CONSTITUTIONAL DEVELOPMENT

TRADITIONAL SENTENCING FACTORS V. ELEMENTS OF AN OFFENSE: THE QUESTIONABLE VIABILITY OF *ALMENDAREZ-TORRES V. UNITED STATES*

In 1998, the United States Supreme Court decided the case of *Almendarez-Torres v. United States.*[1] In *Almendarez-Torres,* the Court held, in a 5–4 decision,[2] that a judge may decide the fact of a defendant's prior conviction, rather than a jury, for purposes of determining whether a sentence should be imposed in excess of the statutory maximum.[3] The Court set forth three principal reasons for reaching such a conclusion. The first, and seemingly most important, reason is that recidivism has been a traditional basis for a sentencing court's increase in an offender's sentence.[4] Hence, it may serve as the grounds for a sentence enhancement.[5] Second, recidivism should be treated differently from other sentencing enhancement factors because "the introduction of evidence of a defendant's prior crimes risks significant prejudice."[6] Third, although a factor may trigger an increase in the maximum permissive sentence, as opposed to an increase in the mandatory minimum sentence as seen in *McMillan v. Pennsylvania,*[7] that factor should not automatically require a greater burden of proof, as it "does not systematically, or normally, work to the disadvantage of a criminal defendant."[8] Accordingly, the Court held that the factor of recidivism need not be included in the indictment, nor proved beyond a reasonable doubt, even if that factor in-

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[1] 523 U.S. 224 (1998).

[2] The majority opinion was authored by Justice Breyer, joined by Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Thomas. Justice Scalia, joined by Justices Stevens, Souter, and Ginsburg, dissented.

[3] *Almendarez-Torres,* 523 U.S. at 226–27.

[4] *Id.* at 231.

[5] *See* Apprendi v. New Jersey, 530 U.S. 466, 554 (2000) (O'Connor, J., dissenting) (discussing *Almendarez-Torres* and the Court's rulings that recidivism is a traditional basis for increasing an offender's sentence).

[6] *Almendarez-Torres,* 523 U.S. at 235.

[7] 477 U.S. 79 (1986). In *McMillan v. Pennsylvania,* the Supreme Court upheld Pennsylvania's Mandatory Minimum Sentencing Act, which prescribed a mandatory minimum sentence of five years upon a judge's finding by a preponderance of the evidence that the defendant "visibly possessed a firearm" during the commission of certain enumerated offenses, all of which carried maximum sentences of more than five years. *Id.* at 81.

[8] *Almendarez-Torres,* 523 U.S. at 244.

creases the criminal sentence beyond the prescribed statutory maximum.[9]

Since the Supreme Court's decision in *Almendarez-Torres*, the Court has decided three cases that cast serious doubt as to the continuing viability of *Almendarez-Torres*. The Supreme Court's rulings in *Apprendi v. New Jersey*,[10] *Blakely v. Washington*,[11] and *Shepard v. United States*[12] have stripped away *Almendarez-Torres*'s stare decisis value. In the end, it is clear that *Almendarez-Torres* no longer has precedential value.[13]

I

In *Apprendi v. New Jersey*,[14] decided only two years after *Almendarez-Torres*, the Court addressed whether the Due Process Clause of the Fourteenth Amendment requires that a jury make any factual determination that authorizes an increase in the maximum prison sentence for an offense based on proof beyond a reasonable doubt.[15] Specifically, *Apprendi* dealt with New Jersey's hate crime law,[16] which allowed a judge to increase a sentence to double the usual statutory maximum if he or she found, by a preponderance of the evidence, that the defendant had acted with a purpose to intimidate an individual or a group of individuals because of race. The Court held, in a

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[9] *Id.* at 227.

[10] 530 U.S. 466 (2000).

[11] 124 S. Ct. 2531 (2004).

[12] 125 S. Ct. 1254 (2005).

[13] It is important to note that despite the questionable stare decisis value of *Almendarez-Torres*, the lower federal courts have refused to address its continuing viability. The Supreme Court in *State Oil Co. v. Khan*, 522 U.S. 3 (1997), explained that despite a decision's "infirmities" and "increasingly wobbly, moth-eaten foundations," it is the "Court's prerogative alone to overrule one of its precedents." *Khan*, 522 U.S. at 20. As such, many federal courts, although invited to address the continuing viability of *Almendarez-Torres*, have refused to do so. *See, e.g.*, United States v. Terry, 240 F.3d 65, 73–74 (1st Cir. 2001) (stating that "until *Almendarez-Torres* is overruled, we are bound by it."); United States v. Latorre-Benavides, 241 F.3d 262, 264 (2d Cir. 2001) (affirming the appellant's conviction on the basis of *Almendarez-Torres*); United States v. Nava-Perez, 242 F.3d 277, 279 (5th Cir. 2001) (stating that the Fifth Circuit cannot overrule the Supreme Court's *Almendarez-Torres* precedent); United States v. Gatewood, 230 F.3d 186, 192 (6th Cir. 2000) (stating that "*Almendarez-Torres* remains the law."); United States v. Brough, 243 F.3d 1078, 1081 (7th Cir. 2001) (declaring that *Apprendi* has not overruled *Almendarez-Torres*, and so the latter is still of precedential value); United States v. Raya-Ramirez, 244 F.3d 976, 977 (8th Cir. 2001) (noting the validity of the *Almendarez-Torres* decision even following *Apprendi*); United States v. Wilson, 244 F.3d 1208, 1217 (10th Cir. 2001) ("*Almendarez-Torres* remains the prevailing legal standard . . . ."); United States v. Thomas, 242 F.3d 1028, 1035 (11th Cir. 2001) ("[W]e are bound to follow *Almendarez-Torres* unless and until the Supreme Court itself overrules that decision.").

[14] 530 U.S. 466 (2000).

[15] *Id.* at 469.

[16] N.J. STAT. ANN. §§ 2C:43-7(a)(3), 2C:44-3(e) (West 2000).

5–4 decision,[17] that "[o]ther 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."[18]

In its ruling, the Court attempted to distinguish *Almendarez-Torres* from *Apprendi.* The Court explained that *Almendarez-Torres,* at most, constituted a narrow exception to the general rule.[19] Furthermore, the Court explained that "[w]hereas recidivism 'does not relate to the commission of the offense' itself, New Jersey's biased purpose inquiry goes precisely to what happened in the 'commission of the offense.'"[20] Moreover, the Court stated that "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and . . . [proof of] guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof."[21]

Despite the majority's efforts to distinguish *Apprendi* from *Almendarez-Torres,* the *Apprendi* Court's analysis casts doubt on the stare decisis value of *Almendarez-Torres.* Specifically, the *Apprendi* Court does damage to the distinction between "elements" and "sentencing factors."[22] The majority wrote that "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[23] The Court goes on to state:

> This is not to suggest that the term "sentencing factor" is devoid of meaning. The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.[24]

Hence, although the Court does not eradicate completely the distinction between "sentencing factors" and "elements of an offense," it

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[17] Justice Stevens wrote the opinion for the Court, joined by Justices Scalia, Souter, Thomas, and Ginsburg. Justices Scalia and Thomas added concurring opinions. Justice O'Connor wrote a dissenting opinion, joined by Chief Justice Rehnquist, and Justices Kennedy and Breyer. Justice Breyer wrote a separate dissent as well.

[18] *Apprendi,* 530 U.S. at 490.

[19] *Id.* at 489–90.

[20] *Id.* at 496 (quoting Almendarez-Torres v. United States, 523 U.S. 224, 244 (1998)).

[21] *Id.*

[22] *Id.* at 494.

[23] *Id.*

[24] *Id.* at 494 n.19.

casts doubt as to the validity of *Almendarez-Torres*. This is because *Apprendi* appears to weaken the principal reason the *Almendarez-Torres* Court held that recidivism need not be included in the indictment and proved beyond a reasonable doubt when it increases the sentence beyond the prescribed statutory maximum: "recidivism . . . is a traditional . . . basis for . . . increasing an offender's sentence."[25]

Despite its attempt to distinguish *Almendarez-Torres* from *Apprendi*, the majority in *Apprendi* expressed skepticism as to the future viability of *Almendarez-Torres*. Justice Stevens, writing for the *Apprendi* majority, stated: "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested . . . ."[26] Thus, it is evident that the *Apprendi* majority called into question the precedential value of *Almendarez-Torres*.

Since *Almendarez-Torres*, the four *Almendarez-Torres* dissenters and Justice Thomas have all expressed their belief that *Almendarez-Torres* was decided in error. Justice Thomas, the only member of the *Almendarez-Torres* majority to join the *Apprendi* majority, renounced his vote with the majority in *Almendarez-Torres* and declared that the decision was in error. In his concurrence in *Apprendi*, Thomas wrote:

> [O]ne of the chief errors of *Almendarez-Torres*—an error to which I succumbed—was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. For the reasons I have given, it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment—for establishing or increasing the prosecution's entitlement—it is an element. (To put the point differently, I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment.) When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute. Indeed, cases addressing such statutes provide some of the best discussions of what constitutes an element of a crime. One reason frequently offered for treating recidivism differently, a reason on which we relied in *Almendarez-Torres* is a concern for prejudicing the jury by informing it of the prior conviction. But this concern, of which earlier courts were well aware, does not make the traditional understanding of what an element is any less applicable to the fact of a prior conviction.[27]

Thomas's abandonment of his position in *Apprendi* means that five sitting justices are now on the record as saying *Almendarez-Torres* was

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[25] *Almendarez-Torres*, 523 U.S. at 243.

[26] *Apprendi*, 530 U.S. at 489–90.

[27] *Id.* at 520–21 (Thomas, J., concurring).

not decided correctly. Therefore, were the Court to revisit the issue, it would likely overturn *Almendarez-Torres*.

II

In *Blakely v. Washington*,[28] the Supreme Court expanded the *Apprendi* rule to include sentences that are above sentencing guidelines but below statutory maximums. Blakely "was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of" a judge's finding, by a preponderance of the evidence, "that he had acted with 'deliberate cruelty.'"[29] The Court held that such action was unconstitutional, stating:

> The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee of the State.[30]

In other words, a jury must find not only the facts that make up the crime with which the offender is charged, but also all punishment-increasing factors.[31] As a result of *Blakely*, the Court now requires identical treatment of a "traditional sentencing factor" and an "element of a greater offense,"[32] yet the exception of recidivism remains.

After *Blakely*, the recidivism exception becomes even more problematic, since the decision appears to have eliminated completely the distinction between a traditional sentencing factor and an element of a greater offense, such that now, "any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense," even if that fact was a traditional basis for increasing an offender's sentence.[33] As discussed previously, the fact that recidivism is "a traditional bas[i]s for increasing an offender's sentence," and thus a traditional sentencing factor, appears to be the primary reason that the *Almendarez-Torres* Court held that recidivism need not be proved beyond a reasonable doubt when it is grounds for a sentence en-

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[28] 124 S. Ct. 2531 (2004).

[29] *Id.* at 2543.

[30] *Id.* (citing WILLIAM BLACKSTONE, 4 COMMENTARIES *343).

[31] *Id.* The holding in *Blakely* is not limited to Washington's Sentencing Reform Act. *See* United States v. Booker, 125 S. Ct. 738 (2005) (holding that *Apprendi* and *Blakely* apply to the United States Sentencing Guidelines such that any factor, other than recidivism, needed to support a sentence beyond the maximum had to be proved beyond a reasonable doubt to a jury or be admitted by a defendant).

[32] *Blakely*, 124 S. Ct. at 2552 (Breyer, J., dissenting).

[33] *Id.* at 2546 (O'Connor, J., dissenting). Justice O'Connor's dissent gives the best explanation of the majority's holding in *Blakely*. *See id.* at 2543 (stating that, in the majority opinion, "[t]he Court says to Congress and state legislatures: If you want to constrain the sentencing discretion of judges and bring some uniformity to sentencing, it will cost you–dearly").

hancement.[34] *Blakely* seems to have eliminated the principal reason the *Almendarez-Torres* Court held that recidivism need not be included in the indictment nor proved beyond a reasonable a doubt. Therefore, *Blakely* casts further doubt as to the stare decisis value of *Almendarez-Torres.*[35]

III

In *Shepard v. United States,*[36] the Court addressed whether a sentencing court, acting pursuant to the Armed Career Criminal Act (ACCA),[37] can examine police reports or complaints to determine whether a prior guilty plea to burglary counts as a prior conviction of a "violent felony."[38] The ACCA mandates a fifteen-year minimum sentence for any person found to have committed certain federal firearms violations if that person has three prior convictions for "violent felonies."[39] Congress has specified that the term "violent felony" includes "burglary," and the Court in *Taylor v. United States,*[40] held that the ACCA's use of the term "burglary" encompasses only "generic burglary."[41]

A "burglary" is a "generic burglary" if three elements are present: "[i] unlawful or unprivileged entry into, or remaining in, [ii] a building or structure, [iii] with intent to commit a crime."[42] In *Taylor,* the Court stated that a sentencing court, in determining whether a previous trial-based conviction is for a "generic burglary," can look to the statutory definition, charging documents and jury instructions.[43] *Tay-*

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[34] Almendarez-Torres v. United States, 523 U.S. 224, 231 (1998).

[35] It is interesting to note that in her dissent in *Blakely,* Justice O'Connor seems to imply that after *Blakely* an exception for recidivism no longer exists. She writes:

> [T]here are additional costs. For example, a legislature might rightly think that some factors bearing on sentencing, such as prior bad acts or criminal history, should not be considered in a jury's determination of a defendant's guilt—such "character evidence" has traditionally been off limits during the guilt phase of criminal proceedings because of its tendency to inflame the passions of the jury. If a legislature desires uniform consideration of such factors at sentencing, but does not want them to impact a jury's initial determination of guilt, the State may have to bear the additional expense of a separate, full-blown jury trial during the penalty phase proceeding.

Blakely, 124 S. Ct. at 2546 (O'Connor, J., dissenting) (joined by Justice Breyer, Justice Kennedy, and Chief Justice Rehnquist).

[36] 125 S. Ct. 1254 (2005).

[37] 18 U.S.C. § 924(e) (2000 & Supp. II 2002).

[38] *Shepard,* 125 S. Ct. at 1254.

[39] *Id.*

[40] 495 U.S. 575 (1990).

[41] *See id.* at 598–99 (stating that burglary is the generic definition of the crime, not a special subclass of the generic crime).

[42] *Id.* at 599.

[43] *Id.* at 602.

lor, then, does not require that recidivism be proved beyond a reasonable doubt for purposes of sentencing pursuant to the ACCA.

The Court in *Shepard*, however, refused to expand *Taylor* to allow a sentencing court to examine the police record and complaint to determine whether an earlier *guilty plea* to burglary counts as a "generic burglary," and thus a "violent felony," for purposes of sentencing pursuant to the ACCA.[44]

Justice Souter, delivering the opinion of the Court, except as to Part III,[45] concluded that judicial enquiry under the ACCA, as to whether a guilty plea to burglary is a "violent felony," "is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information."[46] Thus, the Court effectively held that recidivism, in a situation such as *Shepard* where neither the terms of the charging document, plea agreement, nor colloquy between the judge and the defendant confirm the factual basis for the plea, must be submitted to a jury and proved beyond a reasonable doubt if used to impose a sentence pursuant to the ACCA. Accordingly, recidivism in the *Shepard* context must now be treated as a substantive element of the offense to be determined by a jury, rather than as a "traditional sentencing factor."

The Court's efforts to distinguish *Shepard* appear, in part, to be a pretense. In Part III of the plurality opinion, Justice Souter attempts to distinguish the situation found in *Shepard* from all other situations where a jury need not find the factor of recidivism beyond a reasonable doubt. Justice Souter, joined by Justice Stevens, Justice Scalia, and Justice Ginsburg, explained that the fact of a prior conviction in the *Shepard* context lacks the "conclusive significance of a prior judicial record" because the sentencing judge would have to "make a disputed finding of fact about what the defendant and the state judge must have understood as the factual basis of the prior plea."[47]

However, despite the purported reason of unreliability given by Justice Souter, it appears that one underlying reason for the decision was a desire not to further expand *Almendarez-Torres*. Although there

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[44] *Shepard*, 125 S. Ct. at 1257. It is important to note that this situation arises only when dealing with states, such as Massachusetts, where the state statute's definition of "generic burglary" is overbroad for the purposes of the ACCA, in that the statute punishes both non-generic and generic burglary. *Id.*

[45] Justices Stevens, Ginsburg, and Scalia joined the opinion in full, and Justice Thomas joined except as to Part III. Justice Thomas filed an opinion concurring in part and concurring in the judgment. Justice O'Connor filed a dissenting opinion, which Justices Kennedy and Breyer joined. Chief Justice Rehnquist did not take part in the decision.

[46] *Shepard*, 125 S. Ct. at 1263.

[47] *Id.* at 1262.

may be some situations in which a defendant's guilty plea is premised on substantially different facts than those that were the basis for the original police report, making it unclear whether the guilty plea constitutes a prior conviction of a "violent felony," there is no evidence of that situation in *Shepard*.[48] Moreover, the "majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."[49] Therefore, it is likely that the plurality was motivated, at least in part, by the uncertain viability of *Almendarez-Torres*, and hence, a desire not to further expand its application.

By requiring that recidivism in the *Shepard* context be proved beyond a reasonable doubt, *Shepard* does further damage to the already damaged distinction between "traditional sentencing factors" and "elements of the offense." In so holding, despite recidivism's traditional function as a basis for a sentencing court's increase in an offender's sentence, *Shepard* completely destroys the principal reasoning relied upon by the *Almendarez-Torres* Court in finding that a judge may decide the fact of a defendant's prior conviction, rather than a jury, for purposes of determining whether a sentence should be imposed beyond the statutory maximum for the particular crime.[50] Thus, the fact that recidivism is a traditional sentencing factor is no longer a valid reason for the Court to hold that recidivism need not be set forth in the indictment and need not be proved beyond a reasonable doubt as would any element of the offense.

Justice Thomas's failure to join Part III of the *Shepard* opinion further demonstrates that *Almendarez-Torres* no longer has stare decisis value. His reason for refusing to join Part III was because of his belief that recidivism, in any context, must always be proved beyond a reasonable doubt.[51] Justice Thomas explained that permitting a sentencing judge to determine the fact of recidivism, whether confined to the situation of *Taylor* or expanded to the situation of *Shepard*, gives "rise to constitutional error."[52] Justice Thomas stated clearly and correctly that the logic of the Court's rulings since *Almendarez-Torres* leads to the conclusion that any factor that increases a defendant's sentence beyond the statutory maximum, including recidivism, must be included in the indictment, tested before a jury, and proved beyond a reasonable doubt.[53] Thus, Justice Thomas's concurrence in *Shepard* further demonstrates that *Almendarez-Torres* lacks stare decisis value.

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[48] *See id.* at 1264 (O'Connor, J. dissenting) (discussing why it is not at all disputed that Shepard's previous burglary pleas count as "generic burglaries" for purposes of the ACCA).

[49] *Id.* at 1264 (Thomas, J., concurring); *see also supra* text accompanying note 27.

[50] Almendarez-Torres v. United States, 523 U.S. 224, 226–27 (1998).

[51] *Shepard*, 125 S. Ct. at 1263-64 (Thomas, J., concurring).

[52] *Id.*

[53] *Id.*

IV

Despite the problematic reasoning used by the Court in *Almendarez-Torres*, there is still a question of whether the unique characteristics of recidivism make it possible that the Court, should it revisit the issue, will hold that recidivism, except in the context of *Shepard*, need not be included in the indictment nor proved beyond a reasonable doubt. In two separate cases, *Apprendi* and *Jones v. United States*,[54] the Supreme Court recognized that recidivism normally has characteristics that other sentence-enhancing factors do not have; specifically, prior convictions represent the outcome of earlier proceedings in which the defendant was afforded procedural safeguards such as a trial by jury and proof beyond a reasonable doubt.[55] Although *Almendarez-Torres* does not ground its decision on these protections, some Justices, should the court revisit the issue, may decide that the recidivism exception, except in a *Shepard* context, should remain, since previous convictions were adjudicated pursuant to proceedings which provided substantial procedural safeguards in satisfaction of the Due Process Clause.

Despite the difference between recidivism and other sentence-enhancing factors, it is unlikely that the Court, should it revisit the issue, will hold that recidivism need not be included in the indictment and proved beyond a reasonable doubt. First, as discussed above, at least five justices currently sitting on the Court have expressed their belief that *Almendarez-Torres* was decided wrongly.[56] Second, even though the *Shepard* plurality expressed a belief that a conviction by a jury can provide greater protection than a plea agreement in the *Shepard* context, the plurality does not explicitly state that it sees these protections as sufficient to prevent constitutional violations. Rather, the Court merely states that the protections in place in the *Shepard* context are insufficient. Accordingly, it appears unlikely that the unique characteristics of recidivism will impact the majority decision, should the Court revisit the issue.

CONCLUSION

The Supreme Court has cast considerable doubt as to the continuing viability of *Almendarez-Torres*. Three cases decided subsequent to *Almendarez-Torres* demonstrate that the Court has called into question whether *Almendarez-Torres* should be given any stare decisis value.

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[54] 526 U.S. 227 (1999).

[55] *Jones*, 526 U.S. at 249.

[56] *See Shepard*, 125 S. Ct. at 1264 (Thomas, J., concurring) ("A majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.").

Moreover, it appears that should the Court revisit the issue presented in *Almendarez-Torres*, it will hold that any factor that increases a defendant's sentence beyond the prescribed statutory maximum, even recidivism, must be included in the indictment, presented to the jury, and proved beyond a reasonable doubt.

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