Making Use of *Shepard v. United States* in California Cases.

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On March 7, 2005, the United States Supreme Court decided *Shepard v. United States* (Mar. 7, 2005, no. 03-1968) ____ U.S. ____, holding that a federal trial court could not consider police reports or complaint applications in determining whether prior state court convictions were violent felonies within the meaning of the Armed Career Criminal Act (ACCA). Although Shepard ultimately was not decided on constitutional grounds, it is important for California cases because:

- *Shepard* confirms that there are enough votes on the Supreme Court to hold that there is a federal constitutional right to a jury trial on prior conviction allegations and, thus, to overrule the *Almendarez-Torres v. U.S.* (1998) 523 US 224 prior-conviction exception to *Apprendi* and *Blakely*;

- *Shepard* confirms that although *Almendarez-Torres* remains controlling authority, it should be read very narrowly to only apply to facts established by the record of conviction; and

- assuming that *Almendarez-Torres* remains good law, *Shepard* nevertheless restricts the documents that can be used to prove whether a prior convictions satisfies the requirements of the enhancement statute.

I. Background

ACCA mandates a minimum sentence of 15 years in prison for anyone possessing a firearm and having three prior serious drug convictions or violent felony convictions. (18 U.S.C. § 924(e).) Under ACCA, a burglary of a building or enclosed space ("generic burglary") is a violent felony, but burglary of a boat or vehicle is not. In 1990, the Supreme Court held that when a prior conviction was obtained by jury trial, "a court sentencing under the ACCA could look to statutory elements, charging documents, and jury instructions to determine whether an earlier conviction after trial was for generic burglary." (*Shepard*, slip op. at 1 (citing *Taylor v. United States* (1990) 495 U.S. 575).)

In *Shepard*, the prior conviction had been obtained by plea and the "complaints were broader than generic burglary." The government attempted to prove that the prior conviction was a generic burglary by reference to police reports and applications for issuance of the complaints. (*Id.* at 3.) It that the police reports and complaint applications

were part of the records of the prior conviction.[1] The Court considered not just whether it was proper to look to the police reports and complaint application, but also what documents generally can be considered in the plea context.

II. The Opinions

Majority:

Justice Souter authored the main opinion in *Shepard*. In Part II of that opinion, which was a majority opinion joined by Justices Stevens, Scalia, Thomas, and Ginsburg, the Court held that proof of ACCA prior conviction by guilty plea is limited to "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." (*Shepard*, slip op. at 2.) (Note: Chief Justice Rehnquist did not participate in this case.)

The majority first noted the concerns expressed in *Taylor* that "'the practical difficulties and potential unfairness of a factual approach," rather than a categorical approach of proving the nature of a prior conviction, "are daunting." (*Id.*, slip op. at 5 (citing *Taylor*, 495 U.S. at 601).) The Court, in *Shepard*, concluded that these concerns apply "no less in pleaded cases than in litigated cases." (*Id.*) The Court further saw this as a question of legislative intent and a pragmatic solution necessary to avoid mini-trials on prior convictions. The Court referred to "the *Taylor* conclusion, that "respect for congressional intent and avoidance of collateral trials." (*Id.,* slip op. at 8-9) Because, in the 15 years since *Taylor*, Congress had not modified the statute with respect to the Court's understanding of proof or priors, the Court saw no reason not to follow *Taylor*. (*Id.,* slip op. at 9.)

In *Taylor*, "respecting Congress's adoption of categorical criterion that avoids subsequent evidentiary enquiries into the factual basis for the earlier conviction," meant identifying the prior conviction proved to a jury "only by referring to charging documents filed in the court of conviction, or to recorded judicial acts of that court limiting convictions to the generic category, as in giving instructions to the jury." (*Id.,* slip op. at 6.) In the plea context, staying true to *Taylor*, means similarly limiting the inquiry. In the plea context, "the closest analogs to jury instructions ... would be the statement of the factual basis for

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[1] *Shepard*, O'Connor, J., dissenting opn. at 3 ("I would expand that list to include *any* uncontradicted, internally consistent parts of the record from the earlier conviction. That would include the two sources the First Circuit relied upon") (italics in orig.; underline added).

the charge ... shown by a transcript of plea colloquy or written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." (*Id.*, (footnote omitted).) The Court thus concluded that consideration of the police reports and complaint applications was improper (*Id.*, slip op. at and 1) and that, in the plea context, the determination of whether the plea "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" (slip op. at 12).

Part III of Justice Souter's Opinion:

In Part III Justice Souter was not writing for the Court, as Justice Thomas did not join that portion of the opinion. Justice Souter offered additional reasons for adhering to the limited inquiry required by *Taylor:* the Sixth Amendment problems that arise from a broader inquiry. Citing Jones v. United States, 526 US 227 (1999) and *Apprendi*, Justice Souter explained that in the case of a "generic State," i.e. a state where a burglary conviction categorically qualifies as a predicate prior under ACCA, "a judicial finding of a disputed prior conviction is made on the authority of *Almendarez-Torres*." (*Shepard*, op. of Souter, J., slip op. at 11.) But where the facts are not necessarily established by the record of conviction and the judge has to "make a disputed finding of fact about what the defendant and the state judge must have understood as the factual basis of the prior plea, and the dispute raises the concern underlying Jones 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." (*Id.*)

Almendarez-Torres, moreover, did not ease this doubt because Justice Souter (and at least the three justices who joined him) read the *Almendarez-Torres* exception to *Apprendi* very narrowly, so as not to apply to a fact "far removed from the conclusive significance of a prior judicial record":

> 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.

(*Id.*) The foursome, without deciding the constitutional question, thus concluded that the doctrine of avoiding constitutional doubt supported limited factfinding when the character of a prior conviction is disputed. (*Id.* at 11-12.)

Finally, in a footnote responding to the dissent's accusation that the opinion portends the extension of *Apprendi* to prior convictions, Justice Souter did not deny that *Almendarez-Torres* is skating on thin ice, suggesting "[i]t is up to the future to show whether the dissent is good prophesy," and noting that concerns about prejudice to defendants arising from prosecutor's proving prior convictions to a jury can be eliminated by the defendants waiving their rights to a jury trial on prior conviction allegations. (*Id.* at 12, fn.5.)

Justice Thomas's Concurrence:

Justice Thomas concurred in the main opinion. But he did not join Part III of Justice Souter's opinion because it did not go far enough. Rather than finding constitutional doubt, Justice Thomas finds constitutional error. Justice Thomas would specifically find that consideration of the police reports and complaint applications would be unconstitutional. (*Shepard*, opn. of Thomas, J., concurring opn. at 2-3.) It also appears that Justice Thomas would hold that even the limited fact-finding found permissible by the Court in *Shepard* and *Taylor* violates the federal constitutional right to a jury trial: "Taylor and today's decision thus explain to lower courts how to conduct factfinding that is, according to the logic of this Court's intervening precedents, unconstitutional in this very case." (*Shepard*, opn. of Thomas, J., concurring opn. at 2.) Justice Thomas further notes that "a majority of the Court now agrees that *Almendarez-Torres* was wrongly decided" and urges that "in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability." (*Id.* (citations omitted).)

Dissent:

The three-justice dissent, authored by Justice O'Connor and joined by Justices Kennedy and Breyer, contends that the majority's rule is not compelled by statute or precedent, is impractical, and will frustrate purposes of the ACCA. (*Shepard*, O'Connor, J., dissenting opn. at 1.) Justice O'Connor repeatedly emphasized that all indications are that the prior offenses were burglaries of building and, thus, predicates offenses under ACCA, and that, in the current case, the defendant never denied that the priors were burglaries of buildings. *(Shepard*, O'Connor, J., dissenting opn. at 6-7.)

Justice O'Connor surmises that "the driving force behind today's decision is not *Taylor* itself, but rather '[d]evelopments in the law since *Taylor*,'" i.e. *Apprendi*, *Ring*, *Blakely*, and *Booker*. *(Shepard*, O'Connor, J., dissenting opn. at 10.) Although Justice O'Connor recognizes that this "is a battle [she] has lost" (*id.*), she's not quite ready to put down her sword. She maintains that recidivism is different and the Court to adhere to the line drawn in *Almendarez-Torres*. *(Shepard*, O'Connor, J., dissenting opn. at 10-11.)

III. Analysis

A. Five Justices Agree that *Almendarez-Torres* Was Wrongly Decided.

It has been apparent for almost five years now that *Almendarez-Torres* will someday be overruled. Justice Thomas had been in the majority in *Almendarez-Torres*, but switched his position to provide the crucial fifth vote in *Apprendi v. New Jersey* (2000) 530 U.S. 466. In his separate concurrence in *Apprendi*, Justice Thomas expressed regret for his *Almendarez-Torres* vote and made plain that he saw a right to jury trial to any fact increasing the maximum sentence, including a prior conviction. (*Apprendi*, 530 U.S. at 520-521 (Thomas, J., concur.).) *Shepard* confirms that there are five votes to overrule *Almendarez-Torres*.

None of the *Almendarez-Torres* dissenters suggest that they have changed their minds. In a footnote responding to the dissent's accusation that the opinion portends the extension of *Apprendi* to prior convictions, Justice Souter (joined by Justices Stevens, Scalia, and Ginsburg), did not deny that *Almendarez-Torres* is skating on thin ice, suggesting "[i]t is up to the future to show whether the dissent is good prophesy." *(Shepard*, opn. of Souter, J., slip op. at 12, fn.5.) And Justice Thomas further notes that "a majority of the Court now agrees that *Almendarez-Torres* was wrongly decided" and urges that "in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability." (*Shepard*, opn. of Thomas, J., concurring opn. at 2.)

The Court's failure to take up this issue in the five years since Justice Thomas changed his position on the matter suggests that more patience might be in order. In recent years, the Court reversed its own precedents with respect to several very high profile issues: execution of mentally retarded; private consensual sexual conduct; and execution of juvenile killers. *Almendarez-Torres* will be seven years old on March 28.) Recidivism might have to wait its turn. But There is some reason to think the Court will take this issue up sooner, rather than later. The decisions in *Blakely*, *Booker*, and, now and especially, *Shepard*, have brought the matter considerable attention and highlighted the fact that the Court has not taken the issue up despite Justice Thomas's change of position. The soonest would be next term, as the oral argument calendar for the current term is full.

Until *Almendarez-Torres* is overruled California courts are bound to apply its exception to *Apprendi*. But consideration should certainly be given to preserving claims that there is a federal constitutional right to a jury trial on all aspects of prior conviction enhancements and aggravating factors. *Shepard*, moreover, offers something more than the mere prospect that *Almendarez-Torres* might be overruled some day. As shown below, *Shepard* also supports the argument that *Almendarez-Torres* must be read narrowly.

B. The *Almendarez-Torres* Exception Only Applies to the Mere Fact of a Prior Conviction.

Shepard supports the view already emerging in California courts that the *Almendarez-Torres* exception must be read narrowly, and that the exception extends only to the mere fact of the prior conviction, and only to those aspects of the prior conviction that are established by the record of conviction.

Justice Souter (and at least the three justices who joined him) read the *Almendarez-Torres* exception to *Apprendi* very narrowly, so as not to apply to a fact "far removed from the conclusive significance of a prior judicial record." (*Shepard*, opn. of Souter, J., slip op. at 11.)

> 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.

(*Id.*) Under this view, while *Almendarez-Torres* might allow the judge to look at the complaint and the record of the plea, it would not allow the Court to consider police reports or complaint applications. This appears to be true even if the police reports or complaint applications are part of the court record of the prior case, as they were in *Shepard*. (See *Shepard*, O'Connor, J., dissenting opn. at 3.)

1. *Prior Conviction Enhancements*

In California, there are recidivist-based enhancements which, like the ACCA, use a categorical approach in defining predicate felonies. The lists of serious and violent felonies used to define the prior convictions which qualify to enhance a sentence under the Three Strikes Law (Pen. Code § 667(e)-(I) (Three Strikes Law)) or for a prior serious felony enhancement (§ 667(a) (five-year priors)) include offenses that may not be easily established by reference to the record of conviction. For instance, "any felony in which the defendant personally used a dangerous or deadly weapon" is a "serious felony" (§ 1192.7(c)(2)) and can be used as a predicate offense for sentencing under the Three Strikes Law or for a five-year enhancement under section 667(a). Under the *Shepard* plurality's narrow view of *Almendarez-Torres*, proof of whether such a prior conviction is serious or violent would be confined to facts which were necessarily established by the jury verdict or defendant's admission.

In the case of a prison prior enhancement, for instance, the record of conviction would likely establish the fact of the prior conviction and the prison commitment, but *Shepard* supports the view that, even under *Almendarez-Torres,* there would be a right to a jury trial on the facts showing the prison prior did not washout, i.e. the date of release from prison and the date of commission of an intervening felony. (See Pen. Code § 667.5.)

And *Shepard* may be of particular relevance with respect to foreign priors, as it supports the defendant's arguments in *People v. McGee*, no. S123474, a pending (and fully-briefed) California Supreme Court case, that there is a federal constitutional right to a jury trial on the question of whether an out-of-state prior conviction constituted a serious felony for purposes of the Three Strikes Law.

2. *Aggravating Factors*

In the wake of *Blakely*, the California Courts of Appeal have had to confront the scope of the recidivism exception. In very recent published decisions, three different Courts of Appeal have recognized that certain recidivism-related aggravating factors do not fall within the *Almendarez-Torres* exception: *People v. Vu* (2004) 124 Cal.App.4th 1060 (4th Dist., Div. 3), rev. granted 2/16/05, no. S130656, (unsatisfactory performance on probation does not fall within *Almendarez-Torres* exception]; *People v. Fernandez* (2004) 123 Cal.App.4th 137 (4th Dist., Div. 2), rev. granted 1/26/05, no. S129338 [*Blakely* "Probably" does not apply to single recidivist factor: "pattern of regular or increasing criminal conduct"]; *People v. Jaffe* (2004) 122 Cal.App.4th 1559 (6th Dist.), rev. granted 1/26/05, no. S129344 ["the phrase 'the fact of a prior conviction'" does not "have a broad meaning including all recidivist circumstances"].)

These cases, while no longer citable due to the review grants, demonstrate that not all recidivist-related facts fall outside of *Apprendi. Shepard* supports that view.

3. Does *Shepard* Limit *Guerrero*?

California already has some limits on what can be used to prove a prior conviction and documents like a police report, because they are hearsay, normally would not be admissible to prove a prior conviction. Proof of a prior may be upon, not just the judgment of conviction, but the entire record of the conviction. (*People v. Guerrero* (1988) 44 Cal.3d 343.) But each piece of evidence used to prove an "extra" element of a prior (e.g., personal use of a deadly weapon) has to be admissible under some statutory exception to the hearsay rule. (*People v. Reed* (1996) 13 Cal.4th 217 (preliminary hearing transcript admissible as "former testimony" of unavailable declarants, but a statement in

probation report describing a police officer report of statements by third parties was inadmissible multiple hearsay).)

But *Shepard* provides additional grounds for narrowing the portions of the record admissible to prove a prior in California. A majority of the Court (the plurality and Justice Thomas who would go further than the plurality) take the position that a judge is not authorized to make a factual finding about a prior conviction when that finding is, in the words of the plurality, "too far removed from the conclusive significance of a prior judicial record." (*Shepard*, slip op. at 11.) And the Court repeatedly described its task as determining what was "necessarily admitted" by the defendant.[2] This approach could make inadmissible documents like the preliminary hearing transcript found admissible in *Reed*, a guilty plea case.[3] With one important exception noted immediately below, a preliminary hearing transcript is well-removed from the "conclusive significance" of the prior record, i.e. the truth of all the facts presented at the preliminary hearing ordinarily are not necessarily admitted by the plea.

The one exception is stipulations regarding the factual basis for the plea. The Court suggested, in *Shepard*, that in the plea context, "the closest analogs to jury instructions ... would be the statement of the factual basis for the charge ... shown by a transcript of plea

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[2] Slip op. at 1 ("The question here is whether a sentencing court can look to police reports or complaint applications to determine whether an earlier guilty plea **necessarily admitted**, and supported a conviction for, generic burglary"; slip op. at 6 (with a plea transcript, plea agreement, or "a record of comparable findings of fact adopted by the defendant," "a later court could generally tell whether the plea had '**necessarily**' **rested on the fact**"); opn. of Souter, slip op. at 10 (referring to "the demanding requirement that any sentence under the ACCA rest on a showing that a prior conviction **"necessarily" involved (and a prior plea necessarily admitted)** facts equating to generic burglary"); slip op. at 15 (holding regarding documents that may be considered "to determine whether a plea of guilty to burglary defined by a non-generic statute **necessarily admitted elements of the generic offense**"): see also *Taylor*, 495 U.S. at 602 ("if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury **necessarily had to find** an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement".

[3] When the prior case went to trial, the preliminary hearing transcript is inadmissible to prove the prior conviction because of the availability of the more reliable trial transcript. (*People v. Houck* (1998) 66 Cal.App.4th 350.)

colloquy or written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." (*Id.,* slip op. at 6.) While the question was not presented in *Shepard,* it appears that the Court would permit proof of a prior conviction by reference to the defendant's adoption of a factual basis for his or her guilty plea found in some document not admissible by itself. There is scant caselaw, however, on whether a stipulation that the factual basis for a plea is found in a particular document, such as the preliminary hearing transcript, constitutes an admission that all of the facts found in that document are true. Such a stipulation is an admission only that the facts found in that transcript necessary to establish the bare minimum elements required for the offense to which the defendant is pleading guilty are true. Showing a factual basis "does not require more than establishing a prima facie factual basis for the charges. . . . [N]or does the trial court have to be convinced of defendant's guilt." (*People v. Holmes* (2004) 32 Cal.4th 432, 441-442; See also United States v. Hernandez-Hernandez (9th Cir. 2004) 387 F.3d 799, 809-812, esp. 812 (Kleinfeld, J., dissenting ("Even though Hernandez was bound by his attorney's stipulation that the victim's testimony at the preliminary hearing, as summarized in the 995 motion, furnished a factual basis for his change of plea, that is not the same thing as Hernandez or his lawyer admitting that all the facts in the testimony were true").[4])

So, even in the case of a stipulation that a document, e.g. preliminary hearing transcripts or a police report, establishes the factual basis for the plea, the stipulation only establishes the minimum elements required for the plea. *Apprendi*, and the narrow reading of *Almendarez-Torres* supported by *Shepard*, establish that those documents cannot otherwise be used to prove the nature of a prior conviction.

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[4] On February 28, 2005, the Supreme Court granted certiorari and vacated the judgment in *Hernandez* (apparently on other grounds), remanding for further consideration in light of *United States v. Booker* (2005) 543 U.S. ----.