SHEPARD v. UNITED STATES: NEW SUPREME COURT OPINION WITH NEGATIVE IMPLICATIONS FOR *ALMENDAREZ-TORRES* & *GUERRERO*

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In California, two legal principles applicable to criminal cases involving prior-conviction allegations are: (1) there is no Sixth Amendment right to a jury trial as to such allegations;[1] and (2) in deciding the truth of such an allegation, the trier of fact may consider "the entire record of conviction," i.e., including things like probation reports and preliminary-hearing transcripts, as long as they are admissible under the rules of evidence.[2]

On March 7, 2005, the United States Supreme Court issued an opinion that calls into question the continuing validity of these two principles. In *Shepard v. United States*,[3] the Court (in an opinion by Justice Souter) held that a sentencing judge may not use the entire record of a prior conviction (e.g., including things like police reports) to determine whether a prior conviction that resulted from a guilty plea is one that can be considered in assessing whether the defendant must receive an increased sentence under the Armed Career Criminal Act (18 U.S.C. § 924(e); "ACCA"). Instead, the inquiry into whether a prior conviction that resulted from a guilty plea includes the facts necessary to render it an ACCA prior "is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information."[4]

This holding, the Court explained, is consistent with its prior holding in *Taylor v. United States* (1990) 495 U.S. 575, in which the Court held (as a matter of Congressional intent) that, in determining whether a prior conviction qualifies as a prior under the ACCA, a sentencing judge is limited to the prior's statutory elements, charging documents, and jury instructions.[5]

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[1] *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, 238-247; and see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 ["Other than the fact of a prior conviction ..."]; *People v. Epps* (2001) 25 Cal.4th 19, 23-28.

[2] *People v. Guerrero* (1988) 44 Cal.3d 343, 352 ["the court may look to the entire record of the conviction to determine the substance of [a] prior ... conviction"]; *People v. Reed* (1996) 13 Cal.4th 217.

[3] (2005) ___ U.S. ___ [2005 U.S. LEXIS 2205].

[4] *Shepard*, *supra*, 2005 U.S. LEXIS 2205, p. 26.

[5] *Shepard*, *supra*, 2005 U.S. LEXIS 2205 at p. 7, citing *Taylor v. U.S.*, *supra*

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Although *Shepard*, like *Taylor*, is based on the Court's assessment of Congressional intent, a plurality of the Court in *Shepard* expressed the view that the Court's holding is also required by constitutional concerns regarding due process and the right to trial by jury. In part III of his opinion, Justice Souter explained that allowing the sentencing court to use additional facts (i.e., evidence reflecting facts in addition to those necessarily found by the jury or admitted by the defendant) to determine the nature of a prior conviction would "raise[] the concern underlying *Jones*[[6]] and *Apprendi*: the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence."[7] The Court reasoned that its holding was necessary to protect the defendant's constitutional rights notwithstanding the Court's prior holding in *Almendarez-Torres*.

> While the disputed fact here can be described as 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 findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. The rule of reading statutes to avoid serious risks of unconstitutionality [citation] therefore counsels us to limit the scope of factfinding on the disputed generic character of a prior plea, just as *Taylor* constrained judicial findings about the generic implication of a jury's verdict.[8]

Justice Souter's opinion in *Shepard* is joined by Justices Stevens, Scalia and Ginsburg.[9] Justice Thomas concurred in the result and in all parts of the opinion except part III. However, the reason Justice Thomas did not join in part III of the opinion is that, in his view, it does not go far enough in explaining the constitutional infirmity of the ACCA and of *Almendarez-Torres* in the wake of *Jones* and *Apprendi*. Justice Thomas reiterated his view (previously expressed in his concurring opinion in *Apprendi*) that *Almendarez-Torres* was wrongly decided.

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[6] *Jones v. U.S.* (1999) 526 U.S. 227, 243, fn. 6.

[7] 2005 U.S. LEXIS 2205, p. 24.

[8] *Shepard*, *supra*, 2005 U.S. LEXIS 2205, at pp. 24-25.

[9] Justice O'Connor, joined by Justices Kennedy and Breyer, dissented. Chief Justice Rehnquist did not participate in the case.

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> *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. See 523 U.S., at 248-249, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); *Apprendi*, *supra*, at 520-521, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (Thomas, J., concurring). 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*, despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements."[10]

The combined impact of the plurality opinion of Justice Souter and the concurring opinion of Justice Thomas in *Shepard* is that it is now apparent – as a matter of federal constitutional law – that the only evidence that may be considered by the trier of fact called upon to decide the "truth" of a prior-conviction allegation (i.e., whether the prior conviction includes all of the facts necessary to render it a qualifying conviction under a particular sentence-enhancing statute) are those portions of the record of the prior conviction that establish the facts that the jury in the prior case actually or necessarily *found* in convicting the defendant (viz., the prior's statutory elements, charging documents, and jury instructions) or the facts that the defendant actually or necessarily *admitted* in pleading guilty in the prior case (viz., "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or ... some comparable judicial record of this information").[11] In other words, *Shepard* supports the proposition that *Guerrero* and its progeny must be

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[10] *Shepard v. U.S.*, 2005 U.S. LEXIS 2205, pp. 28-29, Thomas, J., concurring, quoting *Harris* v. *United States* (2002) 536 U.S. 545, 581-582 (Thomas, J., dissenting).

[11] In this respect, *Shepard* could have a significant impact in a case presently pending in the California Supreme Court, *People v. Warner* (S126233), in which the issue on review is: "Does defendant's prior conviction of sexual assault of a child under Nebraska Revised Statutes, section 28-320.01 qualify as a serious felony for sentencing purposes in California although the Nebraska statute does not include all of the elements of any felony under California law amounting to a 'lewd and lascivious act on a child under the age of 14 years' within the meaning of Penal Code section 1192.7, subdivision (c)(6)?"

revisited in light of *Jones* and *Apprendi*.[12]

Additionally, as Justice Thomas's concurring opinion makes clear, criminal defense attorneys should all be challenging the continuing viability of *Almendarez-Torres* and of the California statutory and case authority[13] that deprives their clients of the right to a jury trial—and to a "not true" finding in the absence of jury findings beyond a reasonable doubt—on *all* facts required to impose a prior-conviction-based enhancement (i.e., including the identity of the person who suffered the prior conviction).[14]

In sum, *Shepard* is an important addition to the *Jones-Apprendi-Blakely* line of cases, and it should afford criminal defense counsel considerable additional support in their efforts to challenge *Almendarez-Torres* and *Guerrero* and the California cases and statutory provisions that hinge on their continuing validity. *Shepard* makes clear that the California criminal defense bar should uniformly be arguing that defendants who are charged with a prior-conviction enhancement must be given a jury trial on *all* of the elements of the enhancement allegation, and that the evidence at this jury trial must be limited to those portions of the record of conviction that reflect the facts actually or necessarily found by the jury who convicted the defendant of the prior or the facts that the defendant actually or necessarily admitted when he pled guilty to the prior.

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[12] Curiously, none of the Justices in *Shepard* relies on the Court's opinion in *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531, 2536-2537, 159 L.Ed.2d 403]. However, *Blakely* also provides strong support for the proposition that *Guerrero* is dead in the wake of *Jones* and *Apprendi*. (See "An Approach to Understanding and Applying *Blakely v. Washington* to Sentencing Determinations in California," pp. 31-33, available on the "Blakely" page of CCAP's website, http://www.capcentral.org.)

[13] See, e.g., Pen. Code § 1025, subd. (c) ("the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury"); *People v. Epps*, *supra*; *People v. Kelii* (1999) 21 Cal.4th 452, 454 ("the court, not the jury, determines whether a [prior] conviction is serious"); and *People v. Wiley* (1995) 9 Cal.4th 580 (court, rather than the jury, determines whether prior serious felony convictions were brought and tried separately for purposes of Penal Code section 667, subdivision (a)).

[14] In this respect, *Shepard* could impact another a case pending in the California Supreme Court, *People v. McGee* (S123474), in which the issue on review is: "Under *Apprendi*, was defendant entitled to a jury trial on the question whether his prior conviction for robbery in Nevada constituted a serious felony for purposes of sentencing under the three strikes law when the elements of the Nevada offense differed from the elements of robbery under California law and the sentencing issue thus depended upon whether the record of the prior conviction established that defendant's prior conduct amounted to robbery under California law?"

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And if that evidence is insufficient to establish that the prior conviction was suffered by the defendant or that it includes all of the facts necessary to bring it within the scope of the sentence-enhancement statute under which it has been charged, the defendant should argue that retrial of the prior is barred by double jeopardy.[15]

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[15] See *Burks v. United States* (1978) 437 U.S. 1, 16 (Double Jeopardy precludes retrial of an offense of conviction reversed on appeal for insufficient evidence). In *Monge v. California* (1998) 524 U.S. 721, the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment does not apply to non-capital sentencing proceedings and therefore does not bar retrial of prior-conviction allegations (such as "strikes") as to which the defendant has a state-statute-based right to a jury trial, and as to which the evidence at the first trial was insufficient. However, this 5-4 holding (in which Justice Thomas cast the deciding vote) hinges on the Court's decision in *Almendarez-Torres*. (See *Monge*, *supra*, 524 U.S. at p. 728.) So, to the extent *Shepard* (like *Apprendi* and *Blakely* before it) calls into question the continuing viability of *Almendarez-Torres*, it also calls into question the continuing viability of *Monge*.