No. 10-6117

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY VAZQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS 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. A1-A13) is not published in the Federal Reporter but is available at 381 Fed. Appx. 168.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2010. The petition for a writ of certiorari was filed on August 23, 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 Eastern District of Pennsylvania, petitioner was convicted of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to an enhanced sentence of 198 months of imprisonment under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(1), to be followed by five years of supervised release. The court also imposed a $1500 fine and a special assessment of $100. Pet. App. A4; Gov't C.A. Br. 4. The court of appeals affirmed. Pet. App. A1-A13.

1. On May 2, 2007, police officers in Philadelphia, Pennsylvania were conducting surveillance in a high-crime area when they saw petitioner buying drugs from two dealers. Pet. App. A2. The surveillance officers provided a description of petitioner and the car in which he was riding to backup officers stationed nearby. During an investigatory stop of petitioner's car, petitioner attempted to flee and, while being chased, threw a jar to the ground. Pet. App. A2-A3. Officers caught petitioner and recovered a loaded firearm from his person. Officers also seized the jar that petitioner had discarded, which contained approximately 469 milligrams of PCP. Pet. App. A3.

A grand jury indicted petitioner on one count of being a felon in possession of a firearm, in violation of 18 U.S.C.

922(g)(1). The indictment alleged that petitioner previously had been convicted of a "crime punishable by imprisonment for a term exceeding one year." Pet. App. A3. The ordinary statutory maximum penalty for a conviction under Section 922(g) is ten years of imprisonment, with no mandatory minimum term. 18 U.S.C. 924(a)(2). On the day of trial, petitioner entered a guilty plea to the indictment. Gov't C.A. Br. 4.

2. The Probation Office prepared a Presentence Report (PSR) recommending that petitioner be sentenced under the Armed Career Criminal Act of 1984 ("ACCA"), which imposes a mandatory minimum sentence of 15 years of imprisonment and a maximum of life imprisonment on any person who violates 18 U.S.C. 922(g) after having been convicted on three previous occasions of a "violent felony" or "serious drug offense." 18 U.S.C. 924(e)(1). A "serious drug offense" includes "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). Petitioner objected to sentencing under the ACCA. He argued that Almendarez-Torres v. United States, 523 U.S. 224 (1998), was wrongly decided, and that the Constitution barred the district court from applying Section 924(e)(1)'s recidivist enhancement unless a jury found

beyond a reasonable doubt that petitioner had sustained three qualifying convictions. Def. Sent. Mem. 21.

The government presented evidence that petitioner had three prior Pennsylvania convictions (from April 1999, December 2001, and August 2002, PSR ¶¶ 36, 39, 42) that qualified as "serious drug offense[s]" under the ACCA. See Gov't Sent. Mem. 5-8; Sent. Tr. 190-195. All three prior convictions involved violations of 35 Pa. Cons. Stat. § 780-113(a)(30), which prohibits, inter alia, the "manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance." The Pennsylvania statute prescribes varying statutory maximum penalties for violations of Section 780-113(a)(30), depending on the type or quantity of drug involved. See 35 Pa. Cons. Stat. § 780-113(f). As relevant here, offenses involving heroin, PCP, and cocaine carry a statutory maximum penalty of 10 years or more (id. § 780-113(f)(1) & (1.1); see also id. § 780-104(1)(ii)(10) (classifying heroin as a Schedule I controlled substance)), while offenses involving 1000 pounds or less of marijuana carry only a five year statutory maximum (id. § 780-113(f)(2)).

To prove the fact of petitioner's prior convictions and that each conviction involved a drug trafficking offense "for which a maximum term of imprisonment of ten years or more is prescribed by law," as required to qualify as an ACCA "serious drug offense," the government introduced official court records permitted under

Shepard v. United States, 544 U.S. 13 (2005). First, with respect to petitioner's April 1999 drug conviction, the government introduced: (1) a certified copy of the criminal complaint charging petitioner with a trafficking offense involving PCP and marijuana, Gov. Sent. Mem., Exh. A; (2) a certified copy of the bill of information listing both PCP and marijuana as the controlled substances petitioner was charged with manufacturing, delivering, or possessing with intent to deliver; ibid. (3) a certified copy of the conviction showing that petitioner pleaded guilty to possession with intent to deliver ("P.W.I.D."), ibid.; and (4) a copy of the written guilty plea colloquy, in which petitioner admitted that he was subject to a maximum sentence of 10 years' imprisonment for his offense. Gov. Sent. Mem., Exh. B.

Second, for petitioner's December 2001 drug conviction, the government introduced: (1) a certified copy of the criminal complaint showing that petitioner was charged with a trafficking offense involving cocaine and marijuana, Gov. Sent. Mem., Exh. C; (2) a certified copy of the bill of information showing that petitioner was charged with manufacturing, delivering, or possessing with intent to deliver a controlled substance, ibid.; (3) a certified copy of the conviction showing that petitioner pleaded guilty to possession with intent to deliver a controlled substance, ibid.; (4) a copy of the transcript of the oral guilty plea colloquy, in which petitioner admitted, as part of the factual

basis for the plea, that his offense involved cocaine and marijuana, Gov. Sent. Mem., Exh. E at 6-8, and in which petitioner also acknowledged that he faced a maximum sentence of 10 years' imprisonment, id. at 4-5; and (5) a copy of the written guilty plea colloquy showing that petitioner admitted that he was subject to a maximum statutory term of 10 years' imprisonment, Gov. Sent. Mem., Exh. D.

Third, regarding petitioner's August 2002 drug conviction, the government introduced: (1) a certified copy of the complaint charging petitioner with a trafficking offense involving crack and heroin, Gov. Sent. Mem., Exh. F; (2) a certified copy of the bill of information charging petitioner with manufacturing, delivering, or possessing with intent to deliver a controlled substance, ibid.; (3) a certified copy of the conviction stating that petitioner was "adjudged guilty" of the charged offense, ibid.; (4) a copy of the certified transcript at petitioner's bench trial showing that the court found petitioner guilty of possessing with intent to deliver heroin, Gov. Sent. Mem., Exh. G. at 5-6; and (5) a copy of petitioner's written jury trial waiver colloquy in which he

acknowledged he was subject to a maximum 10-year sentence.* Gov. Sent. Mem., Exh. H.

Petitioner argued that the documents submitted by the government did not prove the identity of the controlled substance involved in his drug trafficking convictions and, therefore, that the government had failed to prove that his prior offenses were punishable by at least 10 years of imprisonment, as necessary to qualify them as ACCA "serious drug offenses." Sent. Tr. 13-23. The district court rejected petitioner's arguments and concluded that the preponderance of the evidence showed that petitioner had sustained three prior "serious drug offenses" under the ACCA. Id. at 31.

Petitioner was subject to an advisory Guidelines range of 188-235 months' imprisonment. Sent. Tr. 50. The district court sentenced petitioner to 198 months of imprisonment, to be followed

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* Pursuant to 35 Pa. Cons. Stat. § 780-104(1)(ii)(10), heroin is a "Schedule I" controlled substance, and a violation of Section 780-113(a)(3) involving a Schedule I drug carries a statutory maximum penalty of 15 years' imprisonment, see 35 Pa. Cons. Stat. § 780-113(f)(1). Petitioner has not argued, however, that any mistake in referring to the 10-year statutory maximum for cocaine, rather than the higher 15-year statutory maximum for heroin, rendered that conviction in any way infirm. Rather, at sentencing, defense counsel acknowledged that the government had "its best chance of meeting its burden" with respect to the August 2002 conviction, Sent. Tr. 22, and primarily argued that the other two convictions did not qualify as ACCA predicates because they may have only involved marijuana, and thus carried only a five-year statutory maximum, id. at 22-23.

by five years of supervised release. The court also imposed a $1500 fine and a special assessment of $100. Pet. App. A4.

3. The court of appeals affirmed. Pet. App. A1-A13. As relevant here, petitioner argued that his "Fifth and Sixth Amendments rights were violated when he was subjected to a statutory sentence increase under the Armed Career Criminal Act, because the prior convictions were not charged in the indictment or proved to a jury beyond a reasonable doubt." Pet. C.A. Br. 10. Petitioner "concede[d] that he [wa]s simply preserving this issue for further review, should the Supreme Court reconsider Almendarez-Torres. Pet. App. A12. Relying on Almendarez-Torres, the court of appeals rejected petitioner's challenge to his ACCA sentence. Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 5-11) that a prior conviction necessary to establish that a defendant is subject to an enhanced statutory maximum sentence under the ACCA must be charged in the indictment and proved beyond a reasonable doubt. That contention lacks merit and does not warrant further review.

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 "[other] 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 repeatedly denied petitions for a writ 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. 05-10706, 05-10743, 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); Weiland v. United States, 129 S. Ct. 900 (2009) (No. 08-6158); Lopez-Velasquez v. United States,

129 S. Ct. 625 (2008) (No. 08-5514); Polino-Mercedes v. United States, 129 S. Ct. 488 (2008) (No. 08-5040); Henderson v. United States, 553 U.S. 1006 (2008) (No. 07-7837); Solis-Alvarez v. United States, 552 U.S. 1188 (2008) (No. 07-6009). There is no reason for a different outcome here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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