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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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ALMENDAREZ-TORRES *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 96–6839. Argued October 14, 1997– Decided March 24, 1998

Title 8 U. S. C. §1326(a) makes it a crime for a deported alien to return to the United States without special permission and authorizes a maximum prison term of two years. In 1988, Congress added subsection (b)(2), which authorizes a maximum prison term of 20 years for "any alien described" in subsection (a), if the initial "deportation was subsequent to a conviction for commission of an aggravated felony." Petitioner pleaded guilty to violating §1326, admitting that he had been deported, that he had unlawfully returned, and that the earlier deportation had taken place pursuant to three convictions for aggravated felonies. The District Court sentenced him under the applicable Sentencing Guideline range to 85 months' imprisonment, rejecting his argument that, since his indictment failed to mention his aggravated felony convictions, the court could not sentence him to more than the maximum imprisonment authorized by §1326(a). The Fifth Circuit also rejected his argument, holding that subsection (b)(2) is a penalty provision which simply permits the imposition of a higher sentence when the unlawfully returning alien also has a record of prior convictions.

Held: Subsection (b)(2) is a penalty provision, which simply authorizes an enhanced sentence. Since it does not create a separate crime, the Government is not required to charge the fact of an earlier conviction in the indictment. Pp. 3–24.

(a) An indictment must set forth each element of the crime that it charges, *Hamling* v. *United States*, 418 U. S. 87, 117, but it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime. Within limits, see *McMillan* v. *Pennsylvania*, 477 U. S. 79, 84–91, the question of which factors are which is normally a matter for Congress. See *Staples* v. *United States*, 511

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U. S. 600, 604. Pp. 3–5.

(b) That Congress intended subsection (b)(2) to set forth a sentencing factor is reasonably clear from a number of considerations. Its subject matter is a typical sentencing factor, and the lower courts have almost uniformly interpreted statutes that authorize higher sentences for recidivists as setting forth sentencing factors, not as creating separate crimes. In addition, the words "subject to subsection (b)" at the beginning of subsection (a) and "[n]otwithstanding subsection (a)" at the beginning of subsection (b) have a meaning that is neither obscure nor pointless if subsection (b) is interpreted to provide additional penalties, but not if it is intended to set forth substantive crimes. Moreover, the circumstances of subsection (b)'s adoption support this reading of the statutory text. The title of the 1988 amendment– "Criminal *penalties* for reentry of certain deported aliens," 102 Stat. 4471 (emphasis added)– also signals a provision that deals with penalties for a substantive crime, and it is reinforced by a legislative history that speaks only about the creation of new penalties. Finally, interpreting the subsection to create a separate offense risks unfairness, for the introduction at trial of evidence of a defendant's prior crimes risks significant prejudice. See, *e.g.*, *Spencer* v. *Texas*, 385 U. S. 554, 560. Pp. 5–11.

(c) Additional arguments supporting a contrary interpretation– that the magnitude of the increase in the maximum authorized sentence shows a congressional intent to create a separate crime, that statutory language added after petitioner's conviction offers courts guidance on how to interpret subsection (b)(2), and that the doctrine of constitutional doubt requires this Court to interpret the subsection as setting forth a separate crime– are rejected. Pp. 11–14.

(d) There is not sufficient support, in this Court's precedents or elsewhere, for petitioner's claim that the Constitution requires Congress to treat recidivism as an element of the offense irrespective of Congress' contrary intent. At most, *In re Winship*, 397 U. S. 358, 364; *Mullaney* v. *Wilbur*, 421 U. S. 684, 704; *Patterson* v. *New York*, 432 U. S 197; and *Specht* v. *Patterson*, 386 U. S. 605, taken together, yield the broad proposition that *sometimes* the Constitution does require (though sometimes it does not require) the State to treat a sentencing factor as an element of the crime, but they offer no more support than that for petitioner's position. And a legislature's decision to treat recidivism, in particular, as a sentencing factor rather than an element of the crime does not exceed constitutional limits on the legislature's power to define the elements of an offense. *McMillan* v. *Pennsylvania*, *supra*, distinguished. Petitioner's additional arguments– that courts have a tradition of treating recidivism as an element of the related crime, and that this Court should simply adopt a

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rule that any significant increase in a statutory maximum sentence would trigger a constitutional "elements" requirement– are rejected. Pp. 14–23.

(e) The Court expresses no view on whether some heightened standard of proof might apply to sentencing determinations bearing significantly on the severity of sentence. Cf. *United States* v. *Watts*, 519 U. S. ___, ___, and n. 2 *(per curiam)*. P. 23.

113 F. 3d 515, affirmed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.