Guidelines and under § 1326(b)(2). *See Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998) (stating that incarceration constitutes a concrete injury for standing purposes). Mr. Ayala is currently imprisoned and, should the Court grant this petition, he will still be serving his punishment in prison or on supervised release. Having already served more than two years for the current conviction, he is now serving time solely for his "sentence enhancement."

This case presents no relevant factual disputes. It is uncontested that, unlike Mr. Almendarez-Torres, Mr. Ayala-Segoviano did object to the PSR and to the application of the prior conviction. Like *Shepard*, no admissions have been made, and no relevant factual disputes exist.

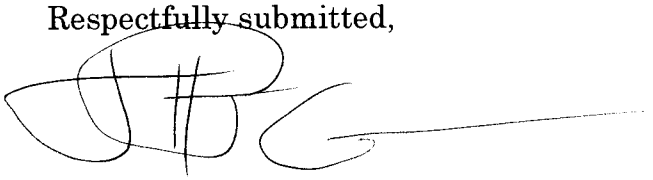
This Court justifiably avoids constitutional questions where it can, *Almendarez-Torres*, 523 U.S. at 237-38 (collecting cases), and has avoided resolution of the *Almendarez-Torres* question before on that ground, *see Shepard*, 544 U.S. at 25-26. This case, by contrast, provides a single, narrow focus on the viability of *Almendarez-Torres* and its specific application to the illegal reentry statute.

To be sure the Court has denied certiorari on this issue in the past. But denial carries no value and expresses no opinion on the merits. See *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting the denial of certiorari); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 306 & n.66 (8th ed. 2002) (collecting cases). Mr. Ayala-Segoviano's case presents sufficient differences from others that this Court could focus on the sole issue of resolving the *Almendarez-Torres* problem once and for all, diminishing the chances that it will continue to lead lower courts into error.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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July 6, 2010

RULE 33.1(h) CERTIFICATE OF COMPLIANCE

No. 10-

Estevan Ayala-Segoviano,

Petitioner,

v.

United States of America,

Respondent.

As required by Supreme Court Rule 33.1(h), I, Jeffrey T. Green, certify that the Petition for a Writ of Certiorari in the foregoing case contains 2,913 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 6, 2010.

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CERTIFICATE OF SERVICE

No. 10-

Estevan Ayala-Segoviano,

Petitioner,

v.

United States of America,

Respondent.

I, Jeffrey T. Green, do hereby certify that, on this sixth day of July, 2010, I caused one copy of the Petition for a Writ of Certiorari in the foregoing case to be served by first class mail, postage prepaid on the following parties:

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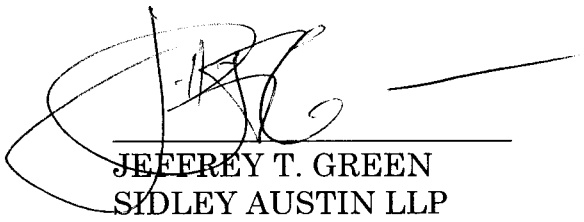

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PETITION APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 10a0213n.06

No. 06-6082

FILED
Apr 07, 2010
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ESTEBAN AYALA-SEGOVIANO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

_____/

BEFORE: KEITH, CLAY, and GRIFFIN, Circuit Judges.

CLAY, Circuit Judge. Defendant, Esteban Ayala-Segoviano, appeals from his sentence after pleading guilty to one count of illegally reentering the United States in violation of 8 U.S.C. §§ 1326(a) and (b)(2). For the reasons set forth below, we **VACATE** Defendant's sentence and **REMAND** for proceedings consistent with this opinion.

BACKGROUND

On September 28, 2005, Defendant Esteban Ayala-Segoviano was charged with one count of illegally reentering the United States in violation of 8 U.S.C. §§ 1326(a) and (b)(2). On April 17, 2006, Defendant pled guilty to this charge. On August 14, 2006, the district court sentenced Defendant to 70 months imprisonment followed by a two year term of supervised release. The district court ordered that the term of supervised release be tolled upon Defendant's expected deportation.

During the April 17, 2006 plea hearing, Special Agent Glen Blache from the Bureau of Immigration and Customs Enforcement ("BICE") testified to the facts that the government would expect to prove at trial. According to Blache, Defendant is a citizen of Mexico who had previously been deported on three occasions. Defendant was previously convicted of voluntary manslaughter on April 29, 1996 in Clay County, Tennessee under the name Pedro Nyala Segobiano and sentenced to serve up to five years. He was last deported from the United States on June 8, 1999 under the name Esteban Nyala-Segoviano and returned to Mexico through El Paso, Texas. He was arrested again on September 9, 2004 in Rutherford County, Tennessee under the name Luis Angel Melgoza for a domestic assault committed on August 11, 2004. He pled guilty to that charge and was sentenced to serve 11 months and 29 days. He completed that sentence and came into the custody of BICE. Defendant's immigration file contains no record that Defendant obtained permission from the Attorney General or the Secretary of the Department of Homeland Security ("DHS") to reapply for admission or return to the United States.

At the plea hearing, Defendant acknowledged only that he illegally reentered the United States after being deported and did not admit or deny any information relating to his criminal history. Both the government and Defendant agreed that the issue of prior convictions is a sentencing factor and is not an element of the offense of illegal reentry. Thus, Defendant was not required to make any admissions regarding his criminal history for the court to accept his plea.

The U.S. Sentencing Guidelines ("USSG") require a 16 level enhancement to the offense level for an illegal reentry offense involving a prior aggravated felony considered to be a "crime of violence." USSG § 2L1.2(b)(1)(A). At the sentencing hearing, upon the recommendation of the probation officer and over Defendant's objection, the district court imposed a 16 level enhancement

for the voluntary manslaughter conviction obtained in 1996. Based on this enhancement, the court calculated the guideline range as 70 to 87 months before sentencing Defendant to 70 months imprisonment followed by a two year term of supervised release.

On August 14, 2006, Defendant filed a timely notice of appeal. On November 13, 2006, Defendant filed his brief in this appeal. On November 30, 2006, the government filed its opposition brief. On December 6, 2006, Defendant filed a motion asking that this appeal be held in abeyance pending *en banc* review by this Court of the panel decision in *United States v. Ossa-Gallegos*, 491 F.3d 537 (6th Cir. 2007). On January 11, 2007, this Court granted Defendant's motion and held this appeal in abeyance. Also on January 11, 2007, Defendant mailed his reply brief before receiving the order of this Court granting his motion to hold this appeal in abeyance. On January 12, 2007, Defendant's reply brief was received and filed by the Court.

On June 21, 2007, this Court issued its *en banc* decision in *Ossa-Gallegos*, 491 F.3d at 545, holding that district courts may not order tolling the period of supervised release as a special condition of supervised release pursuant to 18 U.S.C. § 3583(d). On July 6, 2007, Defendant filed a letter advising the Court of the decision in *Ossa-Gallegos*. On September 29, 2009, the government filed a supplemental brief in which it concedes that *Ossa-Gallegos* controls this case and that the district court lacks authority to order that the period of a defendant's supervised release be tolled during the time that he remains outside the jurisdiction of the United States following his deportation. Thus, this issue is no longer contested on appeal.

DISCUSSION

I. Tolling Supervised Release

Based on the controlling authority of *Ossa-Gallegos*, 491 F.3d at 545, we hold that the district court exceeded its authority by ordering that the period of Defendant's supervised release be tolled during the time that he remains outside the jurisdiction of the United States following deportation.

II. Sixth Amendment Claim

"A district court's interpretation of the Sentencing Guidelines is subject to *de novo* review." *United States v. Williams*, 411 F.3d 675, 677 (6th Cir. 2005). Additionally, we review a constitutional challenge to a sentence *de novo*. *United States v. Hill*, 440 F.3d 292, 298 (6th Cir. 2006).

Defendant argues that the district court violated his Sixth Amendment rights by enhancing his sentence based on facts that were neither admitted by Defendant nor found by a jury beyond a reasonable doubt. Specifically, Defendant argues that the district judge violated his Sixth Amendment rights by applying a 16-level enhancement to Defendant's sentence based on a 1996 conviction for voluntary manslaughter, when Defendant did not admit or deny any information relating to his criminal history in his guilty plea. Defendant concedes that his argument is foreclosed by *United States v. Barnett*, 398 F.3d 516, 525 (6th Cir. 2005), but Defendant raises this issue to preserve it for Supreme Court review. Defendant argues that it appears based on Justice Thomas' concurrence in *Shepard v. United States*, 544 U.S. 13, 27 (2005) that a majority of justices on the Supreme Court may be inclined to rule that the prior conviction exception to the *Apprendi-Booker* rule violates the Sixth Amendment. In the instant case, Defendant pled guilty to 8 U.S.C. §§ 1326(a) and (b)(2) without admitting or denying any information relating to his criminal history.

This Court has found that "a judge can make factual findings about a defendant's prior convictions without implicating the Sixth Amendment." *United States v. Richardson*, 437 F.3d 550, 555 (6th Cir. 2006) (citing *Booker*, 543 U.S. at 244; *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000); *United States v. Hollingsworth*, 414 F.3d 621, 624 (6th Cir. 2005) ("The determination that Hollingsworth's prior convictions for multiple counts of aggravated assault and aggravated robbery included at least one crime of violence was thus squarely within the province of the sentencing judge.")). In *Barnett*, this Court specifically foreclosed Defendant's argument by finding that a judge rather than a jury may determine both the fact and the nature of prior convictions under *Apprendi*. 398 F.3d at 525 ("the district court's authority to determine the existence of prior convictions [is] broad enough to include determinations regarding the nature of those prior convictions").

In addition, the Supreme Court has effectively foreclosed Defendant's argument under the specific statue at issue. Under 8 U.S.C. §1326(a), "any alien who–(1) has been . . . deported . . ., and thereafter (2) enters . . ., or is at any time found in, the United States [without the Attorney General's consent or the legal equivalent] shall be fined under title 18, or imprisoned not more than 2 years, or both." Section1326(b)(2) provides that in the case of any alien described in subsection a "whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both." 8 U.S.C §1326(b)(2). In *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998), the Supreme Court held that 8 U.S.C. §1326(b)(2) "is a penalty provision [that] authorizes a court to increase the sentence for a recidivist,"

not a separate crime. Thus, the government is not required to charge the fact of an earlier conviction in the indictment for a judge to consider it during sentencing. *Id.* at 227.

Therefore, we hold that the district court did not violate Defendant's Sixth Amendment rights by enhancing his sentencing guideline offense level based upon a prior conviction for an aggravated felony.

CONCLUSION

Because the district court exceeded its authority by ordering that Defendant's supervised release be tolled during the time that he remains outside the jurisdiction of the United States following deportation, we **VACATE** the district court's sentence and **REMAND** for proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 3:05-00167
	)	
ESTEBAN AYALA-SEGOVIANO,	)	
	)	
Defendant.	)	

- -

BEFORE THE HONORABLE TODD J. CAMPBELL, CHIEF JUDGE

TRANSCRIPT

OF

PROCEEDINGS

August 14, 2006

Sentencing Hearing

- -

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Amendment of the U.S. Constitution. Again I recognize that current U.S. Supreme Court law does not necessarily support that, but it is my position that in light of Booker and Blakely in particular that the Supreme Court may revisit its position in Almendarez-Torres sometime in the near future.

THE COURT: Thank you. Mr. Jones, do you want to respond?

MR. JONES: Just briefly, Your Honor. We agree the current Supreme Court law under Almendarez-Torres would hold that this is appropriate for the judge to find these facts notwithstanding the fact it wasn't considered by the jury. Ms. Alpert is correct, there is some indication in later opinions that the Supreme Court might revisit that issue, but they haven't so far so we believe the Court is bound by Almendarez-Torres.

THE COURT: I think it is clear under current law that the objection must be denied. However, it is a reasonable objection to make in light of the fact that it is possible that this area could get revisited and it preserves the rights of the defendant in the event it may be revisited, so I am denying the objection based on current law in the Supreme Court as well as the Sixth Circuit. So where does that put us?

There is a base offense level of eight. There is a 16-level increase because defendant was previously deported