

2006

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### Recommended Citation

Daniel Doeschner, *A Narrowing of the Prior Conviction Exception*, 71 Brook. L. Rev. (2006).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol71/iss3/5>

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# A Narrowing of the Prior Conviction Exception

## I. INTRODUCTION

The prior conviction exception should fall. This exception, rooted in the decision of *Almendarez-Torres v. United States*,<sup>1</sup> appears as the caveat introducing the rule laid out in *Apprendi v. New Jersey*:<sup>2</sup> “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>3</sup> While the exception has survived thus far through *United States v. Booker*,<sup>4</sup> as well as the recent decision of *Shepard v. United*

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<sup>1</sup> 523 U.S. 224 (1998). Petitioner *Almendarez-Torres* was a deported alien who returned to the United States in violation of 8 U.S.C. § 1326. *Id.* at 227. Depending on the interpretation of the statute, he faced up to twenty years of imprisonment since his initial deportation followed a conviction for an aggravated felony. *Id.* at 227-28. See discussion *infra* Part II.B.

<sup>2</sup> 530 U.S. 466 (2000). Petitioner *Apprendi* plead guilty to three counts of a twenty-three count indictment. *Id.* at 469-71. The sentencing judge found that one of the counts pleaded fell under a sentence-enhancing “hate crime” law, which allowed an upward departure from a proscribed sentence if the judge found a biased motivation behind the crime. *Id.* at 417. *Apprendi* appealed the finding. *Id.*; see discussion *infra* Part II.D.

<sup>3</sup> *Id.* at 490 (emphasis added).

<sup>4</sup> 543 U.S. 220 (2005). This decision consolidates two cases – the captioned case and *United States v. Fanfan*.

Respondent *Booker* was convicted of possessing with intent to distribute at least fifty grams of cocaine base, punishable under the United States Sentencing Guidelines (USSG) by a range of ten years imprisonment to life. *Id.* at 227. The sentencing judge made further findings, using the preponderance standard, of additional amounts of drugs distributed as well as obstruction of justice. This increased *Booker*’s sentence range to thirty years to life. *Id.* *Booker* challenged the USSG inasmuch as they violated the Sixth Amendment by allowing a judge to find facts (other than that of a prior conviction) that determine a defendant’s sentencing range. *Id.* at 226-27.

Respondent *Fanfan* was found guilty of a conspiracy that involved at least 500 grams of cocaine. *Id.* at 228. The sentencing judge, interpreting *Blakely*, decided that *Fanfan* could only be given a sentencing range of sixty-three to seventy-eight months under the USSG, instead of 188 to 235 months as he had found earlier using upward departure findings made by him. *Id.* at 228-29. The case was appealed to the U.S. Supreme Court. See discussion *infra* Part II.E.

*States*,<sup>5</sup> its application is prone to abuse. Specifically, sentencing courts that broadly interpret the prior conviction exception tend to violate the very rationales that justify it,<sup>6</sup> and those courts that narrowly interpret the exception sometimes walk the line. The differing applications result from a lack of guidance by the Supreme Court in its post-*Apprendi* jurisprudence. Consequently, not only is there a circuit split in how to construe the exception, but state courts have also had to change their interpretations of it over time.<sup>7</sup> As long as the exception remains precedent, courts will need guidance.

This Note attempts to provide assistance by contending that, so long as the prior conviction exception remains law, courts should construe it as narrowly as possible. Only this narrow construction is consistent with the rationales the Court uses to justify the exception. It is worth noting here that the constitutionality of the exception appears to already be teetering on the brink of destruction—Justice Thomas' concurrence in *Shepard* indicates as much.<sup>8</sup> The unconstitutionality of the prior conviction is already well argued in Justice Thomas' concurrence to *Apprendi*,<sup>9</sup> and treated as well in Justice Scalia's dissent to *Almendarez-Torres*.<sup>10</sup> Thus, rather than review these opinions and rehash their legal arguments, this Note instead analyzes the *application* of the exception and its practical effects. This

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<sup>5</sup> 125 S. Ct. 1254 (2005). Petitioner Shepard plead guilty to a violation of 18 U.S.C. § 922(g)(1), which bars felons from possessing a firearm. *Id.* at 1257. At sentencing, the Government attempted to introduce evidence of Shepard's prior burglary convictions, under a Massachusetts burglary statute, in order to raise his sentencing range from between thirty and thirty-seven months (under the USSG) to the fifteen year minimum mandated by § 924(e), popularly known as the Armed Career Criminal Act (ACCA). *Id.* Since Massachusetts' definition of burglary is broader than the definition of burglary under the ACCA, the Government sought to introduce police reports and complaint applications to assist the court in determining whether the earlier convictions fell within ACCA's definition of burglary. *Id.* at 1257-58. The admissibility of these documents was the question presented to the Court. *Id.*; see discussion *infra* Part II.E.

<sup>6</sup> See *infra* Part II.F. for these justifications.

<sup>7</sup> See *infra* Part III.

<sup>8</sup> 125 S. Ct. at 1264 (“*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.”). Justice Thomas names himself as well as Justices Scalia, Stevens, Souter, and Ginsburg as supporting the overruling of *Almendarez-Torres*, which founded the prior conviction exception. *Id.* This is especially noteworthy since the current change in composition of the Court—that of Chief Justice Roberts replacing the late Chief Justice Rehnquist, and Justice Alito replacing Justice O'Connor—will not affect this majority.

<sup>9</sup> See 530 U.S. 466, 499-523 (2000).

<sup>10</sup> See 523 U.S. 224, 248-71 (1998).

analysis will show that only the narrowest construction of the exception permits it to be exercised without violating its justifications. Although the impracticality of the prior conviction exception does not dictate declaring it unconstitutional, it does bolster the argument for doing so.

To show the impracticality of the prior conviction exception, this Note will first trace its history in Part II – from its inception in *Almendarez-Torres* to the present day. Part II.A. introduces the modern context of determinate sentencing jurisprudence, which began with *McMillan v. Pennsylvania*.<sup>11</sup> By “modern determinate sentencing jurisprudence,” this Note means that line of Supreme Court cases which have held determinate sentencing, or sentencing under some form of extrajudicial guidelines, constitutional.<sup>12</sup> *McMillan* is first in the line of these cases, since it was in this decision that the Court first “coined the term ‘sentencing factor’ to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge.”<sup>13</sup> Part II.B. discusses *Almendarez-Torres*, which held that where prior convictions enhance a criminal offender’s sentence, the existence of those prior

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<sup>11</sup> 477 U.S. 79 (1986).

<sup>12</sup> It is worth distinguishing determinate from indeterminate sentencing schemes at this point. Stephanos Bibas outlines the difference between the terms, as well as their change in meaning over time:

The term “indeterminate sentences” used to refer to broad ranges set by judges (for example, five to ten years). Within these broad ranges, parole boards often determined the ultimate release dates. Determinate sentences, in contrast, were precise sentences set by judges (for example, eight years). In more modern parlance, indeterminate sentencing allows judges to set sentences anywhere below the statutory maxima (for example, anywhere from zero to twenty years for armed robbery). Determinate sentencing, in contrast, uses sentencing guidelines or statutes (such as mandatory minima) to guide or constrain judicial discretion within the statutory ranges.

Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2468 n.12 (2004). This Note uses the modern form of the terms, and focuses on determinate sentencing schemes. Note that the Supreme Court has held indeterminate sentencing schemes constitutional. *See, e.g.*, *Williams v. New York*, 337 U.S. 241, 251-52 (1949) (allowing a judge, but not compelling him, to rely on facts outside the trial record in determining whether to sentence a defendant to death); *see also* *United States v. Booker*, 543 U.S. 220, 233 (2005) (“If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment.”); *Blakely v. Washington*, 542 U.S. 296, 309 (2004) (“[I]ndeterminate schemes involve judicial factfinding . . . [b]ut the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence – and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.”).

<sup>13</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 485 (2000).

convictions need not be proved to a jury or beyond a reasonable doubt.<sup>14</sup> Part II.C. reviews *Jones v. United States*,<sup>15</sup> which clarified the scope of *Almendarez-Torres*' holding by interpreting the federal carjacking statute.<sup>16</sup> Part II.D. discusses the landmark decision of *Apprendi*, which created a general rule mandating that a jury must find, using the reasonable doubt standard, any fact that increases the maximum available penalty for a crime.<sup>17</sup> *Apprendi* also carved out the *Almendarez-Torres* prior conviction holding as an exception to this general rule.<sup>18</sup> Part II.E. examines the current status of the prior conviction exception under the more recent *Booker* and *Shepard* decisions, and Part II.F. elucidates the rationales on which the exception now stands.

After explaining the justifications of the prior conviction exception in Part II, this Note will turn in Part III to survey cases, both federal and state, which have applied the exception since its official articulation in *Apprendi*. Part III.A. examines how some courts have broadly interpreted the exception, while Part III.B. inspects how other courts have narrowly construed it. Part IV will analyze these two constructions of the prior conviction exception by comparing them with the exception's justification illuminated in Part II. Thus, Part IV.A. analyzes the broad interpretation and concludes that it does not conform to the exception's justification. Part IV.B. addresses the narrow interpretation and observes that even this construction raises questions as to the continuing vitality of the prior conviction exception. Part V concludes that only a narrow interpretation of the exception is consistent with the rationale underlying it, and that the misuse of the exception provides another reason why the Court should ultimately strike it down.

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<sup>14</sup> See 523 U.S. at 226-27.

<sup>15</sup> 526 U.S. 227 (1999). Petitioner Jones was convicted of aiding and abetting the use of a firearm during a crime of violence and carjacking. *Id.* at 229-31. The indictment made no mention of the carjacking statute's subsections, which provided for an increased sentence if serious bodily injury resulted during the carjacking, nor did the indictment charge facts to support the subsections. *Id.* The sentencing court imposed the increased sentence after making the necessary finding using the preponderance standard, and Jones appealed. *Id.* See discussion *infra* Part II.C.

<sup>16</sup> See *Jones*, 526 U.S. at 229-30.

<sup>17</sup> *Apprendi*, 530 U.S. at 490.

<sup>18</sup> *Id.* at 489-90.

## II. A BRIEF HISTORY OF THE PRIOR CONVICTION EXCEPTION

This Part provides the necessary background of pertinent Supreme Court decisions that bear on modern determinate sentencing beginning with *McMillan v. Pennsylvania*.<sup>19</sup> In the context of these decisions, this Part highlights three thematic rationales that the Court uses to support its reasoning in exempting prior convictions from the *Apprendi* rule.<sup>20</sup> The first rationale is that courts have traditionally treated recidivism as a sentencing factor rather than an offense element. By “sentencing factor,” this Note means only those facts that are found by a judge, instead of a jury, using the preponderance of evidence standard.<sup>21</sup> In contrast, an “offense element” requires a jury to make the necessary factual findings using the beyond a reasonable doubt standard.<sup>22</sup> The second is that due process and jury trial protections are usually already attached to a prior conviction, thus minimizing the need for these rights when prior convictions are subsequently examined. The third rationale is that treating prior convictions as sentencing factors does not create a problematic presumption of guilt, since the fact-finder is still required to make a necessary factual finding.

### A. *The Rise of Modern Determinate Sentencing Jurisprudence*

The first explicit Supreme Court sanctioning of modern determinate sentencing came in *McMillan v. Pennsylvania*.<sup>23</sup> In that case, the Court held that Pennsylvania’s Mandatory Minimum Sentencing Act was constitutional under the Fourteenth Amendment’s Due Process Clause and the Sixth Amendment’s right to a jury trial.<sup>24</sup> In so holding, the decision

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<sup>19</sup> 477 U.S. 79 (1986).

<sup>20</sup> “[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490.

<sup>21</sup> See *McMillan*, 477 U.S. at 91-92.

<sup>22</sup> *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>23</sup> *McMillan*, 477 U.S. at 91-92.

<sup>24</sup> *Id.* at 91-93. The Act, 42 PA. CONS. STAT. § 9712 (1982) (current version at 42 PA. CONS. STAT. § 9712 (2004)), is reproduced in full at *McMillan*, 477 U.S. at 82 n.1. Relevant portions are provided here (as excerpted from the decision):

(a) Mandatory sentence. – Any person who is convicted . . . of [any enumerated felony ranging from third degree murder to kidnapping, and attempt thereof], shall, if the person visibly possessed a firearm during the

upheld a rule allowing a sentencing judge to determine whether the defendant "visibly possessed a firearm" during the commission of the crime without using the beyond a reasonable doubt standard of evidence.<sup>25</sup> If the judge found this visible possession, which the Pennsylvania legislature defined as a "sentencing factor," the defendant would face a mandatory minimum sentence of five years.<sup>26</sup> In other words, the Court allowed the sentencing judge, rather than the jury, to find a fact in a criminal case, and to do so using the lesser evidentiary standard of preponderance.<sup>27</sup> The judge could do this because such facts were considered "sentencing factors," and not elements of the crime.<sup>28</sup>

A sentencing factor, the Court reasoned, goes only to the punishment for the crime, and not to the commission of the crime.<sup>29</sup> Citing *Patterson v. New York*,<sup>30</sup> the Court rejected the claim that "whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt."<sup>31</sup> While due process requires that every element of a crime be proved beyond a reasonable doubt,<sup>32</sup> not every factor listed in a criminal statute is necessarily an "element."<sup>33</sup> States are

commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary.

(b) Proof at sentencing. — Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

(c) Authority of court in sentencing. — There shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in subsection (a) . . . .

<sup>25</sup> *McMillan*, 477 U.S. at 81; § 9712.

<sup>26</sup> See § 9712.

<sup>27</sup> The Court also went on to note that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." *McMillan*, 477 U.S. at 91.

<sup>28</sup> *Id.* at 85-86.

<sup>29</sup> See *id.* at 87-88.

<sup>30</sup> 432 U.S. 197 (1977).

<sup>31</sup> *McMillan*, 477 U.S. at 84 (citing *Patterson*, 432 U.S. at 214).

<sup>32</sup> *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>33</sup> See *McMillan*, 477 U.S. at 84-85.

accorded deference when defining criminal conduct, since crime prevention and prosecution are more the concern of states than the federal government.<sup>34</sup> Thus, when states draft their criminal statutes, it is within their authority to distinguish factors that only bear on sentencing from those that constitute elements of an offense.<sup>35</sup> Consequently, the Court declared that it will not invalidate a state's criminal statute under the Due Process Clause unless it offends a fundamental principle of justice – like withholding the reasonable doubt standard to find the elements of a criminal offense.<sup>36</sup> A potential abuse arises, however, as legislatures may try to circumvent due process protection by manipulating elements of an offense into sentencing factors, which do not require the same protection as elements.<sup>37</sup> In *McMillan*, the manipulation of the burden of proof for the visible possession factor was an issue.

The Court admitted that it had not defined the extent to which a state can reallocate burden of proof requirements while still observing due process,<sup>38</sup> but it did provide some guiding analysis with respect to the issue. First, the Pennsylvania statute did not discard the due process presumption of innocence guarantee by placing the visible possession factor within the sole purview of sentencing considerations.<sup>39</sup> The judge still had to make a finding of visible possession of a firearm – he could not merely assume it. Second, the statute “neither alter[ed] the maximum penalty for the crime committed nor create[d] a separate offense calling for a separate penalty; it operate[d] solely to limit the sentencing court’s discretion in selecting a penalty within the range already available to it . . . .”<sup>40</sup> In other words, if the factor did more than just set a mandatory minimum (which was already within the range of punishment the judge could impose), then that factor would likely be considered an element rather than a sentencing factor. Finally, the Court noted that sentencing

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 89-90.

<sup>36</sup> *Id.* at 85-86. Indeed, the due process requirement of proving every element of a crime beyond a reasonable doubt is one such fundamental principle of justice. See *Winship*, 397 U.S. at 372 (Harlan, J., concurring), *Patterson*, 432 U.S. at 208.

<sup>37</sup> See *McMillan*, 477 U.S. at 86.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 86-87.

<sup>40</sup> *Id.* at 87-88. To put it another way, “[t]he statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense.” *Id.* at 88.



courts have always used instrumentality factors,<sup>41</sup> like the one in the instant case, in assessing punishment.<sup>42</sup> Given these three considerations, along with the reasonable doubt principle and state-deference policy noted above, the Court concluded: “[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.”<sup>43</sup> Sixth Amendment modern determinate sentencing precedent was thus born.

### B. *Prior Convictions as Sentencing Factors*

Eleven years after deciding *McMillan*, the Court confronted the issue of recidivism as a sentencing factor in the controversial case of *Almendarez-Torres v. United States*.<sup>44</sup> Petitioner *Almendarez-Torres* had pleaded guilty to a violation of 8 U.S.C. § 1326, which forbids deported aliens from returning to the United States without permission.<sup>45</sup> The statute authorized up to two years of incarceration as punishment for violation of the statute under subsection (a).<sup>46</sup>

<sup>41</sup> Instrumentality factors deal with the tools that the criminal uses to commit a crime. Possession of a firearm during perpetration, for example, is an instrumentality factor. *See id.* at 89-90.

<sup>42</sup> *McMillan*, 477 U.S. at 89-90.

<sup>43</sup> *Id.* at 93.

<sup>44</sup> 523 U.S. 224 (1998).

<sup>45</sup> *Id.* at 226-27. The relevant portions of the statute, 8 U.S.C. § 1326 (1988) (current version at 8 U.S.C. § 1326 (2000)), are (alterations in original):

Reentry of deported alien; criminal penalties for reentry of certain deported aliens.

(a) Subject to subsection (b) of this section, 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.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

- (1) whose deportation was subsequent to a conviction for commission of [certain misdemeanors], or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both; or
- (2) 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.

*McMillan*, 477 U.S. at 229.

<sup>46</sup> § 1326(a).

The question before the Court was whether subsection (b)(2), which provided for a punishment of up to twenty years of imprisonment if the alien's initial deportation "was subsequent to a conviction for commission of an aggravated felony," defined a separate crime from subsection (a), or was only a sentencing factor which a judge could consider in enhancing a sentence.<sup>47</sup> The Court adopted the latter interpretation.<sup>48</sup>

Initially, the Court noted that the subject matter of subsection (b)(2) was recidivism, a "typical . . . sentencing factor as one might imagine."<sup>49</sup> After a lengthy analysis of the statute's construction and history, the Court concluded that subsection (b)(2) was only a sentencing factor.<sup>50</sup> The Court then addressed the underlying rationales that permitted the use of recidivism as a sentencing factor. First, it recognized *In Re Winship's*<sup>51</sup> interpretation of the Due Process Clause that "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."<sup>52</sup> Nevertheless, it distinguished *Winship* since that decision did not consider which particular facts of a crime are constitutionally required to be treated as elements of the substantive crime.<sup>53</sup> The recognition of this shortcoming was integral for the Court, since it allowed the Court to parse sentencing factors from elements without offending *Winship's* due process guarantee of proof beyond a reasonable doubt. The Court, however, had to reconcile two conflicting cases before it could conclude — *Mullaney v. Wilbur*<sup>54</sup> and *Patterson v. New York*.<sup>55</sup>

In *Mullaney*, a unanimous Court struck down Maine's homicide statute<sup>56</sup> which presumed all intentional homicides to

<sup>47</sup> *Almendarez-Torres*, 523 U.S. at 226.

<sup>48</sup> *Id.* at 226-27.

<sup>49</sup> *Id.* at 230.

<sup>50</sup> *Id.* at 235.

<sup>51</sup> 397 U.S. 358 (1970). Appellant *Winship* was a twelve year-old boy who was found, by a preponderance of the evidence, to have committed what would have been the crime of larceny had he been an adult. *Id.* at 360. The question before the Court was whether the reasonable doubt standard was required, as a matter of due process, during the adjudicatory stage of a delinquency proceeding. *Id.* at 359. The Court held in the affirmative. *Id.* at 360-61.

<sup>52</sup> *Almendarez-Torres*, 523 U.S. at 239-40 (quoting *Winship*, 397 U.S. at 364).

<sup>53</sup> *Id.* at 240.

<sup>54</sup> 421 U.S. 684 (1975).

<sup>55</sup> 432 U.S. 197 (1977).

<sup>56</sup> The murder statute, ME. REV. STAT. ANN. tit. 17, § 2651 (1964) (repealed 1976), provided: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment

have been committed with malice.<sup>57</sup> This presumption of malice meant that offenders faced life imprisonment, unless they could disprove it in order to reduce the offense to manslaughter, a crime punishable by up to twenty years.<sup>58</sup> These different punishments measured different degrees of culpability, an issue the Court observed to be within the purview of due process.<sup>59</sup> Thus, the *Mullaney* Court held that since the existence of malice affected the severity of punishment for homicide, it should be proved beyond a reasonable doubt, and not presumed.<sup>60</sup> According to the Court in *Almendarez-Torres*, if one were to read *Mullaney* literally, then judges would not be able to increase sentences based on recidivism or any other factor not included in an indictment and proved to a jury beyond a reasonable doubt.<sup>61</sup> The *Almendarez-Torres* Court was able to disregard this reading, however, by turning to *Patterson*.

In *Patterson*, the question presented was whether, in a New York State murder trial, it was permissible to require the defendant to prove extreme emotional disturbance as an affirmative defense given the Due Process Clause of the

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for life." *Mullaney*, 421 U.S. at 686 n.3. The manslaughter statute, ME. REV. STAT. ANN. tit. 17, § 2551 (1964) (repealed 1976) provided: "Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than 20 years . . ." *Mullaney*, 421 U.S. at 686 n.3.

<sup>57</sup> *Mullaney*, 421 U.S. at 703-04. The specific problem with the statutes was the fact that the manslaughter statute required the defendant to prove heat of passion on sudden provocation by a preponderance of the evidence. *Id.* at 691-92. The presence of heat of passion was found to be *essential* in the measurement of the degree of culpability under this statutory scheme. *See id.* at 696. This importance made the existence of heat of passion integral in the definition of malice aforethought. *See Almendarez-Torres v. United States*, 523 U.S. 224, 240-41 (1998). Thus, by not requiring the prosecution to disprove heat of passion, the statute in effect allowed the prosecution to presume malice.

<sup>58</sup> *Mullaney*, 421 U.S. at 686 n.3, 691-92.

<sup>59</sup> *Id.* at 697-98. The Court went on to note that "when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance for many lesser crimes." *Id.* at 698.

<sup>60</sup> *See id.* at 697-98, 704 ("We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."). *But cf. McMillan v. Pennsylvania*, 477 U.S. 79, 84 (1986) (rejecting the claim that "whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt").

<sup>61</sup> *Almendarez-Torres*, 523 U.S. at 240.

Fourteenth Amendment.<sup>62</sup> In a five-four opinion, the Court held that it was permissible to shift this burden.<sup>63</sup> The Court found that due process does not completely prohibit states from shifting burdens of proof, so long as the prosecution has proved enough to force the defendant to respond with an excuse or explanation.<sup>64</sup> In other words, as long as the prosecution proves all the elements of a crime beyond a reasonable doubt – as those elements are prescribed by the state’s law itself – the state may shift the burden of proving a mitigating circumstance or affirmative defense to a defendant, but not an element.<sup>65</sup> This was the essential flaw in the statute at issue in *Mullaney* – it presumed malice even though malice was an indispensable element to establishing the commission of

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<sup>62</sup> *Patterson v. New York*, 432 U.S. 197, 198 (1977). N.Y. PENAL LAW § 125.25 (McKinney 1975) (current version at N.Y. PENAL LAW § 125.25 (McKinney 2004)) provided:

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant’s situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

*Patterson*, 432 U.S. at 198-99 n.2. N.Y. PENAL LAW § 125.20 (McKinney 1975) (current version at N.Y. PENAL LAW § 125.20 (McKinney 2004)) provided:

A person is guilty of manslaughter in the first degree when:

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotion disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision.

*Patterson*, 432 U.S. at 199 n.3.

<sup>63</sup> *Patterson*, 432 U.S. at 197, 210.

<sup>64</sup> *Id.* at 203 n.9.

<sup>65</sup> The *Patterson* Court also noted that the presumption of innocence guarantee prevents states from circumventing due process by merely labeling elements of a crime as affirmative defenses. *Id.* at 210.

murder under Maine law.<sup>66</sup> In *Patterson*, the statute had all the basic elements needed to convict a person of murder – death, intent to kill, and causation – and the government had to prove all of these elements beyond a reasonable doubt.<sup>67</sup> Thus the statute was constitutional, and it was permissible to shift the burden of proving extreme emotional disturbance to the defendant.<sup>68</sup>

After limiting the *Mullaney* decision through *Patterson*, the *Almendarez-Torres* Court had one final case to reckon with – *McMillan*.<sup>69</sup> Indeed, the Court analogized the instant case to *McMillan* in most respects save one – the maximum penalty that defendant *Almendarez-Torres* faced under 8 U.S.C. § 1326 increased from two to twenty years if convicted under subsection (b)(2).<sup>70</sup> In contrast, the Mandatory Minimum Sentencing Act that *McMillan* was sentenced under did not alter his maximum penalty, but rather limited the sentencing court's discretion in imposing punishment to within the allowed range of penalties.<sup>71</sup> A wider range of punishments was thus available to a sentencing court under the statute in *Almendarez-Torres* than under the statute in *McMillan*.<sup>72</sup> Despite this difference, the Court decided that the use of prior

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<sup>66</sup> See *Almendarez-Torres v. United States*, 523 U.S. 224, 240-41 (1998). As explained in that decision, by presuming the absence of "heat of passion," Maine made this fact:

[N]ot simply a potential sentencing factor, *but also* a critical part of the definition of "malice aforethought," which was itself in turn "part of" the statute's definition of "homicide," the crime in question. . . . [The] *Mullaney* [Court] . . . held "impermissible" [this] shifting of a burden of proof "with respect to a fact which the State deems so important that it must be either proved or presumed." . . . [The *Patterson*] Court [on the other hand] . . . held that similar burden-shifting *was* permissible with respect to New York's homicide-related sentencing factor "extreme emotional disturbance[.]" [since t]hat factor was not a factor that the state statute had deemed "so important" in relation to the crime that it must be either "proved or presumed."

*Id.* (citations omitted); see also *Patterson*, 432 U.S. at 215-16.

<sup>67</sup> *Patterson*, 432 U.S. at 198-99 nn.2-3, 205-06.

<sup>68</sup> See *id.* at 210. The majority in *Patterson* also, in the end, categorically tempered its holding in *Mullaney* regarding the link between criminal law, punishment, and due process, by stating that *Mullaney* should not be read broadly. *Id.* at 214-15 n.15.

<sup>69</sup> *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

<sup>70</sup> *Almendarez-Torres*, 523 U.S. at 235-36, 242-43; see also *supra* notes 45-47 and accompanying text.

<sup>71</sup> *Almendarez-Torres*, 523 U.S. at 243.

<sup>72</sup> *Id.*

convictions under § 1326(b)(2), as a sentencing factor, did not render the statute unconstitutional.<sup>73</sup>

To justify that conclusion, the Court analyzed four important considerations. First, the Court indicated that recidivism was a traditional sentencing factor, which went solely to the punishment of the defendant and not to the elements of the underlying offense.<sup>74</sup> Second, the Court stated that a mandatory minimum sentence, as in *McMillan*, has a greater risk of unfairness to a defendant than the instant case's permissive maximum sentence<sup>75</sup> (even though *McMillan* had said that the petitioners' argument seeking to make any factor that increases a punishment an element would have had "more superficial appeal" if a greater maximum penalty was at stake).<sup>76</sup> Third, the wide range of sentencing available under § 1326 did not create significant unfairness towards the defendant, since judges have typically exercised discretion within broad statutory ranges.<sup>77</sup> Fourth, and finally, there was no presumption of guilt or restructuring of elements in the statute (i.e., no *Mullaney* violation), which precluded any notion that Congress was abusing its legislative responsibilities.<sup>78</sup> By observing these four considerations, the *Almendarez-Torres* Court laid the foundation for the prior conviction exception.<sup>79</sup>

### C. *A Rule with Exception is Conceived*

*Almendarez-Torres*' holding, that Congress intended § 1326(b)(2) to set forth a sentencing factor and not a separate criminal offense, would enshrine recidivism as a sentencing factor in the Court's modern determinate sentencing jurisprudence. This became more evident one year later, in

<sup>73</sup> *Id.* at 246.

<sup>74</sup> *Id.* at 243-44. See also *Graham v. West Virginia*, 224 U.S. 616, 624 (1912) (holding that a State need not allege prior conviction in indictment even though prior conviction was "necessary to bring the case within the statute.").

<sup>75</sup> *Almendarez-Torres*, 523 U.S. at 244-45.

<sup>76</sup> *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986).

<sup>77</sup> *Almendarez-Torres*, 523 U.S. at 245-46.

<sup>78</sup> *Id.* at 246.

<sup>79</sup> In his dissent to the decision, Justice Scalia laid out an extensive argument rejecting the prior conviction exception given prior Supreme Court jurisprudence, as well as common law tradition. See *id.* at 248-71. However, Justice Scalia fell short of concluding as much since deciding this question was unnecessary to deciding the case. *Id.* at 260. The reader is strongly referred to this lengthy opinion for a deeper analysis of the subject.

1999, when the Court decided *Jones v. United States*.<sup>80</sup> The *Jones* Court considered whether the federal carjacking statute, 18 U.S.C. § 2119, defined three distinct crimes or a single one with three different punishments contingent on certain sentencing factors.<sup>81</sup> These factors included whether serious bodily injury or death occurred as a result of an armed carjacking.<sup>82</sup> The Court held that § 2119 established three separate offenses each with distinct elements.<sup>83</sup>

Recognizing the import of distinguishing elements from sentencing factors and the fact that Congress did not unequivocally indicate the distinction in the statute, the Court began its discussion with a statutory construction analysis.<sup>84</sup> One fact the Court especially noted in this analysis was the dramatic increase in penalties among the subsections – from fifteen years maximum for the base offense, to twenty-five years if serious bodily injury resulted in the carjacking, to life if death resulted.<sup>85</sup> The *Jones* Court questioned whether such increases were permissible without the due process safeguards that accompany elements of an offense.<sup>86</sup> It also contrasted the statute's legislative history and practice of using serious bodily injury as an element of an offense, with the traditional use of

<sup>80</sup> 526 U.S. 227 (1999).

<sup>81</sup> *Id.* at 229.

<sup>82</sup> 18 U.S.C. § 2119, at the time, read:

Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –

- (1) be fined under this title or imprisoned not more than 15 years, or both,
- (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
- (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

*Jones*, 526 U.S. at 230 (quoting 18 U.S.C. § 2119 (1988 ed., Supp. V) (current version at 18 U.S.C. § 2119 (2000))).

<sup>83</sup> *Jones*, 526 U.S. at 251-52.

<sup>84</sup> *Id.* at 232.

<sup>85</sup> *Id.* at 233; see also *supra* note 82.

<sup>86</sup> *Jones*, 526 U.S. at 233. Cf. *United States v. Booker*, 543 U.S. 220, 236 (2005) (finding that “[a]s [sentencing] enhancements became greater, the jury’s finding of the underlying crime became less significant[,]” and thus encroached on the Sixth Amendment’s jury trial guarantee). *But cf.* 8 U.S.C. § 1326 (1988) (current version at 8 U.S.C. § 1326 (2000)), the statute at issue in *Almendarez-Torres*, which increased a defendant’s punishment over a wide range (from two years, to ten years, to twenty years among the subsections), but did not raise concern for the Court. See *supra* notes 45, 70-73, and accompanying text.

recidivism as a sentencing factor.<sup>87</sup> The Court acknowledged that the statute's subsections could possibly be read as setting forth sentencing factors rather than elements, notwithstanding the dramatic increases in punishments among the subsections and the traditional use of serious bodily injury as an element.<sup>88</sup> Nevertheless, the Court held that reading these aspects of the offense as elements was better; three separate offenses thus existed in the statute, each with its own distinct elements that "must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict."<sup>89</sup>

In order to resolve any doubt regarding the preference for an elemental reading, the Court applied the rule "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."<sup>90</sup> To show the constitutional doubt that would arise if the Court interpreted the statute as laying out sentencing factors, the Court turned to several previous cases already discussed, including *Mullaney*, *Patterson*, and *McMillan*.<sup>91</sup> The Court neatly summed up the issues in these cases:

*McMillan* . . . recognizes a question under both the Due Process Clause of the Fourteenth Amendment and the jury guarantee of the Sixth: when a jury determination has not been waived, may judicial factfinding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime? The seriousness of the due process issue is evident from *Mullaney's* insistence that a State cannot manipulate its way out of *Winship*, and from *Patterson's* recognition of a limit on state authority to reallocate traditional burdens of proof; the substantiality of the jury claim is evident from the practical implications of assuming Sixth Amendment indifference to treating a fact that sets the sentencing range as a sentencing factor, not an element.<sup>92</sup>

In a footnote, the Court suggested the principle upon which it based its reasoning:

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<sup>87</sup> *Jones*, 526 U.S. at 235-39; see also *Almendarez-Torres v. United States*, 523 U.S. 224, 243-44 (1998).

<sup>88</sup> *Jones*, 526 U.S. at 239.

<sup>89</sup> *Id.* at 252.

<sup>90</sup> *Id.* at 239 (quoting *United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)).

<sup>91</sup> *Id.* at 240-43.

<sup>92</sup> *Id.* at 242-43.



[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.<sup>93</sup>

This dictum would one year later become *Apprendi*'s overt holding.

The *Jones* Court explained that it is the constitutional safeguards which attach to the required *procedures* for finding facts that matters, and not the identification of elements themselves.<sup>94</sup> The Court also specifically noted the exception of recidivism to the proposition. One basis for constitutionally distinguishing prior convictions from other factors that can enhance sentences is the fact that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."<sup>95</sup> Another, of course, was the traditional nature of recidivism as a sentencing factor.<sup>96</sup>

And so, from the logic of *Almendarez-Torres*' and *Jones*' reasoning, the proposition that any fact that increases the penalty for a crime must be submitted to a jury and proved beyond a reasonable doubt was conceived. Along with it came the carved out exception for recidivism, since prior convictions were considered "traditional sentencing factors," and they already had due process and jury protections associated with them. It is worth recalling that the Court noted this principle was only *suggested* by the prior case law at this point, and not established.<sup>97</sup> In one year this suggested principle would become concrete, though, when the Court decided a case whose name would become synonymous with the very proposition articulated above – *Apprendi*.

#### D. *The Apprendi Doctrine and its Prior Conviction Exception*

On June 26, 2000, the Court announced its decision in *Apprendi v. New Jersey*.<sup>98</sup> The question presented in *Apprendi*

<sup>93</sup> *Jones*, 526 U.S. at 243 n.6.

<sup>94</sup> *Id.* These safeguards, restated, are "the formality of notice, the identity of the factfinder, and the burden of proof." *Id.*

<sup>95</sup> *Id.* at 249.

<sup>96</sup> *See id.* at 249 n.10.

<sup>97</sup> *Id.* at 243 n.6.

<sup>98</sup> 530 U.S. 466 (2000).

was whether the Due Process Clause of the Fourteenth Amendment required a jury, using the reasonable doubt standard, to make a factual determination that would authorize the increase of a defendant's maximum sentence, from ten to twenty years, under a New Jersey criminal statute.<sup>99</sup> In a five-four decision, the Court answered that question in the affirmative.<sup>100</sup> Defendant Apprendi had pleaded guilty to three counts of a twenty-three count indictment.<sup>101</sup> Both the prosecutor and the defense, as part of the plea agreement, reserved the right to request or challenge an enhanced sentence based on the ground that one of the counts fell under the State's "hate crime" law – a statute which enhanced a sentence if the offense was committed with a biased purpose.<sup>102</sup> The trial judge held an evidentiary hearing with respect to Apprendi's "purpose" in committing the offense, and found using the preponderance standard that Apprendi had acted with a bias, so the enhancement provision applied.<sup>103</sup> Apprendi appealed.<sup>104</sup>

The Court began by noting that the adequacy of New Jersey's procedure for sentence enhancement was at issue, especially since the enhancement statute doubled the maximum punishment a judge could impose.<sup>105</sup> The Court also noted that there was no ambiguity in New Jersey's statutory scheme concerning burden of proof – i.e., there was no presumption of guilt in the statute.<sup>106</sup> Therefore, the only

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<sup>99</sup> *Id.* at 468-69. New Jersey Statute § 2C:39-4(a) provides that "[a]ny person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree." N.J. STAT. ANN. § 2C:39-4(a) (2005) (not amended since *Apprendi*). Such offense is punishable, "[i]n the case of a crime of the second degree, for a specific term of years which shall be fixed by the court and shall be between five years and 10 years." *Id.* § 2C:43-6(a)(2). Under a separate statute – a "hate crime" law – an extended term of imprisonment is provided for when a "trial judge finds, by a preponderance of the evidence, that '[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" *Apprendi*, 530 U.S. at 468-69 (citing N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000) (deleted by amendment in 2001)). The extended term was for between ten and twenty years. N.J. STAT. ANN. § 2C:43-7(a)(3) (2005) (not amended since *Apprendi*).

<sup>100</sup> *Apprendi*, 530 U.S. at 468, 476.

<sup>101</sup> *Id.* at 469-70.

<sup>102</sup> *Id.* at 470; see also *id.* at 468 (citing N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000) (deleted by amendment in 2001)).

<sup>103</sup> *Id.* at 470-71.

<sup>104</sup> See *id.* at 471-74 for the procedural history of *Apprendi*.

<sup>105</sup> *Apprendi*, 530 U.S. at 474-75.

<sup>106</sup> *Id.* at 75.

question before the Court was whether Apprendi was constitutionally entitled to have a jury find beyond a reasonable doubt the fact needed to impose the enhancement (in this case, a "biased purpose").<sup>107</sup> *Jones* foreshadowed that answer, according to the Court.<sup>108</sup>

The Court looked at the history of the right to trial by jury and the right to have every element of an offense found by a reasonable doubt standard.<sup>109</sup> The Court noted that any distinction between "elements" and "sentencing factors" did not exist when the Constitution was written.<sup>110</sup> At that time, not only did essential elements of an offense have to be alleged in the indictment, but so did any circumstances that mandated a particular punishment.<sup>111</sup> The Court stated, however, that this requirement did not preclude judges from exercising discretion in imposing sentences; judges could exercise discretion, but only "*within the range* prescribed by statute."<sup>112</sup> In summary, the Court concluded that "[p]ut simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense."<sup>113</sup>

The Court then acknowledged the import of *Winship's* procedural protection of reasonable doubt, and the presumption of innocence that is attached to it, given the loss of liberty and stigma a defendant faces when convicted.<sup>114</sup> The Court stated that: "Since *Winship*, we have made clear beyond peradventure that *Winship's* due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a

<sup>107</sup> *Id.* at 475-76.

<sup>108</sup> *Id.* at 476.

<sup>109</sup> *Id.* at 477-78.

<sup>110</sup> *Apprendi*, 530 U.S. at 478.

As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing "all the facts and circumstances which constitute the offence, . . . stated with such certainty and precision, that the defendant . . . may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly . . . and *that there may be no doubt as to the judgment which should be given*, if the defendant be convicted." The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime.

*Id.* (internal citation omitted).

<sup>111</sup> *Id.* at 480-81.

<sup>112</sup> *Id.* at 481.

<sup>113</sup> *Id.* at 483 n.10. *But cf. supra* notes 31, 53 and accompanying text.

<sup>114</sup> *Apprendi*, 530 U.S. at 484; *see also In re Winship*, 397 U.S. 358, 363 (1970).

defendant's guilt or innocence, but simply to the length of his sentence.' This was a primary lesson of *Mullaney v. Wilbur* . . . ."<sup>115</sup>

In a footnote, the Court went on to indicate that *Patterson* did not limit this aspect of *Mullaney*, as the statute at issue in *Patterson*<sup>116</sup> did not presume any facts required to constitute the crime.<sup>117</sup> Additionally, the Court limited *McMillan's* holding – that legislatures could prescribe certain factors as going only to the punishment, and not to the elements, of a crime – to cases that do not involve alteration of sentencing maximums.<sup>118</sup> By limiting *McMillan's* holding, the consideration of a sentence's maximum became vital to the Court's analysis of determinate sentencing schemes.

After reorienting its stance on *Mullaney* and *McMillan*, the Court turned to *Almendarez-Torres*, which it recognized as a possible departure from historic practice.<sup>119</sup> The Court changed its stance regarding this decision, stating that it rested on the fact that *Almendarez-Torres* had admitted his earlier convictions, which had been entered with their own procedural safeguards.<sup>120</sup> Therefore, there was no contested issue of right to jury trial or reasonable doubt before the Court.<sup>121</sup> Notwithstanding the reorientation, the Court admitted the possibility that *Almendarez-Torres* was incorrectly decided given the newfound extension of due process into the sentencing factor realm; that issue was not before the Court in *Apprendi*, however, and was thus left unresolved.<sup>122</sup> With this issue brushed aside, the Court

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<sup>115</sup> *Apprendi*, 530 U.S. at 484 (alteration in original) (internal citation omitted). *But see supra* notes 52-53 and accompanying text.

<sup>116</sup> *See supra* note 62.

<sup>117</sup> *Apprendi*, 530 U.S. at 485 n.12.

<sup>118</sup> *Id.* at 487 n.13.

<sup>119</sup> *Id.* at 487.

<sup>120</sup> *Id.* at 488. These procedural safeguards refer to the right to notice, the right to jury trial, and the right to have every element of the offense found beyond a reasonable doubt before one is convicted. *See id.* at 476.

<sup>121</sup> *Id.* The Court also later noted that "recidivism 'does not relate to the commission of the offense' itself, [unlike] New Jersey's biased purpose inquiry." *Id.* (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 230, 244 (1998)).

<sup>122</sup> *Apprendi*, 530 U.S. at 489-90. In his concurrence to this opinion, Justice Thomas discusses the prior conviction exception and uses a historical analysis of recidivism statutes to make an excellent case about why prior convictions should be considered elements, rather than sentencing factors. *See id.* at 499-523 (Thomas, J., concurring). He ultimately concludes that *Almendarez-Torres* was incorrectly decided, and that prior convictions should not be exempt from the *Apprendi* rule. *Id.* at 521. Justice Thomas' treatment of the subject is extensive, and so the interested reader is strongly referred to it.

declared what it had only suggested in *Jones*: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>123</sup>

Using this newly articulated rule, the Court declined to interpret the New Jersey statutory sentencing scheme as relating to sentencing factors rather than elements of the offense.<sup>124</sup> The enhancement statute, which used motivating biases as factors to “enhance” the maximum punishment a defendant faced, thus prescribed elements under the Court’s rule.<sup>125</sup> Furthermore, the Court noted that “[w]hen a judge’s finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as ‘a tail which wags the dog of the substantive offense.’”<sup>126</sup> In other words, findings made by a judge using the preponderance standard, which increase the maximum punishment a defendant faces, are elements in reality (and require the associated due process and jury trial guarantees). Hence, the landmark “*Apprendi* rule” was created, along with an exception that stood on rather tenuous ground. As Justice O’Connor forewarned in her dissent, “[t]oday, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in *Jones*.”<sup>127</sup>

### E. *The Prior Conviction Exception as of Today*

The “watershed change” that Justice O’Connor referred to was realized in a decision that came down almost four years later to the day of the *Apprendi* decision. On June 24, 2004, the Court decided *Blakely v. Washington*,<sup>128</sup> a case that dealt with a sentencing enhancement within Washington State’s

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<sup>123</sup> *Id.* at 490.

<sup>124</sup> *Id.* at 491-97. The term “sentencing factor” was not “devoid of meaning” though. *Id.* at 494 n.19. According to the Court, these factors now can only describe mitigating or aggravating circumstances “that support[] a specific sentence *within the range* authorized by the jury’s finding[s].” *Id.*

<sup>125</sup> *Id.* at 494. The Court also noted that these motivating biases, to which the enhancing statute referred, effectively provided a second *mens rea* requirement – a requirement that traditionally fell within the scope of “elements.” *Id.* at 493.

<sup>126</sup> *Id.* at 495 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)); see also *supra* note 40 and accompanying text.

<sup>127</sup> *Apprendi*, 530 U.S. at 524 (O’Connor, J., dissenting).

<sup>128</sup> 542 U.S. 296 (2004).

Sentencing Guidelines.<sup>129</sup> The decision did not further the analysis of the prior conviction exception, but rather clarified several aspects of the *Apprendi* rule and explained in further detail the significance of the right to trial by jury. Although *Blakely* was not about “finding determinate sentencing schemes unconstitutional,”<sup>130</sup> it did have the collateral effect of invalidating Washington’s Sentencing Guidelines. Invalidating Washington’s guidelines, however, called the United States Sentencing Guidelines (USSG) into question, since Washington’s guidelines did not significantly differ from the federal guidelines.<sup>131</sup> The question concerning the constitutionality of the USSG was presented to the Court in *United States v. Booker*<sup>132</sup> on October 4, 2004.

On January 12, 2005, the Supreme Court handed down its decision in *Booker*.<sup>133</sup> This decision invalidated the USSG inasmuch as they required a judge to impose a sentence beyond a prescribed statutory maximum by making additional findings of facts using the preponderance of the evidence standard.<sup>134</sup>

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<sup>129</sup> *Id.* at 298-301. Sentencing guidelines are a modern product of determinate sentencing, originating in the 1970s. See JACK M. KRESS, PRESCRIPTION FOR JUSTICE: THE THEORY AND PRACTICE OF SENTENCING GUIDELINES 3-8 (1980). As legislatures were reforming penal codes after the American Law Institute issued its code reform in the 1960s, a comparative sentencing reform code was lacking. *Id.* at 3-4. For example, degrees of robbery might be established in a penal code, but comparable variances in sentences would be lacking. See *id.* at 4. Accusations of disparate sentencing were also leveled at the judiciary. See *id.* at 19-21. Furthermore, public opinion regarding the benefits of indeterminate sentencing and the rehabilitative promises associated with it began to erode. *Id.* at 5-6.

In response to these problems, reformers proposed guidelines that would assist a sentencing judge in imposing sentences. The purpose of these guidelines is to open access to sentencing to public scrutiny, which theoretically will reduce disparity since judges will be more easily held accountable for the exceptional sentences they impose. *Id.* at 8, 19-21. The increased access will also create a stronger appearance of justice, since procedures are more transparent. *Id.* at 9-10. Sentencing guidelines also offer compromise between the two goals that sentencing judges pursue – individualized punishment and equality of punishment across a society. *Id.* at 9. Finally, sentencing guidelines allow the collective wisdom of many judges in a given jurisdiction to bear on the punishment of a defendant. *Id.* at 16. The guidelines provide a benchmark for a sentencing judge, which not only helps train and educate judges, but also offers them psychological reassurance that they are justly administering punishment. *Id.* at 16-18.

Sentencing guidelines, while closely linked to the issues of modern determinate sentencing regarding due process and jury trial guarantees, are not the issue of this Note. For more on sentencing guidelines, as well as models of such guidelines, see generally KRESS, *supra* (discussing sentencing guidelines); MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973) (same).

<sup>130</sup> *Blakely*, 542 U.S. at 308 (quoting Brief for Respondent at 34).

<sup>131</sup> *Id.* at 305 n.9.

<sup>132</sup> 543 U.S. 220, 125 S. Ct. 738 (2005).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 226, 746.

The Court once again did not consider the prior conviction exception. It did reaffirm its *Apprendi* holding, restating it as: “Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”<sup>135</sup> The Court also crafted a unique remedy for the guidelines – it severed the portions of the guidelines that made them mandatory.<sup>136</sup> While the Court’s analysis adds nothing to the exception’s jurisprudence, it does show that the Court is not about to abandon its line of reasoning since *Apprendi*. Indeed, Justice O’Connor recognized this in her dissent to a case which seems to signal that the end of the prior conviction exception may be near – *Shepard v. United States*.<sup>137</sup>

Though *Shepard* did not terminate the prior conviction exception, it did appear to support a restricted reading of it. Shepard pleaded guilty to violating 18 U.S.C. § 922(g)(1), which bars felons from possessing a firearm.<sup>138</sup> The government sought to increase Shepard’s sentencing range from between 30 and 37 months (under the now advisory USSG) to the 15-year minimum required by § 924(e), commonly known as the Armed Career Criminal Act (ACCA), since Shepard had prior burglary convictions that arguably fell within the ambit of the ACCA.<sup>139</sup> However, Shepard had pled to these prior burglary convictions under a Massachusetts burglary statute that defines burglary more broadly than the ACCA does.<sup>140</sup> Specifically, the ACCA defines burglary in generic terms, requiring the act to take place in a building or enclosed space.<sup>141</sup> In contrast, Massachusetts’ statute allows for the finding of burglary if it was committed in a boat or motor vehicle in addition to a building or enclosed space.<sup>142</sup> Thus, in order for Shepard’s prior burglaries to fall within the ACCA, additional findings of fact *about* the prior convictions would have to be made by the judge.

The government sought to introduce police reports and complaint applications to prove that the prior burglary

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<sup>135</sup> *Id.* at 244, 756.

<sup>136</sup> *Id.* at 245-46, 756-57.

<sup>137</sup> 125 S. Ct. 1254, 1269 (2005) (“I have criticized that [*Apprendi*] line of cases from the beginning. It is a battle I have lost.” (O’Connor, J., dissenting)).

<sup>138</sup> *Id.* at 1257.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *See id.*

<sup>142</sup> *See Shepard*, 125 S. Ct. at 1257.

convictions could be used as predicates to impose the ACCA, but the district court ruled that *Taylor v. United States*<sup>143</sup> precluded courts from delving into these types of materials.<sup>144</sup> Specifically, *Taylor* had held that “generic burglary could be identified only by referring to charging documents filed in the court of conviction, or to recorded judicial acts of that court limiting convictions to the generic category, as in giving instruction to the jury.”<sup>145</sup> However, *Taylor* was decided in the context of jury verdicts, so the Supreme Court granted certiorari to address the different ways Courts of Appeals were applying *Taylor* to guilty pleas.<sup>146</sup> The Court found that guilty pleas may establish ACCA predicate offenses,<sup>147</sup> but *Taylor* still “controls the identification of generic convictions following pleas, as well as convictions on verdicts.”<sup>148</sup> The closest analogs to jury instructions in pleaded cases were plea colloquy transcripts or written plea agreements, since these contained the factual bases for the charges.<sup>149</sup> Thus, the Court held that “a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”<sup>150</sup>

In determining its holding, the Court noted that one of the reasons for restricting the scope of material courts could use in determining predicates under the ACCA is compliance with the Sixth and Fourteenth Amendment rights as defined by the *Apprendi* rule.<sup>151</sup> The problem in the instant case was that the sentencing judge, in considering the ACCA enhancement, had to make a factual finding that Shepard’s prior burglary took place in a building or enclosed space – a fact *about* the prior conviction (since the prior conviction was for a broader category of burglary not limited to buildings or enclosed spaces).<sup>152</sup> The Court found this fact to be “too far removed from the conclusive significance of a prior judicial

<sup>143</sup> 495 U.S. 575 (1990).

<sup>144</sup> *Shepard*, 125 S. Ct. at 1257.

<sup>145</sup> *Id.* at 1259.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Shepard*, 125 S. Ct. at 1259-60.

<sup>150</sup> *Id.* at 1257.

<sup>151</sup> *Id.* at 1262.

<sup>152</sup> *Id.*



record, and too much like the findings subject to *Jones and Apprendi* [than] *Almendarez-Torres* . . . .<sup>153</sup> Hence, the Court distinguished finding a fact of conviction from finding a fact *underlying* the conviction; by making only the former finding permissible, the Court appears to show a preference for narrowly construing the prior conviction exception.

F. *The Justifications for the Prior Conviction Exception*

Although *Shepard* did not overrule *Almendarez-Torres*, it certainly erodes its scope and casts doubt on the continuing vitality of the prior conviction exception.<sup>154</sup> While the exception remains law, however, it is worth understanding the three major rationales the Supreme Court uses to justify it. The first rationale, one that has been recurrent since *Almendarez-Torres*, is that recidivism is a traditional sentencing factor that only goes to the punishment for the crime, and not to the crime itself.<sup>155</sup> The second rationale, articulated in *Jones*, is that due process protections and the jury trial right are already afforded to the defendant in the initial process that resulted in the earlier conviction.<sup>156</sup> The third rationale, which has been a prevalent consideration of the Court for all sentencing factors since *McMillan*, is that the exception does not create a presumption of guilt so long as legislatures do not manipulate their criminal statutes in such a way that would result in a *Mullaney* violation.<sup>157</sup> Upon closer examination, however, only the second rationale can really justify the continuation of the prior conviction exception.

The first rationale for the exception – that recidivism is a traditional sentencing enhancement – is historically contestable. Justice Thomas, in a lengthy concurrence to *Apprendi*, described a history of cases, beginning roughly at the end of the Civil War, where recidivism was used as an aggravating *element* of a crime by various state legislatures.<sup>158</sup>

<sup>153</sup> *Id.*

<sup>154</sup> *Shepard*, 125 S. Ct. at 1264 (Thomas, J., concurring). In his concurrence, Justice Thomas notes his readiness to overrule *Almendarez-Torres*' prior conviction exception, except for the fact that the parties to the case did not request such action by the Court. *Id.*

<sup>155</sup> See *supra* notes 49, 74, 87, 96 and accompanying text.

<sup>156</sup> See *supra* notes 95, 120 and accompanying text.

<sup>157</sup> See *supra* notes 39, 66, 78, 117 and accompanying text.

<sup>158</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 506-18 (2000) (Thomas, J., concurring).

Justice Scalia, in his dissenting opinion in *Almendarez-Torres*, recognized this history as well.<sup>159</sup> Thus, the “tradition” of using recidivism as a sentencing factor is not as historically clear cut as the Supreme Court’s rationale indicates. A cloudy tradition is not a basis on which a judicial rule should rely.

Not only is the historic legal use of recidivism disputable, but the Court has abandoned this kind of argument for other sentencing factors. Recall that in *McMillan*, the Court identified instrumentality factors with traditional sentencing factors as well.<sup>160</sup> This logic fell, however, when the *Apprendi* rule was announced. Today, instrumentality factors that raise a defendant’s sentence beyond a prescribed statutory maximum must now be found by a jury using the reasonable doubt standard. Hence, the Court has previously retreated from the “traditional use” rationale. And finally, it is worth noting that the Court in *Booker* disparaged arguments based on tradition. Responding to Justice Breyer’s dissent that judges could traditionally increase sentences on their own findings, Justice Stevens responded, “tradition . . . does not provide a sound guide to enforcement of the Sixth Amendment’s guarantee of a jury trial in today’s world.”<sup>161</sup> Given all of the above, the “traditional use” rationale hardly seems strong enough to support the prior conviction exception.

Unlike the first and second rationales, the third rationale – that the use of prior convictions as sentence enhancements does not create a presumption of guilt – is more of a secondary consideration rather than a primary justification for the prior conviction exception. Specifically, it deals with how legislatures employ sentencing factors in their statutes. Recall that the Supreme Court will generally defer to state legislatures in interpreting their criminal statutes.<sup>162</sup> However, the Court also stated that it will not allow states to manipulate their statutes in such a way as to avoid the requirements of due process.<sup>163</sup> In this context, the *Apprendi* rule is basically a manifestation of this checking power – it provides objective standards (“any fact that increases the penalty for a crime

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<sup>159</sup> *Almendarez-Torres v. United States*, 523 U.S. 224, 256-57, 261 (1998) (Scalia, J., dissenting).

<sup>160</sup> *McMillan v. Pennsylvania*, 477 U.S. 79, 89-90 (1986); see also *supra* notes 41-42 and accompanying text.

<sup>161</sup> *United States v. Booker*, 543 U.S. 220, 235-36 (2005).

<sup>162</sup> See *McMillan*, 477 U.S. at 84-86.

<sup>163</sup> See *Jones v. United States*, 526 U.S. 227, 242-43 (1999).

beyond the prescribed statutory maximum<sup>164</sup>) the Court can use to decide if a legislature has manipulated its statute so as to violate due process and the jury trial guarantees.

In the context of the prior conviction exception, legislatures would not be allowed to write a criminal statute that presumed the existence of prior convictions, as that would violate due process.<sup>165</sup> This remains true even though prior convictions are excepted from the *Apprendi* rule, as evidenced in *Almendarez-Torres*.<sup>166</sup> Ultimately, a fact-finder is required to make the necessary finding of a prior conviction – and courts should check sentencing statutes, as well as their own practices, in order to make sure that this requirement is fulfilled, much like the way the Supreme Court did throughout its modern determinate sentencing jurisprudence.<sup>167</sup> Thus, the presumption of guilt rationale is better characterized as a secondary consideration when examining the use of prior convictions as enhancements, rather than as a primary rationale which supports the exception itself.

Since the tradition of using prior convictions as sentence enhancements is too murky to be credited, and the presumption of guilt rationale is more fitting as a secondary consideration, the only remaining rationale on which the prior conviction exception stands is that due process and jury trial guarantees already attach to a prior conviction. Indeed the rationale has some sense to it. *Apprendi* is about preserving the rights to a jury trial and to have one's guilt be determined beyond a reasonable doubt; both of these rights are usually afforded to a defendant before he is convicted. Though this rationale appears to sustain the exception, it can only support a very limited reading. It is this rationale that is prone to abuse by lower courts, since they must continue to struggle with interpreting the exception for as long as it remains precedent. It is to these cases that this Note turns now, in order to shed some light on the practical effects of the Court's decisions regarding the prior conviction exception since *Apprendi*.

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<sup>164</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

<sup>165</sup> This was the lesson of *Mullaney*. See *supra* notes 56-60 (discussing *Mullaney v. Wilbur*, 421 U.S. 684 (1975)).

<sup>166</sup> See *supra* note 78 and accompanying text.

<sup>167</sup> See *supra* notes 39, 66, 78, 117 and accompanying text.

### III. A PORTRAIT AND ANALYSIS OF THE PRIOR CONVICTION EXCEPTION

It is difficult to categorize the various ways that lower courts have used the prior conviction exception. Recidivist statutes vary among jurisdictions, as do sentencing judges' interpretations of them. For the purposes of this Note, the most practical way to differentiate these interpretations is by breadth – that is, courts<sup>168</sup> have read the prior conviction exception either broadly or narrowly. When a court reads the exception broadly, certain determinations are made that either underlie the earlier conviction or proceed from the fact of the earlier conviction's existence. In contrast, when a court reads the exception narrowly, it looks to the “fact of the prior conviction” itself, as well as any fact associated with it that does not require additional subjective or factual findings. Most courts generally agree on the appropriateness of the narrow reading under *Apprendi*; there is much discord, however, on what determinations (if any) can be made beyond the narrow reading.

#### A. *The Broad Reading*

There are two ways a court can broadly interpret the prior conviction exception. First, it can simply encompass all recidivist factors under the penumbra of the prior conviction exception, including determinations that are derived from the existence of a prior conviction – like reviewing the daily conduct of a defendant who is on probation.<sup>169</sup> Second, a court can read the exception broadly by holding expansively as to the types of proceedings that can generate a “conviction.” For example, juvenile adjudications may be a type of prior

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<sup>168</sup> Although an extensive review of cases across the country would be desirable, it is beyond the scale of this Note. Thus, Part III primarily uses California Court of Appeal decisions as a representative sample, unless otherwise indicated, since California also uses a determinate sentencing model. In addition, state-level decisions seem fitting for discussion since *Apprendi* interpreted state law, and the Supreme Court has noted deference to states with respect to criminal law. See *supra* note 34 and accompanying text. The focus will be on the interpretative issue of the exception. The cases surveyed here also occurred before the *Shepard* decision; it remains to be seen whether *Shepard* will impact the use of prior convictions in sentencing generally, or be limited by courts only to the ACCA.

<sup>169</sup> See, e.g., *People v. Bushnell*, No. B169231, 2004 WL 2011414 (Cal. Ct. App. Sept. 10, 2004).

“conviction,”<sup>170</sup> and their use as sentence enhancements have created a lot of controversy, though there are other types of adjudications that raise questions as well. Whichever way the prior conviction exception is broadened, little agreement is reached among courts as to the constitutional validity of these two expansions.

Courts can broaden the prior conviction exception by making the general concept of recidivism equivalent to the term “prior conviction.” The general rule for this approach is neatly described in *People v. Thomas*,<sup>171</sup> a case where the California Court of Appeal considered the question of whether the failure to secure the defendant’s agreement to have the trial judge determine the truth of two prior convictions violated the Sixth and Fourteenth Amendments’ jury trial guarantees.<sup>172</sup> According to section 667.5 of the California Penal Code, a defendant’s sentence may be enhanced if the accused served a “prison term” as part of the conviction.<sup>173</sup> While the fact of a prison term goes one step beyond the fact of a prior conviction,<sup>174</sup> the court held that the judge, without the use of a jury, could properly make the determination of whether the defendant had served a prison term in satisfaction of section 667.5.<sup>175</sup> This is because the Supreme Court not only allowed the judge in *Almendarez-Torres* to find that the defendant had a prior conviction, but also to find that this prior conviction involved an “aggravated felony.”<sup>176</sup> Specifically, the court noted that *Almendarez-Torres* did not require due process treatment of *recidivism-related issues* that enhance a defendant’s sentence but are not elemental to the crime.<sup>177</sup> Thus, the

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<sup>170</sup> See, e.g., *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002).

<sup>171</sup> 110 Cal. Rptr. 2d 571 (Ct. App. 2001). *Thomas* was convicted of “evading an officer with willful disregard for the safety of persons or property.” *Id.* at 572. He appealed the use of his prior prison terms as sentence enhancements after his counsel waived the right to a jury trial determination of the prior term allegations. *Id.*

<sup>172</sup> *Id.* at 573.

<sup>173</sup> *Id.*

<sup>174</sup> Since not all convictions require or impose prison terms, the fact of a prior conviction does not necessarily indicate that a defendant served a prison term. Therefore, one would have to look beyond the fact of a prior conviction in order to ascertain whether a defendant had served a prison term in conjunction with his sentence.

<sup>175</sup> *Thomas*, 110 Cal. Rptr. 2d at 579. The case was also resolved on the fact that the defense counsel waived defendant’s statutory right to a jury trial. *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See *id.* To be even more specific, the language employed by the Court in *Almendarez-Torres* sweeps broadly by taking the specific issue of prior conviction and throwing it under the expanded subject heading of recidivism. *Almendarez-Torres v.*

California court read the language of *Apprendi* – “other than the fact of a prior conviction” – broadly to include the recidivist issue of prison terms (and not just the fact of a prior conviction itself), based on *Almendarez-Torres*’ broad use of recidivism.<sup>178</sup>

Cases that followed *Thomas*’ reasoning opened the door for recidivist factors to be lumped together under the prior conviction exception. This became evident when courts began to look at factors that *derive* from the fact of a prior conviction. For example, in *People v. Bushnell*,<sup>179</sup> the court allowed a broad reading of the exception by not only allowing the trial court to draw the conclusion that the defendant’s numerous prior convictions were “replete with crimes of violence,” but also allowing it to conclude that the underlying offenses were “of increasing seriousness” as well.<sup>180</sup> Furthermore, the appellate court permitted the trial court to draw the “legal determination” that the defendant’s prior performance on probation was unsatisfactory given the frequency of his convictions.<sup>181</sup> The court stated, “One cannot satisfactorily perform the conditions of his sentence by constantly breaking the law.”<sup>182</sup> By allowing the trial court to infer the fact that the

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United States, 523 U.S. 224, 230 (1998) (“At the outset, we note that the relevant statutory subject matter is recidivism.”).

<sup>178</sup> *Thomas*, 110 Cal. Rptr. 2d at 579. It is worth noting at this point that *Thomas*’ conclusion is not necessarily incorrect – only the logic from which the decision arrived is flawed. A “prison term” could be found by a judge without any additional findings simply by looking at the paperwork, and not the record, of a prior conviction, not because it is a “recidivist issue.” See *infra* notes 199-206 (discussing *People v. George*, 18 Cal. Rptr. 3d 651 (Ct. App. 2004)). This would also be consistent with the Court’s holding in *Shepard*, which limited sentencing judges to certain materials when determining predicate offenses under the ACCA. *Shepard v. United States*, 125 S. Ct. 1254, 1257 (2005). However, several courts have used reasoning analogous to that of *Thomas* in allowing trial judges to find whether a prior conviction is one of the enumerated types provided by a recidivist statute for sentence enhancement. See, e.g., *United States v. Davis*, 260 F.3d 965, 969 (8th Cir. 2001) (“Under [*Apprendi* and *Almendarez-Torres*], a fact of prior conviction includes not only the fact that a prior conviction exists, but also a determination of whether a conviction is one of the enumerated types qualifying for the sentence enhancement . . . .”); *United States v. Fresnares-Torres*, 235 F.3d 481, 482 (9th Cir. 2000) (“The fact of a prior conviction constitutes a penalty factor, and not an element of the offense . . . . [Therefore,] the subsection increasing the penalty for previous deportation following conviction of an aggravated felony – was a mere penalty provision for recidivist behavior and did not define a separate offense.”).

<sup>179</sup> No. B169231, 2004 WL 2011414 (Cal. Ct. App. Sept. 10, 2004). Defendant *Bushnell* was convicted of manslaughter and appealed, among other things, the use of his prior convictions at sentencing. *Id.* at \*1.

<sup>180</sup> *Id.* at \*6.

<sup>181</sup> *Id.* The court did note that this determination arguably should be made by a jury, but nonetheless allowed it as a “legal determination”. *Id.*

<sup>182</sup> *Id.*

defendant was not complying with the terms of his probation from the fact of repetitive offenses, the reviewing court also allowed an additional factual and subjective finding to be made by the trial judge without a jury or proof beyond a reasonable doubt. This stands in direct conflict with later decisions of the California court.<sup>183</sup>

*People v. Som*<sup>184</sup> provides another example of a judicially found fact flowing from the existence of a prior conviction. In this case, the trial court considered defendant Som's prior juvenile adjudication when enhancing his sentence.<sup>185</sup> Specifically, the trial court found the commission of the offense for which the defendant was charged, coupled with the fact of the defendant's prior juvenile conviction, "showed the defendant had not learned his lesson."<sup>186</sup> The Court of Appeal affirmed this finding under the auspices of *recidivist factors* excluded under *Apprendi's* prior conviction exception.<sup>187</sup> Hence, *Som* evidences not only courts using the prior conviction exception to consider recidivism generally, as in *Thomas*, but also reveals approval for trial judges to make additional factual and subjective determinations. Like *Bushnell*, *Som* is inconsistent with subsequent decisions by the California Court of Appeal, which will be considered in the next subsection.

The second way a court can broaden the prior conviction exception is by allowing any type of prior adjudication to fall under the exception. Examples of these prior adjudications include those of military tribunals, petty offenses, and the juvenile system. The use of juvenile adjudications has sparked the most controversy regarding this method, since the jury trial guarantee is not afforded to juvenile defendants, and the juvenile system is oriented to rehabilitation rather than punishment.<sup>188</sup> Courts have thus split on the appropriate use of these prior adjudications as predicates for sentence enhancements.<sup>189</sup> The broad view, led by the Eighth Circuit in

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<sup>183</sup> See *infra* Part III.B.

<sup>184</sup> No. C044464, 2004 WL 1966058 (Cal. Ct. App. Sept. 7, 2004). Defendant Som was found guilty of attempted murder and attempted voluntary manslaughter. *Id.* at \*1.

<sup>185</sup> *Id.* at \*3.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* Again, note the broad reach of the decision's language by using "recidivism" rather than "prior conviction." *Id.*

<sup>188</sup> See *infra* notes 235-40 and accompanying text.

<sup>189</sup> Compare *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002) (holding juvenile adjudications admissible as sentence enhancements under the prior conviction exception), with *United States v. Tighe*, 266 F.3d 1187, 1194 (9th Cir. 2001)

*United States v. Smalley*,<sup>190</sup> includes juvenile adjudications within the prior conviction exception.

In *Smalley*, the Eighth Circuit deemed juvenile adjudications as fitting under the *Apprendi* prior conviction exception.<sup>191</sup> It mattered to the court that sufficient due process protections – including the right to notice, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self-incrimination, and the requirement of proof beyond a reasonable doubt to convict – existed in the juvenile adjudication so as to make the judgment reliable.<sup>192</sup> Since these due process protections made the juvenile adjudication reliable, a court could treat these adjudications under the prior conviction exception without offending the Constitution.<sup>193</sup> Although the court recognized that the jury trial guarantee is lacking under the juvenile system, it did not believe that the absence of this safeguard undermined the reliability of the conviction.<sup>194</sup> Thus, due process protections alone were dispositive for the court – the conviction could fall under the prior conviction exception so long as sufficient due process protections were afforded in a prior adjudication to ensure reliability.

### B. *The Narrow Reading*

Notwithstanding *Thomas* and *Bushnell*, discussed above, recent decisions from the Court of Appeal of California offer a good example of limiting the prior conviction exception's interpretation. Generally, these decisions reflect an unwillingness to allow trial courts to make any determinations that require additional factual or subjective findings beyond the existence of the fact of a prior conviction.<sup>195</sup> Trial courts

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(holding juvenile adjudications inadmissible as sentence enhancements under the prior conviction exception).

<sup>190</sup> 294 F.3d 1030. Defendant Smalley plead guilty to being a felon in possession of a firearm. *Id.* at 1031. Among other issues, he challenged the use of his prior juvenile convictions by the district court, under the ACCA, to enhance his sentence from a maximum of ten years to a mandatory minimum of fifteen. *Id.*

<sup>191</sup> *Id.* at 1033.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971) (plurality opinion) (holding that the use of a jury in the juvenile context would not strengthen the factfinding function in any meaningful way and therefore is not constitutionally required)).

<sup>195</sup> See, e.g., *People v. Haynes*, No. 103248, 2004 Cal. App. Unpub. LEXIS 9633 (Ct. App. Oct. 25, 2004).



may, however, look at facts that are so essentially analogous to the fact of a prior conviction that no additional findings need be made by a judge.<sup>196</sup> The most extreme example of this analogizing is finding a defendant's status as a probationary – this status only requires the fact-finding of a prior conviction as a predicate without further extrapolations on the part of a trial judge.<sup>197</sup> Additionally, courts have also narrowed the prior conviction exception by limiting the types of convictions that can act as sentencing enhancements.<sup>198</sup>

*People v. George*<sup>199</sup> relates the general rule analogizing the fact of probationary status to the fact of a prior conviction. The Court of Appeal concluded that a trial court could not find facts to the exclusion of a jury, or admitted by the defendant, with respect to sentencing, except for those facts that *arose out of a prior conviction*.<sup>200</sup> Based on this rule, the trial court was constitutionally permitted to increase the defendant's sentence relying on the judge-found fact that the defendant was on probation at the time of the charged offense.<sup>201</sup> According to the court, this fact is essentially similar to a prior conviction (where a trier of fact found the defendant's guilt), since the status can be determined from *a review of the paperwork* regarding that conviction.<sup>202</sup> No additional findings or extrapolations by the judge are necessary. The prior conviction also already affords the defendant the jury trial guarantee since a trier of fact made the determination (unless the defendant admitted his guilt, in which case the jury trial

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<sup>196</sup> See, e.g., *People v. George*, 18 Cal. Rptr. 3d 651 (Ct. App. 2004).

<sup>197</sup> *Id.*

<sup>198</sup> See, e.g., *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001).

<sup>199</sup> 18 Cal. Rptr. 3d 651 (Ct. App. 2004). Defendant George was convicted of two counts of residential robbery. *Id.* at 653. The trial court increased his sentence by five years after finding, without a jury, that George had a serious prior felony strike. *Id.* Specifically, the aggravating factors regarding the defendant's recidivism were "(3) the current offense was more serious than the offense underlying George's prior conviction, which was itself serious; (4) at the time George committed the current offenses, he was on felony probation; and (5) George's prior performance on probation was poor." *Id.* at 655.

<sup>200</sup> *Id.* at 654-55. This language is somewhat misleading as it is seemingly comparable to the rule used in *Thomas*. See *supra* notes 171-78 and accompanying text (equating prior convictions with recidivism generally). However, note how the court in *George* limits *Thomas'* rule by using the term "prior conviction" taken textually from the *Apprendi* rule, *George*, 18 Cal. Rptr. 3d at 655, rather than "recidivism-related issues" as broadly discussed in *Almendarez-Torres* (and construed by *Thomas*). See *supra* note 177.

<sup>201</sup> *George*, 18 Cal. Rptr. 3d at 656.

<sup>202</sup> *Id.*

guarantee would not be implicated).<sup>203</sup> Additionally, the defendant's status as a probationer only goes to the punishment.<sup>204</sup> Notwithstanding the allowance of the defendant's probationary status, the court did not allow the trial court to look at the seriousness of the prior conviction, or to determine that the defendant's prior performance on probation was poor.<sup>205</sup> This stands in stark contrast to *Bushnell*.<sup>206</sup> Thus, the court drew a line to include only those facts that were *analogous to a prior conviction* (rather than facts falling under the heading of recidivism) – in this case, the status as a probationary arising from the earlier conviction.

The court in *George* did not provide specific analysis as to why it chose to eliminate the additional recidivist factors of prior conviction seriousness or probation performance from the trial court's review. However, *People v. Gaitan*<sup>207</sup> and *People v. Haynes*,<sup>208</sup> two cases where the Court of Appeal considered whether the trial court could rely on facts that dealt with their respective defendants' recidivist statuses when increasing their sentences, provides this lacking analysis.<sup>209</sup> In *Gaitan*, the trial

<sup>203</sup> See *id.*

<sup>204</sup> *Id.* (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 244 (1998).

<sup>205</sup> *Id.* at 655-56.

<sup>206</sup> See *supra* notes 179-83 and accompanying text.

<sup>207</sup> Nos. A102560, A104091, 2004 Cal. App. Unpub. LEXIS 8990 (Ct. App. Oct. 4, 2004). Defendant Gaitan pleaded no contest to one count of possession of a forged check and one count of possession of methamphetamine. *Id.* at \*1. He challenged his enhanced sentence after the trial court used the fact of his prior convictions as an adult and juvenile, as well as the fact of his poor prior performance on probation, to increase his sentence. *Id.* at \*32-33. Note that the opinion cited was vacated by the California Supreme Court and a new opinion was subsequently reissued. See *People v. Gaitan*, Nos. A102560, A104091, 2005 WL 2651280 (Ct. App. Oct. 18, 2005). This reissued opinion eliminates the analysis regarding the prior conviction exception this Note relies on given the California Supreme Court's decision in *People v. Black*, 35 Cal. 4th 1238 (2005). *Black* held that under California's sentencing system, "the upper term is the 'statutory maximum' and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi*, *Blakely*, and *Booker*." *Id.* at 1254. Since Gaitan was sentenced to the upper term, there was no *Blakely* violation and the 2004 opinion's discussion regarding *Blakely* became unnecessary. It is questionable whether the court's 2004 analysis would have remained valid had the Supreme Court addressed that aspect of the sentencing issue, rather than what constituted the statutory maximum. Since I only use the 2004 analysis as an example of how lower courts can use the prior conviction exception, I retain it for those purposes only.

<sup>208</sup> No. 103248, 2004 Cal. App. Unpub. LEXIS 9633 (Ct. App. Oct. 25, 2004). Defendant Haynes pleaded guilty to the crime of second degree robbery but did not admit his prior conviction or prior prison term. *Id.* at \*23. He challenged his enhanced sentence after the trial court used these aggravating factors to increase his sentence. *Id.* at \*22-24.

<sup>209</sup> *Id.* at \*24; *Gaitan*, 2004 Cal. App. Unpub. LEXIS 8990, at \*34.

judge found many facts, including that the defendant's prior convictions were numerous, and the fact that defendant's prior performance on probation was unsatisfactory.<sup>210</sup> In *Haynes*, the facts at issue included the fact that the defendant's prior convictions were of increasing seriousness, that the defendant served prior prison terms, and that defendant's prior performance on parole was unsatisfactory.<sup>211</sup> Only the fact of a defendant serving prior prison terms would withstand the appellate court's review.<sup>212</sup>

The *Gaitan* court, reading the prior conviction exception narrowly,<sup>213</sup> declared that the facts at issue in its case – the numerous convictions and unsatisfactory performance on probation – did not fall within the exception since they required additional findings that were factual and subjective.<sup>214</sup> More specifically, to find that the defendant's prior convictions were numerous, the trial court would have to find the number of convictions and determine that this number was relatively large.<sup>215</sup> To find that the defendant's prior performance on probation was unsatisfactory, the trial court would have to find failures by the defendant in satisfying probationary expectations and make subjective determinations that these failures constituted unsatisfactory performance.<sup>216</sup> As these additional considerations are extrinsic to the fact of a prior conviction, the Court of Appeal noted they require a jury determination using the reasonable doubt standard.<sup>217</sup> The *Haynes* court applied the same logic as the *Gaitan* court with respect to the facts that the defendant's prior convictions increased in seriousness over time and the defendant's prior performance on parole was poor.<sup>218</sup> Those facts required

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<sup>210</sup> *Gaitan*, 2004 Cal. App. Unpub. LEXIS 8990, at \*32-33.

<sup>211</sup> *Haynes*, 2004 Cal. App. Unpub. LEXIS 9633, at \*24.

<sup>212</sup> *See id.* at \*27.

<sup>213</sup> *Gaitan*, 2004 Cal. App. Unpub. LEXIS 8990, at \*34 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), as characterizing *Almendarez-Torres* "as a 'narrow exception' arising from 'unique facts.'"). Before narrowing the interpretation of the prior conviction exception, the court recognized that it had read the exception broadly before, specifically noting *People v. Thomas*, 91 Cal. App. 4<sup>th</sup> 212 (Ct. App. 2001). *Gaitan*, 2004 Cal. App. Unpub. LEXIS 8990, at \*34. For a discussion of *Thomas*, see *supra* notes 171-78 and accompanying text.

<sup>214</sup> *Gaitan*, 2004 Cal. App. Unpub. LEXIS 8990, at \*35.

<sup>215</sup> *See id.*

<sup>216</sup> *See id.*

<sup>217</sup> *Id.*

<sup>218</sup> *See People v. Haynes*, No. 103248, 2004 Cal. App. Unpub. LEXIS 9633, at \*28-29 (Ct. App. Oct. 25, 2004).

additional findings that were factual and subjective, and thus necessitated jury determination based on proof beyond a reasonable doubt since they were extrinsic to the fact of a prior conviction.<sup>219</sup>

The *Haynes* court, though, like the court in *Thomas*, allowed the fact that the defendant had served a prior prison term to stand since it meant that he suffered a prior conviction and required no subjective factual determination regarding the defendant's conduct.<sup>220</sup> However, the logic the *Haynes* court used was narrower than that used in *Thomas*. In *Haynes*, the court stated, "[b]ecause the fact that defendant had served a 'prior prison term' necessarily means he suffered a prior conviction and involves no subjective factual determination relating to the defendant's conduct, it fell within the narrow exception recognized by *Blakely*."<sup>221</sup> In contrast, the court in *Thomas* relied on a broad interpretation of the exception which included recidivism enhancements generally: "The language . . . 'other than the fact of a prior conviction,' refers broadly to recidivism enhancements . . ."<sup>222</sup> Thus, the appellate court narrowed the reasoning for allowing judicial findings of prison terms by finding that these determinations required no additional subjective and factual determinations, rather than allowing them under the umbrella of recidivism.

This "additional subjective and factual determinations" observation provides a meaningful and quantifiable standard to analyze the prior conviction exception's limitations. Before doing so in the next Part, it is worth noting that courts have also limited the prior conviction exception by restricting the types of adjudications that fall within its purview. As discussed in the preceding subsection, juvenile adjudications have sparked much controversy regarding their use. A circuit split has resulted, in fact, since the Eighth Circuit respectfully went its own way on the issue in *Smalley*,<sup>223</sup> allowing prior juvenile adjudications to fall within the prior conviction exception.

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<sup>219</sup> *Id.*

<sup>220</sup> *People v. Haynes*, No. 103248, 2004 Cal. App. Unpub. LEXIS 9633, at \*27 (Ct. App. Oct. 25, 2004).

<sup>221</sup> *Id.* (citation omitted).

<sup>222</sup> *People v. Thomas*, 110 Cal. Rptr. 2d 571, 579 (Ct. App. 2001).

<sup>223</sup> See *supra* notes 190-94 and accompanying text.

Before *Smalley* was decided, the Ninth Circuit decided *United States v. Tighe*,<sup>224</sup> which held that juvenile prior convictions did not fall under the ambit of the prior conviction exception.<sup>225</sup> The court in *Tighe* noted that since the ACCA, under which the defendant was charged, raised the statutory maximum sentence if prior convictions were found, constitutional questions implicating *Apprendi* were raised.<sup>226</sup> After reviewing the *Almendarez-Torres*, *Jones*, and *Apprendi* decisions, the Ninth Circuit held that *Jones*' and *Apprendi*'s focus on the right to jury trial and proof beyond a reasonable doubt was dispositive – without these two safeguards together, a juvenile adjudication did not fall within the prior conviction exception.<sup>227</sup> Thus, the rights of due process and jury trial matter under the narrow reading of the exception, whereas only the due process rights ensuring reliability matter under the broad reading.<sup>228</sup>

#### IV. AN ANALYSIS OF THE PRIOR CONVICTION EXCEPTION

As one can see from the above survey, a tension exists among courts today regarding the interpretation of the prior conviction exception. While some courts choose to read it broadly, as based on the broad language of the *Almendarez-Torres* decision, others narrow the exception, by looking to the *Apprendi* rule itself<sup>229</sup> – perhaps with the hope that the Supreme Court will eventually overrule *Almendarez-Torres* and eliminate the tension that plagues the system today. In this Part, this Note considers whether the justifications the Supreme Court uses to bolster the exception, as discussed in Part II.F., also support the various ways in which lower courts have used it, as discussed in Part III. As will be seen, the broad reading of the prior conviction exception cannot stand, and the narrow reading, though clearly superior, also raises

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<sup>224</sup> 266 F.3d 1187 (9th Cir. 2001). Defendant Tighe pleaded guilty to bank robbery, being a felon in possession of a firearm, and interstate transportation of a stolen vehicle. *Id.* at 1190. Tighe contested the constitutional validity of the ACCA, which the court upheld, and the use of his prior juvenile convictions under the act to enhance his sentence. *Id.* at 1197-98.

<sup>225</sup> *Id.* at 1194.

<sup>226</sup> *Id.* at 1192.

<sup>227</sup> *Id.* at 1194-95.

<sup>228</sup> See *supra* notes 191-94 and accompanying text.

<sup>229</sup> The textual reading grounds itself in the *Apprendi* Court's seeming recognition that the prior conviction exception would be a "narrow exception" arising from "unique facts." See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

doubts about whether *Almendarez-Torres* can ultimately be reconciled with the spirit of *Apprendi*.

#### A. *Analysis of the Broad Reading*

As discussed in Part III.A., courts can read the *Apprendi* prior conviction exception broadly in two ways: by allowing all recidivist considerations under it, including determinations that derive from the existence of a prior conviction, or by allowing all types of prior convictions to count under the exception. Both of these readings, however, abuse the rationale that the prior conviction exception affords due process and jury trial protections to the defendant since those rights are already attached to the earlier conviction.

When construing the prior conviction broadly, courts can make additional findings of fact that should be subject to due process and jury trial guarantees. As discussed in Part III.A., the courts in *Bushnell* and *Som* made additional findings of fact that went beyond the mere existence of a prior conviction, including determinations regarding probationary conduct, seriousness of prior convictions, and how numerous the prior convictions were.<sup>230</sup> As noted in Part III.B., the *Gaitan* and *Haynes* courts observed that these kinds of findings require a judge to make additional findings of fact or subjective determinations extrinsic to the fact of a prior conviction, including whether probation rules were violated, the level of severity of a crime, and what constitutes “numerous” with respect to prior convictions.<sup>231</sup> As those courts decided, these additional facts and subjective determinations are not readily present from the fact of a prior conviction, and thus should be afforded due process and trial jury rights.<sup>232</sup> To put it another way, these additional findings could not be found by merely reviewing the paperwork of the conviction, as the court in *George* observed.<sup>233</sup> This position appears consistent with the Supreme Court’s decision in *Shepard*, limiting judges to reviewing only certain paperwork when considering a prior conviction under the ACCA.<sup>234</sup> Thus, this restricted approach appears most in line with the Supreme Court’s jurisprudence.

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<sup>230</sup> See *supra* notes 179-87 and accompanying text.

<sup>231</sup> See *supra* notes 207-22 and accompanying text.

<sup>232</sup> *Id.*

<sup>233</sup> See *supra* note 202 and accompanying text.

<sup>234</sup> See *supra* note 150 and accompanying text.

In addition to making additional findings of fact and subjective determinations, courts can broaden the exception's interpretation by allowing any type of past adjudication to fall within the purview of the exception, especially juvenile ones. However, the Ninth Circuit and those who support its reasoning in restricting juvenile adjudications from applying provide the better argument. Since the Supreme Court justifies the prior conviction exception on the grounds that due process and jury trial guarantees are already afforded to the defendant in a prior proceeding, juvenile adjudications should not count as prior convictions.<sup>235</sup> This is because juvenile proceedings generally are not conducted with the use of a jury.<sup>236</sup> Thus, they lack one of the fundamental protections afforded to a defendant to make a conviction reliable.<sup>237</sup> Furthermore, the purpose of juvenile adjudications is rehabilitative, not punitive.<sup>238</sup> Given the rehabilitative nature of the proceedings, the procedural safeguards that attach to a juvenile proceeding are distinct from those that attach to criminal trial proceedings.<sup>239</sup> Hence, if a prior conviction is not supported by the required procedural protections that justify the exception, that conviction should not be used to enhance a sentence.<sup>240</sup> The narrow reading follows this view. The narrow reading, though, raises questions regarding the validity of the prior conviction exception, even when looking only to the fact of a prior conviction.

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<sup>235</sup> See Kimberly L. Johnson, Note, *Should Juvenile Adjudications Count as Convictions for Apprendi Purposes?*, 20 GA. ST. U. L. REV. 791, 808 (2004); Ellen Marrus, "That Isn't Fair Judge": *The Costs of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing*, 40 HOUS. L. REV. 1323, 1350-51 (2004).

<sup>236</sup> See *McKeiver v. Pennsylvania*, 403 U.S. 528, 543-45 (1971).

<sup>237</sup> Marrus, note 235, at 1350-51; Jeremy W. Hochberg, Note, *Should Juvenile Adjudications Count as Prior Convictions for Apprendi Purposes?*, 45 WM. & MARY L. REV. 1159, 1180-83 (2004). But see Daniel J. Kennedy, Note, *Nonjury Juvenile Adjudications as Prior Convictions Under Apprendi*, 2004 U. ILL. L. REV. 267, 295-97 (2004) (arguing that the *Smalley* analysis, where compliance with the "broader concept of due process" and not with specific jury trial right, is the better approach).

<sup>238</sup> Johnson, *supra* note 235, at 806.

<sup>239</sup> See *id.*

<sup>240</sup> Juvenile adjudications, as noted, are only the most prominent example of this controversy. Military tribunals, foreign adjudications, and petty offense proceedings also create questions regarding their adequacy as sentence enhancements. See Colleen P. Murphy, *The Use of Prior Convictions After Apprendi*, 37 U.C. DAVIS L. REV. 973, 1017-22 (2004) for more on these issues.

*B. Analysis of the Narrow Reading*

Courts that narrow their reading of the prior conviction exception do not allow judges to make additional factual or subjective findings – the only determinations that can be made are ones that are essentially analogous to the fact of a prior conviction.<sup>241</sup> Since the fact of the prior conviction has attached due process and jury trial guarantees, it is hard to argue this point. This approach also appears permissible since no presumptions of guilt are drawn by judges when they make their findings of prior convictions, except for when they determine whether the conviction belongs to the defendant. This point raises a question as to the validity of the exception.

It is likely that the prior conviction exception presumes that a defendant would not contest the fact of a prior conviction.<sup>242</sup> As an example, a defendant might seek to controvert the fact that a prior conviction belonged to her by establishing that the prior conviction belonged to another person with the same name.<sup>243</sup> Thus, identity would become a contestable fact, which plays into both the broad and narrow reading of the prior conviction exception. This kind of presumption would violate the guarantee that all are presumed innocent until proven guilty. However, this identity presumption has led to two further observations on why recidivism should receive special treatment. First is a concern for prejudicing the jury by forcing the defendant to argue his prior convictions.<sup>244</sup> Although this concern attempts to mitigate prejudice toward the defendant, it does not protect him completely since the issue is stripped from him at the sentencing phase. This leads to a second concern – that the administrative costs and efficiency of trials argue in favor of the prior conviction exception. Specifically, in order to solve the prejudice and presumption of innocence dilemma, trials

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<sup>241</sup> See *supra* Part III.B.

<sup>242</sup> Benjamin J. Priester, *Structuring Sentencing: Apprendi, the Offense of Conviction, and the Limited Role of Constitutional Law*, 79 IND. L.J. 863, 935 n.89 (2004).

<sup>243</sup> *Id.*

<sup>244</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 521 (2000) (Thomas, J. concurring); see also FED. R. EVID. 404(b).



would probably have to be bifurcated.<sup>245</sup> This costs time and money as juries have to be kept on for a second phase of trial.<sup>246</sup>

Although bifurcated trials raise the concern of expense, in reality defendants would likely admit their prior convictions in order to avoid a poor disposition with the sentencing judge.<sup>247</sup> Even if they do not make such an admission, the costs of proving that a prior conviction belongs to a defendant in front of a jury seems both simple enough and negligible when compared to the amount of additional incarceration recidivist statutes provide.<sup>248</sup> Besides, as the majority in *Booker* noted:

We recognize . . . that in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial – a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment – has always outweighed the interest in concluding trials swiftly.<sup>249</sup>

Thus, administrative costs and efficiency must bow to the presumption of innocence right, as must the presumption that a prior conviction belongs to the defendant.

## V. CONCLUSION

Over the course of the Court's modern determinate sentencing jurisprudence, the Court has created and held on to the prior conviction exception despite being prone to abuse by lower courts. The single rationale that the Court can rely on to justify the exception – that due process and jury trial guarantees already attach to a prior conviction – can only support the narrowest construction of the exception, and even that interpretation leaves one to wonder about the exception's continuing vitality. Indeed, the Court appears ready to strike down the prior conviction exception and leave only the *Apprendi* rule intact: *any* fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

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<sup>245</sup> *Blakely v. Washington*, 542 U.S. 296, 336-37 (2000) (Breyer, J., dissenting). Bifurcation would allow a defendant to contest a prior conviction after he has been convicted of the charged offense. *Id.*

<sup>246</sup> *See id.*; *see also* *Murphy*, *supra* note 240, at 1003-06 & n.159.

<sup>247</sup> *See* *Murphy*, *supra* note 240, at 1004.

<sup>248</sup> *Id.* at 1004-06. Indeed, the additional loss of liberty and greater stigma associated with increased penalties were a concern of the *Apprendi* court. *See Apprendi*, 530 U.S. at 484.

<sup>249</sup> *United States v. Booker*, 513 U.S. 220, 2443-44 (2005).

The simplicity of such a rule would be an inherent value to it. However, until that time comes, courts should construe the prior conviction exception as narrowly as possible in order to conform with the Court's modern determinate sentencing jurisprudence.

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