

No. 10-5296

IN THE SUPREME COURT OF THE UNITED STATES

ESTEBAN AYALA-SEGOVIANO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Almendarez-Torres v. United States, 523 U.S. 224 (1998), should be overruled.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter, but is available at 371 Fed. Appx. 643.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2010. Pet. App. 1a-6a. The petition for a writ of certiorari was filed on July 6, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Tennessee, petitioner was convicted of being found in the United States without permission after having been convicted of an aggravated felony and after having been deported, in violation of 8 U.S.C. 1326(a) and (b)(2). The district court sentenced petitioner to 70 months of imprisonment, to be followed by a two-year term of supervised release. Pet. App. 1a. The court of appeals vacated the sentence and remanded the case to the district court for resentencing. Pet. App. 1a-6a.

1. Petitioner is a citizen of Mexico. Pet. App. 2a. In 1996, he was convicted of voluntary manslaughter in Tennessee state court and sentenced to a five-year term of imprisonment. Ibid. In 1999, he was deported to Mexico. Ibid. After having reentered the country unlawfully, petitioner was arrested in Tennessee in 2004 on a domestic assault charge. Ibid. He pleaded guilty to that charge and was sentenced to 11 months and 29 days in state prison. Ibid.

2. Following his release from state prison, petitioner was indicted in the United States District Court for the Middle District of Tennessee on one count of illegally reentering and being found in the United States after having been convicted of an aggravated felony and after having been deported, in violation of 8 U.S.C. 1326(a) and (b)(2). Pet. App. 1a. Section 1326(a) provides for a term of imprisonment of up to two years for illegal reentry after deportation. 8 U.S.C. 1326(a). In the case of an

alien whose deportation was subsequent to a conviction for an "aggravated felony," however, the maximum punishment is twenty years. 8 U.S.C. 1326(b)(2).

3. Petitioner pleaded guilty to the illegal reentry charge, admitting at the plea hearing that he had illegally reentered the country after having been deported. 4/17/06 Tr. 6-7, 13-14. He refused, however, to admit or deny that he had been convicted of voluntary manslaughter before being deported. 4/17/06 Tr. 13; Pet. App. 2a.

4. The Probation Office's presentence report calculated petitioner's Guidelines range at 70 to 87 months of imprisonment. Presentence Report (PSR) ¶ 49. That calculation was based in large part on the application of the enhancement set forth in Sentencing Guidelines § 2L1.2(b)(1)(A), which provides for a 16-level enhancement where a defendant's deportation followed a conviction for a designated felony, including manslaughter. PSR ¶ 12; U.S.S.G. § 2L1.2(b)(1)(A), comment. (n.1(B)(iii)). Absent the enhancement, petitioner's Guidelines range would have been six to twelve months. See U.S.S.G. Chap. 5, Pt. A, Sentencing Table.

Petitioner objected to the application of § 2L1.2(b)(1)(A). He argued that the Sixth Amendment barred the court from imposing the enhancement unless the fact of his prior conviction had been found by a jury beyond a reasonable doubt. Pet. App. 2a-3a; 8/14/06 Tr. 3-4.

The district court denied petitioner's objection, found that petitioner had been deported subsequent to a conviction for manslaughter, and imposed a sentence of 70 months of imprisonment, to be followed by a two-year term of supervised release. Pet. App. 3a. The district court further ordered that petitioner's term of supervised release would be tolled during the time that petitioner remained outside the United States following deportation. Pet. App. 4a.

5. On appeal, petitioner renewed his constitutional challenge to the district court's application of § 2L1.2(b)(1)(A). The court of appeals concluded that petitioner's claim was foreclosed by its decision in United States v. Barnett, 398 F.3d 516, 525 (6th Cir. 2005), which held that a judge rather than a jury may determine both the fact and the nature of prior convictions for sentencing purposes. Pet. App. 4a-5a. The court of appeals further observed that petitioner's argument was "effectively foreclosed" by this Court's decision in Almendarez-Torres v. United States, 523 U.S. 224, 226 (1998). Pet. App. 5a. The court noted that Almendarez-Torres held that Section 1326(b)(2) is a penalty provision that "'authorizes a court to increase the sentence for a recidivist,'" and that the government "is not required to charge the fact of an earlier conviction in the indictment for a judge to consider it during sentencing." Pet. App. 5a-6a (quoting Almendarez-Torres, 523 U.S. at 226-227).

The court of appeals vacated petitioner's sentence on another ground, however. Relying on its decision in United States v. Ossa-Gallegos, 491 F.3d 537 (6th Cir. 2007) (en banc), the court found that the district court had exceeded its authority by tolling the running of petitioner's supervised release term during the time that petitioner remained outside the United States following deportation. Pet. App. 4a, 6a. For that reason, the court of appeals vacated petitioner's sentence and remanded for proceedings consistent with its opinion.

ARGUMENT

Petitioner contends (Pet. 3-10) that this Court should overrule Almendarez-Torres and hold that the Sixth Amendment requires a jury to find the fact of a prior conviction beyond a reasonable doubt before a judge may impose a term of imprisonment that exceeds the two-year statutory maximum sentence set forth in 8 U.S.C. 1326(a). Petitioner's claim is without merit.

1. As an initial matter, this Court's review of petitioner's sentencing claim is unwarranted at this time because the case is in an interlocutory posture. See, e.g., VMI v. United States, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari) (noting that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction"); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916) (describing the interlocutory nature of a decision as "a fact that of itself alone furnishe[s] sufficient ground for the

denial of" certiorari). The court of appeals vacated petitioner's sentence and remanded the case to the district court for further proceedings. In the interests of judicial economy, the Court should postpone any review of petitioner's sentence until after the conclusion of the district court's proceedings, thereby permitting the Court to consider all of petitioner's claims, including any claims that might arise upon resentencing, in a single petition.

2. Petitioner's constitutional challenge is without merit in any event. Under Almendarez-Torres, the fact that a defendant has a prior conviction need not be alleged in an indictment or proved beyond a reasonable doubt to support a sentence above the otherwise-applicable maximum sentence. 523 U.S. at 247. In keeping with Almendarez-Torres, this Court held in Apprendi v. New Jersey, 530 U.S. 466 (2000), that the Sixth Amendment requires any fact "[o]ther than the fact of a prior conviction" to be submitted to a jury, and proved beyond a reasonable doubt (or admitted by the defendant), when it increases the penalty for a crime beyond the prescribed statutory maximum. Id. at 490. This Court has since repeatedly affirmed that the Sixth Amendment rule announced in Apprendi applies only to penalty-enhancing facts "other than a prior conviction." Cunningham v. California, 549 U.S. 270, 274-275 (2007); see Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2581 n.3 (2010); James v. United States, 550 U.S. 192, 214 n.8 (2007); United States v. Booker, 543 U.S. 220, 244 (2005); Blakely v.

Washington, 542 U.S. 296, 301-302 (2004); Dretke v. Haley, 541 U.S. 386, 395-396 (2004).

Moreover, this Court has denied numerous petitions for writs of certiorari that have urged the overruling of Almendarez-Torres. See, e.g., Rangel-Reyes v. United States, 547 U.S. 1200, 1201-1202 (2006) (Stevens, J., respecting the denial of certiorari) ("The doctrine of stare decisis provides a sufficient basis for the denial of certiorari in these cases.") (Nos. 05-10743, 05-10706, 05-10815); Washington v. United States, 2010 WL 2151036 (Oct. 4, 2010) (No. 09-11080); Zavala-Alonso v. United States, 2010 WL 2398711 (Oct. 4, 2010) (No. 09-11372); Stanley v. United States, 129 S. Ct. 901 (2009) (No. 08-6271); Pineda-Arrellano v. United States, 552 U.S. 1103 (2008) (No. 07-6202); Diaz-Rodriguez v. United States, 552 U.S. 833 (2007) (No. 06-11007); Styles v. United States, 550 U.S. 906 (2007) (No. 06-8696); Cerna-Salguero v. United States, 545 U.S. 1130 (2005) (No. 04-9248). There is no reason for a different outcome here.*

* Petitioner incorrectly argues (Pet. 6) that an exception to the general rule that the existence of a prior conviction may be determined by the district court should be adopted "[i]n the context of immigration law" because the procedural protections available to "ordinary criminal defendant[s]" may not be fully available in immigration proceedings. A sentencing determination by the district court as to the existence of a defendant's prior conviction is dependent upon the record of the prior criminal proceeding that resulted in the conviction – not on the record of any administrative immigration proceeding – so there is no basis for creating an exception to Almendarez-Torres in prosecutions arising under the immigration laws.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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