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## The Prior Convictions Exception: Examining the Continuing Viability of Almendarez-Torres Under Alleyne

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# The Prior Convictions Exception: Examining the Continuing Viability of *Almendarez-Torres* Under *Alleyne*<sup>†</sup>

Meg E. Sawyer\*

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### I. Introduction

The Sixth Amendment of the United States Constitution guarantees criminal defendants “the right to a speedy and public trial, by an impartial jury.”<sup>1</sup> As established in *In re Winship*,<sup>2</sup> this jury guarantee also gives a criminal defendant the right to demand that a jury find him guilty beyond a reasonable doubt of “every fact necessary to constitute the crime with which he is charged.”<sup>3</sup> In the years following *In re Winship*, the Court expanded its interpretation of this reasonable-doubt standard by attempting to identify the type of facts necessary to prove a defendant’s criminal charge.<sup>4</sup> A distinction eventually emerged between facts that constituted elements of the crime and facts that constituted sentencing factors.<sup>5</sup> Elements of the crime were

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1. U.S. CONST. amend. VI.

2. 397 U.S. 358 (1970).

3. *Id.* at 364; *see also* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1103 (2001) (explaining that both the loss of liberty associated with criminal convictions and the need to blunt community concerns regarding the conviction of innocent people contributed to the formation of the reasonable-doubt standard); Note, *The Unconstitutionality of Determinate Sentencing in Light of the Supreme Court’s “Elements” Jurisprudence*, 117 HARV. L. REV. 1236, 1236 (2004) (describing *Winship* as “constitutionalizing” the reasonable-doubt standard).

4. *See* *Mullaney v. Wilbur*, 421 U.S. 684, 684 (1975) (assessing whether the prosecution must prove the absence of heat of passion on sudden provocation beyond a reasonable doubt in a homicide case).

5. *See* *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) (noting that this distinction was “unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s

charged in the indictment and proved beyond a reasonable doubt to a jury, while sentencing factors were entrusted to the sentencing judge under a lower standard of proof.<sup>6</sup> In 1987, Congress documented this distinction in the Federal Sentencing Guidelines (the Guidelines),<sup>7</sup> utilizing a complex and formulaic sentencing scheme that allowed judges to find particular sentencing factors by a preponderance of the evidence and enhance the severity of a defendant's punishment in correlation with said factors.<sup>8</sup> It is from this foundation that modern sentencing procedure has developed. Following the enactment of the Guidelines, the Court would spend several decades (what this Note refers to as "the *Apprendi*<sup>9</sup> revolution") attempting to square the use of sentencing factors found by judges, rather than juries, with Sixth Amendment jurisprudence.

After years of slowly chipping away at judicial fact-finding in the sentencing process, a narrow majority of the Court ended this complex saga of sentencing case law in *Alleyne v. United States*,<sup>10</sup> holding that any fact that increases the mandatory maximum or the mandatory minimum of a sentence is an "element" of the crime that must be submitted to the jury to be found beyond a reasonable doubt.<sup>11</sup> Thus, while the Sixth Amendment does not expressly guarantee criminal defendants the right to sentencing

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founding").

6. See Bibas, *supra* note 3, at 1102 (referencing *McMillan v. Pennsylvania*, 477 U.S. 79, 84–86, 91 (1986)); see also Benjamin J. Priestler, *Sentenced For a "Crime" the Government Did Not Prove: Jones v. United States and the Constitutional Limitations on Factfinding by Sentencing Factors Rather Than Elements of the Offense*, 61 LAW & CONTEMP. PROBS. 249, 249 (1998) (explaining that unlike elements of the crime, sentencing factors affect only the severity of the sentence imposed, not the defendant's guilt or innocence, and may be found by a preponderance of the evidence by the judge).

7. U.S. SENTENCING GUIDELINES MANUAL (2004).

8. See *id.* § 3B1.4 (enhancing a defendant's sentence, for example, if he uses a minor in the commission of the crime).

9. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi v. New Jersey* marked the first case in which the Court drastically returned sentence-related fact-finding to the jury. See *id.* at 466 (holding that the Constitution requires 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).

10. 133 S. Ct. 2151 (2013).

11. *Id.* at 2153.

by jury, the *Alleyne* Court ultimately determined, in an expansive interpretation of the Constitution, that the Sixth Amendment encompasses the right to have a jury find, beyond a reasonable doubt, any factor that enhances a criminal sentence.<sup>12</sup>

Despite the finality of the *Alleyne* decision, however, one exception to the rule remains—prior convictions. During the course of the *Apprendi* revolution, the Court carved out one narrow exception in the sentencing process for recidivism; under its holding in *Almendarez-Torres v. United States*,<sup>13</sup> the Court concluded that prior convictions are “sentencing factors” which may be determined by a judge by a preponderance of the evidence, and which need not be alleged in the indictment or proven to a jury.<sup>14</sup> While the holding in *Alleyne* seemed to signal an end to judicial fact-finding within the sentencing process, the Court refused to address whether its decision had any impact on *Almendarez-Torres*, thereby leaving the prior convictions exception undisturbed, albeit on shaky ground.<sup>15</sup> As a result, lower courts are now faced with a dilemma: despite continuing to uphold *Almendarez-Torres* as good law, many courts believe that the exception has been completely eroded by the Sixth Amendment jurisprudence of the *Apprendi* revolution.<sup>16</sup> Regrettably, if the prior convictions exception is no longer valid, innumerable criminal defendants have received unconstitutional sentences under the flawed rule of *Almendarez-Torres*.<sup>17</sup> Thus, it

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12. See Molly Gulland Gaston, *Never Efficient, but Always Free: How the Juvenile Adjudication Question Is the Latest Sign That Almendarez-Torres v. United States Should Be Overturned*, 45 AM. CRIM. L. REV. 1167, 1167–68 (2008) (claiming that the Court’s decision to end judicial fact-finding within the sentencing process signaled a return to the Framers’ intent that the Sixth Amendment should protect individuals from an over-punitive government).

13. 523 U.S. 224 (1998).

14. See *id.* at 244 (describing the judicial system’s longstanding tradition of treating recidivism as a factor of punishment only).

15. See *Alleyne*, 133 S. Ct. at 2160 n.1 (reasoning that because neither party contested *Almendarez-Torres*, *Alleyne* is not the proper vehicle to address the validity of the prior convictions exception).

16. See *Velasquez v. Faulk*, No. 12-CV-02057-WYD, 2014 WL 464000, at \*21 (D. Colo. Feb. 5, 2014) (“Even though the recidivism exception announced in *Almendarez-Torres* has been eroded, the Supreme Court has not overruled the exception.”).

17. See Brief for Defendant-Appellant at 11, *United States v. Murray*, No. 06-2950-CR, 2006 WL 5251426, at \*10 (2d Cir. Aug. 16, 2006) (noting that

seems the Supreme Court will eventually need to address the viability of *Almendarez-Torres* under *Alleyne* so that lower courts can respond to criminal defendants' challenges with a more definitive answer in regards to the prior convictions exception.<sup>18</sup>

By analyzing *Almendarez-Torres* and its questionable viability under the Court's recent holding in *Alleyne*, this Note will illustrate that the Supreme Court should *not* overturn the prior convictions exception but rather expressly sustain the rule as good law. Part II of this Note discusses the landscape of sentencing law by evaluating the history of the Guidelines and the inherent conflict between the Guidelines and Sixth Amendment jurisprudence. Part III analyzes the *Apprendi* revolution and the complicated web of case law that addressed this constitutional conflict and built today's criminal sentencing system. Finally, Part IV argues that *Almendarez-Torres* should be upheld for two main reasons: (1) the prior convictions exception is actually consistent with constitutional principles and (2) without the prior convictions exception, the criminal justice system would face administrative burdens that far outweigh any benefit of overturning the case.

## II. History of the Federal Sentencing Guidelines

Prior to the enactment of the Federal Sentencing Guidelines, judges enjoyed "nearly unlimited discretion" when sentencing criminal defendants.<sup>19</sup> Under this "indeterminate sentencing system," the defendant's sentence was determined not only by the

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sentencing criminal defendants under a flawed prior convictions exception would violate "the fundamental imperative that the Court maintains absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond a reasonable doubt requirements" (citing *Shepard v. United States*, 544 U.S. 13, 27–28 (2005)).

18. See Mike Gottlieb, *Reconciling Ceilings and Floors: Alleyne v. United States*, SCOTUSBLOG (June 17, 2013, 9:39 PM), <http://www.scotusblog.com/2013/06/reconciling-ceilings-and-floors-alleyne-v-united-states/> (last visited Jan. 26, 2015) (discussing the uncertainty of future cases under the holding in *Alleyne* and the subsequent possibility of challenges from defendants during the sentencing process) (on file with the Washington and Lee Law Review).

19. Shannon Broderick, *Blakely v. Washington Confuses Federal Courts: A Look into the Constitutionality of Federal Sentencing Guidelines*, 32 W. ST. U. L. REV. 243, 244 (2005).

crime itself but also by the judge's own discretionary considerations, such as the character of the individual defendant.<sup>20</sup> The United States Parole Commission was then given the ultimate authority to determine when the offender was "sufficiently rehabilitated to merit release."<sup>21</sup> Not surprisingly, this broad grant of judicial discretion resulted in wide disparities among sentences for similar crimes: "[T]here undoubtedly are both Santa Clauses and Scrooges on the bench. An offender's punishment should not turn on the luck of the judicial draw or, worse, on a defense attorney's ability to maneuver the offender's case before a favorable judge."<sup>22</sup> By the early 1970s, disapproval of this discretionary sentencing system and its uncertain results grew into to what would become a revolution in sentencing procedure.<sup>23</sup>

#### *A. Navigating the Grid: The Mechanics of the Sentencing System*

In 1984, President Ronald Reagan introduced a "new era"<sup>24</sup> of criminal justice, signing into law the Sentencing Reform Act of 1984 (SRA).<sup>25</sup> The Act established the United States Sentencing

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20. See *id.* (stating that under the system of indeterminate sentencing, a judge's discretion included "any bias or factors" he wished to consider); Todd Witten, Note, *Sentence Entrapment and Manipulation: Government Manipulation of the Federal Sentencing Guidelines*, 29 AKRON L. REV. 697, 699 (1996) (suggesting that as long as the sentence imposed did not exceed broad, statutory limits, federal judges' discretion "seemed almost infinite").

21. William J. Powell & Michael T. Cimino, *Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?*, 97 W.VA. L. REV. 373, 378 (1995).

22. Witten, *supra* note 20, at 700 n.22 (citing Albert W. Alschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 901 (1991)).

23. See Adam Ford, Note, *Three Shots into a Black Santa That May Unwittingly Start an Overhaul of America's Criminal System: Apprendi v. New Jersey and the Restructuring of the Federal Sentencing Guidelines*, 12 SETON HALL L. REV. 249, 252–53 (2001) ("[T]hese factors produced an unusual coalescence of the left, which cited concern over disparate sentences, and the right, which charged that the criminals were 'getting off easy.' These sides joined forces to overhaul the entire criminal system in America.").

24. *Impact of Uncle Sam's New Crime Law*, U.S. NEWS AND WORLD REPORT 50 (Oct. 22, 1984).

25. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–

Commission (the Commission),<sup>26</sup> which was charged with the responsibility of promulgating a new, more uniform sentencing system.<sup>27</sup> In 1987, the Commission completed the U.S. Sentencing Guidelines Manual,<sup>28</sup> which bound judges to specific ranges of punishment for particular crimes and required that all facts relevant to the sentence be found by a preponderance of the evidence.<sup>29</sup> Establishing a “modified real offense” system, the Commission based the length of an offender’s sentence not only on the crime itself, but also on an offender’s actual behavior.<sup>30</sup> The new guidelines directed the judge to follow a series of steps involving a formulated sentencing grid to calculate a score that would indicate the appropriate sentence.<sup>31</sup> First, the judge identified the “base offense level”<sup>32</sup> using the statutory index to

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3586, 28 U.S.C. §§ 991–998 (2012)); *see also* Broderick, *supra* note 19, at 244 (“After enduring sentence disparities for years, President Ronald Reagan decided to take action to resolve the injustice.”).

26. 98 Stat. at 2017 (codified as amended at 28 U.S.C. § 991 (2012)).

27. *See* 98 Stat. at 2019 (codified as amended at 28 U.S.C. § 994(a)(1) (2012)) (delegating the task of promulgating guidelines for use by a sentencing court to the Commission, specifically by an affirmative vote of at least four members); *see also* David C. Holman, *Death by a Thousand Cases: After Booker, Rita, and Gall, the Guidelines Still Violate the Sixth Amendment*, 50 WM. & MARY L. REV. 267, 271–72 (2008) (mentioning the ambiguity of the Act’s directives).

28. U.S. SENTENCING GUIDELINES MANUAL (2004); *see* Broderick, *supra* note 19, at 245 (emphasizing that the Guidelines, while not considered actual statutes, were binding on the courts).

29. *See* U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 (“The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns . . . .”); Eric P. Berlin, *The Federal Sentencing Guidelines’ Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187, 187 (1993) (addressing the Guidelines’ principal aim of curtailing judicial discretion and establishing a sense of certainty within the sentencing system). The Guidelines also addressed a shift in the societal view of criminal punishment, replacing rehabilitation with incapacitation and retribution. *See* Ford, *supra* note 23, at 253 (noting an increased belief that the rehabilitation of criminals was impossible).

30. Bibas, *supra* note 3, at 1169; *see also* James E. Felman, *The Fundamental Incompatibility of Real Offense Sentencing Guidelines and the Federal Criminal Code*, 7 FED. SENT. R. 125, 125 (1994) (stating that this type of system placed more emphasis on what the offender actually did during the offense).

31. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2004).

32. *Id.* § 1B1.1(a)(1)–(2).



locate the statute of conviction.<sup>33</sup> The judge subsequently adjusted the offense level by adding specific offense factors and any appropriate adjustments listed by the Guidelines.<sup>34</sup> Next, the judge used the Guidelines to calculate the offender's criminal history category.<sup>35</sup> After determining the base offense level and the criminal history score, the judge consulted the Guidelines' sentencing grid to locate the meeting point of the two scores.<sup>36</sup> This intersection provided the judge with a range of months for which the offender could be incarcerated.<sup>37</sup> The judge could then depart from the calculated range by finding unusual factors that were not adequately considered by the Commission.<sup>38</sup> "If the Commission has done its job as it hopes, the resulting term of confinement . . . should strike most observers as about the typical time such an offender would have served prior to the Guidelines."<sup>39</sup>

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33. *Id.*; see also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 6 (1988). Justice Breyer used the following scenario to illustrate how a federal judge should utilize the Guidelines to locate a base offense level: A bank robber with one serious prior conviction robs a bank of \$40,000 while pointing a gun at the bank teller. *Id.* Using the index, the judge must look up "Robbery" under § 2B3.1 of the Guidelines. *Id.* The judge must then locate this section in the Manual and find the base offense level, which is "Level 18." *Id.*

34. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)(2)–(3). Specific offense factors are listed under each individual offense section; for example, under § 2B2.3 for "Trespass," the base offense level increases by four levels if the offense occurred at the White House. *Id.* § 2B2.3(b)(2). The Guidelines' third chapter lists general adjustments; for example, using a minor to commit a crime increases a base offense level by two levels. *Id.* § 3B1.4; see also Breyer, *supra* note 33, at 6 (continuing the "Robbery" scenario, the base offense level would increase—based on offense-specific factors—by two levels for the money stolen and three levels for the use of a gun, thereby amounting to "Level 23").

35. *Id.* § 1B1.1(a)(6); see also Breyer, *supra* note 33, at 6 (continuing the "Robbery" scenario, § 4A1.1 of the Guidelines would assign three points to the offender's criminal history score for one prior serious conviction).

36. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)(7).

37. *Id.* § 1B1.1(a)(8); see also Breyer, *supra* note 33, at 7 (concluding the "Robbery" scenario, an offense level of "23" with three points for the offender's prior conviction would yield a range of fifty-one to sixty-three months in prison for the armed robbery by a previously convicted felon).

38. See 18 U.S.C. § 3553(b) (2012) (allowing the sentencing judge to depart from the prescribed range upon the finding of "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission").

39. Breyer, *supra* note 33, at 7.

*B. Conflict Between the Guidelines and the Sixth Amendment*

Despite the initial support for this sentencing reform,<sup>40</sup> the overly complex and lengthy Sentencing Guidelines quickly fell into disfavor.<sup>41</sup> Critics of the Guidelines, including one of its most notable architects, Justice Stephen Breyer, denounced the system's complicated, mechanical sentencing formula as well as its excessive provisions and distinctions.<sup>42</sup> Other critics attacked the system's replacement of deliberation and moral judgment: "By replacing the case-by-case exercise of human judgment with a mechanical calculus, we do not judge better or more objectively, nor do we judge worse. Instead, we cease to judge at all."<sup>43</sup>

Most important, and for the purposes of this Note, application of the new Guidelines revealed a tension between the sentencing system and the Sixth Amendment. Under the new sentencing system, the judge made critical findings regarding the defendant's conduct in order to calculate an appropriate sentence—these findings included certain "sentencing factors" that had the potential to increase the defendant's statutory exposure to a longer, more severe sentence.<sup>44</sup> These sentencing

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40. See M.K.B. Darmer, *The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533, 540 (2005) (noting that liberals and conservatives alike sponsored the bill, including Senators Kennedy, Hatch, Biden, and Thurmond).

41. See Linda Greenhouse, *Federal Sentencing Guidelines Criticized by a Key Supporter*, N.Y. TIMES, Nov. 21, 1998, at A10 ("[P]unishment in federal courts is . . . marked by a technical language—'base levels,' 'categories,' 'points,' 'scores,' and so on—that resonates like the jargon of actuaries or tax accountants . . .").

42. See *id.* (mentioning the dozens of senior federal judges who announced that they would refuse to hear certain cases based on the severity of the Guidelines).

43. KATE SMITH & JOSÉ CABRENES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 78, 81–83 (1998); see also Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 38–39 (2005) ("The defendant is now a two-dimensional character . . . his vertical axis an offense level and his horizontal axis a criminal history category. There is no depth or detail . . . only an initial movement within the grid pursuant to points or levels . . .").

44. See *United States v. Watts*, 519 U.S. 148, 152 (1997) ("Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." (citing U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(2) cmt. background (1987))).

factors appeared both in criminal statutes and in the Guidelines themselves.<sup>45</sup> Criminal statutory enhancements typically increased the maximum sentence that the judge could impose, or in some instances, triggered the mandatory minimum sentence.<sup>46</sup> Thus, if the judge found that a certain circumstance existed in connection with the commission of a crime, “the duration of the defendant’s incarceration would be substantially longer than it would have been in the absence of the circumstance.”<sup>47</sup> The Guidelines functioned in a similar manner in that “[t]he relevant conduct provisions [were] designed to channel the sentencing discretion of the district courts and to make mandatory the consideration of factors that previously would have been optional.”<sup>48</sup> Examples of such sentencing factors include the Guidelines’ aforementioned list of adjustments, such as whether the offense constituted a hate crime,<sup>49</sup> and offense-based characteristics, such as whether the offense involved the reckless operation of a vehicle.<sup>50</sup> Accordingly, if the judge found any such sentencing factors, he could then increase the defendant’s base offense level, which would in turn lead to a lengthier sentence within the prescribed range.<sup>51</sup>

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(amended 2004)).

45. See Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1143–44 (2010) (noting that statutory factors are typically mandatory in that courts must apply them when the facts support the enhancement).

46. See *id.* (referencing 18 U.S.C. § 924 (2012)).

47. Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 51 CALIF. L. REV. 61, 64 (1993). For example, under 21 U.S.C. § 841, the legislature set a minimum term of ten years’ imprisonment if a defendant is convicted of knowingly manufacturing or distributing a controlled substance, for example “1 kilogram or more of a mixture or substance containing a detectable amount of heroin.” 21 U.S.C. § 841(a)–(b)(1)(A) (2012). If it is found that death or serious bodily injury resulted from the use of such substances, however, the statutory minimum is raised to at least twenty years’ imprisonment. *Id.*

48. Darmer, *supra* note 40, at 544 n.54 (citing *Witte v. United States*, 515 U.S. 389, 402 (1995)).

49. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (2004).

50. *Id.* § 2A1.4(a)(2)(B).

51. See *id.* § 1B1.1(a)(7) (indicating that the higher the offense level sits on the sentencing grid’s axis, the higher the sentencing range will spread). The Court expanded on these sentencing factors in *Witte v. United States*, explaining the ways in which the Guidelines and statutes work in tandem:

Herein lies the central conflict between the Guidelines and the Sixth Amendment. The Federal Sentencing Guidelines gave judges the responsibility of finding sentencing factors by a preponderance of the evidence.<sup>52</sup> In certain instances, however, the judge's findings would necessarily go beyond the jury's guilty verdict or those facts admitted by the defendant at the plea hearing,<sup>53</sup> thereby challenging the long-held assumption that "proof of a criminal charge beyond a reasonable doubt is constitutionally required."<sup>54</sup> As Professor Mark Osler has argued, the defendant's constitutional rights are lost "when facts are proven at a lower standard before the judge, rather than beyond a reasonable doubt before the jury."<sup>55</sup> The Guidelines' shift away from jury fact-finding created an obvious conflict between the jury trial requirements of the Sixth Amendment and the judge's ability to enhance a defendant's sentence based on factors that were not found by the jury.<sup>56</sup> As expected, this conflict complicated courts' navigation of the new, determinate sentencing system and raised the question of whether these

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The relevant conduct provisions of the Sentencing Guidelines, like their criminal history counterparts and the recidivism statutes . . . are sentencing enhancement regimes evincing the judgment that a particular offense should receive a more serious sentence within the authorized [statutory] range if it was either accompanied by or preceded by additional criminal activity.

515 U.S. at 402.

52. See U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements . . ."); *McMillan v. Pennsylvania*, 477 U.S. 79, 80 (1986) ("The preponderance standard satisfies due process. Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all.").

53. See *Darmer*, *supra* note 40, at 544 ("For example, even if the evidence introduced at trial was limited to powder cocaine, at sentencing the judge may find that the defendant also distributed heroin in connection with the overall drug distribution scheme.").

54. *In re Winship*, 397 U.S. 358, 362 (1970).

55. Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. REV. 649, 680 (2003). "Fact-finding was historically a function of trial, and its shift to sentencing has resulted in an unsettling loss of rights." *Id.* at 652.

56. See *Broderick*, *supra* note 19, at 251 (describing the issue of whether the Guidelines violate the Sixth Amendment in situations when a judge, not a jury, finds a fact that leads to an enhanced sentence).

enhancement factors were simply sentencing factors to be found by the judge or actual elements of the offense to be found by the jury.<sup>57</sup>

As discussed in Part I, this Note focuses on one enhancement factor in particular—prior convictions. Recidivist enhancements,<sup>58</sup> which increase a sentence based on the defendant's prior criminal history, are traditionally justified under the main theories of punishment: "Indeed, the federal sentencing guidelines, which rely on criminal history to determine a defendant's sentencing range, explicitly state that a defendant's past criminal conduct is relevant to the four purposes of sentencing set forth by federal statute: retribution, deterrence, incapacitation, and rehabilitation."<sup>59</sup> As evidenced by the holding in *Almendarez-Torres*, the Supreme Court has carved out a clear distinction between recidivist enhancements and nonrecidivist enhancements in the context of sentencing.<sup>60</sup> While the Court

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57. See *Apprendi v. New Jersey*, 530 U.S. 466, 466 (2000) (addressing whether the Sixth Amendment's notice and jury trial guarantees require that any fact that increases the maximum penalty for a crime be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt); Katie M. McVoy, Note, "What I Have Feared Most Has Now Come to Pass": Blakely, Booker, and the Future of Sentencing, 80 NOTRE DAME L. REV. 1613, 1614 (2005) (describing how the United States Supreme Court began to cast doubt on the constitutionality of determinate guidelines systems under the Sixth Amendment).

58. See Russell, *supra* note 45, at 1143 (explaining that nonrecidivist enhancements are those that increase a sentence based on the circumstances of an offense).

59. *Id.* at 1150.

The Comprehensive Crime Control Act sets forth four purposes of sentencing. A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.

*Id.* at 1150 n.78 (citing U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 introductory cmt. (2004)).

60. See *Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998) ("[T]he lower courts have almost uniformly interpreted statutes (that authorize higher sentences for recidivists) as setting forth sentencing factors, not as

ultimately determined that a jury must find any fact that increases the prescribed range of penalties to which a criminal defendant is exposed,<sup>61</sup> prior convictions remain unique in that a judge may find their existence at a lower standard of proof despite the fact that such a conviction could raise the defendant's sentencing range.<sup>62</sup> Whether or not this prior convictions exception remains viable under the Court's recent holding in *Alleyne v. United States*, however, requires a look back at the case law that has attempted to address this conflict.

### III. The Saga of Sentencing Case Law

#### A. *McMillan v. Pennsylvania*: Introducing "Sentencing Enhancements"

One of the first major cases to lay the groundwork for the Sixth Amendment sentencing debate was *McMillan v. Pennsylvania*.<sup>63</sup> In this 5–4 decision, the Court coined "the term 'sentencing factor' to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge."<sup>64</sup> The

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creating new crimes . . .").

61. See *Alleyne v. United States*, 133 S. Ct. 2151, 2153 (2013) (claiming that the Sixth Amendment provides defendants with the right to have a jury find those nonrecidivist factors beyond a reasonable doubt).

62. See *Almendarez-Torres*, 523 U.S. at 242 ("[T]he Court said long ago that a State need *not* allege a defendant's prior conviction in the indictment or information that alleges the elements of an underlying crime.").

63. 477 U.S. 79 (1986); see also John M. Parsese, *Putting the Tail Between the Dog's Legs: The Danger of Apprendi v. New Jersey*, 21 QUINNIPIAC L. REV. 645, 654 (2002) (referencing Mark D. Knoll & Richard G. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of McMillan v. Pennsylvania*, 22 SEATTLE U. L. REV. 1057, 1058 (1999)).

*McMillan* marked the birth of the "sentencing factor," a concept that radically restructured roles of judge and jury by shifting to the court the ability to make at sentencing, and by a preponderance of the evidence, factual determinations that, prior to *McMillan*, had to be made by juries, at trial, and beyond a reasonable doubt.

*Id.* It is important to note that at the time *McMillan* was decided, the federal guidelines system was in its "developmental stages," and only a few states had sentencing guidelines of their own. NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY 450 (3d ed. 2013).

64. *Apprendi v. New Jersey*, 530 U.S. 466, 485 (2000).

case involved a challenge to Pennsylvania's Mandatory Minimum Sentencing Act,<sup>65</sup> which required a mandatory minimum sentence of five years if the judge found by a preponderance of the evidence that the defendant "visually possessed a firearm" during the commission of certain underlying offenses.<sup>66</sup> The statute further provided that "visible possession" was not an element of the crime but rather a sentencing factor.<sup>67</sup> In determining whether the prosecution must prove the possession factor beyond a reasonable doubt, the Court relied on *Patterson v. New York*,<sup>68</sup> a fundamental case in the debate surrounding constitutional sentencing procedures.<sup>69</sup> *Patterson* placed great weight on the state legislature's duty to define crimes and prescribe penalties: "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government."<sup>70</sup> Under *Patterson*, the legislature's definition of the crime is usually dispositive, and therefore the prosecution need only prove those elements *included in the definition* of the offense beyond a reasonable doubt.<sup>71</sup>

In keeping with *Patterson*, the *McMillan* Court held that "a State may treat visible possession of a firearm as a sentencing factor rather than an element of the offense that must be proved beyond a reasonable doubt."<sup>72</sup> The Pennsylvania legislature expressly provided that visual possession was a sentencing consideration, not an element of the offense.<sup>73</sup> The fact that the

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65. 42 PA. CONS. STAT. § 9712 (1982).

66. See *McMillan*, 477 U.S. at 79 (noting that the sentencing factor was meant to prevent judges from imposing a sentence of less than five years for the underlying felony).

67. See *id.* (stating that the possession factor does not authorize a sentence in excess of that otherwise allowed, or in other words, in excess of the maximum prescribed sentence).

68. 432 U.S. 197 (1977).

69. See Jason E. Barsanti, Note, *Ring v. Arizona: The Sixth and Eighth Amendments Collide: Out of the Wreckage Emerges a Constitutional Safeguard for Capital Defendants*, 31 PEPP. L. REV. 519, 530 (2004) (claiming that *Patterson v. New York* played an "integral" role in the decisions of *Apprendi v. New Jersey* and *Ring v. Arizona*).

70. See *Patterson*, 432 U.S. at 201 (referencing *Irvine v. California*, 347 U.S. 128, 134 (1954)).

71. See *McMillan*, 477 U.S. at 85 (referencing *Patterson*, 432 U.S. at 210).

72. *Id.* at 79.

73. See *id.* at 88 (stating that there was no indication that the statute had

legislature decided to base the severity of the sentence on the presence (or absence) of a particular fact did not automatically make that fact an “element” of the offense.<sup>74</sup> Rather, the visible possession factor “[came] into play only *after* the defendant [had] been found guilty of one of the enumerated crimes beyond a reasonable doubt.”<sup>75</sup> Additionally, the provision at issue only raised the mandatory *minimum* sentence, thereby limiting the sentencing court to a penalty already within the range that otherwise applied.<sup>76</sup>

In response to the defendants’ Sixth Amendment claim (that the jury must determine all ultimate facts concerning the offense committed), the Court reiterated that the Pennsylvania legislature is free to treat visible possession as a sentencing consideration, and as a result, there is no right to jury sentencing, even if the sentence turns on a specific finding of fact.<sup>77</sup> The *McMillan* Court did maintain, however, that there are constitutional limits to a state’s power to define the elements of a criminal offense.<sup>78</sup> Justice Stevens elaborated on these constitutional limitations in his dissent, claiming that “[i]f a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a ‘fact necessary to constitute the crime.’”<sup>79</sup> Justice Stevens further argued that the criminally accused are owed a level of “accurate factfinding” and that by allowing a state legislature to disregard such safeguards, the Court violates the beyond-a-reasonable-

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“been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense”).

74. See *id.* at 79 (referencing *Patterson*, 432 U.S. at 214).

75. *Id.* at 79–80 (emphasis added).

76. See *id.* at 87–88 (making special note of the fact that the statute did not raise the *maximum* penalty for the crime, a distinction that proves significant in future sentencing cases).

77. See *id.* (referencing *Spaziano v. Florida*, 468 U.S. 447, 459 (1984)).

78. See *id.* at 86 (“[I]n certain limited circumstances *Winship*’s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged.”). The *McMillan* Court did not specifically identify, however, what kind of legislative action would run afoul of those limits. See *id.* (noting that the Court would not attempt to precisely define those constitutional limits as mentioned in *Patterson*).

79. *Id.* at 103 (Stevens, J., dissenting).



doubt standard of *In re Winship*.<sup>80</sup> Justice Stevens would revisit and remedy these same concerns fourteen years later when writing the majority opinion in *Apprendi v. New Jersey*.<sup>81</sup>

### B. *Almendarez-Torres v. United States*

Twelve years after *McMillan*, the Court continued its assessment of determinate sentencing in *Almendarez-Torres v. United States*, this time in the context of recidivist enhancements. According to 8 U.S.C. § 1326(a),<sup>82</sup> it is unlawful for a deported alien to reenter the United States without special permission.<sup>83</sup> Violation of § 1326(a) triggers a maximum term of two years' imprisonment.<sup>84</sup> Subsection (b)(2) provides for a maximum term of twenty years' imprisonment if the alien's deportation is "subsequent to a conviction for commission of an aggravated felony."<sup>85</sup> Defendant Hugo Almendarez-Torres pled guilty to violating § 1326, having been deported pursuant to three convictions for aggravated felonies and subsequently reentering the United States without authorization.<sup>86</sup> The district court sentenced Almendarez-Torres to eighty-five months' imprisonment under the applicable Guidelines range, and he appealed.<sup>87</sup> Almendarez-Torres argued that the Government was required to allege his prior convictions in the indictment and prove those convictions beyond a reasonable doubt to the jury.<sup>88</sup> Given that the indictment failed to include his aggravated felony

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80. *See id.* at 102 ("It would demean the importance of the reasonable-doubt standard—indeed, it would demean the Constitution itself—if the substance of the standard could be avoided by nothing more than a legislative declaration that prohibited conduct is not an 'element' of a crime.").

81. *See Apprendi v. New Jersey*, 530 U.S. 466, 467 (2000) (reiterating the constitutional limits to "[s]tates' authority to define away facts necessary to constitute a criminal offense" (citing *McMillan*, 477 U.S. at 85–88)).

82. 8 U.S.C. § 1326(a) (2012).

83. *Id.*

84. *Id.*

85. *Id.* § 1326(b)(2).

86. *Almendarez-Torres v. United States*, 523 U.S. 224, 224 (1998).

87. *Id.* at 224.

88. *See id.* at 223 (referencing *Hamling v. United States*, 418 U.S. 87, 117 (1974), which provided that an indictment must set forth each element of the crime charged).

convictions, *Almendarez-Torres* claimed that the court could only invoke the maximum imprisonment of two years as authorized by § 1326.<sup>89</sup> The Fifth Circuit upheld the district court's sentence, and a closely divided Supreme Court affirmed, concluding that Congress may treat a recidivist enhancement based on a defendant's prior convictions as a sentencing factor, rather than an element of the crime.<sup>90</sup> The Court therefore determined that subsection (b)(2) was not an element of the crime but rather a penalty provision to be found by a preponderance of the evidence by a judge.<sup>91</sup>

Like *McMillan*, the *Almendarez-Torres* Court was split 5–4, with the narrow majority consisting of Chief Justice Rehnquist and Justices O'Connor, Kennedy, Thomas, and Breyer.<sup>92</sup> Writing for the Court, Justice Breyer approached the sentencing issue as one of statutory construction.<sup>93</sup> The majority first looked to the subject matter of the statute (recidivism) to determine whether Congress intended for subsection (b)(2) to constitute an element of the crime or a sentencing factor.<sup>94</sup> Emphasizing the well-established tradition of recidivism, the Court maintained that the prior commission of a serious crime “is as typical a sentencing factor as one might imagine,”<sup>95</sup> and consequently, lower courts have “almost uniformly” interpreted statutes that increase sentences for recidivists as providing sentencing factors, rather

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89. See *id.* at 227 (noting that two years' imprisonment was the maximum penalty authorized for an offender without a prior conviction).

90. See *id.* at 225 (stating that a legislature's decision to treat recidivism as a sentencing factor does not exceed constitutional limits on the legislature's authority to define the elements of a crime).

91. See *id.* at 224–25 (concluding that the prosecution did not need to allege the defendant's prior convictions in the indictment or prove said convictions to a jury beyond a reasonable doubt in order to trigger the enhancement of the statutory maximum).

92. See *id.* at 226 (listing the division of votes).

93. See *Bibas*, *supra* note 3, at 1108 (suggesting that the holding in *Almendarez-Torres* turned on congressional intent, given that legislatures traditionally define the elements of an offense as provided in *McMillan*).

94. See *Almendarez-Torres*, 523 U.S. at 228–29 (explaining that while an indictment must set forth all elements of the crime charged, it need not allege factors only relevant to the sentencing procedure (citing *Hamling v. United States*, 418 U.S. 87, 117 (1974))).

95. See *id.* at 230 (listing various statutes that mandate increased sentences for recidivists).

than elements of the offense.<sup>96</sup> After reaffirming its endorsement of this longstanding tradition,<sup>97</sup> the Court then turned its attention to an examination of the statute's language.

Under 8 U.S.C. § 1326, subsection (a) provides that, "subject to subsection (b),"<sup>98</sup> any alien who has been deported and since reentered the United States illegally shall be fined or imprisoned for no more than two years.<sup>99</sup> Subsection (b)(2) provides that, "notwithstanding subsection (a),"<sup>100</sup> any alien as described in subsection (a) whose deportation was subsequent to a conviction for commission of an aggravated felony shall be fined or imprisoned no more than twenty years.<sup>101</sup> The majority concluded that the phrases "subject to subsection (b)" and "notwithstanding subsection (a)" clearly demonstrate that Congress intended for the crime set forth in subsection (a) to be "subject to" subsection (b)'s enhanced penalties when the alien is also a felon.<sup>102</sup> If Congress had intended for subsection (b) to set forth substantive crimes, it would make little sense to include the phrases "subject to" and "notwithstanding."<sup>103</sup>

The majority also pointed to the circumstances surrounding subsection (b)'s adoption. When Congress added subsection (b) to § 1326 in 1988, the original language of subsection (a) was as follows: "Any alien who has been . . . deported . . . and thereafter enters . . . the United States . . . *shall be guilty of a felony*, and upon conviction thereof, be punished by imprisonment of not more than two years . . ."<sup>104</sup> Examining this operative language, the majority noted that at the time of the amendment,

96. *See id.* (referencing a string of cases that support the traditional interpretation of recidivism as a sentencing factor, not an offense element).

97. *See Graham v. West Virginia*, 224 U.S. 616, 629 (1912) (concluding that recidivism speaks to the punishment of the offense, rather than the commission).

98. 8 U.S.C. § 1326(a) (2012).

99. *Id.*

100. *Id.* § 1326(b)(2).

101. *Id.*

102. *Almendarez-Torres v. United States*, 523 U.S. 224, 231–32 (1998) (citing § 1326).

103. *See id.* (stating that federal courts have always presumed that Congress did not intend for a defendant to be cumulatively punished for two crimes where one is a lesser included offense of the other).

104. 8 U.S.C. § 1326(a) (1988) (emphasis added) (amended 1990).

subsection (a) addressed the offender's guilt, while subsection (b) referred only to punishment, thereby indicating that Congress solely intended to implement a sentencing consideration.<sup>105</sup> While the dissent argued that Congress eventually struck the aforementioned language ("shall be *guilty* of . . .") from subsection (a) pursuant to the Immigration Act of 1990,<sup>106</sup> the majority maintained that the 1990 amendment was merely a housekeeping matter and did not suggest any intention to change the relationship between subsection (a) and subsection (b).<sup>107</sup> Moreover, the heading of subsection (b), "Criminal *penalties* for reentry of certain deported aliens,"<sup>108</sup> further supported the majority's interpretation.<sup>109</sup> While a title containing the word "penalties" is not necessarily dispositive, the majority argued that legislative history demonstrates that Congress intentionally drafted subsection (b) to signal a provision that addresses penalties, rather than a substantive crime.<sup>110</sup>

Finally, the majority concluded that any contrary interpretation would "risk unfairness."<sup>111</sup> If subsection (b) provided for a separate crime, rather than a sentencing factor, the Government would need to prove beyond a reasonable doubt

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105. See *Almendarez-Torres*, 523 U.S. at 232–34.

Although one could read the language, "any alien described in [subsection (a)]," standing alone, as importing subsection (a)'s elements into new offenses defined in subsection (b) . . . it seems more likely that Congress simply meant to "describe" an alien who, in the words of the 1988 statute, was "guilty of a felony" defined in subsection (a) and "convict[ed] thereof."

*Id.*

106. Pub. L. No. 100-649, 104 Stat. 5059 (codified as amended at 8 U.S.C. § 1101 (2012)).

107. See *Almendarez-Torres*, 523 U.S. at 233–34 (explaining that the amendment to subsection (a) was one of many amendments under the Immigration Act of 1990 meant to "uniformly" simplify the phrasing of various penalty provisions in the Immigration and Naturalization Act).

108. 8 U.S.C. § 1326 (2012) (emphasis added).

109. See *Almendarez-Torres*, 523 U.S. at 324 (claiming that the heading of a section is helpful in resolving doubts regarding the meaning of a statute (referencing *Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519 (1947))).

110. See *id.* (listing various legislative records referring to subsection (b) as a penalty scheme). "The statutory language is somewhat complex. But after considering the matter in context, we believe the interpretative circumstances point significantly in one direction." *Id.* at 238.

111. *Id.* at 234.

to a jury that the defendant was deported subsequent to a conviction for an aggravated felony.<sup>112</sup> Introducing evidence of the defendant's prior convictions, however, would risk significant prejudice.<sup>113</sup> The majority noted that even if a defendant's stipulation concealed the name and the details of the prior offense from the jury, "the government is entitled to prove a prior felony offense through introduction of probative evidence."<sup>114</sup> Thus, jurors would ultimately discover (whether from the indictment, the judge, or the prosecutor) that the defendant committed an aggravated felony.<sup>115</sup> The majority, therefore, concluded that Congress, in adding subsection (b) to § 1326, could not have intended "to create this kind of unfairness in respect to facts that are almost never contested."<sup>116</sup> While the majority did not spend a significant amount of time discussing this issue, the risk of prejudice would remain one of the chief factors preserving the recidivist exception in *Almendarez-Torres*.<sup>117</sup> As argued in the final section of this Note, the risk of prejudice may in fact be an integral reason to uphold *Almendarez-Torres* as good law post-*Alleyne*.

After examining the statute itself, the majority turned its attention to reconciling *Almendarez-Torres* with the Court's reasoning in *McMillan v. United States*. While the two cases are similar in many ways,<sup>118</sup> they also differ in two major respects.

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112. *Id.* at 234–35.

113. *See id.* at 235 (noting that, as the Court concluded in *Old Chief v. United States*, 519 U.S. 172, 185 (1997), the "nature" of the prior offense would inevitably give rise to prejudice).

114. *See id.* at 235 (referencing *Old Chief v. United States*, 519 U.S. 192, 178–79 (1997) (citing *United States v. Breitreutz*, 8 F.3d 688, 690 (9th Cir. 1993))).

115. *See id.* (suggesting that evidence of *Almendarez-Torres*'s aggravated felony would unfairly influence the jury).

116. *See id.* (implying that the presence of prior convictions is rarely contested).

117. *See Apprendi v. New Jersey*, 530 U.S. 466, 521 (2000) (stating that one of the most common reasons for treating recidivism differently, as demonstrated in *Almendarez-Torres*, is the concern for prejudicing the jury by introducing evidence of the defendant's prior conviction(s)); *Gaston*, *supra* note 12, at 1179 (acknowledging that a defendant's prior convictions might make him unsympathetic to a jury, especially considering the Founders' intent for the Sixth Amendment).

118. *See Almendarez-Torres*, 523 U.S. at 242–43 (noting, for example, that

The majority first pointed to the traditional role of recidivism as opposed to possession of a firearm: “[T]he Court said long ago that a State need *not* allege a defendant’s prior conviction in the indictment or information that alleges the elements of an underlying crime, even though the conviction was ‘necessary to bring the case within the statute.’”<sup>119</sup> Echoed throughout *Almendarez-Torres*, the majority reiterated that recidivism is possibly the most well-established basis for enhancing an offender’s penalty; to label recidivism as an “element” of the offense would “mark an abrupt departure” from this tradition of treating recidivism as a sentencing factor.<sup>120</sup>

The majority then addressed the second major difference between *McMillan* and *Almendarez-Torres*, that unlike the Pennsylvania statute in *McMillan*, § 1326(b) triggered an increase in the *maximum* penalty, rather than the *minimum*, and created a wider range of punishment.<sup>121</sup> The majority concluded, however, that this difference did not affect the “constitutional outcome” of the case.<sup>122</sup> The increase of a mandatory maximum penalty carries no more, if not less, risk of unfairness than the increase in a mandatory minimum; as Justice Stevens warned in *McMillan*, a mandatory minimum actually has the capacity to “mandate a *minimum* sentence of imprisonment more than twice as severe as the *maximum* the trial judge would otherwise have imposed.”<sup>123</sup> Because the *McMillan* Court did not rest its ultimate decision upon the aforementioned distinction, the difference between maximum and minimum penalties was not

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neither statute at issue transgressed the limits set forth in *Patterson* and that both “simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor” (citing *McMillan v. United States*, 477 U.S. 79, 88 (1986)).

119. *Id.* at 243 (citing *Graham v. West Virginia*, 224 U.S. 616, 624 (1912)).

120. *See id.* at 244 (referencing *Graham*, 224 U.S. at 629).

121. *Compare* 8 U.S.C. § 1326(b) (2012) (raising the maximum penalty from two years’ imprisonment to twenty years’ imprisonment for those aliens who were deported pursuant to a prior aggravated felony), *with* 42 PA. CONS. STAT. § 9712 (1982) (raising the mandatory minimum sentence to five years’ imprisonment for visible possession of a firearm).

122. *Almendarez-Torres*, 523 U.S. at 243; *see also* *Bibas*, *supra* note 3, at 1109 (stating that this difference actually favored the defendants).

123. *Almendarez-Torres*, 523 U.S. at 244–45 (citing *McMillan*, 477 U.S. at 95 (Stevens, J., dissenting)). A mandatory minimum can essentially eliminate all of the sentencing judge’s discretion. *Id.* at 245.

determinative in *Almendarez-Torres*.<sup>124</sup> Finally, the majority concluded that *McMillan* further supported the conclusion that Congress has the constitutional power to treat a fact, such as the prior conviction of an aggravated felony, as a sentencing factor, rather than an element of the crime.<sup>125</sup>

Justice Breyer closed the opinion by briefly responding to *Almendarez-Torres*'s final argument—that any significant increase in a statutory maximum sentence should trigger a “constitutional elements requirement.”<sup>126</sup> The Court quickly rejected this theory, stating that such a requirement would be inconsistent given the existing case law that allows a judge, rather than a jury, to determine certain factors that may expose a defendant to the death penalty, “a punishment far more severe than that faced by petitioner here.”<sup>127</sup> Interestingly, critics of the recidivist exception would later employ this death penalty argument *against* the precedent of *Almendarez-Torres*.<sup>128</sup>

While the majority's analysis of recidivist enhancements is instrumental in understanding the various rationales behind the *Almendarez-Torres* exception, the vigorous dissent of Justice Scalia (joined by Justices Stevens, Souter, and Ginsburg) arguably plays an even more paramount role in the conflict between recidivist enhancements and the Sixth Amendment's jury trial guarantee. The dissent in *Almendarez-Torres* signaled what would evolve into a decade-long movement away from the

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124. See *id.* at 245 (noting that while the *McMillan* Court claimed that the defendant's argument would have had “more superficial appeal” if the sentencing factor triggered a greater or additional punishment, the statement meant no more than that—*superficial* appeal).

125. See *id.* at 246 (claiming that the Court in *McMillan* established that the Constitution permits a legislature to require a longer sentence for gun possession, thereby suggesting the same for recidivism).

126. *Id.* at 247.

127. See *id.* (referencing *Walton v. Arizona*, 497 U.S. 639 (1990)); *Hildwin v. Florida*, 490 U.S. 638 (1989); and *Spaziano v. Florida*, 468 U.S. 477 (1984)).

128. See *Ring v. Arizona*, 536 U.S. 584, 584 (2002) (overruling *Walton v. Arizona* to the extent that it allows a sentencing judge to find an aggravating circumstance necessary for the death penalty). The Court eventually revoked the authority of sentencing judges to find those factors necessary to trigger the death penalty, thereby chipping away at one of the pillars of *Almendarez-Torres*. See *id.* at 585 (suggesting that a jury, not a judge, is the correct adjudicatory body to find any element, including those aggravating factors triggering the death penalty, that bring about a greater offense).

judicial fact-finding of determinate sentencing procedures.<sup>129</sup> Focusing in large part on the constitutional questions stemming from the majority's statutory interpretation, the dissent effectively foreshadowed the Sixth Amendment challenges that would consume the Court during the *Apprendi* revolution.<sup>130</sup> The dissent first argued that the statute at issue, § 1326, was ambiguous on its face as to whether subsection (b)(2) constituted an entirely separate offense or a mere sentencing enhancement as indicated by the majority.<sup>131</sup> “[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”<sup>132</sup> According to the dissent, the majority's interpretation of § 1326, which allows a judge, by a preponderance of the evidence, to determine a fact that increases a defendant's maximum penalty undeniably triggers the “constitutional doubt” canon.<sup>133</sup>

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129. See *Alleyne v. United States*, 133 S. Ct. 2151, 2153 (2013) (holding that “any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury”); *United States v. Booker*, 543 U.S. 220, 222 (2005) (concluding that the Federal Sentencing Guidelines are hereinafter *advisory* guidelines, rather than mandatory); *Blakely v. Washington*, 542 U.S. 296, 304 (2004) (solidifying the *Apprendi* rule); *Ring*, 536 U.S. at 584 (overruling *Walton v. Arizona*, and, as a result, a sentencing judge's authority to find aggravating circumstances that trigger the death penalty); *Apprendi v. United States*, 530 U.S. 466, 466 (2000) (holding that “[t]he Constitution requires 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”).

130. See *Gaston*, *supra* note 12, at 1171 (stating that in later cases, for example *Apprendi v. New Jersey* and *Blakely v. Washington*, the Court would openly repudiate much of *Almendarez-Torres* and seek a broader interpretation of the right to a jury).

131. See *Almendarez-Torres*, 523 U.S. at 248 (Scalia, J., dissenting) (noting that in prior cases addressing the issue of sentencing enhancements, the statutes in question “unambiguously relieved the prosecution of the burden of proving a critical fact to the jury beyond a reasonable doubt”). In *McMillan v. Pennsylvania*, the statute at issue specifically provided that visible possession of a firearm “shall not be an element of the crime,” but rather “shall be determined at sentencing . . . by a preponderance of the evidence.” 477 U.S. 79, 81 n.1 (1986) (citing 42 PA. CONS. STAT. § 9712(b) (1982)).

132. *Almendarez-Torres*, 523 U.S. at 250 (Scalia, J., dissenting) (quoting *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)).

133. *Id.* at 251.



Therefore, the Court should have read subsection (b)(2) as a separate offense, rather than a sentencing factor.<sup>134</sup>

In order to illustrate this “constitutional doubt,” the dissent pointed to a string of relevant case law addressing the extent to which the Constitution prohibits the reallocation of burdens of proof in criminal cases.<sup>135</sup> Paying special attention to the Court’s most recent case, *McMillan v. Pennsylvania*,<sup>136</sup> the dissent emphasized the distinction between statutes that enhance the permissible maximum penalty and statutes that prescribe a minimum sentence.<sup>137</sup> The dissent reasoned that the Pennsylvania law in *McMillan* fell within constitutional limits because it did not heighten the maximum penalty for the crime committed; rather, it functioned solely to keep the court’s penalty within the range already available.<sup>138</sup> The Court in *McMillan* specifically recognized, however, that the outcome may have been different if the statute had triggered an increase in the maximum penalty.<sup>139</sup> While the majority maintained that this distinction actually strengthens the constitutionality of § 1326 “because an increase of the minimum sentence (rather than the permissible maximum) is more disadvantageous to the defendant,”<sup>140</sup> the dissent summarily replied that the *McMillan* Court not only rejected this position, but also based its holding on the “converse”

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134. *See id.* at 249 (concluding that subsection (b)(2) is a separate offense that includes the violation in subsection (a) but adds the element of prior felony conviction).

135. *See id.* at 251–58 (discussing *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977); and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)).

136. *See id.* at 256 (“[N]o one can read *McMillan*, our latest opinion on the point, without perceiving that the determinative element in our validation of the Pennsylvania statute was the fact that it merely limited the sentencing judge’s discretion within the range of penalty already available, *rather than* substantially increasing the available sentence.”).

137. *See id.* at 253 (noting that *McMillan* did not involve an increase of the maximum penalty such as the statute in *Almendarez-Torres*).

138. *See id.* (referencing *McMillan*, 477 U.S. at 87–88).

139. *See id.* (reiterating the *McMillan* Court’s suggestion that the argument for a separate element would have had “at least more superficial appeal” if the factor in question, visible possession of a firearm, exposed the defendants to a heightened punishment (citing *McMillan*, 477 U.S. at 88)).

140. *Id.* at 254.

conclusion.<sup>141</sup> Moreover, the dissent provided a list of cases in which state supreme courts determined that a prior conviction increasing the charged crime's maximum punishment must be considered an element of the offense.<sup>142</sup>

The dissent next addressed the majority's discussion of the tradition of recidivism, noting that it was "near uniform practice" among states to treat prior convictions as elements of a separate offense when the statute in question creates a greater maximum sentence for crimes committed by convicted felons.<sup>143</sup> The dissent further stressed that the Court's special treatment of recidivism not only lacked a rational basis, but also transgressed the limits of common law.<sup>144</sup> Listing a host of cases in support, the dissent emphasized that under common law, the fact of prior convictions must be charged in the same indictment as the underlying crime and submitted to the jury for determination.<sup>145</sup> The dissent also discussed, albeit more briefly, the majority's textual misreading of § 1326 and the statute's legislative history. The dissent argued that the statute in its current form actually undermined the majority's interpretation—why would the legislature eliminate the statute's decisive language ("shall be guilty of a felony")

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141. *Id.*

142. *See, e.g.*, *State v. Smith*, 106 N.W. 187, 188 (1906) ("By the uniform current of authority, the fact of the prior convictions is to be taken as part of the offense instantly charged, at least to the extent of aggravating it and authorizing an increased punishment."); *Tuttle v. Commonwealth*, 68 Mass. 505, 506 (1854) (concluding that a prior conviction increasing the maximum sentence must be set forth in the indictment).

143. *Almendarez-Torres*, 523 U.S. at 261 (Scalia, J., dissenting). "While several states later altered this procedure by providing a separate proceeding for the determination of prior convictions, at least as late as 1965 all but eight retained the defendant's right to a jury determination on this issue." *Id.*

144. *See id.* (stating that the majority mistakes the issue in this case for whether a prior felony conviction is typically used as a sentencing factor).

145. *See id.* (referencing, for example, *Spencer v. Texas*, 385 U.S. 554, 563 (1967) and *Massey v. United States*, 281 F. 293, 297 (8th Cir. 1922), and questioning why the majority was unable to find any statutes making recidivism an element of the crime); Brent E. Newton, *Almendarez-Torres and the Anders Ethical Dilemma*, 45 HOUS. L. REV. 747, 771 (2008) (noting that, although the Court had never directly addressed the issue set forth in *Almendarez-Torres*, the Court had previously resolved similar questions in favor of the defendants when a disputed fact increased the maximum punishment).

classifying subsection (a) as a crime, if not to make both subsections parallel?<sup>146</sup>

Finally, the dissent addressed the majority's "inherent unfairness argument" regarding the prejudice of prior convictions.<sup>147</sup> While it would certainly be unfair to reveal the existence of prior felony convictions to the jury, it would be equally, if not more, unfair to take away the defendant's right to a jury determination beyond a reasonable doubt on the question of prior conviction.<sup>148</sup> Looking at the congressional intent, the dissent stressed that Congress more likely agreed with the traditional practice of the aforementioned common law rather than with current policy judgments regarding prejudice when drafting this statute.<sup>149</sup> Regardless of Congress's intent, the dissent maintained that the very notion that "jury infection" trumps the defendant's right to a jury verdict secured by a reasonable-doubt standard is unsound.<sup>150</sup>

While Justice Scalia never *definitively* declared that the Constitution requires a jury to find the existence of a prior

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146. See *Almendarez-Torres*, 523 U.S. at 264 (Scalia, J., dissenting).

[B]oth subsections say that the individuals they describe "shall be fined under title 18, or imprisoned not more than [2, 10, or 20] years." If this suffices to define a substantive offense in subsection (a) (as all agree it does), it is hard to see why it would not define a substantive offense in each paragraph of subsection (b) as well.

*Id.*

147. See *id.* at 267 (describing the prejudice of bringing the existence of a prior felony conviction to the jury).

148. See *id.* (stating that the majority incorrectly assessed the risk of prejudice as the greater disadvantage).

149. See *id.* at 267–68 (noting that the majority's preference for judicial fact-finding of prior convictions conflicts with "the manner in which recidivism laws have historically been treated in this country"); see, e.g., *United States v. Texas*, 507 U.S. 529, 534 (1993) (discussing the longstanding principle that when statutes violate the common law, they must be read with "a presumption favoring the retention of long-established and familiar principles"); *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 34–35 (1983) (concluding that the Uniform Relocation Act did not change the "long-established common law principle" that a utility forced to relocate from a public right-of-way must cover its own expenses).

150. See *Almendarez-Torres*, 523 U.S. at 268 (Scalia, J., dissenting) (noting that the majority's assertion relies on the assumption that the fact of prior convictions is rarely contested, which is inaccurate, according to the dissent, especially in the case of an illegal reentry alien statute).

conviction, he made clear the constitutional doubt surrounding the majority's exception to such a rule<sup>151</sup>: "I think it beyond question that there was, until today's unnecessary resolution of the point, 'serious doubt' whether the Constitution permits a defendant's sentencing exposure to be increased tenfold on the basis of a fact that is not charged, tried to a jury, and found beyond a reasonable doubt."<sup>152</sup> Only one year after the holding in *Almendarez-Torres*, the dissent's concerns would begin to take shape in the form of an emerging constitutional rule, first foreshadowed by *Jones v. United States*,<sup>153</sup> and later solidified by *Apprendi v. New Jersey*.

### C. *Apprendi v. New Jersey and Its Revival of Jury Fact-finding*

In *Jones v. United States*, the Court construed the provisions of a federal carjacking statute<sup>154</sup> that established higher penalties for the offense if it resulted in death or serious bodily injury as elements of the offense rather than sentencing factors.<sup>155</sup> The Court overturned the defendant's sentence of twenty-five years, which had been enhanced from a maximum of fifteen years after the district court found, by a preponderance of the evidence, that serious bodily injury resulted from the defendant's crime.<sup>156</sup> This holding marked the beginning of a crucial shift in sentencing jurisprudence.<sup>157</sup>

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151. See *id.* at 260 ("I do not endorse that position as necessarily correct . . . . What I have tried to establish . . . is that on the basis of our jurisprudence to date, the answer to the constitutional question is not clear.").

152. *Id.*

153. 526 U.S. 227 (1999).

154. 18 U.S.C. § 2119 (2012).

155. See *Jones*, 526 U.S. at 227 (holding that § 2119 establishes three separate offenses, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury); DEMLEITNER ET AL., *supra* note 63, at 464 (suggesting that § 2119 created separate crimes because "several related subsections defined increasing maximum penalty levels if the offense resulted in serious bodily injury").

156. See *Jones*, 526 U.S. at 251–52 (stating that affirming the enhanced maximum sentence would "raise serious constitutional questions on which precedent is not dispositive").

157. See JOSHUA DRESSLER & GEORGE C. THOMAS, III, CRIMINAL PROCEDURE 1295 (5th ed. 2013) (noting that the Court's dictum in *Jones* would evolve into a

A “mirror image”<sup>158</sup> of *Almendarez-Torres*, the majority in *Jones* evaluated a similar federal statute but arrived at the opposite conclusion, “recast[ing] what looked like a sentencing factor into a traditional element of an offense.”<sup>159</sup> While the Court in *Jones* insisted that it was merely interpreting a federal statute, not proposing a constitutional rule,<sup>160</sup> it undoubtedly foreshadowed an emerging principle that would consume the Court’s attention during the next decade-long wave of sentencing reform.<sup>161</sup>

In *Apprendi v. New Jersey*, the Court solidified the shift away from judicial fact-finding foreshadowed in *Jones* by taking what was a mere footnote<sup>162</sup> and setting forth a pivotal constitutional rule that would forever change the country’s sentencing system.<sup>163</sup> The Court addressed a New Jersey “hate crime” statute prescribing a greater term of imprisonment for any crime when the trial judge finds, by a preponderance of the evidence,

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“constitutional holding” in *Apprendi*).

158. Bibas, *supra* note 3, at 1115.

159. DEMLEITNER, *supra* note 63, at 464.

Four members of the *Almendarez-Torres* majority repeated their arguments in dissent in *Jones*. They wanted to defer to legislatures, stressed traditional leeway for judicial fact-finding at sentencing, and forecast that the elements rule would cause grave practical problems. Conversely, the *Jones* majority copied the *Almendarez-Torres* dissent. These Justices distrusted legislatures and judges, exalted juries, relied on traditions of jury fact-finding, and adopted a strong rule of construction to avoid constitutional doubts.

Bibas, *supra* note 3, at 1115.

160. See *Jones*, 526 U.S. at 252 n.11 (claiming that the holding does not set forth any new principle of constitutional law, but rather construes a federal statute “in light of a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century”).

161. See *id.* at 243 n.6 (“[A]ny fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. Because our prior cases suggest rather than establish this principle, our concern . . . rises only to the level of doubt, not certainty.”); DRESSLER & THOMAS, *supra* note 157, at 1294 (suggesting that the holding in *Jones* would have been far less instrumental had the Court not introduced the aforementioned constitutional principle).

162. See *supra* note 160 and accompanying text (quoting footnote 6 of the *Jones* opinion).

163. See R. Craig Green, *Apprendi’s Limits*, 39 U. RICH. L. REV. 1155, 1157 (2005) (describing *Apprendi v. New Jersey* as a “landmark” decision in modern sentencing law); Bibas, *supra* note 3, at 1122 (stating that “*Apprendi* is *Jones* taken to its logical conclusion”).

that the defendant “acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity” while committing the crime.<sup>164</sup> After determining that Apprendi, who had been charged with second-degree possession of a firearm for an unlawful purpose, violated the state’s hate crime statute, the trial court increased the original sentence of ten years (for the underlying offense) to twenty years.<sup>165</sup> In a predictable 5–4 split,<sup>166</sup> the Court held that “[t]he Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, *other than the fact of a prior conviction*, must be submitted to a jury and proved beyond a reasonable doubt.”<sup>167</sup> Professor Stephanos Bibas perfectly describes the majority’s core reasoning in the following way: “The majority once again exalted jury fact-finding, relied heavily on historical arguments about juries’ traditional role, and refused to trust judges or legislators. The Court feared the erosion of jury trials and also hinted at the need to give fair notice to defendants of enhancements.”<sup>168</sup>

The majority emphasized that when assessing whether a factor is an element of a separate crime (thereby triggering a jury determination beyond a reasonable doubt) or merely a sentencing enhancement (thereby triggering a judicial determination by a preponderance of the evidence), the central issue is not one of form, but rather one of effect: if a “sentencing element” exposes the defendant to a greater punishment than that authorized by the jury’s verdict, then that factor should constitute an element of a separate offense, regardless of the state’s labeling of that factor.<sup>169</sup> In establishing this brightline rule, the Court

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164. N.J. STAT. ANN. § 2C:44–3(e) (West 1999–2000).

165. *Apprendi v. United States*, 530 U.S. 466, 466 (2000).

166. See Gaston, *supra* note 12, at 1167–68 (noting that the narrow majority in *Apprendi* marked a return to the Framers’ intent that the Sixth Amendment should protect individuals from an “over-punitive” government). It is important to note that the dissent in *Apprendi* was comprised of the majority in *Almendarez-Torres* with the exception of Justice Thomas, thereby reflecting a shift on the bench towards a revival of the jury’s role in sentencing procedures. *Id.*

167. *Apprendi*, 530 U.S. at 466 (emphasis added).

168. Bibas, *supra* note 3, at 1122.

169. See *Apprendi*, 530 U.S. at 494 (suggesting that labels are not

distinguished its holding from *McMillan v. Pennsylvania*, noting that, unlike *Apprendi*, *McMillan* did not involve the enhancement of a statutory maximum but rather the enhancement of a mandatory minimum within a statutory range.<sup>170</sup>

One of the most important implications of the Court's holding was that it articulated a seemingly clear exception for prior convictions.<sup>171</sup> The Court referenced the traditional role of recidivism exalted by the *Almendarez-Torres* majority<sup>172</sup> and noted that the procedural safeguards attached to a fact of prior conviction mitigated any Sixth Amendment concerns.<sup>173</sup> However, while the majority appeared to uphold the recidivism exception as good law, the *Apprendi* Court ultimately marked the first major crack in the *Almendarez-Torres* foundation, calling into question the prior convictions exception and its constitutionality under the Sixth Amendment:

Even though 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, *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. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.<sup>174</sup>

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definitive); *McVoy*, *supra* note 57, at 1617 ("If the fact does indeed expose the defendant to greater punishment, judicial factfinding is constitutionally infirm.").

170. *See Apprendi*, 530 U.S. at 486–87 (perpetuating the distinction between the enhancement of a mandatory minimum sentence and the enhancement of a mandatory maximum sentence).

171. *See id.* at 487 (stating that *Almendarez-Torres* "represents at best an *exceptional* departure from the historic practice that we have described" (emphasis added)).

172. *See id.* at 488 (explaining that "recidivism . . . is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence" (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 244 (1998))).

173. *See id.* (noting that *Almendarez-Torres* did not question the accuracy of the fact of his prior conviction).

174. *Id.* at 489–90.

Justice Thomas echoed the majority's doubt in his concurrence.<sup>175</sup> While originally part of the *Almendarez-Torres* majority, Justice Thomas claimed that the Court, including himself, had based too much of its justification for the recidivist exception on the fact that a prior conviction was traditionally a basis for a heightened sentence.<sup>176</sup> "What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment—for establishing or increasing the prosecution's entitlement—it is an element."<sup>177</sup> Justice Thomas's commentary on *Almendarez-Torres* was especially significant in that it signaled a shift in the Court's composition of those Justices supporting the prior convictions exception and those questioning its validity.<sup>178</sup>

As was the case in *Almendarez-Torres*, the dissent in *Apprendi* was equally important in foreshadowing the forthcoming issues of the sentencing revolution. The divide between the majority and dissent in *Apprendi* has been described as one between "the formalist and the functional";<sup>179</sup> while the majority focused on the Founders' intent to secure the right to a jury, the dissent seemed more concerned with the practical issues resulting from the Court's new rule.<sup>180</sup> "For one . . . juries may be prejudiced just by hearing of enhancements, let alone hearing evidence about them. For another, defendants face difficulties arguing alternative, inconsistent defenses to juries."<sup>181</sup> The

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175. See *id.* at 499 (Thomas, J., concurring) (joining the opinion of the Court but advocating for a broader constitutional rule).

176. See *id.* (noting that this approach "defines away the real issue").

177. *Id.* at 521.

178. Compare *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998) (joining in the opinion of the Court were Chief Justice Rehnquist and Justices O'Connor, Kennedy, Thomas, and Breyer, and dissenting were Justices Stevens, Scalia, Souter, and Ginsburg), with *Apprendi*, 530 U.S. at 468 (joining in the opinion of the Court were Justices Stevens, Scalia, Souter, Thomas, and Ginsburg, and dissenting were Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer).

179. Gaston, *supra* note 12, at 1172.

180. See *Apprendi*, 530 U.S. at 550–52 (O'Connor, J., dissenting) (suggesting that the majority's new rule has left judges "in a state of limbo"); Bibas, *supra* note 3, at 1123 (claiming that the dissenters were right to worry about the compromises to judicial efficiency given the problems this new rule will cause at trial and on habeas corpus).

181. Bibas, *supra* note 3, at 1142–43.



dissenters also took issue with the majority's historical analysis, emphasizing that legislatures have traditionally had broad discretion in defining crimes and punishment, while judges have traditionally had broad discretion in sentencing procedures.<sup>182</sup> Arguably one of the most significant criticisms, however, was the damage that the *Apprendi* holding would have on the Federal Sentencing Guidelines.<sup>183</sup> Despite the intention to protect defendants from the arbitrary and unbridled discretion of judges, the majority's new rule seemed to invalidate as unconstitutional those efforts by Congress and state legislatures to eliminate such judicial abuse through the implementation of determinate sentencing systems.<sup>184</sup> Thus, while the majority opinion did not expressly invalidate the Federal Sentencing Guidelines, the holding seemed to signal an impending demise in the progress of determinate sentencing.<sup>185</sup> With the sentencing revolution well

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182. See *Apprendi*, 530 U.S. at 525–29 (O'Connor, J., dissenting) (claiming that the majority's broad rule is unsupported by history and prior decisions of the Court); Parese, *supra* note 63, at 680–81 (emphasizing the importance of respecting the will of the legislature and its authority to create procedural systems for the administration of justice). The majority's historical interpretation especially attacked the well-established role of judges in capital sentencing. See *Apprendi*, 530 U.S. at 522–23 (majority opinion) (questioning whether the unique nature of capital crimes is sufficient to place such sentencing outside the reach of the majority's new rule in *Apprendi*). This issue took shape in *Ring v. Arizona*, 536 U.S. 584 (2002), when the Court concluded that under the holding in *Apprendi*, “[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” *Ring*, 536 U.S. at 589. This holding effectively eliminated the “death penalty argument” in favor of upholding *Almendarez-Torres*. See *Almendarez-Torres*, 523 U.S. at 247 (supporting the prior convictions exception by referencing a judge's right in capital cases to find those factors underlying the death sentence).

183. See *Apprendi*, 530 U.S. at 544 (O'Connor, J., dissenting) (claiming that the Court's holding “invalidate[s] with the stroke of a pen three decades' worth of nationwide reform, all in the name of a principle with a questionable constitutional pedigree”).

184. See *id.* at 550–51 (warning that the majority's implications regarding the debatable constitutionality of determinate sentencing would unleash “a flood of petitions” from convicted defendants hoping to set aside their sentences); see also Bibas, *supra* note 3, at 1139 (claiming that the majority's new elements rule not only rests on a “premature distrust of legislatures, but also is likely to increase arbitrariness by giving prosecutors more power”).

185. See Green, *supra* note 163, at 1161 (stating that the Guidelines could survive only if the Court's logic were limited to statutory maxima); Ford, *supra*

underway, the Court would continue to carve back judicial fact-finding in the sentencing process over the next several years, with each case bolstering the Sixth Amendment jurisprudence that was gradually wearing down the *Almendarez-Torres* exception.

#### D. *Blakely and Booker*

Four years after *Apprendi*, the dissenters' fears of sentencing disruption became a reality when the Court extended *Apprendi*'s broad rule even further in *Blakely v. Washington*.<sup>186</sup> Blakely pled guilty to second-degree kidnapping involving domestic violence and use of a firearm, an offense that carried a maximum sentence of fifty-three months under Washington's Sentencing Reform Act.<sup>187</sup> After determining by a preponderance of the evidence that Blakely had acted with "deliberate cruelty," however, the judge departed upward and imposed an exceptional sentence of ninety months (thirty-seven months above the state's guidelines range but still below the statutory maximum).<sup>188</sup> In a 5–4 decision, the Supreme Court reversed, concluding that the ninety-month sentence violated Blakely's Sixth Amendment right to trial by jury.<sup>189</sup> Justice Scalia, writing for the majority, stated that *Apprendi* guarantees this right by ensuring that the judge's sentence is based solely on the facts reflected in the jury verdict or admitted to by the defendant, and thus, Washington's sentencing scheme violated the Constitution despite the fact that the sentence was within the statutory maximum term of ten years for Class B felonies.<sup>190</sup> "[T]he relevant 'statutory maximum'

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note 23, at 20 ("The *Apprendi* ruling was indeed craftily written to obtain its objective, to give the legislature time to begin working on a new system without the tumultuous jolt of a Supreme Court ruling which instantaneously overrules [the Federal Sentencing Guidelines] and throws the American criminal system back thirty years.").

186. 542 U.S. 296 (2004).

187. See *id.* at 299 (referencing WASH. REV. CODE ANN. § 9.94A.320 (2000)).

188. *Id.* at 299–300.

189. See *id.* at 306 (noting that *Apprendi* protects this right by "ensuring that the judge's authority to sentence derives wholly from the jury's verdict").

190. See *id.* at 308 (claiming that the Framers' decision to include a jury trial guarantee in the Constitution stemmed from an unwillingness to trust

is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.”<sup>191</sup> In other words, every defendant has the constitutional right to insist that the prosecutor prove beyond a reasonable doubt all facts legally essential to the punishment.<sup>192</sup>

The dissenters in *Blakely*, consisting of the same four dissenters in *Apprendi*, strenuously rejected the majority’s constitutional argument and stressed the practical consequences that the Court’s holding would have on future judicial proceedings.<sup>193</sup> In the first of three dissenting opinions, Justice O’Connor lamented that “over 20 years of sentencing reform [were] all but lost, and tens of thousands of criminal judgments [were] in jeopardy” as a result of the Court’s holding.<sup>194</sup> While the majority claimed that its holding did not address the validity of the Federal Guidelines,<sup>195</sup> the dissenters argued otherwise, pointing to the similarities between Washington’s determinate sentencing scheme and that of the Guidelines:<sup>196</sup> “If the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would.”<sup>197</sup> Considering the number of states with sentencing schemes virtually identical to Washington’s, the dissenters claimed that the *Blakely* holding would result in severe disorder for the criminal justice system,

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government to establish the proper role of the jury).

191. *Id.* at 303–04.

192. *Id.* at 313. “*Blakely* suggests the Constitutional [sic] does not permit judges to find facts which increase applicable sentencing ranges, even though nearly all sentencing reforms of the past two decades have made judges central and essential fact-finders in the application of sentencing laws.” Douglas A. Berman, *Examining the Blakely Earthquake and Its Aftershocks*, 16 FED. SENT. R. 307, 307 (2004).

193. *See Blakely*, 542 U.S. at 323–24 (O’Connor, J., dissenting) (describing the unsettling practical implications of the majority’s holding).

194. *Id.* at 326. Justice O’Connor went as far as to describe the decision as a “Number 10 earthquake.” Luna, *supra* note 43, at 26.

195. *See Blakely*, 542 U.S. at 305 n.9 (majority opinion) (claiming that because the Federal Guidelines are not before the Court, the majority’s holding offers no opinion regarding the constitutionality of said scheme).

196. *See id.* at 325 (O’Connor, J., dissenting) (claiming that Washington’s scheme is almost identical to the upward-departure process established by 18 U.S.C. § 3553(b)).

197. *Id.* at 326.

forcing many states, as well as Congress, to re-examine years of sentencing reform.<sup>198</sup>

The dissenters further stressed that the majority, by implicitly weakening the viability of determinate sentencing schemes, actually undermined the very constitutional principles it claimed to promote through its holding.<sup>199</sup> Justice O'Connor argued that because the majority's broad extension of *Apprendi* would ultimately weaken (or eliminate altogether) determinate sentencing schemes, defendants would consequently face a criminal justice system without the safeguards of sentence uniformity.<sup>200</sup> Justice Kennedy further emphasized that the majority opinion failed to consider the fundamental principle of collaboration, meaning that different branches of government must be able to converse and work together on significant issues of common interest such as improving the judicial sentencing system.<sup>201</sup>

Sentencing guidelines are a prime example of this collaborative process. Dissatisfied with the wide disparity in sentencing, participants in the criminal justice system . . . pressed for legislative reforms. In response, legislators drew from these participants' shared experiences and enacted measures to correct the problems, which, as Justice O'Connor explains, could sometimes rise to the level of a constitutional injury.<sup>202</sup>

Through its implicit destruction of determinate sentencing, Justice Kennedy feared the majority had closed a necessary vehicle for dialogue between the different branches of

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198. See *McVoy*, *supra* note 57, at 1613 (claiming that *Blakely* "wreaked havoc" on established sentencing schemes within the course of just a few months, requiring trial judges, prosecutors, and legislators across the country to face the practical realities of a legal system with a rapidly increasing role for the jury).

199. See *Blakely*, 542 U.S. at 339 (O'Connor, J., dissenting) (claiming, for example, that judges would be unable to base sentencing on real conduct while also maintaining uniformity under the majority's holding).

200. See *id.* at 314 (predicting that the majority's holding would ultimately result in a consolidation of sentencing power in the state and federal judiciaries).

201. *Id.* at 326 (Kennedy, J., dissenting).

202. *Id.* at 327.

government, thereby weakening the fairness and effectiveness of the criminal justice system.<sup>203</sup>

As predicted, the *Blakely* holding created a great deal of confusion regarding the application of determinate sentencing schemes; while state legislatures and sentencing commissions were busy gauging the impact of *Blakely* on their own sentencing guidelines, judges too were in a state of limbo, preparing for the inevitable litany of appeals from those already-sentenced defendants.<sup>204</sup> Within several months of the *Blakely* decision, the Court addressed this confusion by consolidating two federal cases, *United States v. Booker*<sup>205</sup> and *United States v. Fanfan*,<sup>206</sup> and determining whether the imposition of an enhanced sentence under the Federal Sentencing Guidelines violated the Sixth Amendment.<sup>207</sup> Justice Stevens authored the first part of the Court's opinion and was joined by the same majority in *Apprendi* and *Blakely* (Justices Scalia, Souter, Thomas, and Ginsburg).<sup>208</sup> The Court held that the Sixth Amendment as construed in *Blakely* did in fact apply to the Federal Sentencing Guidelines, and that by imposing an enhanced sentence based on a sentencing judge's determination of a fact not found by the jury nor admitted to by the defendant, the Guidelines violated the Constitution.<sup>209</sup> The Court primarily based its decision on the

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203. See *id.* at 345

[T]he fairness and effectiveness of a sentencing system, and the related fairness and effectiveness of the criminal justice system itself, depend upon the legislature's possessing the constitutional authority (within due process limits) to make that labeling decision. To restrict radically the legislature's power in this respect, as the majority interprets the Sixth Amendment to do, prevents the legislature from seeking sentencing systems that are consistent with, and indeed may help to advance, the Constitution's greater fairness goals.

204. See DRESSLER & THOMAS, *supra* note 157, at 1323 (describing *Blakely*'s aftermath as "electric").

205. 375 F.3d 508 (7th Cir. 2004), *cert. granted*, 542 U.S. 956 (2004).

206. No. 03-47, 2004 WL 1723114 (D.Me. 2004), *cert. granted*, 542 U.S. 956 (2004).

207. See *United States v. Booker*, 543 U.S. 220, 226 (2005) (plurality opinion Part I) (noting that both cases involved the issue of whether application of the Federal Guidelines violated defendants' Sixth Amendment rights).

208. See *id.* at 225 (listing the division of votes amongst the Justices).

209. See *id.* at 221 (noting that there was no constitutionally significant distinction between the Federal Sentencing Guidelines and the Washington procedure at issue in *Blakely*).

Guidelines' mandatory nature, noting that if the provisions were advisory and merely recommended—rather than required—particular sentences, the application of the Guidelines would not violate the Sixth Amendment jury trial right.<sup>210</sup> When a judge finds a fact by a preponderance of the evidence that automatically enhances the defendant's sentence, however, the defendant consequently loses his right to a jury determination of those facts deemed relevant by the judge.<sup>211</sup> Justice Stevens also preempted the practical concerns repeatedly expressed by the dissenters, noting that while “jury factfinding may impair the most expedient and efficient sentencing of defendants . . . the interest in fairness and reliability protected by the right to a jury trial . . . now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.”<sup>212</sup>

The second part of the Court's opinion, authored by Justice Breyer and joined by the three dissenters to Justice Stevens's opinion (in addition to Justice Ginsburg), sought to remedy the alleged conflict between the Federal Sentencing Guidelines and the Sixth Amendment with a compromise: rather than invalidating the Guidelines as a whole, Justice Breyer's opinion announced that the Court would strike down 18 U.S.C. § 3553(b)(1),<sup>213</sup> which made the Guidelines mandatory and therefore incompatible with the constitutional protections exalted by Justice Stevens.<sup>214</sup> The Court also severed 18 U.S.C. § 3742(e),<sup>215</sup> which established a *de novo* standard of appellate review and was based on the mandatory nature of the Guidelines.<sup>216</sup> By striking these provisions, the Court recast the Federal Sentencing Guidelines as an “advisory” system, allowing

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210. *See id.* (referencing the language of the Guidelines, for example use of the word “shall,” as evidence of the system's mandatory nature).

211. *See id.* at 233 (suggesting that the Guidelines would be permissible under the Sixth Amendment had Congress not made the Guidelines binding on district judges).

212. *Id.* at 243–44.

213. 18 U.S.C. § 3553(b)(1) (repealed 2005).

214. *See Booker*, 543 U.S. at 259 (plurality opinion Part II) (stating that § 3553(b)(1) is a necessary condition of the constitutional violation).

215. 18 U.S.C. § 3742(e) (repealed 2005).

216. *See Booker*, 543 U.S. at 259 (plurality opinion Part II) (concluding that without the aforementioned provisions, the remainder of the Act satisfies the Court's constitutional requirements).

judges to continue making the factual findings necessary for increased sentences, but no longer in a way that would run afoul of *Blakely* and *Booker*.<sup>217</sup> Thus, while still required to consult the Guidelines' ranges during sentencing proceedings, judges were no longer bound to their application.<sup>218</sup>

*E. Alleyne v. United States: The Final Nail in the Coffin?*

In the years following *Blakely* and *Booker*, courts and legislatures attempted to navigate the concept of advisory sentencing and adjust to the increasingly significant jury role established by the *Apprendi* revolution.<sup>219</sup> On June 17, 2013, *Alleyne v. United States* marked what many would consider the final nail in the coffin for judicial fact-finding in sentencing.<sup>220</sup> Alleyne was convicted of robbery affecting commerce and use of a firearm during and in relation to a crime of violence.<sup>221</sup> While the offense of using or carrying a firearm in relation to a crime of violence carries a mandatory minimum sentence of five years, the judge raised the minimum term to seven years under 18 U.S.C. § 924(c)(1)(A)(ii)<sup>222</sup> after determining by a preponderance of the evidence that Alleyne had "brandished" the firearm.<sup>223</sup> Alleyne appealed, claiming that the jury did not find the fact of "brandishing" beyond a reasonable doubt, and therefore the

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217. See *id.* at 264–65 (claiming that by making the Guidelines advisory, the sentencing system is still in keeping with Congress's goal of avoiding excessive sentencing disparities while maintaining the flexibility needed to individualize sentences).

218. See Darmer, *supra* note 40, at 560 (suggesting that the lack of mandatory application allows the revised sentencing system to avoid constitutional conflicts).

219. See, e.g., *Rita v. United States*, 551 U.S. 338, 338 (2007) (determining that a court of appeal may presume that a sentence imposed within the proper Federal Guidelines range is reasonable, although the presumption of reasonableness is not binding).

220. See Gottlieb, *supra* note 18 (discussing the importance of *Alleyne* in the context of the *Apprendi* line of cases).

221. *Alleyne v. United States*, 133 S. Ct. 2151, 2152 (2013) (citing 18 U.S.C. § 924(c)(1)(A) (2012)).

222. 18 U.S.C. § 924(c)(1)(A)(ii) (2012).

223. See *Alleyne*, 133 S. Ct. at 2152 (referencing § 924(c)(1)(A)(ii), which increases the sentence to a mandatory minimum of seven years upon a finding that the offender brandished the firearm).

judge's decision to raise the mandatory minimum sentence based on that fact violated his Sixth Amendment right to a jury trial.<sup>224</sup>

In yet another 5–4 split, the Court held that “because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.”<sup>225</sup> In vacating *Alleyne*'s sentence as violative of the Sixth Amendment, the Court overruled the previously held distinction between enhancements that increase a mandatory minimum and enhancements that increase a mandatory maximum, the latter of which was addressed in *Apprendi*.<sup>226</sup> The majority concluded that the holding in *Apprendi* applied with equal force to facts increasing the mandatory minimum because a fact that triggers such an increase likewise alters the prescribed range of penalties: “[A] fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense. It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime.”<sup>227</sup> The majority claimed that the “essential Sixth Amendment inquiry” is whether a fact is an element of the crime; in the instant case, the finding of “brandishing” aggravated the range of possible punishment, and thereby constituted an element of a separate, aggravated offense that must be found by the jury.<sup>228</sup> Thus, the *Alleyne* Court brought the *Apprendi* revolution to its logical end, establishing that *any* fact, whether it increases the mandatory minimum sentence or the mandatory maximum, is an element of the crime rather than a sentencing factor and must be submitted to the jury to be proven beyond a reasonable doubt.<sup>229</sup>

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224. *See id.* (noting that the verdict form made no indication that the jury found the fact of brandishing).

225. *Id.* at 2513.

226. *See id.* (overruling *Harris v. United States*, 536 U.S. 545 (2002), which sustained a judge's ability to increase the mandatory minimum sentence, though not beyond the statutory maximum).

227. *Id.*

228. *See id.* at 2161 (asserting that it is “impossible to dispute that the facts increasing the legally prescribed floor aggravate the punishment, heightening the loss of liberty associated with the crime”).

229. *See id.* at 2163 (claiming that there is no basis to distinguish facts that raise the maximum sentence from those that raise the minimum); *see also* Gottlieb, *supra* note 18 (noting that facts that alter both “ceilings” and “floors”



*IV. The Continuing Viability of the Almendarez-Torres Exception Under Alleyne*

By returning judicial fact-finding to the hands of the jury and solidifying a decade's worth of Sixth Amendment jurisprudence, the holding in *Alleyne* seemed to mark the end of a sentencing era.<sup>230</sup> However, the case left one major question unanswered: what about prior convictions? The *Alleyne* Court made clear that *any* facts contributing to the penalty range of a crime must be proven to the jury.<sup>231</sup> Thus, one might conclude that the fact of a prior conviction falls within that category as well. Interestingly, the Court refused to address whether the *Alleyne* rule encompassed the previously carved-out exception in *Almendarez-Torres*: "In *Almendarez-Torres v. United States*, we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today."<sup>232</sup>

Lower courts have continued to uphold *Almendarez-Torres* as good law despite its questionable viability under the holding in *Alleyne*.<sup>233</sup> "Though wounded, *Almendarez-Torres* still marches on

have the potential to increase a defendant's punishment above that which a judge might have imposed).

230. See Gottlieb, *supra* note 18 (suggesting that *Alleyne* provided strong support and consistency to the pro-*Apprendi* Court's Sixth Amendment sentencing saga).

231. See *Alleyne*, 133 S. Ct. at 2153 (referencing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

232. *Id.* at 2160 n.1.

233. See *United States v. Harris*, No. 12-14482, 2014 WL 292381, at \*8–9 (11th Cir. Jan. 28, 2014) (citing *United States v. Thomas*, 242 F.3d 1029, 1035 (11th Cir. 2001)).

We recognize that there is some tension between *Almendarez-Torres* on the one hand and *Alleyne* and *Apprendi* on the other. However, we are not free to do what the Supreme Court declined to do in *Alleyne*, which is overrule *Almendarez-Torres*. As we have said before, we are "bound to follow *Almendarez-Torres* unless and until the Supreme Court itself overrules that decision."

*Id.* See generally *United States v. Abrahamson*, No. 11-2404, 2013 WL 4780090 (8th Cir. Sept. 9, 2013); *United States v. Mack*, No. 12-5451, 2013 WL 4767176 (6th Cir. Sept. 6, 2013); *United States v. Conerson*, No. 12-30291, 2013 WL 4473187 (9th Cir. Aug. 22, 2013); *United States v. Flowers*, No. 12-14930, 2013 WL 4046024 (11th Cir. Aug. 12, 2013); *United States v. Rivera*, No. 12-2116, 2013 WL 3852725 (3d Cir. July 26, 2013); *United States v. Carrigan*, 724 F.3d 39 (1st Cir. 2013); *United States v. Wiggan*, No. 12-2393-cr, 2013 WL 3766535

and we are ordered to follow. We will join the funeral procession only after the Supreme Court has decided to bury it.”<sup>234</sup> This has not deterred defendants from raising the issue for later review, however; in federal circuit courts alone, over 5,200 federal defendants have filed appeals requesting that *Almendarez-Torres* be overruled.<sup>235</sup> Given the obvious tension surrounding *Almendarez-Torres* and its purported “erosion” by Sixth Amendment jurisprudence, it seems likely that the Court will eventually need to address the issue of whether the prior convictions exception still stands under the recent holding in *Alleyne*.<sup>236</sup> Despite those defendants, prosecutors, and even certain Justices who argue that *Almendarez-Torres* is no longer viable, this Note argues that the Court should ultimately sustain the prior convictions exception, leave *Almendarez-Torres* intact, and establish, with finality, that judges are the correct adjudicatory body to determine findings of prior convictions in the sentencing process.

#### A. *The Constitutional Implications of Almendarez-Torres*

Before examining the practical implications of *Almendarez-Torres*, it is important to recognize that the prior convictions exception is arguably sustainable on constitutional grounds alone. While the Sixth Amendment grants criminal defendants the right to a trial by jury, the Constitution fails to specify the role of “nonjury actors” at sentencing after the jury announces a verdict of guilt.<sup>237</sup> The most basic answer to this question is one of

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(2d Cir. July 19, 2013); *United States v. Croft*, No. 12-4890, 2013 WL 3615944 (4th Cir. July 16, 2013).

234. Newton, *supra* note 145, at 785–86 (citing *United States v. Gibson*, 434 F.3d 1234, 1247 (11th Cir. 2006)).

235. *Id.* at 805.

236. See *Shepard v. United States*, 544 U.S. 13, 27–28 (2005) (Thomas, J., dissenting) (“[I]n an appropriate case, this Court should consider *Almendarez-Torres*’ continuing viability.”).

237. Green, *supra* note 163, at 1155 (internal citations omitted); see Darmer, *supra* note 40, at 579 (“[B]road sentencing discretion was a concept unknown to the Framers; they never had to consider the constitutional implications of a choice between ‘submitting every fact that increases a sentence to the jury or vesting the sentencing judge with broad discretionary authority to account for differences in offense and offenders.’”).

categorization: the Sixth Amendment guarantee turns on whether “a fact is an element of the crime.”<sup>238</sup> In other words, the jury trial protections of the Sixth Amendment require that the jury find beyond a reasonable doubt only the *elements* of the crime as defined by the legislature.<sup>239</sup> Thus, the most straightforward reading of the Constitution dictates that after finding the elements of the crime and rendering a verdict, the jury’s role is complete pursuant to the Sixth Amendment.<sup>240</sup> Any prior convictions subsequently found by the judge solely affect the defendant’s sentence, not his innocence or guilt for the crime with which he is charged.<sup>241</sup> As Justice Breyer writes in his concurrence in *Alleyne*, the Court’s reasoning in *Apprendi* was flawed in that it failed to appreciate this consistently held distinction between elements of a crime (facts constituting the crime for the jury to determine) and sentencing facts (facts affecting the sentence for the judge to determine).<sup>242</sup> The Sixth Amendment’s jury trial guarantee does not traditionally include those facts solely affecting the defendant’s sentence;<sup>243</sup> therefore, prior convictions do not logically fall within the category of offense elements and are exempt from the jury trial requirements of the Sixth Amendment.<sup>244</sup>

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238. *Alleyne v. United States*, 133 S. Ct. 2151, 2153 (2013); *see also* *Apprendi v. New Jersey*, 530 U.S. 466, 500 (2000) (Thomas, J., concurring) (stating that Sixth Amendment constitutional protections turn on the determination of which facts constitute “ingredients” of the crime).

239. *See In re Winship*, 397 U.S. 358, 664 (1970) (holding that the jury trial guarantee of the Sixth Amendment gives a criminal defendant the right to demand that a jury find him guilty beyond a reasonable doubt of “every fact necessary to constitute the crime with which he is charged”).

240. *See Alleyne*, 133 S. Ct. at 2169 (Breyer, J., concurring) (stating that the jury’s role was discharged after rendering the verdict and providing the judge with the appropriate range for sentencing).

241. *See Almendarez-Torres v. United States*, 523 U.S. 224, 244 (1998) (explaining that recidivism does not relate to the commission of the offense).

242. *Alleyne*, 133 S. Ct. at 2166–67 (Breyer, J., concurring).

243. *See id.* (noting that the early historical references set forth by the Court in favor of *Apprendi* refer to *offense elements*, not sentencing factors).

244. *See Winship*, 397 U.S. at 364 (limiting the reasonable-doubt standard to *elements* of the crime). *But see* *United States v. Gilliam*, 944 F.2d 97, 100 (2d Cir. 1993) (noting that prior convictions may be proven during the guilt stage when the prior conviction is an actual, statutorily defined element of the crime charged, for example, a felon in possession of a firearm).

This traditional interpretation of the Sixth Amendment is well supported by the unique nature of recidivism. As previously discussed, our judicial system has consistently viewed recidivism as a sentencing factor, not an element of the crime.<sup>245</sup> This categorization seems especially reasonable given that prior convictions represent “the outcome of earlier proceedings in which the defendant was afforded procedural safeguards such as a trial by jury and proof beyond a reasonable doubt.”<sup>246</sup> As a result, the categorical distinction between prior convictions and offense elements ultimately satisfies the judicial guarantees of the Sixth Amendment.

Over the course of the *Apprendi* revolution, however, the Court has drastically departed from this well-established distinction between prior convictions and offense elements and adopted a “broad new interpretation” of the Sixth Amendment’s scope.<sup>247</sup> This overly broad interpretation not only expands the jury’s role outside of those responsibilities articulated by the Sixth Amendment, but also impedes the legislature’s authority to define elements of the crime.<sup>248</sup> By restricting the legislature’s ability to label certain facts as “sentencing factors” versus “elements of the crime,” the Court ultimately prevents the

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245. See *supra* note 172 and accompanying text (suggesting that the Court would be departing from a well-established tradition if it was to consider recidivism as an element of the crime, rather than a sentencing factor).

246. A. Luria, *Traditional Sentencing Factors v. Elements of an Offense: The Questionable Viability of Almendarez-Torres v. United States*, 7 U. PA. J. CONST. L. 1229, 1237 (2005).

247. Stephanos Bibas, *Blakely’s Federal Aftermath*, 16 FED. SENT. R. 333, 333 (2004).

248. The pro-*Apprendi* Court has generally argued that when a sentencing factor enhances a prescribed sentence, it becomes an *element* of a separate, aggravated offense and therefore falls under the Sixth Amendment guarantee. See, e.g., *Alleyne*, 133 S. Ct. at 2153 (concluding that because the fact of brandishing heightens the prescribed sentencing range, it therefore constitutes an element of a separate, aggravated offense). This argument, however, fails to appreciate the legislature’s authority to distinguish between elements of a crime and sentencing factors. Thus, this Note argues that a prior conviction triggers a new, separate crime only when the legislature makes the clear decision to statutorily define and articulate that fact as an “element” of the crime. See, e.g., *McMillan v. Pennsylvania*, 477 U.S. 79, 85–86 (1986) (suggesting that the Pennsylvania Legislature did not include “visible possession” as one of the enumerated elements of the crime, and thereby designated “visible possession” as a separate sentencing factor).

legislature from seeking a sentencing system that is consistent with the Constitution's greater fairness goals.<sup>249</sup> When put into practice, an absolute jury fact-finding approach would undermine constitutional principles central to our judicial system:

The pre-*Apprendi* rule of deference to the legislature retains a built-in political check to prevent lawmakers from shifting the prosecution for crimes to the penalty phase proceedings of lesser included and easier-to-prove offenses. . . . There is no similar check, however, on application of the majority's "any fact that increases the upper bound of judicial discretion" by courts.<sup>250</sup>

If the Court were to re-categorize prior convictions as offense elements, thereby solidifying a system of absolute jury fact-finding, it would not only restrict the legislature's long-held responsibility to define the elements of crimes, but also eliminate a much-needed political check in our criminal justice system.<sup>251</sup> Thus, when applied in practice, the pro-*Apprendi* Court's broad Sixth Amendment interpretation generates a host of constitutional deficiencies. Given that the categorization of prior convictions is already constitutionally sound, it would be imprudent to overturn *Almendarez-Torres* based on such unsteady reasoning.<sup>252</sup>

However, even in the event that the Court re-labels recidivism as an element of the crime, the aforementioned procedural safeguards attached to prior convictions ensure the reliability and constitutionality of such facts, thereby eliminating

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249. See *Blakely v. Washington*, 542 U.S. 296, 345–46 (2004) (Breyer, J., dissenting) (“[There are concerns] about the obstacles the Court’s decision poses to legislative efforts to bring about greater uniformity between real criminal conduct and real punishment; and ultimately about the limitations that the Court imposes upon legislatures’ ability to make democratic legislative decisions.”).

250. *Id.* at 322 (O’Connor, J., dissenting).

251. See *Almendarez-Torres v. United States*, 523 U.S. 224, 225 (1998) (suggesting that a legislature’s decision to categorize recidivism as a sentencing factor is within the constitutional limits of the legislature’s authority to define offense elements).

252. See *Alleyne*, 133 S. Ct. at 2166–67 (Breyer, J., concurring) (suggesting that *Apprendi* was wrongly decided); *Cunningham v. California*, 549 U.S. 270, 295 (2007) (Kennedy, J., dissenting) (stating that the *Apprendi* line of cases is incorrect).

the need for a jury determination.<sup>253</sup> Justice Thomas acknowledged this consideration in *Rangel-Reyes v. United States*,<sup>254</sup> conceding that the judicial determination of a defendant's prior criminal history "will seldom create any significant risk of prejudice to the accused" and that there is ultimately no "special justification" for overruling *Almendarez-Torres*.<sup>255</sup>

*B. Imagining a Sentencing System Without Almendarez-Torres*

The constitutional argument in favor of prior convictions is admittedly problematic, so imagine for argument's sake, that *Almendarez-Torres* truly is unconstitutional and that by allowing judges to determine prior convictions, the judicial system in some way violates defendants' Sixth Amendment rights. Even under this presumption, the Court should still leave *Almendarez-Torres* intact. While absolute jury fact-finding may be an admirable idea in theory, actual implementation of this system would be far more than "a modest inconvenience" to our criminal justice system.<sup>256</sup> As Dean Nora Demleitner of Washington and Lee University School of Law has discussed, many scholars believe that the judicial system should adhere to a rigid and unyielding interpretation of the Constitution, no matter what the cost.<sup>257</sup> Unfortunately, this goal, however noble, is not only impractical, but also dangerously crippling to the functioning of a successful, expedient criminal justice system. The decision to overturn

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253. See *Garrus v. Sec'y of Pa. Dept. of Corrections*, 694 F.3d 394, 400 (3d Cir. 2012) (stating that a prior conviction has already been established through procedural safeguards, such as fair notice, reasonable doubt, and jury trial guarantees (referencing *Jones v. United States*, 526 U.S. 227 (1999))).

254. 547 U.S. 1200 (2006).

255. See *id.* at 1201 (denying certiorari). Justice Thomas also acknowledged that countless judges have relied on *Almendarez-Torres* in making sentencing determinations and thus, "the doctrine of *stare decisis* provides a sufficient basis" for upholding *Almendarez-Torres* in future cases. *Id.*

256. Darmer, *supra* note 40, at 551–52.

257. See DEMLEITNER ET AL., *supra* note 63, at 466 ("Let justice be done though the heavens fall." (quoting a Roman maxim)).

*Almendarez-Torres* would ultimately ignore “the compromises needed for the judicial system to function.”<sup>258</sup>

### 1. Habitual-Offender Statutes

If the Court decided to overrule *Almendarez-Torres*, thereby requiring a jury to find beyond a reasonable doubt the fact of any prior conviction, the judicial system would have two basic options in implementing a post-*Almendarez-Torres* sentencing system. The first option would be to require the prosecution to plead and prove prior convictions beyond a reasonable doubt during the guilt stage. This type of system would likely resemble a concept similar to California’s “Three Strikes” scheme—in other words, a system of anti-recidivist laws that increase the punishment for repeat offenders.<sup>259</sup> Almost all states have enacted some type of habitual-offender statute.<sup>260</sup> Under these anti-recidivist schemes, the prosecution must typically plead and prove all known prior convictions at trial beyond a reasonable doubt.<sup>261</sup> Challenges to such prior convictions are permissible as collateral attacks on the grounds of “violation of constitutional right to jury trial,

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258. See Gaston, *supra* note 12, at 1172 (describing the split between proponents and opponents of *Almendarez-Torres* as a divide of formalists and functionalists, and describing the pro-*Apprendi* majority’s view as somewhat more idealistic, despite potential inefficiency).

259. See DEMLEITNER ET AL., *supra* note 63, at 368 (explaining that under California’s “three strikes and you’re out” policy, many types of prior convictions qualify as “serious” or “violent,” and thus constitute a “strike”). A third felony will result in a sentence of at least twenty-five years. *Id.* Some recidivists may even receive twice the normal sentence for the current felony conviction depending on their prior convictions. See Erik G. Luna, *Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1, 1–3, 10 (1998) (referencing CAL. PENAL CODE § 667(e)(1)).

260. See DEMLEITNER ET AL., *supra* note 63, at 368 (describing California’s “Three Strikes” law as the most severe in the country). Under federal law, the habitual offender statute falls under 18 U.S.C. § 3559, which mandates that a person who is convicted of a serious violent felony shall be sentenced to life imprisonment if the person has been convicted on separate prior occasions of two or more serious violent felonies or one or more serious violent felonies and one or more serious drug offenses. 18 U.S.C. § 3559(c)(1) (2012).

261. See, e.g., CAL. PRAC. GUIDE THREE STRIKES SENTENCING § 4:1 (stating that the prior convictions must be pled and proved beyond a reasonable doubt before the Three Strikes law is triggered).

confrontation, and against self-incrimination.”<sup>262</sup> Herein lies one of the inescapable criticisms surrounding habitual-offender systems and consequently, one of the primary reasons to uphold *Almendarez-Torres*—prejudice to the defendant.

“Rules of evidence have been written to confine trials to evidence that is strictly relevant to the particular offense charged. The rationale . . . is not only to ‘prevent a time consuming and confusing trial of collateral issues,’ but also to prevent juries from being prejudiced by inflammatory facts.”<sup>263</sup> Unlike other sentencing factors that must be proven to the jury beyond a reasonable doubt, the introduction of evidence regarding a defendant’s prior convictions will always pose a significant risk of prejudice.<sup>264</sup> Prior crimes evidence tends to weigh more heavily with the jurors and pushes them to “prejudge” the defendant, denying him the fair opportunity to defend against the particular charge at issue.<sup>265</sup> Given the potential for prejudice, it seems likely that many defendants would actually oppose exercising their right to insist that the prosecution prove prior convictions to the jury.<sup>266</sup> Moreover, for those defendants who *do* want to challenge their prior convictions in front of the jury, the result will likely be “a mini trial” in which the defendant attempts to argue constitutional violations that were already addressed at

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262. *People v. Sumstine*, 687 P.2d 904 (Cal. 1984) (en banc).

263. *Parese*, *supra* note 63, at 685 (quoting *Williams v. New York*, 337 U.S. 241, 246–47 (1949)).

264. *See Shepard v. United States*, 544 U.S. 13, 38 (2005) (O’Connor, J., dissenting) (noting that “whatever the merits of the *Apprendi* doctrine, that doctrine . . . should not be extended to bear on, determinations of a defendant’s past crimes . . .”).

265. *See United States v. Harris*, 332 F. Supp. 2d 692, 706 (D.N.J. 2004) (referencing *Michaelson v. United States*, 335 U.S. 469, 476 (1948)).

266. *See, e.g., Carter v. State*, 824 A.2d 123, 123 (Md. 2003) (noting that the defendant was far more willing to stipulate as to his prior conviction, rather than allow the jury to hear evidence regarding the name and nature of said conviction); *see also* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1361 (2009) (summarizing previous studies that found that jurors use similar criminal record information to develop “propensity judgments” and other “negative evaluations” of a defendant).



the previous trial,<sup>267</sup> thereby expending an unnecessary amount of the court's time and resources.

While defendants can minimize the prejudice of their prior convictions through stipulation,<sup>268</sup> the prosecution is entitled, under most circumstances, to prove its case as it sees fit;<sup>269</sup> aside from violent felonies, the prosecution is typically free to reject a defendant's proposed stipulations.<sup>270</sup> In an attempt to address this issue of prejudice, some states have instituted "partial guilty pleas," which allow defendants to plead guilty to the prior conviction, but go to trial for the remaining elements of the charge.<sup>271</sup> These systems, however, are not without fault. Not only are partial guilty pleas less appealing to the Government,<sup>272</sup> they also provide prosecutors with an unfair bargaining chip in those states that require prosecutors' consent.<sup>273</sup> Thus, there are few effective mechanisms to protect defendants against prejudice in habitual-offender systems.

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267. James Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 23 (2000).

268. See *Old Chief v. United States*, 519 U.S. 172, 187–92 (1997) (holding that the prosecution may not, in a felon-in-possession case, present additional evidence regarding the defendant's prior conviction once the defendant has offered to stipulate to his prior conviction).

269. See Joseph A. Colquitt, *Evidence and Ethics: Litigating in the Shadows of the Rules*, 76 FORDHAM L. REV. 1614, 1645 n.18 (2007) (referencing the Court's holding in *Old Chief*, which recognized the traditional rule that the prosecution may typically prove its case by evidence of its own choice).

270. See *Old Chief*, 519 U.S. at 183 n.7 (noting that the Court's holding is limited to cases involving proof of felon status); David Robinson Jr., *Old Chief, Crowder, and Trials by Stipulation*, 6 WM. & MARY BILL RTS. J. 311, 338 (1998) (recognizing the limitations of the holding in *Old Chief*).

271. See Nancy J. King, *Juries and Prior Convictions: Managing the Demise of the Prior Conviction Exception to Apprendi 5–7* (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory Working Paper No. 14-24), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2459682](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2459682) (describing similar systems in Oregon and North Dakota).

272. See *id.* at 6 (noting that prosecutors are unable to present the prior conviction to the jury in a single proceeding under a partial guilty plea agreement).

273. See *id.* (stating that the option of a partial guilty plea does not necessarily mean an unqualified right to plead guilty to the prior conviction). For example, Nevada requires that the prosecution agree to the stipulation regarding a prior conviction in cases of partial guilty pleas. NEV. REV. STAT. § 207.016 (2013).

Aside from issues of prejudice, there are also practical concerns associated with habitual-offender schemes. For example, if the Court overrules *Almendarez-Torres* and requires that a sentencing jury find facts of prior conviction as “elements” of the crime, to what extent does the Sixth Amendment’s Confrontation Clause apply? In *Washington v. Crawford*,<sup>274</sup> the Court barred admission of testimonial hearsay during trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.<sup>275</sup> The Court expanded this holding to encompass forensic evidence in *Bullcoming v. New Mexico*,<sup>276</sup> concluding that a defendant has the right to confront the analyst who certified his blood-alcohol analysis report (so long as the report is testimonial within the meaning of the Confrontation Clause).<sup>277</sup> So where does this leave proof of prior criminal history? Who must testify in regards to these prior convictions? In federal court, if prior convictions derive from state cases, must the court clerk from that state testify? Who verifies the prior convictions to the jury and in what capacity can the defendant confront that declarant? These are just some of the administrative questions the Court would have to answer if it decided to implement a post-*Almendarez-Torres* system in which the prosecution pleads and proves prior offenses during the guilt stage.

## 2. Sentencing Juries

If the Court determines that the prejudice resulting from pleading and proving prior convictions during the guilt stage is too detrimental, it will have to resort to its second option—implementation of a sentencing jury.<sup>278</sup> This type of system

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274. 541 U.S. 36 (2004).

275. *Id.* at 36.

276. 131 S. Ct. 2705 (2011).

277. *Id.* at 2707.

278. See *Blakely v. Washington*, 542 U.S. 296, 319 (2004) (O’Connor, J., dissenting) (suggesting that in order to prevent the evidence of prior convictions from prejudicing the jury during the guilt determination stage, the Government “may have to bear the additional expense of a separate, full-blown jury trial during the penalty phase proceeding”); Jenia I. Turner, *Implementing Blakely*, 17 FED. SENT. R. 106, 108 (2004) (suggesting that if juries were to determine

bifurcates criminal proceedings into a trial stage and a sentencing stage, meaning that the same jury that determines the defendant's guilt or innocence also determines facts related to the defendant's punishment.<sup>279</sup> However, the jury only hears evidence relevant to sentencing after it has rendered its guilty verdict so as to avoid any undue prejudice to the defendant.<sup>280</sup> In fact, such a system may even require that evidence of recidivism be presented separately from evidence of other, more benign sentencing factors as well.<sup>281</sup> While sentencing juries may seem like a reasonable solution to a post-*Almendarez-Torres* sentencing system, sentencing juries are actually fairly unusual in today's criminal justice system and a blanket implementation of such bifurcation would mark a radical decision for the Court.<sup>282</sup> Ultimately, the issues associated with sentencing juries outweigh whatever constitutional benefits or principles would result from overturning *Almendarez-Torres*.

The ABA Standards for Criminal Justice have long called for the abolition of jury sentencing in noncapital cases: "Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offense and the offender. The jury's role in a criminal trial should not extend to determination of the appropriate sentence."<sup>283</sup> One of the main justifications for excluding the jury from the sentencing process is the potential for bias and inconsistency, two issues the Federal

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prior convictions, bifurcation of the process would be inevitable).

279. See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 334–35 (2003) (explaining the bifurcation process).

280. See *id.* (describing some of the purposes behind the implementation of sentencing juries, mainly the avoidance of prejudice from evidence of prior convictions).

281. See King, *supra* note 271, at 9 n.3 (referencing *Greer v. Commonwealth*, No. 2008-SC-000847-MR, 2010 WL 2471842 (Ky. June 17, 2010), in which the trial was trifurcated: the first phase was the guilt phase for assault and endangerment charges, the second phase was the guilt phase for the persistent felony offender charge, and the final phase was sentencing).

282. See DEMLEITNER ET AL., *supra* note 63, at 102 (noting that only a half-dozen states allow juries to determine the offender's sentence: Virginia, Kentucky, Missouri, Arkansas, Texas, and Oklahoma).

283. ABA STANDARDS FOR CRIMINAL JUSTICE, SENTENCING 18-1.4 (3d ed. 1994).

Guidelines sought to remedy.<sup>284</sup> As evidenced by several major studies regarding the disparities resulting from sentencing juries, different juries lead to different sentences.<sup>285</sup> In one study, an anonymous poll of juror sentence recommendations demonstrated that the median recommendation was only 19% of the median range in the relevant sentencing guidelines.<sup>286</sup> Interestingly, other studies in state courts have shown sentencing juries to impose more severe and more varied sentences than judges.<sup>287</sup> One possible explanation for these discrepancies is the surprising lack of information given to juries during the sentencing process. In those states utilizing noncapital sentencing juries, jurors are not provided with sentencing guidelines or probation statistics prior to rendering a punishment;<sup>288</sup> rather, they are simply asked to select a sentence somewhere within the statutory sentencing range.<sup>289</sup> Additionally, “aggravating and mitigating factors” that might assist the jury in making a decision are generally not identified by statute, nor included in the jury instructions.<sup>290</sup> Ultimately, “[n]o state provides juries with anywhere near the amount of sentence-related information that is currently provided to judges.”<sup>291</sup> Without such information, one wonders how

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284. See Parese, *supra* note 63, at 687 (noting, for example, that the *Apprendi* Court’s decision to involve the jury in the sentencing process “missed the underlying policy of protecting criminal defendants from innate human bias”).

285. See DEMLEITNER ET AL., *supra* note 63, at 104 (describing several studies assessing the severity of punishment in the context of jury sentencing).

286. See *id.* at 103 (referencing James S. Gwin, *Juror Sentiment on Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL’Y REV. 173 (2010)).

287. See *id.* (referencing Nancy J. King & Rosevelt L. Noble, *Jury Sentences in Two States*, 2 J. EMPIRICAL LEGAL STUD. 331 (2005)).

288. See Iontcheva, *supra* note 279, at 355 (noting that sentencing juries in noncapital cases are merely provided with a minimum and maximum range of punishment).

289. See Nancy King, *How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. OF CRIM. L. 195, 197 (2004) (referencing VA. MODEL JURY INSTRUCTIONS: CRIM. NO. P44-100, which permits the jury in a rape case to select a sentence anywhere between five years and life in prison).

290. *Id.*

291. Iontcheva, *supra* note 279, at 367.

sentencing juries can effectively fulfill the Sixth Amendment rights they serve to protect.<sup>292</sup>

While jurors have limited guidance and experience within the realm of sentencing, judges are repeat players. “With superior sentencing experience, a judge may have less apprehension about early parole release, less expectation that a sentence might be reduced, a better idea of what an average sentence is, and sometimes [has] even more mitigating information about the offender than the jury. . . .”<sup>293</sup> Additionally, judges have more exposure to a range of criminals and are able to save the more severe sentences for those defendants they recognize as the worst offenders; a first-time juror, however, may view each offender “as the worst criminal she’s ever seen.”<sup>294</sup> Most important, sentencing requires a certain level of judicial skill that only a judge develops:

[S]entencing is about more. It is about proportionality; it requires individualizing so that the punishment fits the crime. It is not now, nor has it ever been, a one size fits all approach. It continues to be about deterrence and rehabilitation. Indeed, far from being incompetent or illegitimate, *judicial decision-making is central to that enterprise.*<sup>295</sup>

Moreover, a judge is required to write an opinion that is subject to scrutiny; in the case of sentencing juries, however, appellate review extends only to “the grossest of errors,” such as sentencing outside the statutory range.<sup>296</sup> Thus, without a solid understanding of the “larger sentencing framework,” sentencing juries run the risk of returning to the inconsistent, bias-ridden sentences of the pre-Guidelines era.<sup>297</sup>

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292. See Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 888–89 (2004) (claiming that juries cannot properly reflect community sentiment about the severity of sentences because juries do not have the range of information and sentencing options available to sentencing judges).

293. King, *supra* note 289, at 206–07.

294. See *id.* at 207 n.58 (referencing *Proffitt v. Florida*, 428 U.S. 242, 252 (1976), in which the Court noted that a trial judge is more experienced in sentencing than a jury and therefore is “better able to impose sentences similar to those imposed in analogous cases”).

295. Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 558 (2007) (emphasis added).

296. King, *supra* note 289, at 197.

297. See Iontcheva, *supra* note 279, at 356 (noting that without a

While many proponents of sentencing juries justify the practice as a protection of the defendant's Sixth Amendment rights, a brief inspection of this bifurcated process shows that there may be other motives at play. Prosecutors have a major stake in sentencing by jury in that they can use the bifurcated process as a tool to push defendants into plea deals: "[J]uries will really lay it on somebody who deserves it," reported an Arkansas prosecutor, "I think the fear of having those 12 people do that to 'em, it moves a lot of cases. . . ."<sup>298</sup> Ultimately, the "wild card" aspect of jury sentencing and its effect on defendants' decisionmaking begs the question: is sentencing by jury truly a mark of democracy or is it a mere bargaining chip for the prosecution?<sup>299</sup> As Justice Breyer noted in *Blakely*, a sentencing system that relies too heavily on plea bargaining gives prosecutors a great deal of control over the sentence, thereby weakening the relation between real conduct and real punishment.<sup>300</sup> Similarly, Ohio State University law professor Douglas A. Berman warns that this type of prosecutorial power will continue to perpetuate disparate sentencing because unlike a judge's decision, which is made public, there is no real mechanism to review a prosecutor's discretion.<sup>301</sup> Thus, the end result of the proposed bifurcated process—a chilling effect that discourages defendants from exercising their right to a jury trial—runs afoul of the Sixth Amendment's constitutional guarantees.<sup>302</sup>

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comprehensive understanding of this framework, juries will render disparate judgments in similar cases).

298. King & Noble, *supra* note 292, at 896.

299. King, *supra* note 289, at 197.

300. See *Blakely v. Washington*, 542 U.S. 296, 338 (2004) (Breyer, J., dissenting) ("I do not understand how the Sixth Amendment could *require* a sentencing system that will work in practice only if no more than a handful of defendants exercise their right to a jury trial.").

301. See Sarah Glazer, *Sentencing Reform: Are Mandatory Sentences Too Harsh?*, in CQ REPORTER 27, 30 (Thomas J. Billitteri ed., 2014) (noting that, according to Professor Berman, disparate sentencing now occurs in the privacy of a prosecutor's office, rather than on the judge's bench).

302. It is important to recognize that judges also have a vested interest in jury sentencing. Nancy King and Rosevelt Noble refer to this interest as "deference, dodge, and docket." King & Noble, *supra* note 292, at 940. By placing the sentencing responsibility on juries, trial judges are able to avoid taking blame for punishment of offenders, thereby deflecting the "electoral outrage"

In addition to the aforementioned judicial concerns, there are unavoidable administrative problems associated with the implementation of sentencing juries. While the Court has made clear that “principle is more important than pragmatism”<sup>303</sup> in regards to fulfilling the Sixth Amendment, it seems foolish to discount the practicalities of sentencing administration.<sup>304</sup> As the dissenters in *Apprendi* emphasized, the Court’s gradual shift away from judicial fact-finding during sentencing has been heavily based on constitutional ideals, without much consideration for the administrative consequences.<sup>305</sup> For example, similar to the habitual-offender scheme discussed in Part IV.1, if the Court overturns *Almendarez-Torres* and institutes sentencing juries to account for the prejudice of prior convictions, the Sixth Amendment’s Confrontation Clause may present administrative difficulties during sentencing. Pursuant to *Williams v. New York*,<sup>306</sup> the Confrontation Clause does not apply at sentencing proceedings.<sup>307</sup> However, “[a]lthough the evidentiary rules do not apply to sentencing hearings in federal or state courts, the overlapping protections of the Sixth Amendment’s confrontation clause . . . still might require that a defendant be allowed to cross-examine witnesses . . . .”<sup>308</sup> There is substantial debate as to whether *Williams* is the appropriate precedent in determining whether the Confrontation Clause

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often associated with sentencing. See Glazer, *supra* note 301, at 52–53 (referencing King and Noble’s deference, dodge, and docket theory).

303. Turner, *supra* note 278, at 110.

304. See *Payton v. New York*, 445 U.S. 573, 602 (1980) (claiming that policy arguments must give way when constitutional commands are “unequivocal”). Given that the constitutional concerns at issue here seem far from “unequivocal,” this Note argues that they merit a less rigid standard of adherence as proposed by the pro-*Apprendi* Court.

305. See *Apprendi v. New Jersey*, 530 U.S. 466, 555 (2000) (Breyer, J., dissenting) (“[The real world of criminal justice] can function only with the help of procedural compromises, particularly in respect to sentencing. And those compromises, which are themselves necessary for the fair functioning of the criminal justice system, preclude implementation of the procedural model that today’s decision reflects.”).

306. 337 U.S. 241 (1949).

307. See *id.* at 253 (concluding that there was no violation of due process when the defendant’s sentence was based on information supplied by witnesses with whom the accused had no opportunity to confront).

308. DEMLEITNER ET AL., *supra* note 63, at 451.

applies at sentencing proceedings; rather, many commentators believe that the *Apprendi* series of cases is the more appropriate line of precedent.<sup>309</sup> Given that the *Apprendi* saga carved out a more active role for the jury during sentencing, such a shift in precedent would indicate that the Confrontation Clause may eventually apply to sentencing—the more trial-like sentencing proceedings become, the greater influence evidentiary rules could have on the federal sentencing process.<sup>310</sup> Such a development would obviously complicate sentencing procedures in a system without the prior convictions exception.

In addition to evidentiary issues, sentencing juries pose additional practical concerns—the main one being cost, both in time and money.<sup>311</sup> Financially, the bifurcation of cases means extending jury duty to the sentencing stage, thereby increasing jury fees and the amount of “productivity lost” to this elongated jury duty.<sup>312</sup> The cost in time and resources is equally burdensome.<sup>313</sup> While “bifurcation” suggests that there will only be two parts to a trial, many cases will involve multiple defendants along with multiple enhancements. In this more complex scenario, would the jury be required to try all of these issues in sequence? What if the defendants risk prejudicing one another in respect to jury consideration of later issues? While the pro-*Apprendi* majority has maintained that constitutional

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309. See Dustin K. Doty, *Saving Face: Arkansas’s Application of the Confrontation Clause to Jury Sentencing Proceedings*, 66 ARK. L. REV. 549, 550 (2013) (noting that many commentators believe that *Williams* is inconsistent with the Confrontation Clause analysis established in *Crawford*).

310. See *id.* (suggesting that the pro-*Apprendi* Court may be more willing to grant defendants the right to confront witnesses during sentencing proceedings when jury decisionmaking is involved).

311. See *Blakely v. Washington*, 542 U.S. 296, 336 (2004) (Breyer, J., dissenting) (“Our experience with bifurcated trials in the capital punishment context suggests that requiring them for run-of-the-mill sentences would be costly, both in money and in judicial time and resources.”); Turner, *supra* note 278, at 110 (claiming that many federal courts have refused to implement sentencing juries due to the “impractical” and “expensive” nature of such proceedings).

312. Iontcheva, *supra* note 279, at 364; see Bibas, *supra* note 3, at 1144 (suggesting that bifurcation would be far more cumbersome than anticipated as evidenced by the millions of dollars spent on capital cases).

313. See Turner, *supra* note 278, at 108 (referencing *United States v. Agett*, No. 2:04-CR-10, 2004 WL 1698094, at \*4 (E.D. Tenn. July 24, 2004), which emphasized the wasteful delays that would result from a bifurcated system).



principles must come before pragmatism,<sup>314</sup> the aforementioned questions demonstrate the cumbersome and unavoidable realities that the Court would need to resolve were it to bifurcate cases and implement sentencing juries.<sup>315</sup>

### V. Conclusion

By the time the Court reached the final case in its march through the *Apprendi* revolution, it had built an extensive arsenal of Sixth Amendment jurisprudence.<sup>316</sup> Returning absolute fact-finding to the jury box, *Alleyne* left many defendants hopeful that *Almendarez-Torres* would consequently be overruled and that the finding of prior convictions would finally be removed from the purview of the judge.<sup>317</sup> There is a crucial disconnect, however, between the issue at hand and the remedy being sought. Why are defendants with prior convictions so concerned with the possibility of a judge finding the existence of prior criminal history? Are they concerned with the way the convictions are proved or are they concerned with the amount of punishment that follows as a result? It seems reasonable to assume that defendants are mostly concerned with the fact that a prior conviction can expose them to a more severe, enhanced sentence. Overturning *Almendarez-Torres*, however, is not the right vehicle to address this concern.

If *Alleyne* was to mark the death of *Almendarez-Torres*, the Court would either need to institute (1) repeat-offender laws, which would result in prejudice during the guilt-determination stage, or (2) sentencing juries, which would likely prove too

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314. See *Blakely*, 542 U.S. at 313 (asserting that the holding in *Blakely* “cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice”).

315. See Iontcheva, *supra* note 279, at 335 n.134 (“The trial-like factfinding mandated by *Apprendi* is clearly more costly and time-consuming than judicial determinations at a sentencing hearing, added to which is the cost of thousands of appeals as a result of the dramatic change in sentencing practices mandated by *Apprendi*.”).

316. See *supra* Part III (addressing the saga of case law interpreting the Sixth Amendment).

317. See *supra* notes 234–236 and accompanying text (discussing the growing number of *Almendarez-Torres* challenges by defendants).

cumbersome a process to implement throughout our entire criminal justice system. Both of these options pose judicial and administrative frustrations, including the possibility of prosecutorial abuse, inconsistent sentencing, uninformed juries, evidentiary issues, and the unnecessary expenditure of time and money.<sup>318</sup> The result, therefore, becomes the weighing of a doctrinaire invocation of a constitutional right and the benefits it provides to defendants versus the cost such a right would impose on the judicial system. While “unequivocal” constitutional rights should trump concerns of judicial administration,<sup>319</sup> that is not the case here. As previously discussed, the pro-*Apprendi* Court’s broad Sixth Amendment interpretation is riddled with imperfections. The alleged right to have a prosecutor prove beyond a reasonable doubt the fact of prior convictions to a jury is far from well-established and “unequivocal,” and as such, should not take precedent over a myriad of unfavorable, burdensome consequences that would result from the implementation of a post-*Almendarez-Torres* sentencing system.

Ultimately, opponents of *Almendarez-Torres* will need to look to the legislature, to the Eighth Amendment perhaps, if they want to change the ways in which prior convictions affect sentences.<sup>320</sup> Defendants will not achieve a reduction in exposure to sentencing enhancements by simply changing the adjudicatory factfinder of prior convictions. Having envisioned the framework of a sentencing system without *Almendarez-Torres*, the question arises: how many times would a defendant actually choose to present or challenge a prior conviction, which has already been found with procedural safeguards, and voluntarily open himself up to prejudice from the jury? The answer is likely almost none. Thus, even if the Court were to determine that *Almendarez-Torres* violates the Sixth Amendment, overturning the prior convictions exception would not procure the victory against over-punishment that defendants are truly seeking; therefore, the

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318. See *supra* Part IV (discussing the practical realities of sentencing juries).

319. *Payton v. New York*, 445 U.S. 573, 602 (1980).

320. See *King*, *supra* note 271, at 2 (suggesting that the legislature could enact a law that would require the Government to inform a defendant *before* he admits to guilt or pursues a trial that his conviction will carry a higher sentence as a result of his prior conviction).

Court should confirm the viability of *Almendarez-Torres* and sustain the prior convictions exception.