No. 03-9168

In the Supreme Court of the United States

REGINALD SHEPARD,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 States. NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the interpretation and constitutionality of sentencing provisions like the Armed Career Criminal Act. NACDL has filed *amicus curiae* briefs in this Court in many cases involving the interpretation of sentencing enhancement provisions, including *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). NACDL also has briefed this Court on issues concerning the definition of the phrase "violent felony" in ACCA, most notably in *Taylor* v. *United States*, 495 U.S. 575 (1990).

NACDL is particularly interested in seeing the correct rule emerge in *this* case, because of the current state of flux in the federal sentencing scheme, as a result in part of the *Blakely* decision. Because of the implications for criminal practice of

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

the rules that will be announced in this case, as well as the other cases implicating *Blakely* that the Court will hear this Term (including *United States* v. *Booker*, No. 04-104, and *United States* v. *Fanfan*, No. 04-105), NACDL wishes to present to the Court its views on behalf of its members.

STATEMENT

This Court granted certiorari to decide the degree to which a sentencing court may inquire into the facts underlying a state-court guilty plea to determine whether the plea was to a burglary qualifying as a "violent felony" within that term's meaning in the Armed Career Criminal Act,18 U.S.C. § 924(e) (ACCA). The Court addressed a similar question 14 years ago, stating in part that, if "the *charging paper* and *jury instructions* actually required the jury to find all the elements of generic burglary in order to convict the defendant" (*Taylor* v. *United States*, 495 U.S. 575, 602 (1990) (emphasis added)), the state-court conviction was for a violent felony as that term is defined by ACCA. Here, instead of facts reflected in a jury verdict (or admitted by petitioner), the court of appeals ordered inquiry into documents – police reports and complaint applications – never subjected to any testing in the adversarial process.

Three days after the June 21, 2004, grant of certiorari in this case, this Court issued an opinion that casts even more fundamental doubt on the result reached by the court of appeals below. In *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), the Court held 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*." *Id.* at 2537 (emphasis in original). This holding calls into further doubt the result in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1997). That case permits a defendant's prior conviction to be treated as a mere sentencing factor outside the province of a jury. *Id.* at 247. This case is an excellent vehicle for deciding whether *Almendarez-Torres* should be overruled, as well as the *Taylor* issue on which certiorari was granted.

Petitioner was arrested for, was charged with, and pleaded guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). *United States* v. *Shepard*, 125 F. Supp. 2d 562, 567 (D. Mass.) (*Shepard I*), rev'd, 231 F.3d 56 (1st Cir. 2000). At the time of his conviction, petitioner had a criminal record that included five prior guilty pleas to violations of Mass. Gen. L. ch. 226 §§ 16 and 18. Those sections criminalized conduct that meets the *Taylor* definition of "generic" burglary, but also covered other conduct – such as breaking into vehicles and ships – that does not. See *Shepard I*, 125 F. Supp. 2d at 566 n.8. In each case, petitioner had "pleaded guilty to a generally worded complaint" that did not specify what he had burglarized. *Shepard I*, 125 F. Supp. 2d at 566.

After petitioner pleaded guilty, the probation office prepared a pre-sentence report (PSR) containing facts relating to his criminal history, including violations of the Massachusetts burglary statutes. 125 F. Supp. 2d at 566. Petitioner objected to the contents of the PSR to the extent that they recited facts "beyond the face of the complaints and specifically, any reference to police reports and complaint applications." *Id.* at 564.

At the sentencing proceeding, the government argued that petitioner's prior criminal record met the requirements for a 15-year minimum sentence under Section 924(e)(1), because petitioner had been convicted on at least three prior occasions in Massachusetts state court after guilty pleas to burglary. *Shepard I*, 125 F. Supp. 2d at 568 & n.11. The government submitted police reports and criminal complaint applications from the prior convictions, and contended that those documents constituted evidence that petitioner had pleaded guilty on each occasion to generic burglary, as required by ACCA and *Taylor*. *Id.* at 569. However, the government did not submit "plea colloquies or plea agreements." *Ibid.*

The district court interpreted *Taylor* and other precedents to preclude consideration of the police reports and complaint applications. And, because "[t]he government concede[d] that

without the police reports or complaint applications it cannot determine the precise conduct to which Shepard actually pled guilty," the court refused to impose the 15-year sentence under Section 924(e)(1). Without the ACCA enhancement, the guideline range was 30-37 months. The district court exercised its discretion to depart upward, imposing a sentence of 46 months. *Shepard I*, 125 F. Supp. 2d at 572.

The court of appeals reversed, the district court on remand again refused to consider the police reports and again sentenced petitioner to 46 months, and the court of appeals reversed again. *United States* v. *Shepard*, 231 F.3d 56 (1st Cir. 2000) (*Shepard II*); *United States* v. *Shepard*, 181 F. Supp. 2d 14 (D. Mass. 2002) (*Shepard III*), rev'd, 348 F.3d 308 (1st Cir. 2003); *United States* v. *Shepard*, 348 F.3d 308 (1st Cir. 2003) (*Shepard IV*). The court of appeals characterized the *Taylor* categorical approach as resting "[p]artly" on "practical reasons of administration." *Shepard IV*, 348 F.3d at 311. The court recognized that under *Taylor*'s categorical approach "the sentencing court can still look at the charging papers and jury instructions," but then said, "[t]he Court did not explicitly rule out attention to other court-related documents or say just how guilty pleas should be parsed." *Shepard IV*, 348 F.3d at 312.

The court then held that petitioner's failure to demonstrate that the facts underlying the state-court guilty pleas were different from those stated in the police reports required the district court to rely on the reports to determine the nature of the underlying guilty plea. 348 F.3d at 314. Assuming the accuracy of the police reports, the court stated, "it is barely possible that someone in Shepard's position might have pled guilty, not to the charge that underlay the complaint * * *, but to the burgling of some other venue such as a boat." *Ibid.* The court then undertook its own analysis of the evidence. It was "highly unlikely * * * to the point of nearly impossible" that it had happened for "most of Shepard's predicate pleas." *Ibid.* Therefore, it was "'clearly erroneous'" for the district court *not*

to find that petitioner had pleaded guilty to burgling a building at least three times. *Ibid.*

SUMMARY OF THE ARGUMENT

I. The existence of prior convictions is not meaningfully distinguishable from any other factual finding necessary to increase a defendant's sentence beyond the otherwise applicable maximum. Sentencing enhancements made on that basis must therefore be authorized by a jury verdict or a defendant's admission. *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1997), which reasons otherwise, was wrongly decided, has been undermined by subsequent decisions of this Court, and should now be expressly overruled.

II. Alternatively, the holding of the First Circuit below can in no way be squared with this Court's unanimous decision in *Taylor*, adopting a "categorical" approach to determining what state-law crimes qualify as "burglary" under ACCA. The Court held that the fact of conviction and the statutory definition of the prior offense are required to determine whether the prior offense was burglary under ACCA. Noting that some statutes defined offenses more broadly, the Court held that a sentencing court could look further, "in a narrow range of cases where a jury was actually required to find all the elements of generic burglary." *Taylor*, 495 U.S. at 602.

Taylor's categorical rule does not permit inquiry into police reports and criminal complaint applications. Such forms of evidence are not the products of testing in the adversarial process and thus lack reliability. Additionally, the inquiry required by the court of appeals placed on petitioner the burden to prove that he did not plead guilty to certain activities, rather than requiring the government to prove that he did. These errors undermine *Taylor*'s foundational principles of ease of administration and fairness to the defendant.

ARGUMENT

I. *Almendarez-Torres* Was Wrongly Decided, Has Been Eroded By Subsequent Cases, And Should Be Overruled

Although this case presents important issues about how recidivism findings are made under ACCA, those issues are subsidiary to an even more significant question about the constitutionality of the statute's application. ACCA "raises the penalty for possession of a firearm by a felon from a maximum of 10 years in prison to a mandatory minimum sentence of 15 years and a maximum of life in prison without parole if the defendant 'has three previous convictions * * * for a violent felony or a serious drug offense.'" *Custis* v. *United States*, 511 U.S. 485, 487 (1994) (quoting 18 U.S.C. § 924(e)). The determination that the defendant has the convictions necessary to trigger application of the increased sentence is made by a federal judge, not by a jury.

Based on petitioner's plea of guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), he faced a *maximum* sentence of ten years. He did *not* admit (and has never admitted) committing three or more "violent felonies," as that term is defined in ACCA. Yet, if the First Circuit's decision is upheld and petitioner is sentenced based on a factual finding, which he contests, about the nature of his prior convictions, he will face a *minimum* sentence of 15 years (and a possibility of life in prison). If applied here, ACCA would therefore require the sentencing judge to impose "a sentence greater than the maximum [s]he could have imposed * * * without the challenged factual finding." *Blakely*, 124 S. Ct. at 2537. In any other context, such a sentence would plainly violate the Sixth Amendment, which forbids judges from imposing punishment beyond the range authorized "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Ibid.* (emphasis in original).

The judicial factfinding at issue here, however, concerns recidivism. Under current law, that makes all the difference. In

Almendarez-Torres v. *United States*, 523 U.S. 224 (1997), the Court discerned no constitutional problem with a federal statute that allowed a defendant's sentence to be increased from a maximum of two years to a maximum of 20 based on a fact – that the defendant had a prior aggravated felony conviction – that had not been charged in the indictment.[2] And, although the Court's subsequent decision in *Apprendi* v. *New Jersey*, 530 U.S. 466, cast significant doubt on both the reasoning and the result of *Almendarez-Torres*, *Apprendi* does purport to exempt "the fact of a prior conviction" from its otherwise-universal rule that 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." 530 U.S. at 490.

It is thus clear that, but for *Almendarez-Torres* and the corresponding exception to the *Apprendi* rule, the conclusion reached by the court of appeals in this case – that "the district court *must* sentence Shepard under [ACCA] and apply the mandatory minimum prescribed by Congress" (*Shepard IV*, 348 F.3d at 314-315) – would be unconstitutional. Accordingly, the present case provides a timely opportunity for this Court to revisit *Almendarez-Torres*. By overruling *Almendarez-Torres* and eliminating the ill-fitting recidivism exception to *Apprendi*, the Court would keep faith with the animating principle of its more recent decisions: that every fact authorizing additional punishment against a criminal defendant must have been either found by a jury or admitted by the defendant. See *Blakely*, 124 S. Ct. at 2537; *Apprendi*, 530 U.S. at 490. Exempting recidivism findings from that bedrock rule is supported neither by logic nor by experience. Indeed, it is supported only by

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[2] The petitioner in *Almendarez-Torres* admitted, in the course of pleading guilty to violating 8 U.S.C. § 1326, that he had been deported "pursuant to" three earlier felony convictions. See *Almendarez-Torres*, 523 U.S. at 227. It was thus undisputed that he had actually been convicted of the crime that triggered the sentencing enhancement, so the only constitutional issue discussed by the Court was whether the fact of those prior convictions had to be presented in the indictment.

Almendarez-Torres itself, a decision whose assumptions and reasoning were problematic from the start and have been fatally undermined by subsequent cases. See *Monge* v *California*, 524 U.S. 721, 741 (1998) (Scalia, J., dissenting) (describing *Almendarez-Torres* as "a grave constitutional error affecting the most fundamental of rights").[3]

A. Despite the indisputable importance of *stare decisis*, when the "necessity and propriety" of overruling prior decisions have been established, the Court has not hesitated to act. *Ring* v. *Arizona*, 536 U.S. 584 (2002) (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989)). *Stare decisis*, after all, is not an "inexorable command," *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991), but instead reflects "a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) (internal quotation omitted). *Stare*

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[3] Because the constitutional claim in *Almendarez-Torres* concerned only notice (*i.e.* whether the fact of prior conviction must be charged in the indictment), the case could be limited to its facts, as having not definitively resolved whether recidivism findings may properly be made by a judge under something less than a reasonable doubt standard. See Colleen P. Murphy, *The Use of Prior Convictions After* Apprendi, 37 U.C. DAVIS L. REV. 973, 994 (2004) (noting that "neither *Almendarez-Torres* nor *Apprendi* answered whether the Constitution requires a jury trial and proof beyond a reasonable doubt on the existence of a prior conviction"); cf. *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004) (limiting reach of *Oregon* v. *Elstad*, 470 U.S. 298 (1985)). Moreover, as the Court noted in *Apprendi*, the defendant in *Almendarez-Torres* had actually admitted the prior convictions, so his case raised "no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact." 530 U.S. at 488; see also *Jones*, 526 U.S. 227, 248-249 (2002). *Almendarez-Torres* thus could be read to stand only for the propositions that recidivism need not be alleged in the indictment and that a recidivism charge may support a sentencing enhancement when the defendant *admits* that he was convicted of the prior offenses on which the increased sentence is based. That approach would be consistent with *Blakely*'s core holding that, "[w]hen a defendant pleads guilty, the State is free to seek judicial sentence enhancements *so long as* the defendant either stipulates to the relevant facts or consents to judicial fact-finding." 124 S. Ct. at 2541 (emphasis added).

decisis is of course far weaker in constitutional cases than in statutory cases, see *Payne*, 501 U.S. at 828, and this case arises in a particular area of constitutional law in which there is especially strong reason to reconsider an incorrect precedent. See *Harris* v. *United States*, 536 U.S. 545, 572 (2002) (Thomas, J., dissenting) ("[C]onsiderations of *stare decisis* are at their nadir in cases involving procedural rules implicating fundamental constitutional protections afforded criminal defendants.").

For *stare decisis* purposes, *Almendarez-Torres* is perhaps most analogous to *Sinclair* v. *United States*, 279 U.S. 263 (1929). *Sinclair* held that a particular determination on which the defendants' punishment was conditioned – the "pertinency" element of a criminal contempt statute – need not be found by the jury, but could instead be submitted to and decided by the judge. *Id.* at 298. In *United States* v. *Gaudin*, 515 U.S. 506 (1995), this Court faced a very similar question: whether the Fifth and Sixth Amendments require that the "materiality" element of 18 U.S.C. § 1001 be found by the jury beyond a reasonable doubt. Concluding that the Constitution did so require, the Court overruled *Sinclair*. See *id.* at 519-522. The Court identified three considerations that compelled its decision to do so.

First, the force of *stare decisis* was reduced because the question whether a particular fact is properly decided by a judge or a jury involves a "procedural rule * * * which does not serve as a guide to lawful behavior." 515 U.S. at 521; see also *Hohn* v. *United States*, 524 U.S. 236, 251-252 (1998). Second, the Court's conclusion that the jury must decide the elements of the offense "rests upon an interpretation of the Constitution." 515 U.S. at 521. Finally, "*stare decisis* cannot possibly be controlling when, in addition to those factors, the decision in question has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." *Ibid.*; see also *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997).

B. The case for overruling *Almendarez-Torres* is, if anything, stronger than was the case for dispatching with *Sinclair*. In holding that the Sixth Amendment does not require the fact of prior convictions – even those that increase the range of punishment to which the defendant is subject – to be alleged in the indictment, *Almendarez-Torres* articulated a procedural rule grounded in the Constitution. This is so even if that rule is understood to apply beyond the context of indictments, to allow recidivism findings to be made by judges rather than juries. See *Gaudin*, 515 U.S. at 521; see also *Schriro* v. *Summerlin*, 124 S. Ct. 2519, 2523 (2004) ("Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules, a conclusion we have reached in numerous other contexts.").

Moreover, and more important, *Almendarez-Torres* is perhaps the paradigm of a decision that not only was wrong when it was decided, but also has been significantly undermined by later cases. Indeed, Sixth Amendment law has been upended since *Almendarez-Torres* pronounced it "absolutely clear" that it was wrong to suggest that "Congress cannot permit judges to increase a sentence in light of recidivism, *or any other factor*, not set forth in an indictment and proved to a jury beyond a reasonable doubt." 523 U.S. at 240 (emphasis added). That dramatic transformation began almost immediately after *Almendarez-Torres* was decided.

1. In *Jones* v. *United States*, 526 U.S. 227 (1999), the Court examined the same body of law as *Almendarez-Torres*, yet reached a very different conclusion. Whereas the Court in *Almendarez-Torres* discerned no general rule that facts increasing the maximum penalty to which the defendant is exposed raise Sixth Amendment concerns, the Court in *Jones* suggested just such a principle. 526 U.S. at 243 n.6. Whereas the Court in *Almendarez-Torres* discerned no constitutional norm strong enough to convert a recidivism finding that increased the maximum penalty into an element of 8 U.S.C. § 1326, the Court in *Jones* determined that serious Sixth Amendment concerns compelled it to read a provision increasing the sentence for

carjacking under 18 U.S.C. § 2119 as an element of the offense. 526 U.S. at 239-252. *Jones* canvassed history, at which *Almendarez-Torres* had barely glanced, and ascertained that the Framers put the protection of the jury from the encroachment of judicial factfinding at the heart of the jury-trial right. See *id.* at 244-248. And, although *Jones* distinguished *Almendarez-Torres*, it did so with some equivocation, narrowly describing it as a case primarily about the "possible constitutional distinctiveness" of recidivism. *Id.* at 248-249 & n.10.

2. A more serious blow came the next Term in *Apprendi*. *Apprendi* confirmed the general Sixth Amendment rule at which *Jones* had hinted: that facts increasing the quantum of punishment that a defendant faces must be found by jury beyond a reasonable doubt. See 530 U.S. at 490. Although *Apprendi* did not overrule *Almendarez-Torres*, the Court made no secret that it was retreating from the broader constitutional foundations of that decision, describing it as "at best an exceptional departure from the historic practice that we have described." 530 U.S. at 487. The Court explained that "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." *Id.* at 489-490.

Apprendi thus recognized that *Almendarez-Torres*'s recidivism holding fit uncomfortably with the Court's clarified understanding of the Sixth Amendment. Indeed, along with its citation to Justice Scalia's dissent in *Almendarez-Torres*, *Apprendi* offered a criticism of its own: "the Court's extensive discussion of the term 'sentencing factor' virtually ignored the pedigree of the pleading requirement at issue" – a requirement that every allegation legally essential to the punishment be charged and proven to the jury. 530 U.S. at 490 n.15. This point is elaborated in Justice Thomas's separate opinion, which makes clear that the common law pleading requirement invoked by the Court did not distinguish between the fact of a prior conviction and any other fact that "was by law a basis for imposing or increasing punishment." *Id.* at 512 (Thomas, J., concurring). The Court

in *Apprendi* thus went out of its way to highlight the analytic mistakes that informed the result in *Almendarez-Torres* and to suggest that those flaws render *Almendarez-Torres* an outlier.

Nevertheless, it was not necessary for *Apprendi* actually to overrule *Almendarez-Torres* to find the New Jersey hate crime statute unconstitutional, as that statute raised the maximum penalty based on a judicial finding that the defendant had committed a crime for a particular purpose, not on a recidivism finding. See 530 U.S. at 491-492. Because the Court had no need to revisit the narrow holding of *Almendarez-Torres*, the exception that *Apprendi* makes for recidivism findings is perhaps best understood as an interim prudential measure. See *id.* at 490 ("Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision *today* to treat the case as a narrow exception to the general rule we recalled at the outset.") (emphasis added). The *Almendarez-Torres* holding has never been tested in a case (like this one) in which the lawfulness of the defendant's sentence actually depends on the validity of the exception. Thus, even if preserving *Almendarez-Torres* was prudent in the context of *Apprendi*, the former's mistakes should not be perpetuated when they would actually make a difference to the outcome.

3. In fundamental ways, *Apprendi* and its progeny have eroded the arguments and assumptions on which the holding of *Almendarez-Torres* rests. The first concerns the way in which *Almendarez-Torres* distinguished and applied *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1987). The petitioner in *Almendarez-Torres* argued that *McMillan* created an important distinction between judicial factfinding that leads to the application of a mandatory minimum sentence (which *McMillan* upheld) and judicial factfinding that alters the maximum penalty for the crime (which *McMillan* had suggested would present a different problem). Instead of adopting such a bright-line rule, *Almendarez-Torres* fashioned a new five-factor test, which aims at determining whether a feature is a mere "sentencing factor" (which need not be part of the indictment)

or instead is an actual "element" of the crime (which must be charged). See 523 U.S. at 242-246. This methodology is, however, irreconcilable with the Court's more recent Sixth Amendment cases.

As currently understood, the relevant Sixth Amendment inquiry does *not* involve analyzing a number of different subjective factors to determine whether a law goes too far in transferring factfinding responsibility from jury to judge. Instead, "[w]hat matters is the way by which a fact entered into the sentence," *Apprendi*, 530 U.S. at 521 (Thomas, J., concurring) – that is, whether the challenged finding had the effect of increasing the sentence beyond the maximum authorized by the jury verdict or guilty plea. See *Blakely*, 124 S. Ct. at 2537 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.") (internal quotation omitted). Any finding that has that effect, however it is labeled, must be made by a jury using a reasonable-doubt standard. In so holding, *Blakely* rejected alternatives to what it called a "bright-line rule" as either too malleable or too subjective. See *id.* at 2539-2540.

Given that its basic methodology has been superseded, it is not surprising that *Almendarez-Torres*'s conclusions about the relevance of the distinction between a finding that requires a minimum penalty and one that allows a greater penalty have now also been rejected. *Almendarez-Torres* announced that the difference between these two was not a "determinative" one, 523 U.S. at 245, and had no effect on the "constitutional outcome," *id.* at 243. Indeed, insofar as it thought the distinction relevant, the Court in *Almendarez-Torres* suggested that the use of permissive maxima is actually fairer to criminal defendants and therefore might be *less* constitutionally problematic. *Id.* at 244-245. These statements have simply not survived their encounter with subsequent cases.

Similarly, in *Jones*, the Court noted the "substantiality" of the claim that judicial factfinding may not "support the applica-

tion of a provision that increases the potential severity of the penalty for a variant of a given crime." 526 U.S. at 242-243. Rather than cite to *Almendarez-Torres*, the Court returned to the suggestion made in *McMillan* that jury findings are required to raise the otherwise-applicable maximum penalty. See 526 U.S. at 242. Consistent with that distinction, the constitutional principle identified in *Jones* is one that, at a minimum, draws a fundamental line around factual findings that "increase[] the maximum penalty for a crime." *Id.* at 243 n.6. Then, in *Apprendi*, the Court expressly adopted the core Sixth Amendment rule that a legislative scheme may not remove from the jury "determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." 530 U.S. at 483. In so holding, the Court distinguished *McMillan* as not involving a scheme that kept from the jury facts necessary to subject the defendant to greater punishment. See *id.* at 486. Thus, far from treating the two situations as constitutionally equivalent, the Court (since *Almendarez-Torres*) has treated increasing the allowable maximum and raising the required minimum as lying on opposite sides of a basic constitutional divide.

In *Harris*, the Court confirmed its view of that divide. There, the Court held that – even in light of *Apprendi* – findings that triggered mandatory minimums could still be made by a judge. Rejecting the equivalence drawn in *Almendarez-Torres*, the Court declared that "*McMillan* and *Apprendi* are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases." 536 U.S. at 557. According to *Harris*, mandatory minimums merely limit a judge's sentencing discretion within an authorized range of punishments. "Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments." *Id.* at 558. Those provisions are concerned with something else. They protect against judicial determination of "[f]acts extending the sentence beyond the

statutory maximum," which traditionally had been charged in the indictment and submitted to the jury. *Id.* at 564.

Under *Harris*, whether a fact must be submitted to the jury turns not on the "risk of unfairness to a particular defendant," *Almendarez-Torres*, 523 U.S. at 245, but on whether the fact "extend[s] the defendant's sentence beyond the maximum authorized by the jury's verdict." *Harris*, 536 U.S. at 557; see also *id.* at 566 ("[A] factual finding's practical effect cannot by itself control the constitutional analysis."). As *Harris* explained,

> The factual finding in *Apprendi* extended the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the jury. The finding in *McMillan* restrained the judge's power, limiting his or her choices within the authorized range. It is quite consistent to maintain that the former type of fact must be submitted to the jury while the latter need not be.

536 U.S. at 567; see also *Blakely*, 124 S. Ct. at 2538. In rejecting the petitioner's use of *McMillan*, *Almendarez-Torres* misunderstood that constitutional distinction.[4]

4. The recent vintage of *Almendarez-Torres* is no reason to preserve it. The Court has not hesitated to overturn newly issued decisions as soon as it became clear that they represented a break either with their predecessors or with their successors. See *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995) (overruling *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990)); *United States* v. *Dixon*, 509 U.S. 688 (1993) (overrul-

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[4] This is not the only aspect of *Almendarez-Torres*'s reasoning that has been repudiated. For example, when the Court in that case refused to adopt "a rule that any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement," it relied, in part, on the fact that such a rule would be "anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty." 523 U.S. at 247. That case law was *Walton* v. *Arizona*, 497 U.S. 639 (1990), which has now been overruled in light of *Apprendi*. *Ring*, 536 U.S. at 589.

ing *Grady* v. *Corbin*, 495 U.S. 508 (1990)); *Payne*, 501 U.S. 808 (overruling *Booth* v. *Maryland*, 482 U.S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U.S. 805 (1989)). Nearly from the moment it was decided, the scope of *Almendarez-Torres* has been narrowed and its reasoning impugned. Indeed, it can rightly be said that, even in the short time that *Almendarez-Torres* has been on the books, "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 855 (1992).

Indeed, few areas of law could be more *unsettled* than sentencing law in the aftermath of *Apprendi* and *Blakely*. Since those decisions, sentencing at both the federal and state levels has been in constant flux. See *United States* v. *Penaranda*, 375 F.3d 238 (2d Cir. 2004) (describing the effects of *Blakely*); Andrew M. Levine, *The Confounding Boundaries of* Apprendi-*Land: Statutory Minimums and the Constitution*, 29 AM. J. CRIM. L. 377, 379-380 (2002) ("*Apprendi* * * * unleashed a series of far-reaching concerns and questions in the minds of judges, attorneys, defendants, and legislators alike."). Decisions better established than *Almendarez-Torres* already have begun to yield to the logic of *Apprendi*. See *Ring*, 536 U.S. at 608-609. In this dynamic area, therefore, it is clear that "precedents are not sacrosanct," *ibid.*, and that a basic justification for *stare decisis* – ensuring that legal rules remain consistent and predictable – rings particularly hollow.

C. All that is left of *Almendarez-Torres* are its intimations that there is something constitutionally distinct about recidivism findings. As Justice Scalia pointed out in his dissent, however, "there is no rational basis for making recidivism an exception" to the general rule that any fact altering the maximum penalty for a crime must be proved to a jury beyond a reasonable doubt. 523 U.S. at 258. That criticism has been echoed by commentators. See Murphy, *supra*, 37 U.C. DAVIS L. REV. at 998; Kryon Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387, 408 (2002) ("[N]one of these reasons for excepting

criminal history from the *Apprendi* rule withstands scrutiny."). Indeed, not only does the fundamental logic of *Apprendi* and *Blakely* suggest no basis for a recidivism exception,[5] but the justifications that have been offered in support of such an exception do not withstand scrutiny.

1. The most common defense of the recidivist exception focuses on the "certainty that procedural safeguards attached to any 'fact' of prior conviction." *Apprendi*, 530 U.S. at 488; see also *Jones*, 526 U.S. at 249 ("[A] prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."). This argument, however, misperceives the nature of the finding that must be made to apply a recidivism enhancement. Under ACCA, as under similar federal statutes, the finding that allows the increased sentence to be imposed is not that the defendant actually engaged in particular conduct with respect to the prior crimes, but rather that the defendant "has three previous convictions" for offenses of the sort identified by the statute. 18 U.S.C. § 924(e)(1); see *Taylor*, 495 U.S. at 602 (ACCA "generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense").[6]

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[5] *Apprendi*'s liberty-based defense of its core holding brooks no obvious exception for recidivism findings: "If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of the protections that have, until that point, unquestionably attached." 530 U.S. at 484; see also Murphy, *supra*, 37 U.C. DAVIS L. REV. at 996 ("[T]he concerns about liberty and stigma offered to justify the *Apprendi* holding apply whether the contested fact involves conduct related to the underlying offense or involves whether the defendant sustained a prior conviction.").

[6] In addition to the immigration statute construed in *Almendarez-Torres* itself, 8 U.S.C. § 1326, the Violent Crime Control and Law Enforcement Act (the so-called federal "three strikes" law) imposes a mandatory life sentence on a defendant convicted of a "serious violent felony" if that person has been

An enhancement under Section 924(e) requires the govrnment to prove that the defendant was previously *convicted* of a qualifying offense, not that he was actually *guilty* of that offense. Although the latter may have already been tested through constitutionally adequate procedures, the former has not. It is thus a non sequitur to tell a defendant who contests the fact of a prior conviction that his guilt has already been determined in a way that satisfies the Sixth Amendment. The *existence* of a qualifying conviction is simply not an issue that has been adjudicated ever before.

And, as *Apprendi* and *Blakely* recognize, the Constitution does not allow defendants to be deprived of jury findings and the reasonable-doubt standard at the very moment that they seek to put the government to its proof on a new factual issue that, if found, will elevate their expected sentences beyond the range of punishment that they could have lawfully faced without such a finding. In this sense, challenges to the accuracy, authenticity, or sufficiency of the evidence put forward by the government to prove prior convictions necessary to increase the defendant's punishment are functionally indistinguishable from factual challenges of the sort to which the jury-trial right obviously attaches. They have the same consequences for the criminal defendant and should be attended by the same procedural guarantees.

2. The *Almendarez-Torres* exception has been alternatively defended based on a pragmatic calculation that – because recidivism determinations are generally straightforward and uncontested – applying *Apprendi* to them would likely make no difference in the run of cases. See *Almendarez-Torres*, 523 U.S. at 235. There are at least two basic flaws in this argument.

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convicted of two previous serious violent felonies or one serious violent felony and one "serious drug offense." 18 U.S.C. § 3559(c)(1)(A); see also 21 U.S.C. § 841(b)(1)(A)-(D) (imposing significantly enhanced sentences on a person who distributes illegal drugs "after a prior conviction for a felony drug offense has become final").

First, the underlying assumption is not necessarily valid. There are a number of circumstances in which defendants can mount plausible challenges to the government's contention that they were previously convicted of a crime qualifying for an increased sentence, whether under ACCA or under some other provision. Justice Scalia's dissent in *Almendarez-Torres* gives the apt example of unlawful entry cases, where the use of false identification documents and assumed names is rampant. See 523 U.S. at 268. In those circumstances, the mere fact that a defendant subject to a recidivist enhancement has the same name or identifying information as someone previously convicted of a qualifying offense by no means proves that the defendant was actually the person convicted. Similarly, if the predicate convictions occurred in a foreign country, in which record-keeping can be erratic and translations (especially of legal terminology) unreliable, the risk of error is real. Cf. *United States* v. *Small*, 333 F.3d 425, 427 n.2 (3d Cir. 2003) (foreign conviction can be used a predicate under Section 924(e)), cert. granted, 124 S. Ct. 1712 (2004).

Moreover, even if there is no dispute that the defendant was convicted of a prior offense, there can be significant dispute about what the offense of conviction actually was. Under ACCA, after all, whether a particular conviction is in fact a qualifying conviction often becomes the vital question – as it is in this case.[7] And, although the categorical approach adopted in *Taylor* appropriately works to limit the extent to which making determinations under Section 924(e) involves "an elaborate factfinding process regarding the defendant's prior offense," 495 U.S. at 601, there remain situations (of which the present case provides an example) in which the government and the defendant disagree about the proof of the underlying convictions. The more that making recidivism findings requires the

[7] Lower courts have construed the *Almendarez-Torres* exception as extending "beyond the question whether a prior conviction exists and to the question of whether it is a qualifying conviction under the statute." *United States* v. *Matthews*, 312 F.3d 652, 663 (5th Cir. 2002).

kind of archaeological inquiry into primary sources that the First Circuit endorsed in this case, the more those determinations will be both contested and prone to error. In such circumstances, the burden of proof and the identity of the factfinder make a difference, both practically and constitutionally. See *Addington* v. *Texas,* 441 U.S. 418, 423 (1979) (the standard of proof "serves to allocate the risk of error between the litigant and to indicate the relative importance attached to the ultimate decision"); see also *Apprendi*, 530 U.S. at 483-484. The government should not be able to go beyond the statutory elements of the prior conviction to see what the "case files showed," *Shepard IV*, 348 F.3d at 312, while simultaneously insisting that such factfinding can proceed unconstrained by the constitutional procedures that *Apprendi* requires for every other contested factual determination that raises the maximum penalty for a crime.

Second, that a particular finding may often be easy to make (or may be undisputed) provides no reason to dispense with the protections that the Sixth Amendment, as construed in *Apprendi* and *Blakely*, requires before a defendant can be exposed to increased punishment as a result of that finding. The ease with which such findings may be made means only that the government may have little difficulty proving to the jury that the defendant was convicted of the offenses that trigger a recidivist enhancement. But it makes no sense to deprive those alleged recidivists to whom a jury-trial right and a different burden of proof *could* make a difference of those historic safeguards merely because many, or even most, other defendants would not similarly benefit. Constitutional protections do not disappear merely because, in many cases, they will not be outcome-determinative.[8]

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[8] Moreover, insofar as practical consequences matter, if it is true that overruling *Almendarez-Torres* is unlikely to cause significant disruption (because most defendants will either waive their rights or stipulate to the fact of their prior convictions), that surely provides *greater* reason for the Court to take that step. If the Court in *Blakely* was willing to allow the tremendous

3. The defenders of *Almendarez-Torres* have also invoked fairness, specifically the notion that "the introduction of evidence of a defendant's prior crimes risks significant prejudice." 523 U.S. at 235. Although such concerns do exist, see *Old Chief* v. *United States*, 519 U.S. 172, 185 (1995), they are not dispositive of the constitutional issue. Just as arguments about fairness did not persuade the Court in *Harris* that the *Apprendi* rule should apply when the trial jury has found (or the defendant admitted) "all the facts necessary to impose the maximum," 536 U.S. at 566, such concerns have not prevented and should not prevent the Court from applying *Apprendi* when those facts have *not* been found by the jury or conceded by the defendant. See *Blakely*, 124 S. Ct. at 2541-2542 (rejecting fairness concerns in applying *Apprendi* to determinate sentencing schemes that rely on judicial factfinding); *Apprendi*, 530 U.S. at 521 (Thomas, J., concurring) (fairness concerns do not make "the traditional understanding of what an element is any less applicable to the fact of a prior conviction").

Moreover, whatever problems jury-made recidivism findings pose can be alleviated through the use of bifurcated proceedings and, perhaps, appropriate limiting instructions or stipulations. As is the practice in some States that already protect the right to a jury trial on the recidivism issue, in a bifurcated proceeding, the jury (after finding other elements met) determines whether the defendant previously has been convicted of offenses qualifying for the enhancement. See, *e.g.*, Ind. Code Ann. § 35-50-2-8(f); N.C. Gen. Stat. § 14-7.5; cf. *Apprendi*, 530 U.S. at 521 n.10 (Thomas, J., concurring); *Old Chief*, 519 U.S. at 190 (holding that it is an abuse of discretion for a court in a Section 922(g) case to refuse to admit defendant's stipulation of his felon-status).

D. In short, none of the purported justifications for a recidivism exception provide a reasoned basis for that

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upheaval caused by taking the logic of *Apprendi* seriously, it cannot seriously be argued that *Almendarez-Torres* must be preserved on account of the far more modest effects of requiring recidivism to be proven to a jury.

"exceptional departure" from the general rule requiring jury findings for facts used to elevate a sentence beyond the otherwise-available maximum. *Apprendi*, 530 U.S. at 487. Indeed, the Court's admonition in *Blakely* fits just as well to this case: "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 neighbors rather than a lone employee of the State." 124 S. Ct. at 2543 (citation omitted). That bedrock principle, which animates the Court's understanding of the Sixth Amendment, applies equally to the accusation that a defendant has been convicted of previous crimes. *Almendarez-Torres* says otherwise and, for that reason, has no rightful place in the constitutional pantheon. *Almendarez-Torres* "was not correct when it was decided, and is not correct today. It ought not remain binding precedent." *Lawrence* v. *Texas*, 123 S. Ct. 2472, 2483 (2003).

II. In The Alternative, This Court Should Reverse The First Circuit's Overbroad Reading Of *Taylor*, And Clarify That The Government Bears The Burden Of Proving Prior Convictions Through Reliable Evidence That Reflects Adversarial Testing

In *Taylor*, this Court observed that "the practical difficulties and potential unfairness of a factual approach are daunting." 495 U.S. at 601. Nonetheless undaunted, the court below ordered the sentencing judge to inquire into police reports relating to petitioner's prior *arrests* to determine the elements of subsequent *convictions*. Its fundamental error was looking beyond matters that had been tested by the adversarial process to determine the basis for the convictions.

A. *Taylor* defined the degree to which a sentencing court could look beyond "the fact of conviction and the statutory definition of the prior offense" when inquiring whether a conviction for violating a non-generic burglary statute satisfied the definition of a violent felony under ACCA. See 495 U.S. at

599-602. As Judge Gertner concluded below: "Not very far, is the answer." What Judge Gertner labeled "the exception to the categorical approach" – but what is actually a procedure this Court endorsed for applying the categorical approach to broadly written statutes – "is a limited one." *Shepard I*, 125 F. Supp. 2d at 569.

Applying the categorical approach to defining the phrase "violent felony" under ACCA, a court must consider "the elements of the statute of conviction" and not "the facts of [the] defendant's conduct." *Taylor*, 495 U.S. at 601. Also, if the statute covers both non-violent and violent felonies, "the indictment or information and jury instructions" may be considered if they demonstrate that "the jury necessarily had to find" the elements of a violent felony under ACCA. *Id.* at 602. Thus, under *Taylor*, the only matters that may be considered to inform the question whether the crime of conviction encompassed the elements of a violent felony under ACCA are matters tested by the adversarial process, with its attendant procedural protections for defendants, in the underlying proceedings.

1. The court of appeals' opinion below does violence to these principles. Paying lip service to the directive that the elements of the underlying offense, not the conduct for which petitioner was arrested, determine whether the conviction can be used to determine the applicability of the sentencing enhancement (*Shepard IV*, 348 F.3d at 311), the court nonetheless repeatedly engaged in just such an impermissible inquiry. "There is surely an air of make-believe about this case. No one, and this includes Shepard and the district court, has seriously disputed that Shepard *in fact* broke in to half a dozen or more buildings * * *." *Ibid.* (emphasis in original). The court then held that it was "nearly impossible * * * that the police reports were mistaken as to venue for four or more of the six crimes." *Id.* at 314. It noted that petitioner did not "offer any evidence" that the police reports were incorrect. Because of these facts, the court held that it was "'clearly erroneous' to

find that Shepard did not plead guilty to at least three burglaries of buildings." *Ibid.*

The court of appeals violated another of this Court's directives by looking beyond the few documents that might show what was *necessarily* found to convict petitioner of the underlying crimes. It stated: "The Court did not explicitly rule out attention to other court-related documents * * *." 348 F.3d at 312 But *Taylor* in fact did just that. The Court explicitly refused to permit inquiry into "the government's proof at trial," or, on a guilty plea, into a record of underlying facts that perhaps the government might be able to prove, but were not necessarily the basis for the plea. *Id.* at 601-602.[9] Consistent with that approach, in *United States* v. *Palmer*, 68 F.3d 52 (2d Cir. 1995), the court refused to allow reliance on a PSR, which it viewed as simply a surrogate for the factfinding process that *Taylor* had prohibited. *Id.* at 59. Accord *United States* v. *Franklin*, 235 F.3d 1165, 1172 (9th Cir. 2000).

2. Logic dictates that the *Taylor* rule also apply in the context of prior convictions obtained (as in this case) through guilty pleas. As the court of appeals noted, "all twelve circuits that have addressed the issue have agreed that the *Taylor* analysis applies after a guilty plea." 348 F.3d at 312 n.4. But *Taylor* also recognized the particular concerns posed by guilty pleas: "[I]f a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." 495 U.S. at 602.[10] When courts apply *Taylor* to

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[9] The rule announced by the court of appeals also eviscerates this Court's prescription that looking beyond the statutory definition of the prior offense is appropriate only "in a narrow range of cases." *Taylor*, 495 U.S. at 602. Under the court of appeals' conception of the inquiry required, the sentencing court should indulge this inquiry *in every case* in which the government can produce *some evidence* pertaining to the underlying proceedings.

[10] "Plea bargains affect guilty pleas that may or may not be on all fours with the charging documents; they are the product of strategic 'bargains' after all,

prove convictions obtained by plea bargain, it is essential that they respect the same concerns of administration and fairness that *Taylor* mandates relating to convictions after jury verdicts. This the Court can do by limiting the information permissibly used to prove the elements of the underlying conviction to matters subjected to adversarial testing in the plea proceeding. Fundamentally, along with the charging document and the judgment of conviction, such information is composed of the factual basis required under Fed. R. Crim. P. 11 in every plea proceeding – in other words, the defendant's admissions. See also *Woldiger* v. *Ashcroft*, 77 Fed. Appx. 586, 590 (3d Cir. 2003) ("other courts of appeals have considered charging documents, jury instructions, plea agreements, and plea hearing transcripts to determine if a defendant's prior conviction qualifies as a 'violent felony' under the ACCA") (citing cases).

At least two circuits have applied *Taylor* successfully in the context of underlying convictions secured by guilty pleas, using a cabined approach that respects the foundational principles of *Taylor*. In *United States* v. *Howze*, 343 F.3d 919 (7th Cir. 2003) (Easterbrook, J.), faced with a statute that criminalized conduct broader than ACCA's definition of a "violent felony," the court looked only to the charging document to determine that the guilty plea was to theft from a person – which the court held qualified categorically as a violent felony under ACCA. *Id.* at 922. In *United States* v. *Demint*, 74 F.3d 876 (8th Cir. 1996), the court affirmed the sentencing judge's look at "the charging paper and the text of Demint's guilty plea to determine whether Demint's plea was to a charge meeting the generic definition of burglary." *Id.* at 877. Considering a different prior conviction, the court examined a Florida "attempt" statute, and its interpreting case law, to determine that attempted burglary under Florida law categorically met the catch-all definition of violent felony. *Id.* at 877-878.

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based on the sentence offered, the risks of trial, and the state of the evidence." *Shepard III*, 181 F. Supp. 2d at 24.

B. Important policy rationales underlie the *Taylor* rule. Concerns of administration arise when federal sentencing courts are asked to "engage in an elaborate fact-finding process regarding the defendant's prior offenses," and there are important concerns of due process and fairness to the defendant. *Taylor*, 495 U.S. at 601-602. See *Woldiger*, 77 Fed. Appx. at 591 (noting support for the *Taylor* rule including "the practical difficulties and potential unfairness of making factual findings on a contested evidentiary record, and potential due process concerns"); *Shepard I*, 125 F. Supp. 2d at 563 (categorical approach "saves judicial resources" and "is by far the fairest approach"). These principles demand that the decision below be reversed.

1. The decision below increases the likelihood that federal courts will become increasingly immersed in factfinding inquiries into underlying proceedings. *Taylor*, 495 U.S. at 601. The Court relied on a similar rationale in *Custis* when holding that defendants may not collaterally attack their underlying state-court convictions at a sentencing hearing on an ACCA enhancement. "Two considerations motivated our constitutional conclusion in *Custis*: ease of administration and the interest in promoting the finality of judgments." *Daniels* v. *United States*, 532 U.S. 374, 378 (2001).

As Judge Gertner noted in *Shepard III* (181 F. Supp. 2d at 25):

> [T]he Supreme Court ha[s] been clear about limiting collateral attacks on convictions during federal sentencing proceedings. *Custis* v. *United States*, 511 U.S. 485 (1994) * * *; *Daniels* v. *United States*, 532 U.S. 374 (2001) * * *. If, on the one hand as in *Taylor*, a defendant is not allowed to look below the surface of the plea to demonstrate that he did not *really* threaten anyone, even though the crime to which he pled was an ACCA predicate, then surely the government cannot do the reverse. It cannot look below the surface of the plea to show that even though the plea was to the general offense of breaking and entering and

even though nothing else apparently was discussed, what was *really* going on was a plea to a violent crime.

2. The approach followed by the court of appeals below raises substantial due process concerns. A defendant has a due process right to be sentenced on the basis of accurate information. *Townsend* v. *Burke*, 334 U.S. 736, 740 (1948).[11] See also *United States* v. *Tucker*, 404 U.S. 443, 447-448 (1972) (noting the likelihood that a defendant's sentence might have been different if the judge had known that prior convictions had been unconstitutionally obtained). As one commentator has noted, "[t]he accuracy of fact-finding is determined by the burden of proof, the reliability of the underlying evidence, and the opportunity for review of the decision." Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 301 (1994). The court of appeals' approach shifts to petitioner the burden of proof, and relies on police reports that lack any assurance of reliability to enhance a defendant's sentence dramatically.

Such burden-shifting violates this Court's rule that facts relevant to the imposition of a mandatory minimum sentence must be proved by the government. See *McMillan*, 477 U.S. at 91; see also *United States* v. *Cooper*, 375 F.3d 1041, 1052 (10th Cir. 2004) ("Whenever a prior conviction is relevant to sentencing, the government must establish the fact of that conviction by a preponderance of the evidence.").[12]

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[11] In *Townsend*, the sentence was overturned because the sentencing court had failed to distinguish prior *arrests* from prior *convictions*. 334 U.S. at 740. The court of appeals' apparent willingness to rely on the untested records of petitioner's arrests implicates this right in much the same manner as in *Townsend*.

[12] There is a substantial issue about what the appropriate burden of proof should be. Some recidivist statutes expressly place on the government the burden of proof beyond a reasonable doubt. See, *e.g.*, *United States* v. *Green*, 175 F.3d 822, 833-834 (10th Cir. 1999) (interpreting 21 U.S.C. § 851). In *United States* v. *Watts*, 519 U.S. 148, 156 (1997), the Court stated, "The [U.S. Sentencing] Guidelines state that it is 'appropriate' that facts

Parke v. *Raley*, 506 U.S. 20 (1992), is not to the contrary. In that case, the Court permitted a State to adopt, as part of its recidivist statute, a presumption that a previous, final, unchallenged conviction was valid. The defendant therefore could be required to produce evidence demonstrating the invalidity of the conviction to avoid a consequent sentence enhancement. *Id.* at 31. This case is very different. Rather than challenging the *validity* of the underlying conviction, petitioner argues that there has been no showing of *what* he was convicted of in the relevant respect. Applying *Parke* in this context would require the Court to indulge the presumption, not that the *conviction* is valid, but that the *police report* is valid.

The due process concern is heightened if consideration is given to matters that have not been subjected to adversarial testing under standardized procedures designed to ensure their reliability. Such testing occurs in trial through the adversarial process, resulting in the jury instructions and a verdict form. Such testing occurs at a guilty plea through the requirements of a plea colloquy, and through enforcing the "knowing and intelligent waiver" requirement. But there are precious few such protections available to ensure the reliability of facts at the sentencing stage.[13] If *Taylor* survives along with *Almendarez-*

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relevant to sentencing be proved by a preponderance of the evidence" (internal citation omitted). The Court also noted, but did not reach, the question whether "relevant conduct that would dramatically increase the sentence" – like the prior convictions in this case – "must be [proved by] clear and convincing evidence." *Ibid.*

[13] The police reports relied on by the court of appeals – representing double layers of hearsay – are a prime example of unreliable evidence. "Hearsay evidence has raised the greatest concern with reliability of evidence at sentencing." Young, *supra*,79 CORNELL L. REV. at 342. Evidence rules protect against the use of hearsay evidence at trial, and operate also to protect the defendant's rights under the Confrontation Clause as well as the Due Process Clause. *Ibid.* Without question, the police reports relied on by the courts below would be inadmissible at trial. According to Judge Becker, "the notion of 'reliable hearsay' is, theoretically at least, an oxymoron." Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years – The Effect of "Plain Meaning" Jurisprudence, the Need for an*

Torres, this Court should articulate the framework it identified in *Taylor*. Under that framework, the government must bear the burden of proving prior convictions through reliable evidence that reflects adversarial testing – a categorical, limited approach that advances the goals of fairness and ease of administration.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules, 60 GEO. WASH. L. REV. 857, 889 (1992). "Given the centrality of the district court's findings under the new regime, reliance upon inadmissible evidence at the sentencing stage presents a serious problem." *Id.* at 890. See also Young, *supra*, 79 CORNELL L. REV. at 343-351 (discussing other problems of unreliable evidence being used in sentencing proceedings).