No. 17-1320

IN THE

Supreme Court of the United States

SEAN GARVIN,

Petitioner,

v.

NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit voluntary professional bar association that works on behalf of criminal defense lawyers to ensure justice and due process for those accused of crime or misconduct. NACDL was

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amici's intent to file this brief at least 10 days prior to its due date.

founded in 1958. It has a nationwide membership of thousands of direct members, and up to 40,000 including affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges, and is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL regularly files amicus curiae briefs in this Court and in other federal and state courts in cases that present issues of broad importance to criminal defendants, criminal defense lawyers and the criminal justice system as a whole.

The New York State Association of Criminal Defense Lawyers ("NYSACDL") is a non-profit membership organization of more than 750 criminal defense lawyers who practice in the State of New York and is the largest private criminal bar association in the State. Its purpose is to assist the criminal defense bar in enabling its members to better serve the interests of their clients and to enhance their professional standing. NYSACDL regularly files amicus curiae briefs in New York state and federal courts in cases that present issues of broad importance to criminal defendants, criminal defense lawyers and the criminal justice system as a whole.

Both NACDL and NYSACDL are dedicated to ensuring the protection of individual rights and liberties for all. Thus, amici believe that this Court's review is critical to ensuring uniform nationwide enforcement of the Sixth Amendment right to have "'any fact (other than prior conviction) that increases the maximum penalty for a crime … be … submitted to a jury, and proven beyond a reasonable doubt.'" *Apprendi* v. *New Jersey*, 530 U.S. 466, 476 (2000). This Court has reaffirmed *Apprendi* in a long line of decisions discussed below.

However, the New York Court of Appeals' decision upholds the New York non-violent repeat offender sentencing law, despite the fact that it permits a judge (rather than a jury) to increase significantly an individual's sentence beyond that permissible for the offense for which he or she stands convicted, in part based on findings established by a preponderance of the evidence (rather than beyond a reasonable doubt). The New York Court of Appeals' view of this sentencing scheme misapplies *Apprendi* and its progeny, defies both the plain language of the governing statutes and how sentencing judges have in fact enhanced individuals' sentences based on facts not found by a jury beyond a reasonable doubt, and flatly contradicts how other state courts have treated similar repeat offender laws under *Apprendi*. Indeed, a sentence enhancement for hypothetical non-violent repeat offender in New York will depend on a judge's weighing of facts under a preponderance of the evidence standard, yet just over the border in Connecticut, the same hypothetical defendant could not have his or her sentence enhanced by judicial factfinding, because Connecticut's highest court has held that process to be unconstitutional under *Apprendi*. Accordingly, to ensure consistent nationwide application of enhanced sentencing schemes, amici respectfully urge this Court to grant review.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court held in *Apprendi* v. *New Jersey* that the Sixth Amendment (and the Due Process Clause of the Fifth Amendment) require that "'any fact (other than prior conviction) that increases the maximum penalty for a crime … be … submitted to a jury, and proven beyond a reasonable doubt.'" 530 U.S. 466, 476 (2000). This Court has clarified and reaffirmed that holding

multiple times in applying it to a broad range of state and federal sentence enhancement schemes. *See Hurst* v. *Florida*, 136 S. Ct. 616 (2016); *Alleyne* v. *United States*, 570 U.S. 99 (2013); *Descamps* v. *United States*, 570 U.S. 254 (2013); *Southern Union Co.* v. *United States*, 567 U.S. 343 (2012); *Cunningham* v. *California*, 549 U.S. 270 (2007); *United States* v. *Booker*, 543 U.S. 220 (2005); *Blakely* v. *Washington*, 542 U.S. 296 (2004); *Ring* v. *Arizona*, 536 U.S. 584 (2002).

Relying on Apprendi and its progeny, state and federal courts across the country have held that sentence enhancement schemes requiring judicial factfinding violate the Sixth Amendment. One type of such schemes are repeat offender laws, which enhance an individual's sentence based at least in part on one or more prior criminal convictions. New York has both a persistent violent felony offender statute and a persistent non-violent felony offender statute. This case involves the latter, Penal Law § 70.10 (the "Statute"), and its related criminal procedure law, Criminal Procedure Law § 400.20 (the "CPL"). Under the Statute and CPL, individuals with prior non-violent felony convictions can receive significantly harsher sentences—up to life in prison—than the maximum sentence for the crime for which they stand convicted. Such enhanced sentences can be imposed once a judge makes certain findings (beyond the fact of prior convictions) based on a preponderance of the evidence standard.

Not surprisingly, individuals sentenced under the Statute and CPL have argued that both, as written and as applied, are unconstitutional under *Apprendi.* The New York Court of Appeals has addressed this issue on four occasions, most recently in *People* v. *Prindle*, 80 N.E.3d 1026 (N.Y. 2017), *cert. denied*, 138 S. Ct. 514 (2017). The decision below relied on *Prindle* in sum-

marily holding that petitioner's sentencing as a persistent felony offender is constitutionally permissible. *Id.*; *see also People* v. *Rosen*, 752 N.E.2d 844 (N.Y. 2001); *People* v. *Rivera*, 833 N.E.2d 194 (N.Y. 2005); *People* v. *Quinones*, 906 N.E.2d 1033 (N.Y. 2009). Each time, the New York Court of Appeals has relied on the same untenable position, that prior felony convictions are the sole determinant of whether an individual will be eligible for an enhanced sentence. In fact, however, a defendant ***cannot*** be sentenced under the Statute and CPL ***unless a judge makes factual findings*** beyond the predicate felony convictions, on a ***preponderance of the evidence standard***. These facts include anything about the "history and character" of the individual and the "nature and circumstances of his criminal conduct" that the judge deems relevant to whether the enhanced sentence is warranted. CPL § 400.20(5).

Amici file this brief in support of petitioner's Sixth Amendment question concerning *Apprendi* and its progeny. While this Court has applied *Apprendi* to a broad set of sentence enhancement schemes, this Court has not yet explicitly considered whether a repeat offender scheme that requires judicial factfinding beyond a prior conviction offends the Sixth Amendment. Courts in at least five states with repeat offender sentencing schemes substantially similar to New York's have invalidated those schemes under this Court's *Apprendi* line of decisions.

This brief explains how the Statute and CPL clearly violate an individual's right to have a jury, rather than a judge, find facts that enhance his or her sentence, and under a preponderance of the evidence standard rather than beyond a reasonable doubt. The plain language of the Statute and CPL make clear that an individual ***cannot*** be sentenced as a persistent felo-

ny offender unless the judge makes findings not only about predicate felony convictions ***but also about*** the individual's "history and character" and "nature and circumstances of his criminal conduct." Penal Law § 70.10(2); CPL § 400.20(5). Indeed, when a judge in New York fails to consider the individual's "history and character" and "nature and circumstances of his criminal conduct," the judge's sentencing has been reversed for failing to follow the statutory scheme.

Perversely, the New York statutory scheme applicable to more dangerous, violent offenders requires ***only*** the fact of prior convictions to be considered and makes no mention of any other judicial findings before the individual is qualified for enhanced sentencing. *See infra*, Section I.C.

The Statute and CPL are also unconstitutional as applied. In determining whether to sentence an individual as a persistent felony offender, sentencing judges have engaged in the impermissible fact finding—in some cases relying on facts pertaining to charges on which a jury acquitted the accused.

The Court should grant the petition for certiorari and reverse the judgment of the New York Court of Appeals.

ARGUMENT

I. NEW YORK'S PERSISTENT FELONY OFFENDER SENTENCING SCHEME VIOLATES *APPRENDI*

A. *Apprendi* Applies Broadly To A Host Of Sentencing Schemes, As Multiple States Have Recognized

This Court has repeatedly reaffirmed *Apprendi*'s holding—the Sixth Amendment requires that any fact

that increases a criminal penalty beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. Indeed, this Court has applied *Apprendi* to a host of other sentence enhancement schemes, beginning with Arizona's death penalty statute under which a trial judge determined aggravating factors necessary to impose the death penalty, *Ring* v. *Arizona*, 536 U.S. 584 (2002); followed by the federal sentencing guidelines in *United States* v. *Booker*, 543 U.S. 220 (2005); a Washington state criminal sentencing statute in *Blakely* v. *Washington*, 542 U.S. 296 (2004); a California state criminal sentencing statute in *Cunningham* v. *California*, 549 U.S. 270 (2007); criminal fines in *Southern Union Co.* v. *United States*, 567 U.S. 343 (2012); the Armed Career Criminal Act in *Descamps* v. *United States*, 570 U.S. 254 (2013); mandatory minimum sentences in *Alleyne* v. *United States*, 570 U.S. 99 (2013); and most recently Florida's death penalty statute in *Hurst* v. *Florida*, 136 S. Ct. 616 (2016).

Immediately following *Apprendi*, repeat offender sentencing laws were among the sentence enhancement schemes that faced Sixth Amendment challenges in state courts. These early challenges failed, however, as the challenged schemes imposed enhanced sentences based on prior convictions alone, as permitted under *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). *See, e.g.*, *State* v. *Hurbenca*, 669 N.W.2d 668 (Neb. 2003); *People* v. *Pickens*, 752 N.E.2d 1195 (Ill. App. Ct. 2001); *State* v. *Wheeler*, 34 P.3d 799 (Wash. 2001) (en banc).

In *Blakely* v. *Washington*, 542 U.S. 296 (2004), this Court clarified the scope of impermissible judicial factfinding under *Apprendi*. *Blakely* held that a Washington state court's sentencing of a defendant to more than

three years above the statutory maximum, based on the judge's finding that the defendant acted with deliberate cruelty, violated the defendant's Sixth Amendment right to a jury trial. *Id.* at 303. In reaching this holding, this Court made clear "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" and "[w]hether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence." *Id.* at 303, 305 (emphasis in original).

Following *Blakely*, a number of state courts held that their repeat offender sentencing schemes requiring judicial factfinding (beyond the fact of a prior conviction) violated the Sixth Amendment.

- In *State* v. *Franklin*, 878 A.2d 757 (N.J. 2005), the New Jersey Supreme Court held that the second-offender provision of New Jersey's Graves Act was unconstitutional, because it provided for an enhanced sentence based on a judge's finding, by a preponderance of the evidence, that an individual used or possessed a firearm during the commission of the offense at issue, and not just the fact of a prior conviction of an offense involving the use or possession of a firearm.
- In *State* v. *Henderson*, 706 N.W.2d 758 (Minn. 2005), the Minnesota Supreme Court held that an individual's enhanced sentence violated *Apprendi* where a sentencing judge found that the defendant had five or more prior felony convictions and that the present offense was committed as a part of a

pattern of criminal conduct. The court found that the "determination of a pattern of criminal conduct 'involves a comparison of different criminal acts, weighing the degree to which those acts are sufficiently similar'" which "'goes beyond a mere determination as to the fact, or number, of the offender's prior convictions.'" *Id.* at 762.

- In *State* v. *Chauvin*, 723 N.W.2d 20, 24 (Minn. 2006) and *State* v. *Kendell*, 723 N.W.2d 597, 610 (Minn. 2006), the Minnesota Supreme Court held that lower courts properly responded to *Blakely* by impaneling a jury to make findings about whether an individual is a danger to public safety, even though the state's dangerous and repeat offender statute, as written, placed the responsibility for making such findings on the sentencing judge.
- In *State* v. *Foster*, 845 N.E.2d 470 (Ohio 2006), *abrogated on other grounds by Oregon* v. *Ice*, 555 U.S. 160 (2009), the Ohio Supreme Court held that a repeat offender law violated *Apprendi* and *Blakely* because it increased sentences based on a judge's finding that an enhanced sentence was necessary to "'protect the public from future crime.'" *Id.* at 490-491.

Two and a half years after *Blakely*, this Court held in *Cunningham* that California's determinate sentencing law, which authorized a judge to find facts exposing a defendant to an enhanced sentence, violated the defendant's Sixth Amendment right to a jury trial. In reaching this holding, this Court noted:

> We cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particu-

> lar case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.

Cunningham, 549 U.S. at 290.

Following *Cunningham*, at least two states' highest courts found that recidivist sentencing schemes nearly identical to New York's were unconstitutional under *Apprendi* and its progeny.

- In *State* v. *Bell*, 931 A.2d 198 (Conn. 2007), the Connecticut Supreme Court held the state's persistent dangerous felony offender statute unconstitutional because it allowed a judge to make findings concerning both the fact of predicate felony convictions ***and*** the individual's history and character and the nature and circumstances of his or her criminal conduct. *Id.* at 236. The court focused on the inclusion of the word "and" in the statute. Moreover, citing *Cunningham* and *Blakely*, the court noted "[t]hese decisions also make clear that, if its ultimate finding subjects the defendant to a higher sentence than authorized by the jury's verdict, it is immaterial whether the sentencing court is being called on to consider the type of facts that courts historically have weighed when otherwise exercising discretion in determining an appropriate sentence within a prescribed range." *Id.* at 229. The court reviewed the New York Court of Appeals' decision in *Rivera*, discussed *infra* Section II, but expressly disagreed with the reasoning.
- In *State* v. *Maugaotega*, 168 P.3d 562 (Haw. 2007), the Hawaii Supreme Court invalidated a repeat of-

> fender statute, ruling that "[a]lthough the necessity [for the protection of the public] finding is *also* a traditional sentencing consideration articulated in HRS § 706-606(2)(c) … as was true in California's system, the reasoning of the *Cunningham* majority leaves no doubt that, like California's DSL system, a majority of the United States Supreme Court would consider the necessity finding set forth in HRS § 706-662(4) as separate and distinct from traditional sentencing considerations and, instead, as a predicate to imposing an extended prison term on a defendant that, under *Apprendi* and its progeny, must either be admitted by the defendant or be proved beyond a reasonable doubt to a the trier of fact." *Id.* at 576.

This Court most recently considered *Apprendi* in *Hurst*, which involved the Florida death penalty statute's two-part sentencing scheme. In the first part, the jury recommended either a life or death sentence. However, the statute also required that a sentencing judge make findings of aggravating and mitigating factors in determining the ultimate sentence, under a preponderance of the evidence standard. 136 S. Ct. at 620. This Court ruled that the judge's "central and singular" role rendered the statute unconstitutional under *Apprendi*, noting that "the Florida sentencing statute does not make a defendant eligible for death until findings *by the court* that such person shall be punished by death." *Id.* at 622 (emphasis in original; internal quotation marks omitted).

As described below, New York's Statute and CPL are constitutionally indistinguishable from the repeat offender sentencing schemes struck down in other states. As of January 1, 2016, 2,174 individuals in New York are serving persistent felony offender or persis-

tent violent felony offender sentences under the Statute and CPL.[2] Seventy-three individuals serving persistent felony offender sentences will be incarcerated for fifteen years to life for property crimes such as grand larceny, forgery, and stolen property.[3] Three individuals may spend up to their lives in prison for a conviction of first-degree contempt.[4] All of their sentences are unconstitutional under the Sixth Amendment.

B. The Statute's Plain Language And History Confirm That It Mandates Impermissible Judicial Factfinding Based On A Preponderance Of The Evidence

The New York State Legislature enacted Penal Law § 70.10, titled "Sentence of imprisonment for persistent felony offender," in 1965, more than three decades before *Apprendi*. Under the Statute, a criminal sentence for an individual previously convicted of two or more felonies may be increased beyond the maximum sentence authorized by the statute of conviction. The enhanced sentence is from 15 years to life imprisonment.

The Statute includes two sections. Section 1 defines a "persistent felony offender" as "a person, other than a persistent violent felony offender defined in Sec-

[2] New York State, *Under Custody Report: Profile of Under Custody Population As of January 1, 2016*, at 18-19 (Apr. 2016), http://www.doccs.ny.gov/Research/Reports/2016/UnderCustody_Report_2016.pdf. New York Department of Corrections statistics do not distinguish between violent and non-violent persistent felony offenders.

[3] *Id.* at 19.

[4] *Id.*

tion 70.08, who stands convicted of a felony after having previously been convicted of two or more felonies ...." Sub-paragraphs (b) and (c) of Section 1 describe the types of previous non-violent felony convictions that qualify.

Section 2, titled "Authorized sentence," sets forth the circumstances under which a court may impose an enhanced sentence under the Statute. Unlike the persistent ***violent*** felony offender statute (Penal Law § 70.08), which only requires confirmation of prior convictions, the Statute requires an ***additional*** predicate for a judge to enhance a sentence. Specifically, the sentencing judge ***must find*** that the defendant meets the "persistent felony offender" definition ***and*** "[be] of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest." Penal Law § 70.10(1)-(2). The word "and" establishes that both findings are required. *See, e.g.*, *Monroe* v. *Rock*, 2017 WL 1164400, at *7 (W.D.N.Y. Mar. 29, 2017) ("While P.L. § 70.08 allows imposition of a life-term based solely on the court's finding of the requisite number of qualifying predicate felonies, P.L. § 70.10 requires an additional step not required by P.L. § 70.08—hence, why it is referred to as the discretionary persistent felon statute."); *People* v. *Wicks*, 900 N.Y.S.2d 485, 488-489 (App. Div. 2010) (noting that the court had to find the previous convictions and make a public interest finding based on the history and character of the defendant and the nature and circumstances of his criminal conduct to impose the sentence).

The CPL, which sets forth the persistent felony offender sentencing procedure, further confirms that both findings are necessary predicates for imposing an

enhanced sentence. Indeed, CPL § 400.20 repeatedly references the required judicial findings aside from the prior convictions. In particular, the CPL requires a preliminary hearing before the judge, *id.* § 400.20(2), and requires the judge to "file with the order [directing a hearing] a statement setting forth the following: "(a) [t]he dates and places of the previous convictions which render the defendant a persistent felony offender … and (b) [t]he factors in the defendant's background and prior criminal conduct which the court deems relevant for the purpose of sentencing the defendant as a persistent felony offender." *Id.* § 400.20(3).

If the defendant wishes to present evidence on either issue, the judge can order a further hearing in order to make findings on both issues. CPL § 400.20(7), (9). "At the conclusion of the [further] hearing the court must make a finding as to whether or not the defendant is a persistent felony offender and, upon a finding that he is such, must then make such findings of fact as it deems relevant to the question of whether a persistent felony offender sentence is warranted." *Id.* § 400.20(9). In the absence of such findings, "the defendant may not be sentenced as a persistent felony offender." *Id.* § 400.20(10).

The legislative history of the CPL confirms this common sense reading. The practice commentary to the CPL notes that the enhanced sentence must be based "not only upon the requisite predicate offenses; ***but also*** upon facts regarding the overall history and character of the defendant. This second distinction requires—unlike normal sentencing—articulation of the aspects of the defendant's behavior the court is relying [on] … and findings of fact with regard thereto…." 11A Preiser, *Practice Commentary, McKinney's Consolidated Laws of New York* § 400.20, at 406-407 (2005)

(emphasis added); *see Proposed New York Criminal Procedure Law*, at vi, Temporary State Commission (Edward Thompson Co., 1964 ed.) (crediting Preiser with drafting the laws in 1964 legislative study).

C. Prior Felony Convictions Are Not The "Sole Determinant" Of A Persistent Non-Violent Felony Offender Sentence

Confirming the fact of prior felony convictions is thus only one half of the two-part factfinding process that a sentencing judge must engage in before imposing an enhanced sentence under New York's persistent non-violent offender scheme. Prior convictions alone are plainly insufficient. Instead, an individual can only be sentenced under the Statute if a judge also makes the requisite findings about the individual's "history and character" and "nature and circumstances of his criminal conduct."

Judge Fahey's dissent below stated as much: "The statute is clear that a defendant is subject to enhanced sentencing—i.e., may have enhanced sentencing imposed on him—as a persistent felony offender only if *both* statutory necessary conditions are met." *People* v. *Garvin*, 88 N.E.3d 319, 332 (N.Y. 2017) (emphasis in original). His dissent is the latest in a line of strong dissents to each of the rulings of the New York Court of Appeals considering whether the Statute passes muster under *Apprendi* and its progeny. *See People* v. *Giles*, 25 N.E.3d 943, 950-951 (N.Y. 2014) (Abdus-Salaam, J., dissenting); *People* v. *Battles*, 942 N.E.2d 1026, 1029-1030 (N.Y. 2010) (Lippman, J., dissenting); *Rivera*, 833 N.E.2d at 205 (Ciparick, J., dissenting).[5]

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[5] In addition, various other courts (including federal courts sitting in habeas) have reached the same conclusion. *See Besser* v.

New York's persistent ***violent*** felony offender statute (Penal Law § 70.08) and its companion criminal procedure law (CPL § 400.16), not at issue here, only require judicial factfinding on the single issue of whether an individual has the predicate violent felony convictions. The clear distinction between the two statutes demonstrates that the New York Court of Appeals decisions simply ignore the statutory language. That does not, however, save the Statute and the CPL from being unconstitutional on their face.

D. Sentencing Judges Engage In The Impermissible Factfinding In Practice

The practice of New York courts under the Statute and CPL further reinforces that they condition sentence enhancement on judicial factfinding beyond the fact of prior convictions. Notably, the *absence* of additional findings about a defendant's history, character, and criminal behavior is by itself sufficient grounds to vacate a persistent felony offender sentence under New York law. *See, e.g., People* v. *Brown*, 963 N.Y.S.2d 732, 734 (App. Div. 2013) (vacating sentence because sentencing judge did not make findings on defendant's conduct and circumstances); *People* v. *Rivera*, 875

Walsh, 601 F.3d 163, 173-174 (2d Cir. 2010), *vacated in part en banc by Portalatin* v. *Graham*, 624 F.3d 69 (2d Cir. 2010) (finding that the Statute required judicial fact finding and vacating sentence); *Barney* v. *Conway*, 730 F. Supp. 2d 264, 284-285 (W.D.N.Y. 2010) (same); *Washington* v. *Poole*, 507 F. Supp. 2d 342, 359-360 (S.D.N.Y. 2007), *vacated in part by Besser* v. *Walsh*, 601 F.3d 163 (2d Cir. 2010) (same); *Portalatin* v. *Graham*, 478 F. Supp. 2d 385, 404 (E.D.N.Y 2007), *rev'd*, 624 F.3d 69 (2d Cir. 2010) (same); *Brown* v. *Greiner*, 258 F. Supp. 2d 68, 87-89 (E.D.N.Y. 2003), *rev'd* 409 F.3d 523 (2d Cir. 2005) (same); *People* v. *West*, 768 N.Y.S.2d 802, 804 (Sup. Ct. 2003), *rev'd*, 783 N.Y.S.2d 473 (App. Div. 2004) (same).

N.Y.S.2d 173, 176-177 (App. Div. 2009) (same); *People* v. *Bazemore*, 860 N.Y.S.2d 602, 603 (App. Div. 2008) (same); *People* v. *Murdaugh*, 833 N.Y.S.2d 557, 559 (App. Div. 2007); *People* v. *Garcia*, 700 N.Y.S.2d 44, 45 (App. Div. 1999) (same); *People* v. *Smith*, 649 N.Y.S.2d 444, 445 (App. Div. 1996) (same). These decisions demonstrate beyond any question that, in practice, New York state courts require the very findings that the Court of Appeals, in its decisions, treats as irrelevant.

Under this Court's *Apprendi* line of decisions, the Sixth Amendment requires that a jury find any facts relating to prior convictions beyond the fact that they exist. The Statute and CPL go far beyond this limitation and require factual findings about the individual's "history and character" and the "nature and circumstances of his criminal conduct."

Indeed, sentencing judges in New York have actually imposed persistent non-violent felony offender sentences based on facts underlying charges for which juries have acquitted the defendant. For example, in *People* v. *Battles*, the New York Court of Appeals upheld an enhanced sentence imposed based on a sentencing judge's findings that pouring gasoline on someone and lighting it was a "heinous" crime, even though the jury acquitted the defendant of the arson-based counts. 942 N.E.2d at 1033 (Lippman, J., dissenting). *See also People* v. *Rosario*, 69 N.Y.S.3d 149, 154-155 (App. Div. 2018) (upholding persistent felony offender sentence where sentencing judge made factual findings that were dropped from the final convictions); *People* v. *Fews*, 50 N.Y.S.3d 523, 525 (App. Div. 2017) (vacating persistent felony offender adjudication in part due to consideration of a crime for which the defendant was acquitted); *People* v. *Battease*, 904 N.Y.S.2d 241, 247-

248 (App. Div. 2010) (same); *People* v. *Wilkonson*, 724 N.Y.S.2d 18, 20 (App. Div. 2001) (vacating persistent felony offender sentence because it was based on a charge for which defendant was acquitted by the jury).

In a related case below, after confirming the existence of prior convictions, the sentencing judge explicitly stated, "I can consider any facts in addition to what [defendant] has been convicted of." Defense counsel then asked whether that "includ[ed] those facts that relate to the charges he was acquitted?" The sentencing judge responded: "[T]hat's correct." Defendant-Appellant Br. 17-18, *People* v. *Wright*, No. APL-2016-00078 (N.Y. June 23, 2016); The sentencing judge then went on to consider evidence about an attempt to reach for a pistol, which was never found by the jury, as well as juvenile offenses excluded from the defendant's criminal record. *Id.* at 19; *People* v. *Wright*, 88 N.E.3d 303 (N.Y. 2017).

As this Court explained in *Apprendi*, "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?" 530 U.S. at 494. In practice, the effect of the Statute and CPL is to enhance an individual's sentence based on facts not found by a jury. As almost all other states with indistinguishable sentencing schemes have recognized, this violates the Sixth Amendment. [6]

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[6] Pennsylvania appears to be the only state like New York that has refused to invalidate a repeat offender sentencing scheme that requires judicial factfinding beyond the fact of a prior conviction. *See Commonwealth* v. *Lane*, 941 A.2d 34, 37 (Pa. Super. Ct. 2008) (though Pennsylvania's three-strikes statute provides for an enhanced sentence if a judge determines that public safety requires it, the court found that "[t]he range of permissible sentenc-

II. THE NEW YORK COURT OF APPEALS' REASONING DOES NOT SQUARE WITH *APPRENDI* AND ITS PROGENY

The New York Court of Appeals has granted certiorari to review *Apprendi* challenges to the Statute and CPL on four occasions.[7] Each time, the court's reasoning has failed to conform to this Court's precedents. Shortly after this Court decided *Apprendi*, the New York Court of Appeals reviewed the constitutionality of the Statute and CPL in *Rosen*. Despite acknowledging that the second prong of the sentencing procedure requires a judge to make additional findings in order to sentence an individual as a persistent felony offender, the court found that "prior felony convictions are the sole determinant of whether a defendant is subject to enhanced sentencing as a persistent felony offender." *Rosen*, 752 N.E.2d at 847. The court further reasoned that in carrying out the second step, "the sentencing court is thus only fulfilling its traditional role—giving due consideration to agreed-upon factors—in determining an appropriate sentence within the permissible statutory range." *Id.* (citation omitted).

The New York Court of Appeals relied on this flawed reasoning in rejecting two additional challenges to the Statute and CPL, each challenge following a decision in this Court's *Apprendi* line of decisions. *See People* v. *Rivera*, 833 N.E.2d 194 (N.Y. 2005) (uphold-

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es is expanded only by a showing that the defendant has committed two previous crimes of violence.")

[7] We are not aware of the New York Court of Appeals deciding whether New York's persistent *violent* felony offender penal and criminal procedure laws comported with *Apprendi* and its progeny until 2010 in *People* v. *Bell*, 940 N.E.2d 913 (N.Y. 2010). The court summarily rejected the individual's *Apprendi* challenge, finding that the sentencing scheme's consideration of prior convictions only was constitutional under *Almendarez-Torres*.

ing New York's persistent felony offender sentencing scheme after *Blakely*); *People* v. *Quinones*, 906 N.E.2d 1033 (N.Y. 2009) (same after *Cunningham*). Following *Quinones*, a panel of the Second Circuit found the Court of Appeals' rationale unreasonable and struck down the Statute, only to reverse its own ruling *en banc*. *See Portalatin* v. *Graham*, 624 F.3d 69 (2d Cir. 2010) (vacating in part *Besser* v. *Walsh*, 601 F.3d 163 (2d Cir. 2010)). The Court of Appeals reiterated its interpretation most recently in *People* v. *Prindle*, 80 N.E.3d 1026 (N.Y. 2017), *cert. denied*, 138 S. Ct. 514 (2017).

The New York Court of Appeals' decisions incorrectly focus on what makes an individual *eligible* for an enhanced sentencing range, rather than on what is required for the sentence to be *imposed*. The initial threshold inquiry into the existence of prior qualifying felonies is analogous to the first-degree murder conviction that made a defendant death-eligible under the Florida sentencing scheme at issue in *Hurst*. However, the inquiry in *Hurst* did not end with a finding that a defendant was eligible for the death penalty. Instead, the Court looked past the factors that triggered a sentence enhancement, and held that "the Sixth Amendment requires a jury, not a judge, to find each fact necessary to *impose* [the enhanced sentence]." 136 S. Ct. at 619 (emphasis added); *see also Blakely*, 542 U.S. at 303 ("Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (emphasis in original)).

Thus, even though Mr. Hurst was eligible for an enhanced sentence based on qualifying conduct and a jury recommendation, the sentence was unconstitu-

tional because it could not be imposed without judicial findings of fact. *Hurst*, 136 S. Ct. at 620. Likewise, in this case, even though Petitioner Sean Garvin was eligible for an enhanced sentence based on prior qualifying convictions, an enhanced sentence could not be actually imposed without judicial findings of fact. As *Apprendi* made clear, "[i]t does not matter how the required finding is labeled, but whether it exposes the defendant to a greater punishment than that authorized by the jury's verdict." *Apprendi*, 530 U.S. at 467. The judicial findings required by the Statute and CPL unambiguously do so. It is only after the judicial findings are made that the sentencing judge actually exercises his or her discretionary role by choosing whether to enhance an individual's sentence and by how much.

In the eyes of the Sixth Amendment, there is no meaningful difference between New York's scheme and the Florida death penalty scheme struck down in *Hurst*. The decision below is not just an outlier among those considering recidivist sentencing schemes, but stands alone in refusing to apply this Court's plain teachings in *Hurst* and other *Apprendi*-related decisions. This Court's review is sorely needed to ensure that New York defendants are not uniquely deprived of their Sixth Amendment rights compared to the rest of the country.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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