

NO. 05-8400

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY JEROME SALINAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

Respectfully submitted,

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Petitioner, Jeffrey Jerome Salinas, submits this reply to Respondent's Brief in Opposition ("BIO").

I. Respondent agrees that the reasoning of the decision of the Court of Appeals is unsupportable.

In his petition for a writ of certiorari, Petitioner argued that the Court of Appeals clearly erred when it treated his prior conviction for possession of a controlled substance as a "controlled substance offense" as that phrase is defined at USSG § 4B1.2(b). Respondent agrees. BIO, at 8.

II. This Court should leave to the lower courts the initial tasks of interpreting state law and applying the prudential plain error doctrine.

Declining to defend the reasons advanced by the Court of Appeals for its judgment, Respondent advances an alternative basis which it believes support that decision. Thus, Respondent contends that the "district court did not plainly err in counting petitioner's two robbery convictions separately." BIO, at 9. The Court of Appeals explicitly declined to consider this argument. Pet. for Cert., App. A, at 35 (noting that "it is irrelevant whether [Petitioner's] robberies are related"). And, "[w]hile it is true that a respondent may defend a judgment on alternative grounds, [this Court] generally [does] not address arguments that were not the basis for the decision below." Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 379 n.5 (1996).

Remanding this matter to the Court of Appeals will allow that court to address this ground for decision suggested by Respondent.

Likewise, a remand would permit the Court of Appeals to apply properly the plain-error doctrine, as well as any other relevant prudential doctrines, in the course of considering Petitioner's arguments. See, e.g., Booker v. United States, 543 U.S. 220, 268 (2005).

In addition, Respondent's discussion of functional consolidation of related cases under Texas law is incomplete. In LaPorte v. Texas, 840 S.W.2d 412 (Tex. Crim. App. 1992) (en banc), the Texas Court of Criminal Appeals overruled several prior cases and concluded that Texas law recognizes criminal proceedings as functionally consolidated whenever they: (1) arise out of a single "criminal episode"; and (2) "are presented in a single trial or plea proceeding, whether pursuant to one charging instrument or several." Id., at 415. The Court of Appeals for the Fifth Circuit, however, has not yet considered LaPorte. For this reason, too, a remand would permit the Fifth Circuit to have the initial opportunity to consider how a substantial change in state law affects federal sentencing. In addition, this Court has recognized that the lower courts are better situated to make determinations regarding the functional consolidation of state proceedings. See Buford v. United States, 532 U.S. 59, 64 (2001).

Accordingly, Petitioner respectfully requests that this Court issue a writ of certiorari, vacate, and summarily remand his sentence so that the Fifth Circuit can have the opportunity to evaluate and properly apply the plain error and functional consolidation doctrines to this matter.

Date: March 29, 2006

Respectfully submitted,

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