I. Introduction

Think about it. We’re back almost full circle to the year 2000, immediately after *Apprendi v. New Jersey* was decided, when Justice Thomas concurrence promised the imminent demise of recidivist enhancements as mere sentencing factors. Constrained by its earlier decision in *Almendarez-Torres v. United States*, the majority in *Apprendi* made prior convictions the exception to its holding. But Justice Thomas made his disagreement with that exception clear, by announcing in his concurring opinion that his swing-vote with the majority in *Almendarez-Torres* had been wrong. It seemed only a matter of time before the Court reversed itself and included recidivism in its Sixth Amendment analysis, such that prior convictions, like all other enhancing factors, would have to be charged and proven beyond a reasonable doubt, or admitted by the defendant.

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1 125 S. Ct. 1254 (2005), a 5-4 decision issued on March 7, 2005 and authored by Justice Souter. Many thanks to Alan Dubois for his excellent outline on this subject, to David McColgin, and to the national federal defender community for its ongoing, always enlightening, dialogue.

2 530 U.S. 466 (2000). *Apprendi* held that other than the fact of a prior conviction, the Sixth Amendment demands that all other factors which enhance a sentence beyond the statutory maximum must be charged and proven beyond a reasonable doubt, or admitted by the defendant.

3 523 U.S. 224 (1998). The 5-4 majority concluded that recidivist enhancements were sentencing factors, not elements, to be proven to the judge at sentencing by a preponderance of the evidence.
In expectation of *Almendarez-Torres*\textdagger\textdagger, districts nationwide took prophylactic steps in the year 2000 and many began charging prior convictions in the indictment and litigating them before juries in bifurcated proceedings. But nothing ultimately happened. The Supreme Court denied certiorari in case after case, and things gradually went back to the way they\textdagger\textdagger always been, with recidivist enhancements viewed as sentencing factors, not elements of the offense, to be proven to the judge by a preponderance of the evidence.

Then *Blakely*\textsuperscript{4} rocked the world, clarifying the term \textsuperscript{statutory maximum,}\textsuperscript{\textcircled{}}} followed by *Booker/Fanfan*,\textsuperscript{5} which applied the Sixth Amendment analysis to the federal sentencing guidelines and rendered them advisory only. While both opinions paid lip service to the \textsuperscript{\textcircled{}}prior conviction\textsuperscript{exception}, we now have *Shepard*, which again raises serious doubt about the vitality of that exception.

The decision does not reverse *Almendarez-Torres* but instead restricts the facts courts can consider in determining whether a prior conviction qualifies for the enhanced penalty. If the analysis works to disqualify the conviction, which it did for the defendant in *Shepard*, the enhanced penalty will not apply. But if the analysis works to your client\textdagger\textdagger detriment and the prior conviction qualifies, the *Shepard* opinion invites the argument that a given recidivist statute is unconstitutional on its face.\textsuperscript{6} *Shepard*\textsuperscript{\textcircled{}} application to the federal sentencing guidelines is less clear, given their advisory nature, but a broad reading also invites its application in that context.

The bottom line is that as effective advocates, we must continue raising and preserving all possible objections to recidivist enhancements, based upon *Shepard* and the Sixth


\textsuperscript{6} Needless to say, vulnerable statutes are those which treat prior convictions as sentencing factors, and does not include 18 U.S.C. \textsuperscript{'} 922(g)(1), the felon-in-possession statute, where the prior conviction is an element of the offense.
Amendment’s jury trial guarantee set forth in the *Apprendi* line of cases.

II. *Shepard*’s Holding

The Sixth Amendment’s application to recidivist enhancements was not directly raised in *Shepard*, and thus was not decided in the Court’s opinion. *Shepard* was an Armed Career Criminal Act (ACCA) case, where the defendant pled guilty to felon-in-possession (18 U.S.C. ’922(g)(1)) and the government sought the 15-year mandatory minimum recidivist enhancement under ’924(e). At issue was the sentencing court’s fact finding authority regarding the prior convictions and whether they constitute a violent felony within the meaning of the ACCA statute. Mr. Shepard had three Massachusetts burglary convictions, and under the Supreme Court’s earlier decision in *Taylor v. United States*, only a generic burglary (i.e., unlawful entry into a building or structure with intent to commit a crime) qualified as a violent felony for ACCA purposes. Massachusetts has a broad, a non-generic burglary statute, meaning that it prohibits unlawful entries not just into buildings or structures but also vehicles and boats. The issue at Mr. Shepard’s sentencing was how far the court could go in determining whether the conduct underlying his conviction was a generic or a non-generic burglary.

In *Taylor*, the prior burglary conviction resulted from a jury trial, and the Supreme Court limited the sentencing judge’s fact finding to the statutory elements, the charging documents, and the jury instructions from the prior conviction. The problem at Mr. Shepard’s sentencing was that he had pled guilty to the prior burglaries, so there were no jury instructions, and the statutory elements and charging documents did not clarify whether his pleas were to generic or non-generic burglary. The government wanted the judge to consider police reports and other documents outside of *Taylor*’s restrictions, which the judge felt unauthorized to do and therefore refused to apply the ACCA recidivist enhancement.

The 5-4 *Shepard* majority held that where a defendant pled guilty to a non-generic statute, inquiry to determine whether this amounted to generic burglary was limited to the charging documents, the plea agreement and the guilty plea colloquy. It refused to extend the court’s fact finding authority to police reports and similar documents, for to do so would erode *Taylor*’s conclusion that respect for congressional intent and avoidance of collateral trials

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require confining generic conviction evidence to the convicting court’s records approaching the
certainty of the record of conviction in a generic crime State. At thus affirmed the sentencing
judge’s refusal to sentence Mr. Shepard under ACCA’s harsh recidivist enhancement.

In Part III of the opinion, a four-member plurality relied on the doctrine of constitutional
avoidance as an additional reason for its holding. The plurality pointed out that Sixth
Amendment concerns are raised when a judge resolves a factual dispute over the nature of a
burglary, for although it is a fact about a prior conviction, it is too far removed from the
conclusive significance of a prior judicial record, and too much like the finding subject to Jones
and Apprendi, to say that Almendarez-Torres clearly authorizes a judge to resolve the dispute. @
Justice Thomas did not join in Part III, and filed a separate concurring opinion explaining that he
saw not constitutional doubt, but constitutional error, in such judicial fact finding.

Like in Apprendi, Justice Thomas’s concurrence laments that the constitutional infirmity of [the ACCA statute] ... makes today’s decision an unnecessary exercise. @ He goes on to observe that Almendarez-Torres, like Taylor, has been eroded by this Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that Almendarez-Torres was wrongly decided.... The parties do not request it here, but in an appropriate case, this Court should consider Almendarez-Torres’ continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of Almendarez-Torres.... @

This language is strong and unequivocal, so how can it be doubted that recidivist
enhancements as sentencing factors will be short lived? Just because Justice Thomas is saying
the same thing now that he said in Apprendi, and nothing happened in these intervening years,
does not mean that major change for recidivist enhancements is not now around the corner. The
Court’s Sixth Amendment jurisprudence is substantially more developed now as compared to
then. One cannot help but conclude, as we did back in 2000, that the continued viability of
Almendarez-Torres is again hanging on a thread (but for real this time!).

Shepard raises many questions, not the least of which is why the Court didn’t simply
reverse Almendarez-Torres and be done with it? Was is only because the issue was not directly
raised by the parties? Is the Court that afraid of judicial activism’s accusations and the
anticipated wrath of Congress? And why didn’t the so-called majority that Thomas references,
those who now recognize[] that Almendarez-Torres was wrongly decided, join his concurring
opinion?

Whatever the answers, the Shepard majority avoided the constitutional question by construing the ACCA statute in a manner that did not require it to rely on Almendarez-Torres: by limiting inquiry into the facts of the prior conviction to those already contained in the prior judicial record, thus eliminating affirmative fact finding by the sentencing judge. To do otherwise would have required it to decide whether such fact finding is authorized by Almendarez-Torres. And given the Court’s Sixth Amendment jurisprudence since Apprendi, it seems inescapable that only a jury can make findings that increase the statutory maximum. So for now, Almendarez-Torres has not yet been reversed, and Shepard =holding only directly= helps defendants convicted of non-generic burglaries in circuits that permitted courts to look at police reports and similar documents to determine if generic burglary was actually committed.

Nonetheless, the Shepard analysis has far-reaching potential, impacting both statutory and guideline recidivist enhancements. Defense practitioners should be creative and expansive in utilizing it, and must prudently raise and preserve the issue wherever possible, from the district court through to a petition for certiorari in the Supreme Court.

III. Litigation Strategies in Light of Shepard

A. Statutory Recidivist Enhancements

1. Determine If The Priors Qualify

Together, the categorical approach of Shepard and Taylor restricts those facts a court can consider in deciding whether prior convictions qualify for the enhanced penalty. It worked for the defendant in Shepard because the permissive records of the prior convictions did not clarify that generic burglary had been committed. It is therefore critical to review both the statutes and the court records from the prior convictions, including the plea colloquy in guilty plea cases (when available), to see if the requisite facts are present.

Like Massachusetts=non-generic burglary statute in Shepard, a number of states have statutes addressing drugs or violence that may or may not meet the federal statute=definition of a predicate conviction. For example, under Pennsylvania law, a trafficking offense involving marijuana carries a 5-year statutory maximum, and thus does not meet the ACCA=definition of Aserious drug offense, which requires that it be punishable by at least ten years=imprisonment. 18 U.S.C. § 924(c)(2)(A). In a post-Shepard ACCA sentencing here in Philadelphia, the court
disqualified a prior conviction because the conspiracy offense involved possession with intent to distribute heroin, cocaine and marijuana. It was not clear from the statutory definition, the charging document (the bill of information)\(^8\) and the remaining records permitted under Shepard (the written plea agreement and the transcript from the plea colloquy) which substance was attributable to the defendant. The plea colloquy had been conducted simultaneously with that of two co-defendants, and although the factual basis included an allegation of a direct sale of cocaine by the defendant among other facts, the defendant was never asked whether he agreed to that specific fact.\(^9\) Ultimately, the court disqualified the conviction because the records did not establish a plea to anything more than possession with intent to distribute marijuana.\(^10\)

Carefully scrutinizing court records may be very fruitful in remote cases, where records may be incomplete or no longer in existence. You should also carefully check the criminal history section of the presentence report if it contains information harmful to your client, to ensure that the report has not relied on impermissible documents (such as arrest reports, witness interviews, former presentence reports or records from probation or parole files) in setting forth the facts of a prior conviction.

Remember the related argument that factors necessary for application of certain enhancements may go beyond the mere fact of conviction. Under the ACCA, for example, there must still be a finding that the priors constitute either a \textit{violent felony} or a \textit{serious drug offense},\(^1\) and they must be found to have been \textit{committed on occasions different from one another}....\(^2\) 18 U.S.C. \(^1\) 924(e). The illegal reentry statute, for its part, requires findings about the timing of the removal proceeding in relation to when the conviction was sustained and whether the conviction constitutes an \textit{aggravated felony}....\(^3\) 18 U.S.C. \(^1\) 1326(b). Since \textit{Almendarez-Torres}...  

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\(^8\) The prosecutor was unsuccessful in persuading the court to consider the criminal complaint, which specifically alleged a cocaine sale by the defendant, because under Pa. rules of criminal procedure, the bill of information, not the complaint, is the charging document.

\(^9\) \textit{Shepard} allows consideration of \textit{explicit factual finding[s]} by the trial judge [from the prior conviction] but only those \textit{to which the defendant assented}....\(^2\) 25 S. Ct. at 1257.

\(^10\) Great work by Cathy Henry and Ben Cooper of the Phila. Federal Defender Office!

\(^11\) Are these factual findings or conclusions of law? The answer is not settled in this climate, and it is appropriate to argue that these are findings of fact.
does not clearly authorize a judge to make such findings about the nature or timing of the prior convictions, those facts must be apparent from the face of the permissible documents and records or the enhanced penalty cannot apply. Counsel should object and preserve the issue whenever appropriate.

2. **If Priors Qualify, Raise The Constitutional Challenge**

Assuming the prior convictions qualify under *Shepard* and *Taylor* for the enhanced penalty, it is wholly appropriate to use the reasoning in Justice Thomas’s concurrence to argue that the applicable recidivist statute is unconstitutional on its face. In addition to the ACCA, other statutes vulnerable to the challenge include 8 U.S.C. ' 1326(b) (illegal reentry after deportation following aggravated felony conviction), 21 U.S.C. ' 841(b) and ' 851 (enhancements for prior drug convictions), 18 U.S.C. ' 3559(c) and (e) (Three Strikes and offenses against children), and 18 U.S.C. ' 2241 et seq. and ' 2426 (sexual abuse). Given the tenuous viability of *Almendarez-Torres*, there is no reason to ever waive this issue unless you are getting something substantial in return from the government. The constitutional challenge should be made and preserved through appeal, including a petition for certiorari to the U.S. Supreme Court.

The challenge relies on the fact that they can run, but they can≠hide forever! *Shepard* avoided the constitutional issue, but it will have to be confronted by the Supreme Court at some point. The argument is that *Almendarez-Torres* must be overruled, because prior convictions cannot logically be distinguished from other enhancement factors that increase the statutory maximum. Pursuant to the *Apprendi* line of cases, the Sixth Amendment demands that the fact of a prior conviction likewise must be charged and found by the jury beyond a reasonable doubt, or admitted by the defendant, before the enhanced penalty can apply. Moreover, *Almendarez-Torres* can be distinguished because its vulnerability mandates that it be read narrowly and strictly confined to the facts of that case. Those facts include an admission to the prior conviction and a Fifth (not Sixth) Amendment challenge under the due process clause. As such, it can possibly be argued that it is not controlling, especially where a defendant did not admit the prior conviction.

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8 Sixth Amendment jurisprudence since *Apprendi*, has evolved past the point of no return, and the issue will be ever harder for the Supreme Court to evade.
But given Almendarez-Torres holding that recidivism is a sentencing factor and not an element, and that it has not yet been reversed, we can expect district courts to rule in our favor at this time. The goal should be to preserve the issue for appeal.

3. **Jury Trials for Recidivist Enhancements**

The government, and some courts, may respond by invoking the doctrine of constitutional avoidance, reading a jury trial requirement into the statute to salvage it. As noted earlier, this was done in many districts in the aftermath of Apprendi, when the government began alleging priors in the indictment. Such allegations are surplusage, and motions to strike priors from the indictment should be filed, as explained below.

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13 It is the *Supreme* Court’s prerogative *alone* to overrule one of its precedents. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (emphasis added).
Although the constitutional challenge asserts that jury findings are required, you must object to proceeding with a jury trial because it is not authorized by any of the recidivist statutes and is contrary to Congress’s plain intent. That intent, which is that prior convictions are sentencing factors, not elements, to be proven to the judge by a preponderance of the evidence, has been confirmed by every court to consider the issue, up to the Supreme Court in *Almendarez-Torres*. Courts cannot legisllate such deficiencies away, by construing a statute in a manner that coerces a jury trial and is plainly contrary to the intent of Congress.¹⁴

If you are ultimately forced, over objection, to try the issue of prior convictions to a jury, there should be a bifurcated proceeding during which the priors are separately addressed, after guilt has been determined on the underlying offense. The defendant can always offer to waive the jury and have the judge decide the prior conviction issue beyond a reasonable doubt. *Do not stipulate to the prior convictions*, because doing so may waive the issue altogether.

4. **Motions To Strike Priors As Surplusage**

If the government alleges the priors in the indictment, you should object and move to strike them as surplusage pursuant to Fed.R.Crim.P. 7(d) and the due process clause. Many similar motions were filed in the aftermath of *Blakely*, when non-recidivist factors were being included in indictments. Many district courts granted those motions, although the reported decisions considering the issue are split, because of the state of confusion post-*Blakely*.¹⁵

5. **Do Not Admit To The Prior Convictions**

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¹⁴ *United States v. Jackson*, 390 U.S. 570, 580 (1968) (courts are not free to impose upon an unwilling defendant a jury fact finding procedure not authorized by Congress, solely for the purpose of rescuing a statute from the charge of unconstitutionality).

It is extremely important, from this point forward, to not admit to the prior convictions at trial, in a written plea agreement, during a guilty plea colloquy, during a presentence investigation and, if possible, at sentencing. If your client already has already done so, argue that it was not a knowing admission and try to clarify the record as best you can. If the government or the court tries to force the issue at the plea colloquy or at sentencing, remind them of the defendant’s Fifth Amendment privilege under *United States v. Mitchell*.16

This could come up at a plea colloquy, for example, where your client is asked to acknowledge the 10-year statutory minimum and life maximum in a drug case where quantity would have triggered the 5-year minimum and 40-year maximum, but the government filed notice under 21 U.S.C. ' 851 of a prior drug conviction to trigger the enhanced penalty. In *Mitchell*, the defendant could not be forced to answer questions as to drug quantity because of the Fifth Amendment privilege, and the same should hold true for prior convictions, given that *Almendarez-Torres* still regards them as sentencing factors. Make it clear that your client is not admitting the prior conviction to preserve this issue, and as long as the judge advises of the possibility of a life maximum, the colloquy is intact and the plea should be accepted. You should also object to the presentence report insofar as it reflects an enhanced penalty because of the prior conviction.

At sentencing, however, you may need to argue facts related to a prior conviction to lower the advisory guideline range and/or bolster your ultimate argument under 18 U.S.C. '3553(a) for a reasonable sentence. For example, you may have a solid argument that a prior does not qualify as an aggravated felony, such that it warrants only a 4-level (not a 16-level) enhancement under USSG '2L1.2, or that the criminal history category significantly over represents the seriousness of your client’s record. In most cases, you should not forfeit meritorious sentencing arguments to avoid admitting the prior convictions, but it could come down to a judgment call. Be aware of this potential dilemma and whenever possible, try to avoid it by articulating the merits of your legal argument carefully, perhaps hypothetically, without affirmatively admitting that your client sustained the conviction.

B. *Shepard’s Application to Federal Sentencing Guidelines*

As noted earlier, *Shepard*’s application to the sentencing guidelines is less clear, given their advisory nature. It is also possible that restricting the information courts can consider about prior convictions under the guidelines may work to a defendant’s detriment, depending on the case. There may be a scenario where police reports and other extraneous documents are particularly helpful, perhaps in arguing why certain prior convictions are related and should not count as separate convictions. The point is to carefully consider whether *Shepard*’s applicability to the guidelines benefits your client, and don’t make the argument if it does not. In any event, if the underlying conduct is helpful in mitigating a prior conviction, it can always be argued as a mitigating factor under 18 U.S.C. § 3553(a), in pursuit of a reasonable sentence that is not harsher than necessary.17

1. **Guideline Recidivist Enhancements**

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17 Alternatively, it can be argued as an appropriate departure ground from the advisory range (assuming you concede that departures remain a viable concept post-Booker). *United States v. Harris*, 165 F.3d 1062, 1068 (6th Cir. 1999).
In the career offender context, USSG '4B1.1, a number of circuit courts across the country, including the Third Circuit, have been restricting the information courts can consider about prior convictions for many years.\(^{18}\) *Shepard* further clarifies what courts should consider in prior guilty plea cases. Section 4B1.2's definition of a crime of violence, which applies to the career offender guideline, includes (1) an elemental analysis, where the statute of conviction as an element the use, attempted use, or threatened use of physical force against the person of another; (2) enumerated categories of offenses, including burglary of a dwelling, arson, or extortion and the additional categories set forth in Application Note 1 (murder, kidnapping, aggravated assault, etc.); and (3) a catch-all provision which includes offenses for conduct that involves the use of explosives or presents a serious potential risk of physical injury to another, which conduct the commentary in Application Note 1 instructs must be expressly charged...in the count of which the defendant was convicted... if that conduct is not expressly charged, the conviction does not qualify.

*Shepard* can be read broadly as also restricting the court's fact finding authority regarding other recidivist enhancements in the guidelines, including those found in '2K2.1 (firearms), '2L1.2 (illegal reentry), and '4B1.5 (repeat sex offender against minors). There is no logical reason to apply restrictions to the career offender guideline but not to similar recidivist guidelines. The concern for ensuring the reliability of information and avoiding collateral, mini-trials at sentencing proceedings is equally applicable.

2. **Calculating Criminal History Points**

Because Part III of the *Shepard* decision states that it is unclear whether *Almendarez-Torres* authorizes a court to make findings beyond the fact of conviction, it can be argued in appropriate cases that *Shepard* restricts the court's fact finding authority in calculating criminal

\(^{18}\) See, e.g., *United States v. Joshua*, 976 F.2d 844, 856 (3d Cir. 1992) (must look solely to conduct alleged in count of conviction); *United States v. Parson*, 955 F.2d 858, 862-73 (3d Cir. 1992) (where statute of conviction indicates offense involved serious potential risk of physical injury to another, do not look to underlying conduct); *United States v. McAllister*, 927 F.2d 136, 138-39 (3d Cir. 1991) (follows *Taylor*); *United States v. Gaitan*, 954 F.2d 1005, 1008-11 (5th Cir. 1992) (cannot consider conduct underlying state possession conviction to expand to trafficking offense); *United States v. Damon*, 127 F.3d 139, 140-45 (1st Cir. 1997); *United States v. Hernandez*, 145 F.3d 1433, 1440 (11th Cir. 1998) (error to use arrest affidavits to determine if convictions were for selling rather than buying drugs).
history points as well. Even given that the guidelines are now advisory, the Supreme Court’s clear directive that nothing outside of the judicial records of prior convictions should be considered is compelling, at least by way of guidance. Criminal history points are assigned based upon many factors that go beyond the mere fact of conviction and that may not be reflected in the court records sanctioned by the Shepard/Taylor analysis. These include the length of the prior sentence imposed, how long ago it was imposed, its relatedness to other prior convictions, and whether the offense conduct occurred while the defendant was under court supervision or within two years of release from imprisonment.

Judicial records of the prior conviction should be carefully reviewed, for they may not contain the facts necessary for the assignment of criminal history points. For example, a judgment order may reflect only a flat time served @ sentence, without specifying the time actually served that was being credited. In that scenario, argue that the court should not go beyond the Shepard and Taylor restraints to determine how long the defendant spent in custody, and that only one criminal history point should apply under 4A1.1(c). If the court wants to exceed those restraints because of the advisory nature of the guidelines, it can also be argued that the resulting sentence would be unreasonable, within the meaning of Booker.

C. Cases on Appeal

For cases that are on direct appeal, it is prudent to file supplemental briefs challenging Almendarez-Torres and any recidivist enhancements that were imposed. If the case was on appeal and was remanded for re-sentencing after Booker, such proceedings are de novo, and defendants can challenge ACCA and other enhancements at the new sentencing proceeding.

IV. Conclusion

The Shepard analysis is not confined to the Armed Career Criminal Act (ACCA) and should apply to all statutory recidivist enhancements that treat prior convictions as sentencing factors. The exact reach of the analysis, especially in the sentencing guidelines context, remains to be seen, but a broad reading of it invites the arguments suggested above. The decision opens up new arenas for challenging criminal history enhancements, and in this climate of uncertainty, they should be creatively pursued whenever possible.